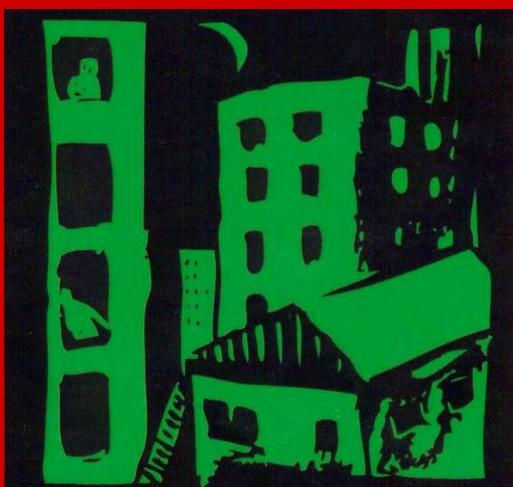


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The difference between a relocation and an eviction in the context of ESTA: A critical reflection on *Boplaas Landgoed (Pty) Ltd v Jonkies* (LCC 37/2022) [2022] ZALCC 38 (15 August 2022)

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ABSTRACT

In recent years, disputes around the relocation of occupiers under the Extension of Security of Tenure Act 62 of 1997 (ESTA) have increased significantly. This contribution analyses the case of Boplaas Landgoed (Pty) Ltd v Jonkies (LCC 37/2022) [2022] ZALCC 38 (15 August 2022) (Jonkies), in which an owner sought the relocation of ESTA occupiers from their ESTA homes to state-sponsored ones allocated to them by the state and which they owned. The aim of this case note is to critically reflect on the case of Jonkies. The argument is made that there is a distinction between "relocation" and "eviction", and that not only owners should be able to request relocation. It is also argued that while relocations as evictions are not permitted under ESTA, ESTA occupiers who have been offered alternative housing by the state may be evicted. A balance is, however, required in the context of ESTA so as to challenge the historical hierarchy which persists between owners and ESTA occupiers, in order to transform property relations, ensure fairness, and prevent further prejudice to ESTA occupiers.

Keywords: Eviction; Extension of Security of Tenure Act 62 of 1997; ESTA homes; ESTA occupiers; relocation; rural areas; state-sponsored homes

1 INTRODUCTION

The Extension of Security of Tenure Act 62 of 1997 (ESTA) deals with evictions in the rural areas of South Africa.¹ ESTA refers to "relocation" in the sense that evictees should be provided with suitable alternative housing under certain circumstances,² and does not deal with relocations on the same property. An owner or the person in charge might, however, seek to relocate an ESTA occupier,³ hence the courts have introduced the concept that the movement of ESTA occupiers from one ESTA home to another, on

¹ For more detail on when ESTA applies, see section 2 of ESTA. See further Scheepers TE & Du Plessis W "Extension of Security of Tenure Act: A bone of contention" (1998) 61 *Tydskrif vir Hedendaagse Romeins-Hollandse Reg* 473; Pienaar JM "Farm workers: Extending security of tenure in terms of recent legislation" (1998) 13(2) *Southern African Public Law* 423; Carey Miller DL & Pope A *Land title in South Africa* Cape Town: Juta (2000) at 492; Pienaar JM *Land reform* Cape Town: Juta (2014) at 395–432; Muller G, Brits R, Boggenvoel ZT & Pienaar JM *Silberberg and Schoeman's the law of property* 6th ed South Africa: LexisNexis (2019) at 700.

² Sections 10(2) and 11(3)(c) of ESTA.

³ An ESTA occupier is defined in section 1 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". An owner is defined in section 1 of ESTA as the "owner of the land at the time of the relevant act, omission or conduct, and includes, in relation to the proposed termination of a right of residence by a holder of mineral rights, such holder in so far as such holder is by law entitled to grant or terminate a right of residence or any associated rights in respect of such land, or to evict a person occupying such land". A person in charge is defined in section 1 of ESTA as a "person who at the time of the relevant act, omission or conduct had or has legal authority to give consent to a person to reside on the land in question".

the same property, is to be known as relocation.⁴ Although a relocation can generally mean movement of people to another property or house off-site, or a relocation on the property itself, the case of *Boplaas Landgoed (Pty) Ltd v Jonkies* (LCC 37/2022) [2022] ZALCC 38 (15 August 2022) (*Jonkies*) demonstrates that “relocation” may have various meanings.

An eviction involves depriving an ESTA occupier, against his or her will, of residence on land, the use of land, or access to water, all of which are linked to a right of residence in terms of ESTA.⁵ Prior to an eviction, the owner or person in charge must first terminate an ESTA occupier’s right of residence in terms of section 8 of ESTA. This right may be terminated if the ESTA occupier (a) has resigned from employment or has been dismissed, or (b) has committed a breach in terms of section 10(1)(a), (b) or (c).⁶ Furthermore, the owner or person in charge must approach the court for an order of eviction, and the court will grant such an order if it complies with the conditions set out in sections 10 or 11 of ESTA.

ESTA was enacted to provide measures that facilitate and protect long-term security of land tenure,⁷ thereby give effect to section 25(6) of the Constitution of the Republic of South Africa, 1996 (Constitution).⁸ ESTA regulates (a) the conditions of residence on land; (b) the circumstances under which the right of ESTA occupiers to reside on land may be terminated; and (c) the eviction of ESTA occupiers whose rights of residence have been terminated.⁹

The focus of this case note is on (a), and particularly in respect of the conditions pertaining to the relocation of ESTA occupiers on rural land. When contextualising relocation, a distinction must be made between “relocation” and “eviction”, because different suitable alternative accommodation considerations emerge in the respective domains. The discussion on evictions seeks to illuminate this difference. Historically, ESTA occupiers on farmland have been vulnerable, they have been marginalised and

⁴ *Boplaas Landgoed (Pty) Ltd v Jonkies* (LCC 37/2022) [2022] ZALCC 38 (15 August 2022) at para 12. See further *Pharo’s Properties CC v Kuilders* 2001 (2) SA 1180 (LCC) at para 13, where the court found that relocation in the context of ESTA is the movement from one ESTA home to another on the same registered property. A similar finding was made in *Drumearn (Pty) Ltd v Wagner* 2002 (6) SA 500 (LCC) at 504F, and in *Mjoli v Greys Pass Farm (Pty) Ltd* [2019] ZALCC 25 (15 October 2019) at para 11. The Supreme Court of Appeal confirmed this in *Chagi v Singisi Forest Products (Pty) Ltd* 2007 (5) SA 513 (SCA) at paras 19 and 20. Likewise, in *Oranje v Rouxlandia Investments (Pty) Ltd* 2019 (3) SA 108 (SCA) at para 10, the court confirmed, with reference to *Chagi*, that an eviction in terms of ESTA is confined to an eviction from the land, not from one ESTA home to another. See also *Pieterse v Drumearn (Pty) Ltd* (LCC 135/2022; 3/2021) [2023] ZALCC 13 (19 April 2023) at para 29; *Du Plessis v Kriel NO* (LCC88/2022) [2023] ZALCC 43 (14 December 2023) at para 33.

⁵ Section 1 of ESTA.

⁶ Section 8(2), (4) and (5) of ESTA.

⁷ Preamble of ESTA.

⁸ 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”.

⁹ Preamble of ESTA.

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subjected to hardship, conflict, and social instability due to arbitrary, unreasonable and unlawful relocations.¹⁰ Where ESTA occupiers' services are terminated or he or she has retired, his or her land tenure rights can become precarious. Partly in response to past discriminatory laws and practices, ESTA seeks to ensure that ESTA occupiers enjoy long-term security of land tenure on land belonging to another.¹¹

The issue of relocating ESTA occupiers has not been the subject of much litigation until of late, but in recent years disputes around such relocations have increased significantly. The *Jonkies* case¹² is a pertinent example. Here, the first and second respondents had acquired the status of long-term ESTA occupiers;¹³ the third respondent was an ESTA occupier with consent,¹⁴ as she resided with her parents on the land concerned.¹⁵ The owner discovered that the first and second respondents had been allocated state-sponsored homes by the Witzenberg Local Municipality, and that the third respondent had also been allocated a separate home within the same municipal area.¹⁶ The owner sought to relocate the respondents from their ESTA homes to the state-sponsored homes, albeit that the homes were not on the same property.¹⁷ The key issue before the Land Claims Court (LCC) (now the Land Court) was thus whether such a purported relocation was, in fact, an eviction. The court distinguished between "evictions" and "relocations", finding that such a relocation would amount to an eviction.

The purpose of this case note is to critically reflect on the case of *Jonkies*. The first section has introduced the topic. The second section gives contextual background for the distinction between relocations and evictions in terms of ESTA. The third section provides an overview of the facts and finding of the LCC in *Jonkies*. This is followed by a critical reflection on the case, and then by a conclusion.

¹⁰ Preamble of ESTA; *Klaase v Van der Merwe NO* 2016 (6) SA 131 (CC) at para 2; *Daniels v Scribante* 2017 (4) SA 341 (CC) at para 22.

¹¹ Preamble of ESTA.

¹² (LCC 37/2022) [2022] ZALCC 38 (15 August 2022).

¹³ *Jonkies* (2022) at paras 1, 3 and 4.

¹⁴ 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".

¹⁵ *Jonkies* (2022) at para 3. In terms of section 8(5) of ESTA, the dependent of an ESTA occupier, as in this case, who is 60 years or older and has lived on the land for more than ten years, or of an employee who cannot provide labour due to ill health, is allowed to remain on the land and the right of residence can be terminated only on 12 calendar months' written notice, unless the dependent has committed a material breach. A "dependent" is defined in section 1 of ESTA as a family member whom the ESTA occupier has a legal duty to support.

¹⁶ *Jonkies* (2022) at para 5.

¹⁷ *Jonkies* (2022) at para 5.

2 CONTEXTUAL BACKGROUND ON ESTA RELOCATIONS AND EVICTIONS

2.1 Relocation as opposed to eviction

A relocation in the context of ESTA is limited to the movement of ESTA occupiers from one ESTA home to another on the same property (i.e., the same deed description and title deed).¹⁸ In contrast, an eviction in terms of section 1 of ESTA is confined to the removal of ESTA occupiers from the land (i.e., different title deeds).¹⁹ There is hence a distinction between relocation and eviction.

The right of residence is not terminated when ESTA occupiers are relocated, whereas, prior to an eviction, it must be lawfully terminated.²⁰ The threshold for relocations is much lower than it is for evictions. This is because owners or persons in charge do not have to meet the requirements for an eviction before ESTA occupiers are relocated, whereas in the case of an eviction, they must meet all the substantive and procedural requirements before evicting ESTA occupiers.²¹ As such, relocations are easier and simpler to accomplish, as ESTA does not set out procedural or substantive requirements for relocations. In evictions, a host of requirements have to be met, before a court can order an eviction.

As such, even if the relocation is intended to move an ESTA occupier to another property belonging to the same or different owner, it is not a relocation but an eviction.²² In cases of eviction, the proximity to work and other social amenities, such as schools, clinics and shopping centres, may be an issue.²³ When ESTA occupiers are relocated, the issue of proximity to work and other social amenities should, theoretically, not be too challenging – this is because the relocation happens on the same property. Thus, the location of the ESTA home on the relocation site should not, in theory, be too far removed from the existing social amenities which the ESTA occupier makes use of.

2.2 The occurrence of the relocation or eviction

Relocations are usually initiated by the owner or person in charge. It might, for example, be that the owner or person in charge (a) wants to use that portion of the property for another purpose; (b) needs the property to house current employees who are in dire

¹⁸ *Jonkies* (2022) at para 12. See also *Kuilders* (2001) at para 13; *Wagner* (2002) at 504F; *Mjoli* (2019) at para 11; *Chagi* (2007) at paras 19 and 20; *Oranje* (2019) at para 10; *Du Plessis* (2023) at para 33.

¹⁹ *Jonkies* (2022) at para 12. See also *Kuilders* (2001) at para 13; *Wagner* (2002) at 504F; *Mjoli* (2019) at para 11; *Chagi* (2007) at paras 19 and 20; *Oranje* (2019) at para 10; *Du Plessis* (2023) at para 33.

²⁰ Section 8 of ESTA. Section 1 of ESTA defines “terminate” to mean the withdrawal of consent to a person to occupy or use land.

²¹ Sections 9, 10 and 11 of ESTA, which deal with the procedural and substantive requirement for evictions. See also Pienaar (2014) at 400; Pienaar C “Farm dwellers: Eviction versus relocation” (2023) *Stockfarm* 67 at 67.

²² See also *Pieterse* (2023) at para 37.

²³ See section 1 of ESTA for a definition of suitable alternative accommodation.

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need of ESTA homes;²⁴ or (c) in terms of their physical condition, the ESTA homes are dilapidated or derelict.²⁵ Where these conditions lead to a relocation, the owner or person in charge may not relocate ESTA occupiers to uninhabitable ESTA homes,²⁶ since that could have an impact on the ESTA occupiers' right to live in accordance with the tenets of basic human dignity.²⁷ The ESTA home to which ESTA occupier are to be relocated should not only be habitable, but fit for purpose. When ESTA occupiers are relocated, they should not unreasonably delay their relocation by insisting on an ESTA home of their choice.²⁸ If the alternative accommodation on the relocation site is unsuitable for human habitation, and has an impact on the ESTA occupiers' security of tenure and other fundamental rights, ESTA occupiers can resist such a relocation based on sections 5(a) and 6(2)(a) of ESTA,²⁹ which ensure that ESTA occupiers are not subjected to inhumane conditions that infringe on their human dignity.³⁰ The protective measures in sections 5 and 6 of ESTA do not, however, provide blanket protection against relocation under all circumstances; these measures can be relied on to prevent relocation where the state of disrepair of the ESTA home on the relocation site will have a negative impact on the constitutional rights of the ESTA occupiers.³¹

An eviction is usually initiated by the owner or person in charge,³² and he or she may terminate the right of residence of an ESTA occupier on the basis of any legal ground.³³ These grounds may include that the ESTA occupier has intentionally threatened or intimidated others; has caused harm to others or material damage to property; has assisted unauthorised persons to establish new ESTA homes on the land;³⁴ has resigned or been dismissed from employment;³⁵ has breached a material and fair term of an agreement between him- or herself and the owner; or has committed a fundamental breach of the relationship between him- or herself and the owner that cannot be remedied.³⁶ Furthermore, the owner or person in charge must also terminate the

²⁴ See, for example, *Oranje* (2019) at paras 4–6; *Jonkies* (2022) at paras 5–6.

²⁵ See, for example, *Mjoli* (2019) at paras 5–6.

²⁶ For the meaning of a habitable ESTA home, see Ngwenyama LR "A common standard of habitability? A comparison between tenants, usufructuaries and occupiers in South African law" (doctoral thesis, Stellenbosch University, 2021) at 121–144.

²⁷ *Oranje* (2019) at para 17; *Wagner* (2002) at 504F.

²⁸ *Oranje* (2019) at paras 20–22.

²⁹ *Oranje* (2019) at para 17.

³⁰ *Daniels* (2017) at paras 31–32; *Oranje* (2019) at para 18.

³¹ *Oranje* (2019) at para 18.

³² Muller et al. (2019) at 709–710; *Kuilders* at para 10.

³³ Section 8(1) of ESTA. See also *Landbou Navorsingsraad v Klaasen* 2005 (3) SA 410 (LCC) at paras 56–58; *Hattingh v Juta* 2013 (3) SA 275 (CC) at para 32; Pienaar (2014) at 401; Muller et al. (2019) at 708.

³⁴ Section 6(3)(a)–(d) of ESTA. See also Pienaar (2014) at 401; Muller et al. (2019) at 708.

³⁵ Section 8(2) of ESTA. See also Pienaar (2014) at 401–405; Muller et al. (2019) at 708. See, for example, *Sterklewies (Pty) Ltd t/a Harrismith Feedlot v Msimanga* 2012 (5) SA 392 (SCA) at paras 21–23; *Baron v Claytile (Pty) Ltd* 2017 (5) SA 329 (CC) at paras 12 and 49.

³⁶ Section 10(1)(a), (b) or (c). See also Pienaar (2014) at 401; Muller et al. (2019) at 708.

accommodation and/or employment agreements entered into with the ESTA occupier.³⁷ Unless both agreements are terminated and the requirements for eviction are satisfied, the court may not grant an eviction order.³⁸

2.3 Who can apply for a relocation or eviction order?

The owner or person in charge can apply for a relocation order, which may be granted by the court only if the court is satisfied that the suggested relocation complies with the process (as explained below); that the owner or person in charge complied with such a process; and that suitable alternative accommodation has been made available by the owner or person in charge in the relocation site and the ESTA occupiers unreasonably refused to be relocated. If suitable alternative accommodation is not available on the relocation site, the court should hold the relocation order in abeyance until the owner or person in charge has made available suitable alternative accommodation on the relocation site to the ESTA occupiers.³⁹

In this regard, it is proposed that not only the owner or person in charge may apply for a relocation order – an ESTA occupier should also be allowed to approach the court as well. If an ESTA occupier applies for a relocation, the court should consider the purpose and location (but not the preferred location or spot) of the relocation. For example, the property (buildings, structures or dwellings) must not be unsuitable for human habitation and/or the property must not be built on a polluted site or in the immediate proximity of sources of pollution that might threaten the health of ESTA occupiers.⁴⁰

When an ESTA occupier requests a relocation, it is important to consider how the request aligns with housing jurisprudence, in which it has been determined that homeless people cannot choose where they wish to live – there is no choice in terms of location.⁴¹ Yet although ESTA occupiers cannot choose exactly where they would be relocated, their ESTA homes must be adequate and not be built in a polluted site or close to sources that cause pollution.⁴² This is because such ESTA homes and their location could impact on ESTA occupiers' rights to health⁴³ and a healthy

³⁷ *Klaasen* at para 14; *Du Toit v George* (LCC31R/01) [2001] ZALCC 7 (28 February 2001) at paras 3–7; *Morceaux Boerdery Trust v Vergotine* (LCC110R/04) [2004] ZALCC 22 (29 November 2004) at paras 2–15; Muller et al. (2019) at 708.

³⁸ Muller et al. (2019) at 708. See further in general, Van der Walt AJ “Exclusivity of ownership, security of tenure, and eviction orders: A model to evaluate South African land-reform legislation (2002) 18(3) *South African Journal on Human Rights* 372; Keightley R “The impact of the Extension of Security of Tenure Act on an owner's right to vindicate immovable property” (1999) 15(3) *South African Journal on Human Rights* 277.

³⁹ *Mjoli* (2019) at para 11.

⁴⁰ General Comment No. 4 *The Right to Adequate Housing* UN Doc E/1992/23 para 8(f).

⁴¹ See, for example, *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 the Unlawful Occupation of Land Act 19 of 1998 rather than ESTA, the same approach should be followed here.

⁴² General Comment No. 4 *The Right to Adequate Housing* UN Doc E/1992/23 para 8(f).

⁴³ See section 27 of the Constitution.

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environment.⁴⁴ An ESTA occupier hence cannot justify a relocation based on preference – ESTA was not enacted to provide security of land tenure to an ESTA occupier in an ESTA home and/or location of his or her choice.⁴⁵

In circumstances where the ESTA occupier requests a relocation, he or she must follow the relocation process (as explained below). It is thus not only the owner or person in charge who can apply for a relocation, but also, in specific circumstances, the ESTA occupier. An eviction order can be applied for only by the owner or person in charge,⁴⁶ but an ESTA occupier is allowed to voluntarily move him- or herself.

2.4 The process before a relocation or eviction can take place

As mentioned, the process which is currently followed in the relocation of ESTA occupiers is not provided for in ESTA. Most of the associated practices flow from case law and LCC orders in regard to ESTA⁴⁷ (as explained below). When an owner or person in charge wishes to relocate an ESTA occupier, he or she should inform the ESTA occupier of this in writing.⁴⁸ The ESTA occupier should then be given an opportunity to respond to the owner's letter in writing.⁴⁹ The owner or person in charge should also convene a meeting with the ESTA occupier to enable the two parties to discuss the relocation and where the ESTA occupier would be relocated to.

The meeting may yield any of several results: (a) the owner or person in charge may convince the ESTA occupier that he or she needs the premises occupied by the ESTA occupier for current employees who are in dire need of ESTA homes, or (b) the argument may be made that the physical condition of the ESTA home is not fit for human habitation;⁵⁰ (c) the ESTA occupier may convince the owner or person in charge that the current ESTA home is habitable and fit for purpose, and that the relocation is unnecessary; or (d) the parties might not come to an agreement.

⁴⁴ See section 24 of the Constitution.

⁴⁵ *Oranje* at paras 20–21. See also *Rand Properties* at paras 44 and 75; *Grobler v Phillips* 2023 (1) SA 321 (CC) at paras 35–36.

⁴⁶ Section 9(1) of ESTA. See also *De Villiers v Msimango* (LCC14R/98) [1999] ZALCC 21 (6 May 1999) at para 12.

⁴⁷ *Oranje* (2019) at para 24.

⁴⁸ *Oranje* (2019) at para 6.

⁴⁹ *Oranje* (2019) at paras 5–6.

⁵⁰ For example, due to environmental reasons, the ESTA-related property might become uninhabitable, be it due to the costs of upkeep, for instance, or the risk or incidence of floods or fires. There is ample evidence indicating that climate change can affect livelihoods and where people live, making it necessary to relocate ESTA occupiers. See generally Kotze L & Du Plessis A “Putting Africa on the stand: A bird’s eye view of climate change litigation on the continent” (2020) 50 *Environmental Law* 615 at 654 and 657; Maluleke WI & Mokwena RJ “The effect of climate change on rural livestock farming: Case study of Guyani policing area, Republic of South Africa” (2017) 45(1) *South African Journal of Agricultural Extension* 26; PLAAS “Climate change and rural livelihoods in Southern Africa: A research and policy agenda” (2022) Institute for Poverty, Land and Agrarian Studies (PLAAS) 17 at 17–20.

During the meeting, the owner or person in charge should assure the ESTA occupier that he or she will provide the occupier with suitable alternative accommodation on the relocation site.⁵¹ The ESTA occupier must be granted an opportunity to be heard, to give input, participate in the meeting, and advise on whether he or she agrees to be relocated.⁵² Where there is an agreement to relocate, the parties should also agree on the time, date, and relocation site. Where there is no such agreement, the owner or person in charge should attempt respectful face-to-face mediation⁵³ through an independent third party.⁵⁴

In the context of ESTA disputes, as this author has noted elsewhere, the use of meaningful engagement between purely private parties might be flawed.⁵⁵ “Meaningful engagement” is a tool which is used to compel the state to abide by its constitutional obligations and listen to the needs of those affected.⁵⁶ Practically speaking, once private parties approach a court to resolve their dispute, it may be assumed that they have been unable to reach a mutually acceptable outcome themselves.⁵⁷ So, this raises the question of how meaningful engagement would assist the owner and ESTA occupier, seeing as it would appear that these parties cannot resolve the dispute themselves.⁵⁸ As this author has argued before, meaningful engagement should be reconsidered with reference to the case law where this constitutional remedy has been used and imposed.⁵⁹ Mediation in terms of section 21 of ESTA might then be an appropriate remedy in the circumstances.⁶⁰

⁵¹ *Oranje* (2019) at para 6; *Mjoli* (2019) at para 6.

⁵² *Oranje* (2019) at para 6. Compare *Baleni v Minister of Mineral Resources* 2019 (2) SA 453 (GP) at paras 79, 83 and 84. In this case, the occupiers had informal rights, so they had to give permission before mining rights could legally be granted on their land.

⁵³ The concept of mediation is not easy to define. Nevertheless, it has been defined generally 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 Scott-MacNab D “Mediation in the family context” (1988) 105 *South African Law Journal* 709 at 715; Nupen C “Mediation” in Pretorius P (ed) *Dispute resolution* Cape Town: Juta (1993) at 39; Faris J “Deciphering the language of mediatory intervention in South Africa” (2006) 39(3) *Comparative and International Law Journal of Southern Africa* 427; Skelton A, Carnelley M, Human S & Smith BS *Family law in South Africa* Oxford: Oxford University Press (2010) at 345; Boulle L *Mediation principles, process, practice* Butterworths: LexisNexis (2011) at 13; Schultz H “A legal discussion of the development of family law mediation in South African law, with comparisons drawn mainly with the Australian family law system” (master’s thesis, University of KwaZulu-Natal, 2011) at 11; *Port Elizabeth Municipality v Various Occupiers* 2005 (1) SA 217 (CC) at para 41, particularly footnote 38.

⁵⁴ *PE Municipality* (2005) at para 39; Nupen (1993) at 40.

⁵⁵ See Ngwenyama LR “Meaningful engagement or mediation or structural interdict? An appropriate remedy to resolve disputes under ESTA” (2023) 37(1) *Speculum Juris* at 75 and 79.

⁵⁶ Ngwenyama (2023) at 75 and 76.

⁵⁷ Ngwenyama (2023) at 75 and 80.

⁵⁸ Ngwenyama (2023) at 75.

⁵⁹ Ngwenyama (2023) at 80.

⁶⁰ Ngwenyama (2023) at 76, 82 and 84.

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Mediation helps the parties to avoid the tension and frustration associated with court cases and reduce the expenses incurred through court processes.⁶¹ When the owner or person in charge and the ESTA occupier come together to talk, the mediator can narrow down the issues causing the dispute, and facilitate a mutually acceptable solution.⁶² This approach enables the parties to resolve their problems, and determine an outcome of their dispute in a manner that the court process might not be able to replicate.⁶³ If mediation does not yield the desired results, the owner or person in charge should approach a court for an order to have the ESTA occupier relocated.⁶⁴ Where it is the ESTA occupier who initiates the relocation, he or she should follow the same process explained above.

Before a court may grant an order for the eviction of an ESTA occupier, the owner or person in charge must have complied with stringent requirements set out in sections 9(2)(a)–(d) read together with 9(3)(a)–(d) of ESTA.⁶⁵ The procedure for evictions is provided for in ESTA – the owner cannot rely on common law to evict an ESTA occupier.⁶⁶

3 THE FACTS AND FINDING OF THE JONKIES JUDGMENT

3.1 Facts

The first and second respondents, who had obtained the status of long-term ESTA occupiers (as described in section 8(4) of ESTA), on the appellants' farm,⁶⁷ were 73 and 70 years of age respectively.⁶⁸ They began employment on the farm in October 1994 when the previous owner granted them the right to occupy a labourer's house on the farm.⁶⁹ The first respondent was employed as a truck driver and the second, as a general labourer.⁷⁰ They worked on the farm for more than 20 years until their retirement. In the first respondent's case, retirement occurred at the age of 69 years, at the request of the farm management. By that stage, he had been an employee on the farm and had lived there for approximately 25 years.⁷¹

Having lived on the farm for ten years, and reached the age of 60, the respondents had obtained the status of long-term ESTA occupiers as per section 8(4) of ESTA, entailing that their right of residence could not be terminated unless they had committed a

⁶¹ *PE Municipality* (2005) at para 42.

⁶² *PE Municipality* (2005) at para 42. See also *Nupen* (1993) at 40.

⁶³ *PE Municipality* (2005) at para 42. See also *Human et al.* (2010) at 346.

⁶⁴ *Oranje* (2019) at paras 6–7.

⁶⁵ See also *Msimango* at paras 10–11; *Pienaar* (2014) at 406–407.

⁶⁶ *Molusi v Voges NO* 2016 (3) SA 370 (CC) at para 29; *Muller et al.* (2019) at 707.

⁶⁷ *Jonkies* (2022) at para 3.

⁶⁸ *Jonkies* (2022) at para 3.

⁶⁹ *Jonkies* (2022) at para 3.

⁷⁰ *Jonkies* (2022) at para 3.

⁷¹ *Jonkies* (2022) at para 3.

material breach as contemplated in section 10(1)(a), (b) or (c).⁷² The third respondent was their daughter, who had lived in her parents' ESTA home since her birth in 1994.⁷³

The appellants bought the farm and recognised the status and rights of residence of the first and second respondents as long-term ESTA occupiers, as well as that of the third respondent as an ESTA occupier with consent to live with her parents.⁷⁴ The appellants convened a meeting on the farm in which the terms and conditions of the first and second respondents' continued residence as long-term ESTA occupiers were explained to them.⁷⁵ The first and second respondents had been given copies of a housing agreement, but were not required to sign it. They thus argued that no housing agreement had been concluded.⁷⁶

The appellants discovered that the first and second respondents had been allocated a new state-sponsored home by the Witzenberg Local Municipality, and that the third respondent had also been allocated a separate new state-sponsored home by the same municipality.⁷⁷ This meant that the respondents were now homeowners of their respective state-sponsored homes within the Witzenberg Local Municipality.⁷⁸ The appellants convened several meetings for the relocation of the respondents from their ESTA homes to the newly allocated state-sponsored homes they owned, but those homes were not on the same property. These meetings did not, however, yield any results. The appellants subsequently approached the magistrates' court to apply for an off-site relocation of the respondents.⁷⁹

The appellants argued, first, that it could not have been the intention of the legislature for the respondents' rights of residence to continue indefinitely, if they acquired a stronger right or title in the form of ownership under the Housing Act 107 of 1997.⁸⁰ Second, the appellants contended that the respondents had no further need for their

⁷² *Jonkies* (2022) at para 3. Section 8(4) of ESTA read with sections 6(3) and 10(1)(a), (b) or (c) provides that the right of residence of an ESTA occupier who has resided on the land belonging to another for ten years and who has reached the age of 60 years may not be terminated, unless that ESTA occupier intentionally and unlawfully harmed other ESTA occupiers, damaged the property, allowed unauthorised persons to erect ESTA homes on the land, or committed a material breach of contract or the relationship between him- or herself and the owner or person in charge. The same provisions apply to an ESTA occupier who is an employee or former employee of the owner or person in charge and who, as a result of ill health, injury or disability, is unable to supply labour to the owner or person in charge.

⁷³ *Jonkies* (2022) at para 3.

⁷⁴ *Jonkies* (2022) at para 4.

⁷⁵ *Jonkies* (2022) at para 4.

⁷⁶ *Jonkies* (2022) at para 4.

⁷⁷ *Jonkies* (2022) at para 5.

⁷⁸ *Jonkies* (2022) at para 5.

⁷⁹ *Jonkies* (2022) at para 5.

⁸⁰ *Jonkies* (2022) at para 6.

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ESTA homes on the farm.⁸¹ Third, they asserted that the respondents could not continue to reside on the farm for free, while they had their own property.⁸²

Next, the appellants averred that the appropriateness of the state-sponsored homes allocated to the respondents could not be in dispute when compared to the ESTA homes – consisting of three bedrooms, a bathroom, living room and kitchen – they occupied on the farm. This meant that by relocating to the state-sponsored homes off the farm, the respondents' human dignity would not be impaired.⁸³ Fifth, the appellants stated that they needed the ESTA homes occupied by the respondents for current employees in desperate need of accommodation.⁸⁴ In the final instance, they contended that their right to ownership was being infringed on.⁸⁵

The respondents raised two points *in limine*. First, they argued that the application for relocation was a 'veiled eviction' because they were being removed from the land, and as long-term ESTA occupiers who were not in material breach, they were protected from eviction in terms of sections 8(1) and 8(4) of ESTA.⁸⁶ Second, the respondents opposed the argument raised by the appellants that the respondents' right to housing in terms of the Housing Act was stronger than their rights as long-term ESTA occupiers under ESTA.⁸⁷

On the merits, the first respondent averred that the state-sponsored homes were unsuitable for his family's needs, as they were a family of three adults and three minors living in the ESTA home. Furthermore, the first respondent asserted that the second respondent was bedridden and that his daughter and granddaughter were the carers of the second respondent, feeding, bathing and dressing her.⁸⁸ The first respondent contended that a relocation would not cater to their needs, and might cause the family to split up and be denied the only family life they knew.⁸⁹ He argued that the family home would be overcrowded if they moved to the new state-sponsored houses provided by the Witzenberg Local Municipality, which were ten times smaller than the ESTA home they were occupying, and that it could not accommodate their furniture. He claimed that an offer from the appellants to store their furniture was not useful since they needed to use it.⁹⁰ The respondent also disputed the claim that the ESTA home they were occupying was needed for another employee, pointing out that all the truck drivers on the farm had homes.⁹¹

⁸¹ *Jonkies* (2022) at para 6.

⁸² *Jonkies* (2022) at para 6.

⁸³ *Jonkies* (2022) at para 6.

⁸⁴ *Jonkies* (2022) at para 6.

⁸⁵ *Jonkies* (2022) at para 6.

⁸⁶ *Jonkies* (2022) at para 7.

⁸⁷ *Jonkies* (2022) at para 7.

⁸⁸ *Jonkies* (2022) at para 8.

⁸⁹ *Jonkies* (2022) at para 8.

⁹⁰ *Jonkies* (2022) at para 8.

⁹¹ *Jonkies* (2022) at para 8.

The appellants rejected the contention that the application was a ‘veiled eviction’, reasoning that the respondents had hidden the fact that they had been allocated two new state-sponsored homes with a combined size greater than the size of the ESTA home on the farm.⁹² The appellants contended that the respondents gave no sufficient reason why they should not be relocated to their own alternative accommodation,⁹³ and denied the contention that all employees on the farm had ESTA homes.⁹⁴

The Ceres Magistrates’ Court adjudicated the first point *in limine* and found that the relocation of the respondents would amount to an eviction, if granted.⁹⁵ On the second point *in limine*, the Court acknowledged that it lacked the necessary jurisdiction,⁹⁶ and therefore dismissed the application.

The appellants then approached the LCC for an appeal against the decision of the Magistrates’ Court. On appeal, the appellants argued that it was not an eviction and that the concept of relocation had to be extended to cover situations where ESTA occupiers had to move from their current ESTA homes to another new state-sponsored home not on the same farm (or wherever the premises are), rather than only situations where they had to move from one ESTA home to another on the same premises.⁹⁷ They contended, in short, that the Magistrates’ Court erred in finding that the relocation constituted an eviction.⁹⁸

3.2 Finding of the Land Claims Court

The LCC (*per* Meer AJP, and Cowen J concurring) acknowledged that the respondents were long-term ESTA occupiers with rights protected against unlawful eviction in terms of sections 8(1) and 8(4) of ESTA.⁹⁹ This meant that the right of residence of the respondents could not be terminated unless they had committed a material breach as contemplated in section 10(1)(a), (b) or (c) of ESTA.¹⁰⁰ The court confirmed that a relocation in the context of ESTA was the movement of an ESTA occupier from one ESTA home to another, on the same farm or property.¹⁰¹ In this case, the removal of an ESTA occupier from the farm or land amounted to an eviction, as defined in section 1 of ESTA.¹⁰² The court pointed out that if a relocation order were granted in those circumstances, it would impact on the security of land tenure (under section 6(2)(a) of ESTA) of the respondents, and would be at odds with sections 8(1) and 8(4) of ESTA,

⁹² *Jonkies* (2022) at para 9.

⁹³ *Jonkies* (2022) at para 9.

⁹⁴ *Jonkies* (2022) at para 8.

⁹⁵ *Jonkies* (2022) at para 10.

⁹⁶ *Jonkies* (2022) at para 10.

⁹⁷ *Jonkies* (2022) at paras 2, 11 and 13.

⁹⁸ *Jonkies* (2022) at para 2.

⁹⁹ *Jonkies* (2022) at paras 16 and 17.

¹⁰⁰ *Jonkies* (2022) at para 17.

¹⁰¹ *Jonkies* (2022) at para 12, citing with approval the cases of *Kuilders* (2001) at para 13; *Wagner* (2002) at 504F; *Mjoli* (2019) at para 11; *Chagi* (2007) at paras 19 and 20; *Oranje* (2019) at para 10.

¹⁰² *Jonkies* (2022) at para 14.

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which deal with circumstances that may lead to the right of residence being terminated.¹⁰³ Furthermore, the court noted that such an order would not be in line with the objectives of either ESTA or the Constitution.¹⁰⁴

The LCC thus found that the Magistrates' Court correctly held that the application sought by the appellants was an eviction, not a relocation.¹⁰⁵ Consequently, the challenge to the continued residence of the respondents on the appellants' farm should have been brought in terms of section 8 and other eviction provisions of ESTA.¹⁰⁶ The appeal was dismissed with no order as to costs.¹⁰⁷

4 CRITICAL REFLECTION

4.1 Should the concept of relocation be extended?

The concept of relocation should not be extended to include the removal of an ESTA occupier from the land, as in the case of *Jonkies* (and future similar cases). This is because some exploitation in such relocations could take place and might result in hardship,¹⁰⁸ mainly in that a person or household would have to go through the process of moving from one ESTA home, or place of occupation, to the next. There is a real burden in such relocations, which could easily be used by owners or persons in charge to inconvenience an ESTA occupier.

Matters would be worse yet if the home to which the ESTA occupier were relocated, was not suitable – for example, if the new ESTA home offered by the owner or person in charge, were, overall, less favourable than the previous one. In that instance, it would not be enough to state that the ESTA home to which the occupiers have to be relocated, should be habitable. The ESTA home should also be fit for purpose. The notion of the home earmarked for the specific household is also important. Sachs J in *PE Municipality* explains it thus:

[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 secure space of privacy and tranquillity in what (for poor people in particular) is a turbulent and hostile world. Forced removal is a shock for any family, the more so for one that has established itself on a site that has become its familiar habitat.¹⁰⁹

In the light of this statement, it should be pointed out that relocations, as in the instant case, are akin to evictions because the new home is on a completely different part of the land, far removed from where the household previously lived. As such, extending the notion of relocation to include removal from the land would have an impact on the

¹⁰³ *Jonkies* (2022) at para 19.

¹⁰⁴ *Jonkies* (2022) at para 19.

¹⁰⁵ *Jonkies* (2022) at para 20.

¹⁰⁶ *Jonkies* (2022) at para 20.

¹⁰⁷ *Jonkies* (2022) at para 21.

¹⁰⁸ See preamble of ESTA, which provides that unfair evictions lead to great hardship, conflict and social instability.

¹⁰⁹ *PE Municipality* (2005) at para 17.

security of tenure of ESTA occupiers, guaranteed by section 6(2)(a) of ESTA.¹¹⁰ If an ESTA occupier's security of tenure were impaired, his or her way of life would be disrupted and he or she would not be able to participate fully in social and political activities.¹¹¹ Roisman explains that it is important to protect one's security of tenure because

it is the basis upon which residents build their lives. It enables people to make financial, psychological, and emotional investments in their homes and neighbourhoods. It provides depth and continuity for children's school attendance and for the religious, social, and employment experiences of children and adults. Security of tenure enables tenants "to fully participate in social and political life".¹¹²

In order to ensure that an ESTA occupier has social stability, it is thus important to protect the security of tenure of an ESTA occupier by not extending the meaning of relocation to include removal from the land. An extended concept of relocation would also be in contravention of ESTA, particularly sections 8(1) and 8(4), which deal with circumstances that may lead to the right of residence being terminated.¹¹³ If the concept of relocation is extended it could result in the effective eviction of an ESTA occupier, by circumventing the protection afforded to him or her in terms of section 8 of ESTA.¹¹⁴ Furthermore, an extended notion of relocation would be at odds with the spirit, purport and objectives of both ESTA and the Constitution, as these statutes aim to deal, in part, with arbitrary, unreasonable and unlawful relocations, and to offer protection against unlawful eviction.¹¹⁵

4.2 Why did the court circumscribe the meaning of relocation?

The court's intent to circumscribe the meaning of relocation was to protect ESTA occupiers against unfair practices and exploitation. Here, an unfair practice could mean any act or omission by an owner or person in charge undertaken during the relocation in contravention of ESTA, or a relocation practice that unreasonably prejudices the rights and/or interests of ESTA occupiers. Therefore, to avoid the exploitation that could take place during a relocation and result in hardship or something worse, as when the ESTA home to which the ESTA occupier is relocated is not suitable, the meaning of relocation had to be confined to the movement of an ESTA occupier on the same property.

The court's intent to circumscribe the meaning of relocation is a good approach. This is because it regulates the relocation of vulnerable ESTA occupiers in a fair manner, while acknowledging the right of an owner or person in charge to apply to court for a

¹¹⁰ *Jonkies* (2022) at para 19.

¹¹¹ *Daniels* (2017) at para 34.

¹¹² Roisman FW "The right to remain: Common law protections for security of tenure" (2008) 86 *North Carolina Law Review* 817 at 820.

¹¹³ *Jonkies* (2022) at para 19.

¹¹⁴ *Jonkies* (2022) at para 19.

¹¹⁵ Section 26(3) of the Constitution; sections 8, 9 and 10 of ESTA; *Baron* (2017) at paras 11-12.

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relocation order in certain appropriate circumstances (mentioned above). Such an approach ensures that ESTA occupiers are not further prejudiced.

4.3 Is the eviction process too burdensome to owners or persons in charge?

The eviction process is deemed too burdensome to owners or persons in charge, as it is both time-consuming and costly. It can drag on and result in further costs and delays in owners or persons in charge gaining control and possession of their property. Evictions are generally stressful and complicated, as ESTA in sections 8, 9, 10 and 11 sets out the procedural and substantive requirements when evictions are at stake. In evictions a host of requirements must be met, meaning checks and balances are in place – something which is not the case in relocations.

The success of the eviction process will depend on the following: First, the owner or person in charge must terminate an ESTA occupier's right of residence. Second, the owner or person in charge can proceed with the eviction if the ESTA occupier – having been duly notified – refuses to vacate the ESTA home. Third, the owner or person in charge must comply with the conditions for an eviction order in terms of sections 10 or 11 of ESTA. Fourth, the owner or person in charge must give adequate notice to the ESTA occupier, municipality and representative of the Department of Land Affairs.

Fifth, the owner or person in charge must obtain a report from a probation officer, stating the availability of suitable alternative accommodation to the ESTA occupier, the impact of the eviction on the constitutional rights of the ESTA occupier and his or her household, and any undue hardship that the eviction would cause the ESTA occupier.

Sixth, the owner or person in charge must wait for the municipality to find and provide suitable alternative accommodation. If the municipality is unable to do so, the owner might be expected to assist with finding such alternative accommodation, or failing that, in truly exceptional circumstances, to provide it.¹¹⁶ This means that the owner or person in charge must house that ESTA occupier for an indefinite period until such time as suitable alternative accommodation has been secured by the municipality. However, such a position would have to be decided on a case-by-case basis.

Given that the eviction process is onerous, owners or persons in charge are likely to opt for a relocation as it is easier, simpler and less costly.

4.4 Is it acceptable for people to be ESTA occupiers for life yet have their own homes elsewhere?

It is generally acceptable for people to be ESTA occupiers for life, as the purpose of ESTA is to promote the achievement of long-term security of land tenure.¹¹⁷ Where possible, an owner or person in charge is allowed to register against the title deed of the property a right of *habitatio*.¹¹⁸ However, where ESTA occupiers have their own homes

¹¹⁶ Baron (2017) at para 37.

¹¹⁷ See preamble of ESTA.

¹¹⁸ See, for example, Grobler (2022) at paras 7, 17–18 and 49(3). A right of *habitatio* is a lifelong right that allows an occupier to live in a house belonging to another together with his or her household without

elsewhere (presumably RDP housing offered by the state), as in the present case, it is not acceptable for them to become occupiers for life. This is because it is a waste of state resources, especially given housing shortage in South Africa.

In such instances, ESTA occupiers can be evicted if they have been offered alternative housing by the state. Although long-term ESTA occupiers are protected from eviction in terms of sections 8(1) and 8(4) of ESTA, unless they have committed a material breach, it should be considered in a scenario such as the one depicted in the present case. Normatively speaking, it would not make sense for ESTA occupiers to be allowed to be ESTA occupiers for life and stay in their ESTA homes if they have their own state-sponsored homes, in town, where they can live as homeowners. Therefore, it is submitted that removing ESTA occupiers from land, if they have state-subsidised homes, is an issue that can be dealt with through eviction.¹¹⁹

4.5 What is the balance between the rights of owners and ESTA occupiers?

Section 6(2)(a) of ESTA asserts the right of security of tenure of ESTA occupiers; this right must be balanced with the rights of the owner or person in charge. The purpose of section 6(2)(a) of ESTA is to ensure that, despite living on land belonging to another, ESTA occupiers are able to lead a life which is as close as possible to the kind of life they would have led if they resided on their own land.¹²⁰ However, the extent of the right set out in section 6(2)(a) of ESTA would generally depend on the striking of a fair balance between enabling the ESTA occupier to enjoy his or her rights, on the one hand, and, on the other, enabling the owner or person in charge to enjoy his or her rights as well.

Therefore, depending on the circumstances of each particular case, if the balance is unjust and inequitable to the owner or person in charge, it would mean that the ESTA occupier's right in section 6(2)(a) of ESTA could be appropriately limited.¹²¹ In the context of this instant case, the right of residence of the two long-term ESTA occupiers means they are protected from eviction in terms of sections 8(1) and 8(4) of ESTA, unless they have committed a material breach.¹²² An owner may evict these ESTA occupiers, provided that doing so would not be unjust and inequitable to the occupiers when the rights of the owner or person in charge are balanced against the ESTA occupiers' rights under sections 6(2)(a), 8(1) and 8(4) of ESTA.¹²³ Essentially, what matters is what is just and equitable (in the circumstances of each particular case) when

detriment to the substance of the property. See generally *Hendricks v Hendricks* 2016 (1) SA 511 (SCA) at para 6; *Grobler* (2022) at para 5, particularly footnote 2; Muller et al. (2019) at 387.

¹¹⁹ *Jonkies* (2022) at para 20.

¹²⁰ *Hattingh* (2013) at para 35.

¹²¹ *Hattingh* (2013) at para 37.

¹²² *Jonkies* (2022) at paras 17–19.

¹²³ *Hattingh* (2013) at para 32, where the court pointed out that the requirement in section 8(1) of ESTA was that the termination of an ESTA occupier's right of residence must not only be based on a lawful ground, but also be "just and equitable" considering all relevant factors.

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the rights of the ESTA occupier are balanced with those of the owner or person in charge.¹²⁴

Although the current private property system seems to consistently favour the rights and/or interests of owners or persons in charge, where the rights of ESTA occupiers outweigh those of owners or persons in charge, they must be upheld. This is because section 6(2)(a) of ESTA recognises that, in appropriate circumstances, an owner's right to property must give way, in the interests of justice and equity, to the right of vulnerable ESTA occupiers to a secure home. *Sach J* in *PE Municipality* pointed out that the words "just and equitable" relates to:

... what is just and equitable not only to the persons who occupied the land [belonging to another] but to the landowner as well.

And proceeded to hold that:

... the term also implies that a court, when deciding on a matter of this nature, would be obliged to break away from a purely legalistic approach and have regard to extraneous factors such as morality, fairness, social values and implications and circumstances which would necessitate bringing out an equitably principled judgment.¹²⁵

Balancing ESTA occupiers and owners' rights is mentioned in section 6(2) of ESTA, which indicates awareness on the legislator's part that extending the rights of ESTA occupiers might create tension between the owner and an ESTA occupier enjoying their respective rights.¹²⁶ As such, a balance is required in the context of ESTA.

5 CONCLUSION

There is a distinction between relocations and evictions. If relocations as evictions are allowed under ESTA, such an approach would make the two processes less distinct and thereby compromise the rights of ESTA occupiers. In view of the distinction between these two processes, owners would want a removal from the land (as in the instant case) to be considered a relocation, not an eviction, because a relocation is not as costly, time-consuming and burdensome as an eviction process. However, if a relocation from the land is not characterised as an eviction, it would impact on the ESTA occupiers' rights of residence and security of tenure. As such, relocations as evictions should not be permitted under ESTA, notwithstanding that ESTA occupiers who have been offered alternative housing by the state may be evicted after due court process.

A court must therefore balance out and reconcile the competing rights and/or interests of owners and ESTA occupiers in the particular case in a fair manner to ensure that ESTA occupiers are not further prejudiced. This balancing must be done in a manner that challenges the historical and persistent hierarchy between owners and ESTA occupiers, in order to transform property relations and ensure fairness.

¹²⁴ *Hattingh* (2013) at para 40.

¹²⁵ *PE Municipality* (2005) at para 33.

¹²⁶ *Daniels* (2017) at para 61.

BIBLIOGRAPHY

Books

Boule L *Mediation: Principles, process, practice* Butterworths: LexisNexis (2011)

Carey Miller DL and Pope A *Land title in South Africa* Cape Town: Juta (2000)

Muller G, Brits R, Boggenpoel ZT & Pienaar JM *Silberberg and Schoeman's the law of property* 6th ed South Africa: LexisNexis (2019)

Pienaar JM *Land reform* Cape Town: Juta (2014)

Skelton A, Carnelley M, Human S & Smith BS *Family law in South Africa* Oxford: Oxford University Press (2010)

Chapters in books

Nupen C "Mediation" in Pretorius P (ed) *Dispute resolution* Cape Town: Juta (1993) 39–50

Journal articles

Faris J "Deciphering the language of mediatory intervention in South Africa" (2006) 39(3) *Comparative and International Law Journal of Southern Africa* 427–499

Keightley R "The impact of the Extension of Security of Tenure Act on an owner's right to vindicate immovable property" (1999) 15(3) *South African Journal on Human Rights* 277–307

Kotze L & Du Plessis A "Putting Africa on the stand: A bird's eye view of climate change litigation on the continent" (2020) 50 *Environmental Law* 615–663

Maluleke WI & Mokwena RJ "The effect of climate change on rural livestock farming: Case study of Giyani policing area, Republic of South Africa" (2017) 45(1) *South African Journal of Agricultural Extension* 26–40

Ngwenyama LR "Meaningful engagement or mediation or structural interdict? An appropriate remedy to resolve disputes under ESTA" (2023) 37(1) *Speculum Juris* 73–84

Pienaar C "Farm dwellers: Eviction versus relocation" (2023) *Stockfarm* 67

Pienaar JM "Farm workers: Extending security of tenure in terms of recent legislation" (1998) 13(2) *Southern African Public Law* 423–437

Roisman FW "The right to remain: Common law protections for security of tenure" (2008) 86 *North Carolina Law Review* 817–858

Scheepers TE and Du Plessis W "Extension of Security of Tenure Act: A bone of contention" (1998) 61 *Tydskrif vir Hedendaagse Romeins-Hollandse Reg* 473–482

Scott-MacNab D "Mediation in the family context" (1988) 105 *South African Law Journal* 709–726

THE DIFFERENCE BETWEEN A RELOCATION AND AN EVICTION

Van der Walt AJ "Exclusivity of ownership, security of tenure, and eviction orders: A model to evaluate South African land-reform legislation (2002) 18(3) *South African Journal on Human Rights* 372 at 372–420

Legislation

Constitution of the Republic of South Africa, 1996

Extension of Security of Tenure Act 62 of 1997

Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998

Case law

Baleni v Minister of Mineral Resources 2019 (2) SA 453 (GP)

Baron v Claytile (Pty) Ltd 2017 (5) SA 329 (CC)

Boplaas Landgoed (PTY) Ltd v Jonkies (LCC 37/2022) [2022] ZALCC 38 (15 August 2022)

Chagi v Singisi Forest Products (Pty) Ltd 2007 (5) SA 513 (SCA)

City of Johannesburg v Rand Properties (Pty) Ltd 2007 (6) SA 417 (SCA)

Daniels v Scribante 2017 (4) SA 341 (CC)

De Villiers v Msimango (LCC14R/98) [1999] ZALCC 21 (6 May 1999)

Drumearn (Pty) Ltd v Wagner 2002 (6) SA 500 (LCC)

Du Plessis v Kriel NO (LCC88/2022) [2023] ZALCC 43 (14 December 2023)

Du Toit v George (LCC31R/01) [2001] ZALCC 7 (28 February 2001)

Grobler v Phillips 2023 (1) SA 321 (CC)

Hattingh v Juta 2013 (3) SA 275 (CC)

Hendricks v Hendricks 2016 (1) SA 511 (SCA)

Klaase v Van der Merwe NO 2016 (6) SA 131 (CC)

Landbou Navorsingsraad v Klaasen 2005 (3) SA 410 (LCC)

Mjoli v Greys Pass Farm (Pty) Ltd [2019] ZALCC 25 (15 October 2019)

Molusi v Voges NO 2016 (3) SA 370 (CC)

Morceaux Boerdery Trust v Vergotine (LCC110R/04) [2004] ZALCC 22 (29 November 2004)

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

Pharo's Properties CC v Kuilders 2001 (2) SA 1180 (LCC)

Pieterse v Drumearn (Pty) Ltd (LCC 135/2022; 3/2021) [2023] ZALCC 13 (19 April 2023)

Port Elizabeth Municipality v Various Occupiers 2005 (1) SA 217 (CC)

Residents of Joe Slovo Community, Western Cape v Thubelisha Homes 2010 (3) SA 454 (CC)

Sterkiewies (Pty) Ltd t/a Harrismith Feedlot v Msimanga 2012 (5) SA 392 (SCA)

Reports

PLAAS “Climate change and rural livelihoods in Southern Africa: A research and policy agenda” (2022) Institute for Poverty, Land and Agrarian Studies

Theses

Ngwenyama LR “A common standard of habitability? A comparison between tenants, usufructuaries and occupiers in South African law” (doctoral thesis, Stellenbosch University, 2021)

Schultz H “A legal discussion of the development of family law mediation in South African law, with comparisons drawn mainly with the Australian family law system” (master’s thesis, University of KwaZulu-Natal, 2011)