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Defining suitable alternative accommodation: Standards for evictions and relocations in South Africa

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Summary: *The purpose of this article is to investigate whether different (or similar) suitable alternative accommodation standards emerge in the evictions and relocations domain of occupiers under the Extension of Security of Tenure Act 62 of 1997 (ESTA) and the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998 (PIE). It is important to determine the acceptable standard of alternative accommodation for occupiers evicted or relocated under ESTA and PIE. Even more importantly, the state or owners must provide evicted or relocated occupiers with alternative accommodation of an acceptable standard, when evicting or relocating them. I argue that the key consideration when it comes to determining the standard of suitable alternative accommodation for both evictions and relocations under ESTA and PIE is that the alternative accommodation must be 'safe and overall*

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not less favourable than the occupier's previous situation'. It is concluded that a consistent core standard emerges. While the core standard is identical, I contend that the weight given to particular factors such as employment and earnings, vulnerable groups may vary by context. This is because courts balance these factors flexibly, rather than applying them mechanically. Finally, the article indicates a substantial overlap, but also contextual variations on the standards, especially under ESTA relocations. In other words, the standards substantially converge, but with context-specific applications.

Key words: *access to adequate housing; ESTA; evictions; PIE; relocations; suitable alternative accommodation*

1 Introduction

The Extension of Security of Tenure Act 62 of 1997 (ESTA) was enacted to give effect to the provisions of sections 25(1), 25(6) and 26(3) of the Constitution of the Republic of South Africa, 1996 (Constitution).[1] ESTA protects the occupation rights of persons who lawfully occupy rural land with the consent of the owner or person in charge[2] and, among others, regulates evictions of occupiers from such land.[3] The Prevention of Illegal Eviction From and Unlawful Occupation of Land Act 19 of 1998 (PIE) was enacted to give effect to the provisions of sections 25(1) and 26(3) of the Constitution.[4]

1 *Baron v Claytile (Pty) Limited* 2017 (5) SA 329 (CC) para 10.

2 Secs 2 & 3 ESTA. See also *Ndlovu v Ngcobo, Bekker v Jika* 2003 (1) SA 113 (SCA) para 42; *Elankor Ses (Pty) Ltd v Ngcosholo* (LCC 31R/2006) [2010] ZALCC 31 (8 December 2010) para 28. Consent is defined in sec 1 of ESTA as 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'. An owner is defined in sec 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 sec 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'.

3 Preamble to ESTA; secs 9, 10 & 11. An occupier is defined in sec 1 of ESTA as a 'person residing on land which belongs to another person, and who, on 4 February 1997 or thereafter, had consent or another right in law to do so, but excluding – (a) … (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'.

4 Preamble to PIE. See also *Port Elizabeth Municipality v Various Occupiers* 2005 (1) SA 217 (CC) para 24, particularly fn 24; *Residents of Joe Slovo Community, Western Cape v Thubelisha Homes* 2010 (3) SA 454 (CC) paras 17 & 233.

PIE regulates the eviction of unlawful occupiers from urban and rural land.[5]

There is a clearer distinction between PIE and ESTA. PIE protects unlawful occupants who have settled on public or private urban or rural land without the authorisation of the owner. ESTA, on the other hand, is concerned with the termination and eviction of occupiers who once had a right to occupy space on rural land at some point, but no longer do so. This position has two implications being the wording in section 1 of PIE, which states that 'a person who occupies land without … consent, or without any other legal right to occupy' could be taken broadly to mean 'a person who occupies land without consent, or without any other legal right to occupy' at the moment proceedings are started. This would cover circumstances where an occupant has never had consent or other right to occupy, as well as those where the occupant had consent or a right to occupy before. As a result, failure to prove a qualifying reason under ESTA or any other statute will bring one under the jurisdiction of PIE.

Speaking concerning ESTA and PIE, Pretorius AJ in *Baron v Claytile (Pty) Limited* (*Baron*), stated:[6]

> [I]t must be kept in mind that we are dealing with different pieces of legislation with different purposes. ESTA was enacted to strengthen the lawful occupation of persons residing on farms, as part of the land reform scheme envisaged in section 25 of the Constitution. It does not go without saying that legal principles developed with reference to PIE can apply to ESTA, or that the balance that must be struck will be struck in the same way.

The central theme of these two pieces of legislation is that evictions must take place in a manner consistent with the values of the new constitutional dispensation. This is because, in the pre-constitutional dispensation, unlawful occupiers of land were not protected against evictions under common law and they could be evicted or forcibly removed from land without a court order.[7] Under the common law

5 Preamble to PIE; secs 4 & 6 of PIE. See also *Ndlovu v Ngcobo, Bekker v Jika* (n 2) para 42; *Ngcosholo* (n 2) para 28. An unlawful occupier is defined in sec 1 of PIE as a 'person who occupies land without the express or tacit consent of the owner or person in charge, or without any other right in law to occupy such land, excluding a person who is an occupier in terms of the Extension of Security of Tenure Act, 1997, and excluding a person whose informal right to land, but for the provisions of this Act, would be protected by the provisions of the Interim Protection of Informal Land Rights Act, 1996 (Act No 31 of 1996)'. Consent is defined in sec 1 of PIE as the 'express or tacit consent, whether in writing or otherwise, of the owner or person in charge to the occupation by the occupier of the land in question'.

6 *Baron* (n 1) para 20.

7 *Jaftha v Schoeman, Van Rooyen v Stoltz* 2005 (2) SA 140 (CC) para 29; *City of Johannesburg v Rand Properties (Pty) Ltd* 2007 (6) SA 417 (SCA) para 30;

principles governing the *rei vindicatio*, a lawful occupier was entitled to raise, as a defence, the fact that they were in lawful occupation of the land (that is, that they had a valid limited real right such as a servitude, or personal right, such as a lease agreement, to occupy the land and could enforce this right against the owner).[8] However, the position insofar as both lawful and unlawful occupiers are concerned has changed in the new constitutional dispensation.[9] These categories of occupiers are currently protected against unlawful evictions or relocations by the provisions of ESTA or PIE.[10] To further strengthen the precarious position of these categories of occupiers, the court must, prior to the eviction or relocation, consider the availability of suitable alternative accommodation to be provided to evicted or relocated occupiers.[11] This is because an eviction without making provision for suitable alternative accommodation displaces people and leads to great hardship, conflict and social instability.[12]

Suitable alternative accommodation is defined in section 1 of ESTA as alternative accommodation that is safe and overall not less favourable than the occupiers' previous circumstances. It must cater for the occupants' basic needs and requirements and their joint earning abilities. Further, it must be located in close proximity to employment opportunities and social amenities such as schools, clinics and shopping centres. PIE does not define suitable alternative accommodation. The courts, however, have developed the meaning of suitable alternative accommodation in the context of PIE that coincides with section 1 of ESTA, as further discussed below.

The question is whether persons evicted, on the one hand, and persons relocated, on the other, are entitled to the same standard or the same kind of suitable alternative accommodation. This

PE Municipality (n 4) paras 8-10; *Baron* (n 1) para 12. See further C O'Regan 'No more forced removals? An historical analysis of the Prevention of Illegal Squatting Act' (1989) 5 *South African Journal on Human Rights* 361-394; AJ van der Walt 'Dancing with codes – Protecting, developing and deconstructing property rights in a constitutional state' (2001) 118 *South African Law Journal* 258-311; AJ van der Walt 'Exclusivity of ownership, security of tenure and eviction orders: A model to evaluate South African land-reform legislation' (2002) *Tydskrif vir die Suid-Afrikaanse Reg* 254-289; G Muller 'The impact of section 26 of the Constitution on the eviction of squatters in South African Law' LLD thesis, University of Stellenbosch, 2011 33-71; G Muller 'The legal-historical context of forced evictions in South Africa' (2013) 19 *Fundamina* 367-369, 382-394; CT Cloete 'A critical analysis of the approach of the courts in the application of eviction remedies in the pre-constitutional and constitutional context' LLM dissertation, University of Stellenbosch, 2016 9-73 (on file with author).

8 ZT Boggenpoel *Property remedies* (2017) 74.

9 Cloete (n 7) 74-142.

10 *PE Municipality* (n 4) paras 11-23; *Baron* (n 1) para 12. See further Cloete (n 7) 74-142.

11 Secs 10(2) & 11(3)(a) ESTA; secs 4(7) & 6(3)(c) PIE.

12 Preamble to ESTA.

article, therefore, aims to investigate what the suitable alternative accommodation standards are in instances of eviction, as opposed to relocation. Furthermore, once that is established, the implication of the approach followed must be determined. This is important as all affected persons and role players involved must know what the relevant standards are. This has implications for evictees, relocated individuals and families, as well as land owners and local authorities, where relevant.

It is important to also clarify the distinction between relocation and eviction, as they are two separate legal and practical concepts. An eviction refers to the legal process of removing an unlawful occupier from property, typically involving a court order. Relocation, on the other hand, refers to the process of providing alternative accommodation for those who are not necessarily undesirable. When comparing these two, the focus can either be on the legal standard governing the need for alternative accommodation or on the quality of such accommodation. The first issue is whether the law requires suitable alternative accommodation before an eviction can be ordered, and the second issue is whether there is a consistent standard regarding the quality of the accommodation provided. This analysis is not concerned with the mere legal requirement to provide accommodation, but with the adequacy and suitability of that accommodation in meeting the needs of vulnerable groups such as children, the elderly or persons with disabilities.

The investigation is approached as follows: Succeeding the introductory part is part 2, which analyses the provisions of section 26 of the Constitution and the constitutional obligations imposed thereby. Part 3 offers an analysis of suitable alternative accommodation under ESTA, followed by a similar analysis in part 4 with respect to PIE. Part 5 concludes the article.

2 Section 26 of the Constitution

2.1 Section 26(1) of the Constitution

Section 26(1) of the Constitution provides that '[e]veryone has the right to have access to adequate housing'. This provision confers a general right on everyone to have access to adequate housing.[13] Because the provision does not define what 'adequate housing'

13 *Government of the Republic of South Africa v Grootboom* 2001 (1) SA 46 (CC) para 21.

means,[14] it would have to be determined in particular contexts.[15] Generally, 'adequate housing' must provide the occupiers with secure tenure and allow them to live in conformity with their culture.[16] It must provide access to basic services (such as electricity) and social amenities (such as employment).[17] Further, it must provide its inhabitants with privacy, space, security, lighting and ventilation.[18] In determining whether specific forms of housing may constitute 'adequate housing' for the purposes of section 26(1) of the Constitution, it is important to consider certain aspects of the right of access to adequate housing, such as security of tenure, the availability of services, affordability, habitability, accessibility, location and cultural adequacy.[19] The elements of the right of access to adequate housing that are relevant to this article are accessibility and location.

Housing is adequate if it is accessible to all those who are entitled to it.[20] An accessible house is a dwelling that is readily usable, with rooms of sufficient size to accommodate its occupants comfortably. It must contain certain features such as widened doorways, ramps, wheel-in bathrooms, lowered kitchen counters and sinks. These features are legally required for 'suitable alternative accommodation'. 'Adequate housing' is the constitutional benchmark, whereas 'suitable alternative accommodation' is a statutory standard interpreted in light of section 26 of the Constitution. The standard for suitable alternative accommodation may be narrower, but must not undermine constitutional guarantees. A house, therefore, would be suitable for the particular individual or family if it is in keeping with their reasonable needs and requirements.

Housing is also adequate if it is in a location that allows occupiers to have access to employment options, healthcare services, schools, childcare centres and other social facilities. This is true both in large cities and in rural areas where the temporal and financial costs of getting to and from the place of work can place excessive demands upon the budgets of poor households. Similarly, housing should not

14 G Muller & S Viljoen *Property in housing* (2021) 60.
15 *Grootboom* (n 13) para 37. See also Muller & Viljoen (n 14) 240-241.
16 ESCR Committee General Comment 4 on the right to adequate housing (art 11(1) of the Covenant) (13 December 1991) UN Doc E/1992/23 (1991) paras 7 & 8.
17 General Comment 4 (n 16) para 8.
18 General Comment 4 (n 16) para 7.
19 General Comment 4 (n 16) para 8; Muller & Viljoen (n 14) 56-57. See *Grobler v Phillips* 2023 (1) SA 321 (CC). The court order accepts that the landowner has made an offer to provide the unlawful occupier with alternative accommodation. The order emphasises that in such instances the unlawful occupier may not unreasonably exercise a preference of where to stay.
20 General Comment 4 (n 16) para 8(e); Muller & Viljoen (n 14) 56-57.

be built on polluted sites nor in immediate proximity to pollution sources that threaten the right to health of the inhabitants.[21]

This statement does not mean that persons who stand to be evicted, under ESTA and PIE respectively, and persons who stand to be relocated have a right of access to adequate housing in the location of their own choosing, for example, a house in the same demarcated area or preferred spot or location in which the occupier resided since they moved onto the land.[22] This is because the issue of a preferred spot or location for evictions or relocations is determined by considering several factors, such as whether land is available on the preferred location or site.[23]

2.2 Section 26(2) of the Constitution

2.2.1 Obligation imposed on the state

In terms of section 7(2) of the Constitution, the state is obliged to 'respect, protect, promote and fulfil' the right of access to adequate housing.[24] The obligation to respect means that the state should refrain from carrying out practices, policies or legal measures that interfere with all occupiers' enjoyment of constitutional and statutory housing rights.[25] In relation to the obligation to protect, the state is required to act positively in regulating, preventing and remedying breaches of housing rights.[26] This would mean that the state should regulate the actions of individuals and private entities.[27] Furthermore, the obligation to protect means that the state should adopt laws, policies and regulations to protect all occupiers' constitutional and statutory housing rights against unlawful or unjustified interferences by non-state actors.[28] In this regard, the obligation of the state goes beyond its own actions, but also includes actions by third parties.[29]

The obligation to promote means that the state should adopt educational and informational programmes that enhance all

21 General Comment 4 (n 16) para 8(f).
22 *Rand Properties* (n 7) paras 44 & 75; *Joe Slovo* (n 4) para 254.
23 *Rand Properties* (n 7) para 44; *Joe Slovo* (n 4) para 254. See also Muller & Viljoen (n 14) 418. The notion of locational justice was addressed by the Supreme Court of Appeal in two recent judgments, namely, *City of Cape Town v Commando* 2023 (4) SA 465 (SCA) paras 53-56 and *Minister for Transport and Public Works: Western Cape v Adonisi* 2024 (4) SA 499 (SCA) para 39.
24 Muller (2011) (n 7) 227.
25 P de Vos and others *South African constitutional law in context* (2021) 796.
26 As above.
27 As above.
28 As above.
29 As above.

occupiers' awareness and understanding of their housing rights.[30] This undertaking by the state will ensure that all occupiers effectively participate in decision-making processes that affect their housing rights.[31] The obligation to fulfil means that the state must adopt legislation and other measures to realise housing rights.[32] Furthermore, this obligation also means that the state must adopt measures to intervene and assist disadvantaged groups.[33] This statement would mean that the state should intervene after evictions or relocations, by actually providing suitable alternative accommodation to evicted or relocated occupiers.[34] Therefore, when occupiers are evicted or relocated, the state must take reasonable measures within its available resources to provide access to adequate housing, and the duty to provide alternative accommodation depends on context and court supervision.

Section 26(1) imposes a negative obligation on the state not to unjustifiably interfere with existing rights of access to adequate housing, while section 26(1) and section 26(2) read together impose a positive obligation on the state to take positive steps to protect, promote and fulfil the right of access to adequate housing for those who do not currently enjoy that right, within the state's available resources.[35] These provisions establish and delineate the scope of the positive obligation on the state to protect, promote and fulfil the right of access to adequate housing.[36] In the state's effort to fulfil its obligations in terms of section 26(3) of the Constitution, the state enacted ESTA and PIE as legislation aimed at protecting and promoting the right of access to adequate housing.

30 De Vos and others (n 25) 797.
31 As above.
32 As above.
33 As above. See also *Grootboom* (n 13) para 99.
34 *Grootboom* (n 13) para 99; *City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39 (Pty) Ltd* 2012 (2) SA 104 (CC) para 96; *Baron* (n 1) para 37; *PE Municipality* (n 4) para 28; ESCR Committee General Comment 7 on the right to adequate housing (art 11(1) of the Covenant): forced evictions (20 May 1997) UN Doc E/C12/1997/4 (1997) para 16, which provides that a '[s]tate party must take all appropriate measures, to the maximum of its available resources, to ensure that adequate alternative housing, resettlement or access'.
35 *Grootboom* (n 13) para 34. See also *Ex parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa, 1996* 1996 (4) SA 744 (CC) para 78; *Minister of Health v Treatment Action Campaign* 2002 (5) SA 721 (CC) para 46; *Jaftha* (n 7) para 34; Muller (2011) (n 7) 93; Muller & Viljoen (n 14) 20.
36 *Grootboom* (n 13) para 21. See also Muller (2011) (n 7) 82.

2.2.2 Obligation imposed on private parties

Sections 8(1) and (2) of the Constitution provide for the horizontal application of the Bill of Rights.[37] Section 8(1) states that the Bill of Rights applies 'to all law, and binds the legislature, the executive, the judiciary and all organs of state'. Section 8(2) provides that a provision of the Bill of Rights 'binds a natural or a juristic person if, and to the extent that it is applicable, taking into account the nature of the right and the nature of any duty imposed by the right'.

Private parties generally have negative obligations in relation to the fulfilment of obligations imposed by the Bill of Rights, but in exceptional contexts (for instance, agreed contractual duties, long-term occupiers, equitable relief under ESTA) they may bear limited positive duties.[38] The negative obligation requires private parties not to interfere with or diminish the enjoyment of housing rights.[39] A positive obligation would mean that a private party must do something to fulfil a right or take positive steps to enable another to enjoy a right.[40] The application of section 8(2) to socio-economic rights 'is not to obstruct private autonomy or to impose on a private party the duties of the state in protecting the Bill of Rights'.[41] If that were the case, it would be unreasonable to require private persons to bear the same (positive) obligations as the state.[42] Rather, the application of section 8(2) should be seen as 'requir[ing] private parties not to interfere with or diminish the enjoyment of a right'.[43] This notwithstanding, a growing body of academic commentary suggests that, given the increasing strain on government's capacity to meet the needs of all people, private parties may, in certain circumstances, be required to fulfil positive obligations in relation to socio-economic rights.[44] Therefore, it is arguable that, based on

37 De Vos and others (n 25) 798.
38 *Daniels v Scribante* 2017 (4) SA 341 (CC) para 48. See also De Vos and others (n 25) 798-799; *AllPay Consolidated Investment Holdings (Pty) Ltd v Chief Executive Officer, South African Social Security Agency (No 2)* 2014 (4) SA 179 (CC) paras 65-66; *AB v Pridwin Preparatory School* 2020 (5) SA 327 (CC) para 124. See also B Meyersfeld 'The South African Constitution and the human-rights obligations of juristic persons' (2020) 137 *South African Law Journal* 439, 467-478.
39 De Vos and others (n 25) 801-802. See, eg, *Governing Body of the Juma Musjid Primary School v Essay* (CCT 29/10) [2011] ZACC 13 (11 April 2011) para 58; *Daniels* (n 38) paras 49 & 190; *Pridwin* (n 38) para 89.
40 De Vos and others (n 25) 803. See, eg, *Daniels* (n 38) para 49.
41 *Juma Musjid* (n 39) para 58. See also *Daniels* (n 38) para 44; *Pridwin* (n 38) para 123.
42 *Daniels* (n 38) para 40. See also *Juma Musjid* (n 39) para 57; *Pridwin* (n 38) para 123.
43 *Juma Musjid* (n 39) para 58. See also *Daniels* (n 38) para 44; *Pridwin* (n 38) para 123.
44 Meyersfeld (n 38) 467-478. See also M Madlanga 'The human rights duties of companies and other private actors in South Africa' (2018) 29 *Stellenbosch Law Review* 359-378.

the circumstances of each case, socio-economic rights may impose positive duties on private parties.

2.3 Section 26(3) of the Constitution

2.3.1 Introduction

Section 26(3) of the Constitution provides that '[n]o 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.' Sachs J in *PE Municipality*[45] explained that section 26(3) of the Constitution

> evinces special constitutional regard for a person's place of abode. It acknowledges that a home is more than just a shelter from the elements. It is a zone of personal intimacy and family security. Often it will be the only relatively 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.[46]

This provision prohibits and protects against arbitrary evictions.[47] As such, all evictions must be carried out in accordance with the values underlying our constitutional democracy, such as human dignity, equality and freedom.[48]

2.3.2 Evictions and the provision of suitable alternative accommodation

An eviction involves the movement of occupiers from one piece of land to another. The primary obligation to provide suitable alternative accommodation in the context of evictions rests on the state,[49] and this duty depends on context and court supervision. In the context of ESTA, it has been held by the courts that it might be 'appropriate to expect the private landowner to assist with the finding of, or, failing that, in truly exceptional circumstances, [providing], suitable alternative accommodation'.[50] However, such a position will have to be decided on a case-by-case basis. Given that location is a contextual factor in the provision of suitable alternative accommodation, the

45 *PE Municipality* (n 4).
46 *PE Municipality* (n 4) para 17.
47 *Grootboom* (n 13) para 21; *Joe Slovo* (n 4) para 231.
48 *Joe Slovo* (n 4) para 231.
49 *PE Municipality* (n 4) para 28; *Baron* (n 1) para 37.
50 *Baron* (n 1) para 37.

state must before the eviction consider the location of potential housing to be inhabited by evicted occupiers.[51]

2.3.3 Relocations and the provision of suitable alternative accommodation

The definition of a relocation under ESTA is limited to the movement of occupiers from one house to another on the same land.[52] The land owner must provide suitable alternative accommodation to occupiers, as the relocation is on the same portion of land.[53] The definition of ESTA relocation differs from the meaning of a relocation under PIE, which is confined to the movement of occupiers from one house to another on different pieces of land. It is the state's obligation to provide occupiers with suitable alternative accommodation, and this duty depends on context and court supervision.

If an owner or the state wishes to relocate occupiers under ESTA or PIE, the relocator must, prior to the relocation, consider the location of the house to which occupiers will be relocated.[54] Therefore, housing that is built on polluted sites or close to sources that cause pollution will likely be classified as inadequate.[55] This is because such an environment may impact on occupiers' rights to health[56] and a healthy environment.[57] This means that access to adequate housing must, at the very least, be provided in a location that is not dangerous to persons' health or safety, and does not impair their human dignity.[58]

51 *Rand Properties* (n 7) para 44; *Joe Slovo* (n 4) para 254; *Commando* (n 23) paras 53-56; *Adonisi* (n 23) para 39.

52 *Pharo's Properties CC v Kuilders* 2001 (2) SA 1180 (LCC) para 13; *Pretorius v Beginsel* (LCC94R/01) [2001] ZALCC 52 (13 December 2001) para 2; *Drumearn (Pty) Ltd v Wagner* 2002 (6) SA 500 (LCC) 504F; *Chagi v Singisi Forest Products (Pty) Ltd* 2007 (5) SA 513 (SCA) paras 19-20; *Oranje v Rouxlandia Investments (Pty) Ltd* 2019 (3) SA 108 (SCA) para 10; *Mjoli v Greys Pass Farm (Pty) Ltd* [2019] ZALCC 25 (15 October 2019) para 11; *Boplaas Landgoed (Pty) Ltd v Jonkies* (LCC 37/2022) [2022] ZALCC 38 (15 August 2022) para 12; *Pieterse v Drumearn (Pty) Ltd* (LCC 135/2022; 3/2021) [2023] ZALCC 13 (19 April 2023) para 29; *Du Plessis v Kriel NO* (LCC88/2022) [2023] ZALCC 43 (14 December 2023) para 33.

53 *Oranje* (n 52) para 19.

54 *Rand Properties* (n 7) para 44; *Joe Slovo* (n 4) para 254.

55 General Comment 4 (n 16) para 8(f).

56 Sec 27 Constitution.

57 Sec 24 Constitution.

58 General Comment 4 (n 16) para 8(f). See further *Mpange v Sithole* 2007 (6) SA 578 (W) paras 46 & 50-55; *Rand Properties* (n 7) para 36; *Occupiers of 51 Olivia Road, Berea Township and 197 Main Street, Johannesburg v City of Johannesburg & Others* [2008] ZACC 1; 2008 (3) SA 208 (CC) para 44; *Joe Slovo* (n 4) para 108.

3 Suitable alternative accommodation under ESTA

3.1 Introduction

ESTA was promulgated with the express intention of providing measures to facilitate and protect the long-term security of land tenure.[59] It regulates the conditions of residence on rural land, the circumstances under which the right of a person to reside on rural land may be terminated, and the eviction of a person whose right of residence has been terminated.[60] Before 1997, occupiers on land, usually farm workers, were vulnerable and their rights were not protected because there was no legislation regulating this category of occupiers.[61] This situation, in part, was the result of past discriminatory laws and practices.[62] While historical developments are important and explains why rural dwellers have remained vulnerable, this part of the contribution focuses on suitable alternative accommodation specifically. This is done by first discussing suitable alternative accommodation within the eviction paradigm, followed by suitable alternative accommodation in the relocation paradigm.

3.2 Evictions

An 'eviction' or 'to evict' is defined in section 1 of ESTA as to 'deprive 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'. An ESTA occupier may be evicted only in terms of a court order.[63] An eviction order will be granted if the right of residence was terminated in terms of section 8 of the Act and the ESTA occupier has not vacated the land within the period of notice given by the owner.[64] The owner must give an ESTA occupier at least two months' notice of their intention to apply for an eviction.[65] Section 10 of ESTA deals with the eviction of a person who was an ESTA occupier on 4 February 1997, and section 11 with the eviction of a person who became an occupier after that date. The court may grant an eviction order if all substantive and procedural requirements had been complied with, when the granting of the order is just and equitable, and if it is satisfied that suitable alternative accommodation is available to an occupier.[66] If suitable alternative accommodation is not available and

59 Preamble to ESTA.
60 As above.
61 As above.
62 As above.
63 Sec 9(1) ESTA.
64 Secs 9(2)(a)-(b) ESTA.
65 Sec 9(2)(d)(i) ESTA.
66 Secs 10(2) & 11(3)(c) ESTA.

an occupier will be rendered homeless, the court should not grant an eviction order.[67]

Suitable alternative accommodation is defined in section 1 of ESTA as

> alternative accommodation which is safe and overall not less favourable than the occupiers' previous situation, having regard to the residential accommodation and land for agricultural use available to them prior to eviction and suitable having regard to –
>
> (a) the reasonable needs and requirements of all of the occupiers in the household in question for residential accommodation, land for agricultural use, and services;
>
> (b) their joint earning abilities; and
>
> (c) the need to reside in proximity to opportunities for employment or other economic activities if they intend to be economically active.

Clearly, alternative accommodation after an eviction order must meet stringent standards as set out in section 1 of ESTA. Occupiers are entitled to raise concerns regarding the suitability of the alternative accommodation, which cannot simply be ignored by the courts. This is because the court has a duty to oversee whether the alternative accommodation is suitable for occupiers to be evicted.

In *Baron*, the Land Claims Court (LCC) granted an order for the eviction of the occupiers from private land in terms of the provisions of ESTA. The occupiers applied for leave to appeal. As the eviction order was confirmed on review in terms of section 19(3) of ESTA, the occupiers amended their notice of application for leave to appeal to the Constitutional Court by inserting an alternative appeal against the confirmation of the order on review in terms of section 19(3).[68] The occupiers, except for one of them, were all former employees of a brick manufacturing business on the farm to which the eviction order applied. That entitled them to reside in the accommodation on the farm for the duration of their employment. Their employment was terminated between 2006 and 2011 pursuant to disciplinary enquiries premised on misconduct on their part.[69]

The Court held that the central issue was whether the eviction complied with section 10 of ESTA, read with sections 25 and 26

67 *Ngcosholo* (n 2) paras 16-38. See also JM Pienaar *Land reform* (2014) 407-408.
68 *Baron* (n 1) para 1.
69 *Baron* (n 1) para 8.

of the Constitution.[70] On appeal, the issues were narrowed down further, leaving the single issue for determination the existence of suitable alternative accommodation for the occupiers.[71] The City of Cape Town Municipality had made an offer of alternative accommodation in February 2017, but the offer was rejected by the occupiers on the ground that the alternative accommodation was unacceptable.[72] The Court also explained the duties of a private land owner.[73] While section 10(2) does not specify who is responsible for making available suitable alternative accommodation, the logical role player would be the state.[74]

The question then was whether the city had an obligation to continue offering accommodation until the occupiers were satisfied.[75] The Court answered that question in the negative. The occupiers' concerns about what made the initial accommodation not suitable had been addressed by the city to the best of its abilities. Cognisant that the duty was one of progressive realisation, the Court accepted that the alternative accommodation provided qualified as suitable alternative accommodation provided by the city within 'its available resources'.[76] It was therefore just and equitable that the occupiers be evicted within three months of the date of judgment.[77] The occupiers requested the Court to 'make a value judgment as to what is just and equitable, which includes consideration of the distance from the applicants' places of employment and the distance from social amenities, such as schools, clinics and shopping centres'.[78] The Court found that the occupiers had

> failed to deal with the objection that [the alternative accommodation] was far from their places of employment, but relied on a bald allegation, without setting out any particulars as to where they were employed and the distance from [the alternative accommodation]. They did not deal with any hardship they would suffer should they move to [the alternative accommodation].[79]

In challenging the suitability of the alternative accommodation, it is important that occupiers substantiate their concerns or complaints as the duty to provide alternative accommodation depends on context and court supervision. They must do so prior to accepting the offer

70 *Baron* (n 1) para 4.
71 *Baron* (n 1) para 29.
72 *Baron* (n 1) paras 30-31.
73 See *Baron* (n 1) paras 35-37.
74 *Baron* (n 1) para 37.
75 *Baron* (n 1) para 40.
76 *Baron* (n 1) para 50.
77 *Baron* (n 1) para 54.
78 *Baron* (n 1) para 32.
79 *Baron* (n 1) para 32.

of accommodation. Such action will ensure that occupiers are not further prejudiced by their unsubstantiated allegations.

3.3 Relocations

A 'relocation' or 'to relocate' is not defined in ESTA. According to case law developments, a 'relocation' means the movement of occupiers from one house to another on the same piece of land.[80] Notably, an application for a relocation can be initiated by either the land owner or the occupiers. A relocation may occur at the owner's prerogative in a variety of instances, including, when the owner wants to use that portion of the farm for another purpose, such as to house current employees who need accommodation;[81] when extant conditions lead to a relocation, such as dilapidated or derelict buildings;[82] when the owner needs the land for agricultural purposes;[83] or there needs to be an on-site development of the land for public benefit.[84] The particular occupier can also approach the court for a relocation order, for example, where the dwelling is not fit for human habitation.

Importantly, there is no provision in ESTA that deals with relocation specifically. Instead, the practices and approaches have been developed by case law. If the owner initiates the relocation, they must inform the occupier in writing about the relocation.[85] The occupier should be allowed to respond to the owner's correspondence.[86] The owner should arrange a meeting with the occupiers at which time the potential area of relocation should be discussed, as well as the kind of accommodation, inevitably constituting suitable alternative accommodation.[87]

The occupiers must be able and should participate in the discussions on the relocation.[88] Different scenarios may ensue: If the occupiers agree to be relocated, parties should then agree on the time, date and site of relocation. When the occupiers do not agree to be relocated, the first step is to ascertain what the reason for their refusal is. If the refusal is unreasonable in that they also refuse to participate in the meeting, the owner should approach a court for

80 *Kuilders* (n 52) para 13; *Pretorius* (n 52) para 2; *Wagner* (n 52) 504F; *Chagi* (n 52) paras 19-20; *Oranje* (n 52) para 10; *Mjoli* (n 52) para 11; *Jonkies* (n 52) para 12; *Pieterse* (n 52) para 29; *Du Plessis* (n 52) para 33.
81 *Oranje* (n 52) paras 4-6; *Jonkies* (n 52) paras 5-6.
82 *Mjoli* (n 52) paras 5-6.
83 Pienaar (n 67) 313.
84 As above.
85 *Oranje* (n 52) para 6.
86 *Oranje* (n 52) paras 5-6.
87 *Oranje* (n 52) para 6; *Mjoli* (n 52) para 6.
88 *Oranje* (n 52) para 6.

a relocation order.[89] The exact same approach should be followed, irrespective of who initiated the relocation.

As mentioned, specific approaches have been developed by way of case law. In this regard, the courts' general views on suitable alternative accommodation in relocation scenarios are as follows: In *Wagner*,[90] the Court held that although a relocation was not an eviction, it still affected the rights of the occupiers and, therefore, the accommodation to which the occupiers were being relocated had to be suitable alternative accommodation as defined in section 1 of ESTA.[91]

The broad criteria for the suitability of alternative accommodation were set out in the case of *Oranje v Rouxlandia Investments (Pty) Ltd* (*Oranje*).[92] In this case, Mr Oranje was a 51 year-old farm worker who, together with his wife and his two adult children, resided on a farm owned by Rouxlandia Investments. Mr Oranje was born on the farm, and had lived there for most of his life.[93] The Oranje family had the use of a house on the farm as part of Mr Oranje's contract of employment. In 2001 Mr Oranje suffered serious injuries while driving a tractor in the course and scope of his employment. He continued working on the farm until he was declared medically unfit 13 years later. His wife was medically boarded in 2007. Although she no longer worked there, she and the family continued residing on the farm with Mr Oranje.[94] The farm had 102 workers' houses, of which six were upgraded to managers' houses in 2013. 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 a manager's house. It was a specific term of the housing agreement that the house was allocated only to management members, and if the primary occupant no longer occupied a management position, the housing agreement would be terminated on 30 days' notice. Mr Oranje's continued occupation of the house was conditional upon him remaining permanently employed as a manager on the farm.[95]

In June 2014 Mr Oranje was declared medically unfit for work and his employment on the farm came to an end.[96] Rouxlandia requested him and his family to move to a smaller house on the

89 *Oranje* (n 52) paras 6-7.
90 *Wagner* (n 52).
91 *Wagner* (n 52) 504.
92 *Oranje* (n 52).
93 *Oranje* (n 52) para 2.
94 *Oranje* (n 52) para 3.
95 *Oranje* (n 52) para 4.
96 *Oranje* (n 52) para 5.

farm, but he refused.[97] Rouxlandia launched an application in the Land Claim's Court (LCC) seeking an order to have Mr Oranje and his family relocated from the managers' house to a smaller house on the same farm. The order was granted.[98] On appeal, the Supreme Court of Appeal (SCA) had to consider whether the LCC erred in not appreciating that it had a discretion in terms of section 26(3) of the Constitution to refuse the relocation order based on considerations of equity and justice.[99]

The SCA held that the appeal concerned the respective rights of the parties when a farm owner wishes to relocate a worker from one dwelling to another, on the same farm.[100] It further held that it had been established in case law that an eviction in terms of ESTA was confined to an eviction from the land, not from one dwelling to another. As such, a relocation cannot amount to an eviction in terms of ESTA.[101] An argument was made by Mr Oranje that, while a relocation is not an eviction in terms of ESTA, it amounted to an eviction in terms of section 26(3) of the Constitution.[102] The SCA found that the argument made by Mr Oranje was not in line with the subsidiarity principle. In terms of this principle, where legislation (such as ESTA) 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.[103] As such, it was impermissible for the SCA to bypass ESTA, legislation specifically enacted to give effect to a constitutional right, and to decide the matter on the basis of the constitutional provision that gives effect to the right.[104]

Mr Oranje also sought to locate his right to resist the relocation in sections 5 and 6 of ESTA.[105] The SCA confirmed that where a relocation

97 *Oranje* (n 52) para 6.
98 *Oranje* (n 52) para 7.
99 *Oranje* (n 52) para 8.
100 *Oranje* (n 52) para 1.
101 *Oranje* (n 52) para 10.
102 *Oranje* (n 52) para 11.
103 AJ van der Walt 'Normative pluralism and anarchy: Reflections on the 2007 term' (2008) 1 *Constitutional Court Review* 77, 100-103; AJ van der Walt *Property and constitution* (2012) 49-61; De Vos and others (n 26) 528; Muller & Viljoen (n 14) 441; *South African National Defence Union v Minister of Defence* 2007 (5) SA 400 (CC) paras 51-52; *MEC for Education: KwaZulu-Natal v Pillay* 2008 (1) SA 474 (CC) paras 39-40; *Chirwa v Transnet Ltd* 2008 (2) SA 347 (CC) paras 59 & 69; *Walele v City of Cape Town* 2008 (6) SA 129 (CC) paras 29-30; *Nokotyana v Ekurhuleni Metropolitan Municipality* 2010 (4) BCLR 312 (CC) paras 47-49; *De Lange v Presiding Bishop of the Methodist Church of Southern Africa for the Time Being* 2016 (2) SA 1 (CC) para 53; *My Vote Counts NPC v Speaker of The National Assembly* 2016 (1) SA 132 (CC) para 53; *Esorfranki Pipelines (Pty) Ltd v Mopani District Municipality* 2023 (2) SA 31 (CC) para 46.
104 *Oranje* (n 52) para 12.
105 *Oranje* (n 52) para 13.

infringes an occupier's human dignity, this could be successfully resisted by invoking sections 5(a) and 6(2)(a).[106] However, where suitable alternative accommodation was provided and there was no infringement on the right to human dignity, those sections relied upon by Mr Oranje do not afford him any protection.[107]

The SCA interpreted and applied the definition of suitable alternative accommodation in section 1 of ESTA as follows: It must cater for the reasonable needs and requirements of all occupiers in the relevant household, and provide them with access to basic services such as running water, a flush toilet and an inside bathroom.[108] The physical structure of the alternative accommodation must protect the occupiers from elements, for example, a leak-proof roof.[109] This interpretation aligns with ESTA statutory standard in light of section 26 of the Constitution. If the alternative accommodation is overall less favourable than the previous accommodation, it arguably would not meet the required standard. Importantly, it is the court that needs to assess whether the alternative accommodation is indeed suitable and does not undermine constitutional guarantees.

3.4 Concluding remarks

In light of *Oranje* above, evictions and relocations are two conceptually different, but substantively similar processes. The Court interpreted an eviction as removal from the land and a relocation as movement from one dwelling to another on the same land. In evictions applications, *Baron* above indicates that the whole list of factors relating to suitable alternative accommodation must be considered. On the other hand, prior to a relocation, *Oranje* shows that these factors are not considered. This would mean that an eviction may be impacted on by the list of factors, whereas relocations would not be similarly impacted.

The cases of *Wagner*, *Oranje* and *Baron* show that the key consideration when it comes to determining the standard of suitable alternative accommodation for both evictions and relocations is that alternative accommodation must be 'safe and overall not less favourable than the occupier's previous situation' in terms of section 1 of ESTA. This would mean that the factors set out in paragraphs (a) to (c) of the definition are simply factors a court should take into

106 *Oranje* (n 52) para 17.
107 *Oranje* (n 52) paras 18-22.
108 *Oranje* (n 52) para 20.
109 As above. Eg, a thatch roof that is leak-free could be considered adequate.

account to decide whether the new accommodation is safe and not less favourable.

It therefore follows that in light of the cases of *Wagner*, *Oranje* and *Baron* the standard of suitable alternative accommodation for both evictions and relocations domain under ESTA is exactly the same – there is no difference. The implication of this approach is to ensure that occupiers are not evicted or relocated to alternative accommodation that is unsafe and less favourable than their previous home.

4 Suitable alternative accommodation under PIE

4.1 Introduction

PIE was enacted to provide for the prohibition of unlawful eviction, to regulate the procedures for the eviction of unlawful occupiers and to infuse some humanity into the eviction process.[110] It furthermore specifically repealed the Prevention of Illegal Squatting Act 52 of 1951 (PISA).[111] In relation to PIE and PISA, Sachs J in *PE Municipality*[112] pointed out the following:[113]

> PIE not only repealed PISA but in a sense inverted it: squatting was decriminalised and the eviction process was made subject to a number of requirements, some necessary to comply with certain demands of the Bill of Rights. The overlay between public and private law continued, but in reverse fashion, with the name, character, tone and context of the statute being turned around. Thus the first part of the title of the new law emphasised a shift in thrust from prevention of illegal squatting to prevention of illegal eviction. The former objective of reinforcing common law remedies while reducing common law protections, was reversed so as to temper common law remedies with strong procedural and substantive protections; and the overall objective of facilitating the displacement and relocation of poor and landless black people for ideological purposes was replaced by acknowledgement of the necessitous quest for homes of victims of

110 Preamble to PIE. For a general discussion of PIE, see JM Pienaar & A Muller 'The impact of the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998 on homelessness and unlawful occupation within the present statutory framework' (1999) 10 *Stellenbosch Law Review* 370-396; DLC Miller & A Pope *Land title in South Africa* (2000) 516-525; Muller (2011) (n 7) 103-146; Cloete (n 7) 74-142; G Muller and others *Silberberg and Schoeman's the law of property* (2019) 751-763; ZT Boggenpoel & S Mahomedy 'Reflecting on evictions and unlawful occupation of land in South Africa: Where do some gaps still remain?' (2024) 27 *Potchefstroom Electronic Law Journal* 1-44.

111 Preamble to PIE. For a historical background on PISA, see further *PE Municipality* (n 4) paras 8-10.

112 *PE Municipality* (n 4).

113 *PE Municipality* (n 4) para 12.

> past racist policies. While awaiting access to new housing development programmes, such homeless people had to be treated with dignity and respect.

Sachs J went on to explain:[114]

> Thus, the former depersonalised processes that took no account of the life circumstances of those being expelled were replaced by humanised procedures that focused on fairness to all. People once regarded as anonymous squatters now became entitled to dignified and individualised treatment with special consideration for the most vulnerable. At the same time the second part of the title established that unlawful occupation was also to be prevented. The courts now had a new role to play, namely, to hold the balance between illegal eviction and unlawful occupation. Rescuing the courts from their invidious role as instruments directed by statute to effect callous removals, the new law guided them as to how they should fulfil their new complex and constitutionally ordained function: when evictions were being sought, the courts were to ensure that justice and equity prevailed in relation to all concerned.

Historically, unlawful occupiers could be evicted from their homes or have their homes demolished without a court order.[115] PIE's objective was to move away from such a situation by regulating the eviction of unlawful occupiers from land in a fair manner, while recognising the right of owners to apply to court for an eviction order, in the appropriate circumstances.[116] This approach ensures that the needs of those who were previously marginalised and disadvantaged are considered in eviction proceedings.[117]

4.2 Evictions

An 'eviction' or 'to evict' is defined in section 1 of PIE as to 'deprive a person of occupation of a building or structure, or the land on which such building or structure is erected, against his or her will'. Two central provisions under PIE deal with evictions: The first is section 4 of PIE, which deals with evictions sought by owners or persons in charge of property.[118] Section 4 of PIE further deals with

114 *PE Municipality* (n 4) para 13.
115 *Jaftha* (n 7) para 29; *Rand Properties* (n 7) para 30; *PE Municipality* (n 4) paras 8-10. See further O'Regan (n 7) 361-394; Van der Walt (n 7) 258-311; Van der Walt (n 7) 254-289; Muller (2011) (n 7) 33-71; Muller (2013) (n 7) 367-369, 382-394; Cloete (n 7) 9-73.
116 Preamble to PIE.
117 As above.
118 An owner is defined in sec 1 of PIE as the 'registered owner of land, including an organ of state'. A person in charge is defined in sec 1 of PIE as a 'person who has or at the relevant time had legal authority to give permission to a person to enter or reside upon the land in question'.

two eviction situations.[119] The first is captured by section 4(6), which deals with the eviction of an unlawful occupier who has occupied the land in question for less than six months at the moment when the proceedings are initiated. Here, a court may grant an eviction order if it is just and equitable to do so, after considering all the relevant circumstances, including the rights and needs of vulnerable people such as the elderly, children, disabled persons and households headed by women.[120]

The second is captured by section 4(7). This section deals with the eviction of an unlawful occupier who has occupied the land in question for more than six months at the moment when the proceedings are initiated. It requires that, before an eviction order is granted, three crucial findings must be made: (1) A court must first find that it is just and equitable to grant an eviction order after considering all the relevant circumstances; (2) whether land has been made available or can reasonably be made available by a municipality or other organ of state or another landowner for the relocation of the unlawful occupier.[121] The provision of suitable alternative accommodation is necessitated so that unlawful occupiers are not rendered homeless and that other social amenities remain accessible.[122] A more fundamental reason for such a finding concerning alternative land is that, in most cases, it is the most effective way to uphold the land owner's constitutional right to property, while not infringing the unlawful occupier's constitutional right of access to housing. Consequently, if no provision is made for suitable alternative accommodation, a court should not grant an eviction order;[123] and (3) a court must have regard to the rights and needs of the elderly, children, disabled persons and households headed by women.[124]

The second provision is section 6 of PIE, which deals with eviction proceedings brought by the organs of state.[125] Section 6 requires

119 Secs 4(6) and 4(7) of PIE creates a nuanced threshold of 'just and equitable' considerations based on the duration of occupation, which is explained in the main text. However, as seen in *The Occupiers, Shulana Court, 11 Hendon Road, Yeoville, Johannesburg v Steele* (102/09) [2010] ZASCA 28 (25 March 2010), courts are empowered to gather further information and even seek creative solutions when evidence presented by parties is lacking. This implies that courts are not necessarily constrained by the six-month occupation threshold and may still consider broader social justice issues. Regard must also be had to the COVID-19 judgments that presented new dynamics to just and equitable evictions and the suitability of alternative accommodations.

120 Sec 4(6) PIE.

121 Sec 4(7) PIE.

122 Muller & Viljoen (n 14) 249.

123 *PE Municipality* (n 4) para 28.

124 Sec 4(7) PIE.

125 An organ of state is defined in sec 1 of PIE as an 'organ of state as defined in section 239 of the Constitution of the Republic of South Africa, 1996'.

that two crucial findings be made by the court before an eviction order:[126] (1) A court must find that it is just and equitable to grant an eviction order after considering all the relevant circumstances; and (2) whether it is in the public interest to do so.[127] Section 6(3), in turn, prescribes that, in deciding whether it is just and equitable to grant an eviction order, regard must be had to three crucial factors: (1) the circumstances under which the unlawful occupier occupied the land;[128] (2) the period of occupation;[129] and (3) the availability of suitable alternative accommodation or land.[130] These considerations, as set out in section 6(3), are peremptory and, as such, a court must consider these circumstances in deciding whether to grant an eviction order.[131]

In light of case law, it seems that alternative accommodation in terms of PIE evictions is suitable if it accommodates the particular vulnerability of the occupiers who stand to be evicted, and is established in sites that grant the occupiers access to employment, schooling and other social amenities.[132] The meaning of 'suitable alternative accommodation' as it has developed in the context of PIE coincides with the definition in section 1 of ESTA, discussed above. Cases decided under PIE, such as *PE Municipality*, highlight that point. In this case, the applicant was a local municipality. Certain privately owned property within its jurisdiction had been unlawfully occupied by the respondents. In response to a petition by the property owners and others in the neighbourhood, the applicant sought the eviction of the respondents.[133]

The Court held that the central enquiry in such a matter was whether it was just and equitable for the occupiers to be evicted.[134] The Court was influenced by the length of time for which the respondents had occupied the land.[135] During that time, they had appealed to the appellant to come to their assistance in providing alternative accommodation, but no provision was made. Although the property was privately owned, it was not urgently needed by the owners for any other use. It could therefore not be just and equitable

126 *Joe Slovo* (n 4) para 161.
127 Sec 6(1) & sec 6(1)(b) PIE.
128 Sec 6(3)(b) PIE.
129 As above.
130 Sec 6(3)(c) PIE.
131 *Joe Slovo* (n 4) para 162.
132 *PE Municipality* (n 4) paras 27 & 30. See also Muller (2011) (n 7) 170.
133 *PE Municipality* (n 4) para 1.
134 *PE Municipality* (n 4) paras 33-36.
135 *PE Municipality* (n 4) paras 27 & 59.

for the respondents' eviction to be ordered.[136] In this regard, Sachs J pointed out that

> [j]ustice and equity require showing special concern when settled communities or individuals are faced with being uprooted. The longer the unlawful occupiers have been on the land, the more established they are on their sites and in the neighbourhood, the more well settled their homes and the more integrated they are in terms of employment, schooling and enjoyment of social amenities, the greater their claim to the protection of the courts. A court will accordingly be far more cautious in evicting well-settled families with strong local ties, than persons who have recently moved on to land and erected their shelters there.[137]

In any event, *PE Municipality* endorse the definition of suitable alternative accommodation as provided in terms of ESTA.[138] The elements of suitable alternative accommodation, such as 'proximity to work', were already applied by the courts in the context of each specific legislative measure.[139]

4.3 Relocations

A 'relocation' or 'to relocate' is not defined in PIE. However, relocation arguably means the movement of unlawful occupiers from one house to another on different pieces of land. Given that an eviction under PIE also involves the movement of occupiers from one piece of land to another, the definition of a relocation under PIE is not different from the definition of an eviction under PIE. For example, in *Grobler v Phillips*[140] the land owner's decision to move the unlawful occupiers to a different piece of land was treated as an eviction and not a relocation, even though he owned both pieces of land. The movement of occupiers must therefore not occur beneath the radar of a carefully crafted provision of section 26(3) of the Constitution, as given effect to by PIE. As Ngcobo J in *Joe Slovo*[141] explained:[142]

> The Constitution, in particular section 26(3), recognises that at times it may be necessary for the government to relocate landless people and people who are living in deplorable conditions in order to provide them with access to adequate housing. This may be necessary either

136 *PE Municipality* (n 4) para 59.
137 *PE Municipality* (n 4) para 27.
138 *PE Municipality* (n 4) paras 27-30 & 54. For more on suitable alternative accommodation under PIE, see also J Dugard 'Beyond blue moonlight: The implications of judicial avoidance in relation to the provision of alternative housing' (2014) 5 *Constitutional Court Review* 265-279.
139 As above.
140 *Grobler* (n 19).
141 *Joe Slovo* (n 4).
142 *Joe Slovo* (n 4) para 230.

> because the land they occupy must be upgraded or developed in order to provide decent houses for them in that area, as the present case illustrates, or because they are occupying the land without the permission of the land owner and the land owner requires the land. However, these relocations must take place in accordance with the Constitution and the law, in particular section 26(3) and the provisions of PIE.

All relocations should therefore be conducted in a manner that is fair to occupiers, having regard to the Constitution.[143] A court may grant a relocation order if it is just and equitable to do so. It would rather order a relocation as opposed to an eviction because the owner needs the current land, and the state should relocate the occupiers to another available land, or the occupiers could be relocated by the state for housing development purposes.[144] There are factors that the court must take into account in deciding whether it is just and equitable to do so. The first factor is the purpose of the relocation,[145] which must be viewed in light of the right of access to adequate housing and, in particular, the constitutional obligation of the state to facilitate the progressive realisation of the right of access to adequate housing imposed by section 26(2) of the Constitution.[146]

The second factor is the relevant circumstances of all the unlawful occupiers, including the rights and needs of the elderly, children, disabled persons and households headed by women.[147] The consideration of the rights and needs of each household is important, as it will assist in assessing the nature and extent of the disruption that would be caused by the relocation to a different land, and how such disruption may be ameliorated.[148] The third factor is whether the alternative land has been made available by the relocator, or can reasonably be made available by a municipality or other organ of state[149] or a land owner,[150] for the relocation of the occupiers. If no alternative accommodation is made available, the relocation should not be ordered by the court, as it is not just and equitable to do so.[151] The standard of the alternative accommodation is that it must

143 *Joe Slovo* (n 4) para 261.
144 See, eg, *Joe Slovo* (n 4). In this case, the relocation had to do with the fact that a portion of the community knew that they would have to relocate while the housing development took place. This is not a suitable platform to approach all relocations because the *Joe Slovo* judgment was unique. The court should carefully consider the relevant facts and circumstances of each case before such an order is granted.
145 *Joe Slovo* (n 4) para 224.
146 As above.
147 *PE Municipality* (n 4) para 30.
148 *Joe Slovo* (n 4) para 241.
149 See, eg, *Joe Slovo* (n 4).
150 See, eg, *Grobler* (n 19).
151 *Joe Slovo* (n 4) paras 170 & 313. See also Muller & Viljoen (n 14) 249.

be equipped with basic services, including tarred roads, electricity (by prepaid meter), fresh water and reasonable provision for toilet facilities.[152] It is the obligation of the state to ensure this standard. It is important that the relocation meets all the substantive and procedural requirements similar to those of an eviction,[153] because relocations from one house to another on different pieces of land displace people and often lead to considerable hardship.[154] As such, all occupiers must be treated with care and concern during the relocation.[155]

Prior to the relocation, the parties must have meaningful negotiations (engagement or consultations) regarding the proposed relocation and the implementation thereof.[156] Each party to the negotiations must be given an opportunity to be heard.[157] All affected unlawful occupiers must be given adequate and reasonable notice before the scheduled date of the proposed relocation, in order for them to plan accordingly.[158] They must also be given information on the purpose of the proposed relocation and the alternative accommodation to be made available to them, within a reasonable time.[159] In this regard, the unlawful occupiers must have regard to the reasonableness of offers made in connection with suitable alternative accommodation or land.[160]

Where groups of people are involved in the relocation, government officials (or their representatives) must be present during the relocation process, and all the people who are to carry out the relocation must be properly identified.[161] The relocation should not take place during bad weather or at night, unless the affected unlawful occupiers have consented to be relocated as such.[162] For the negotiations to be successful, there must be a willingness on the part of the unlawful occupiers to respond to reasonable alternative accommodations proposed to them.[163] It is important that the parties therefore approach the negotiations in good faith.

152 *Joe Slovo* (n 4) para 319.
153 *Joe Slovo* (n 4) para 104, citing *PE Municipality* (n 4) paras 30-31.
154 *Joe Slovo* (n 4) para 107.
155 *PE Municipality* (n 4) para 29.
156 *PE Municipality* (n 4) para 30; *Joe Slovo* (n 4) para 236; General Comment 7 (n 34) para 15(a).
157 *PE Municipality* (n 4) para 30.
158 *PE Municipality* (n 4) para 30; *Joe Slovo* (n 4) paras 236 & 241; General Comment 7 (n 34) para 15(b).
159 *Joe Slovo* (n 4) para 236; General Comment 7 (n 34) para 15(c).
160 *PE Municipality* (n 4) para 30.
161 *Joe Slovo* (n 4) para 236; General Comment 7 (n 34) paras 15(d)-(e).
162 *Joe Slovo* (n 4) para 236; General Comment 7 (n 34) para 15(f).
163 *PE Municipality* (n 4) para 30.

4.4 Concluding remarks

There is a distinction between an eviction (termination of the right to occupy) and relocation (movement within or across land without termination). These processes are analytically distinct, but practically convergent and not truly identical under PIE. The convergence is legal (same statutory treatment) and not factual (same consequences), and hence their separateness. While relocation and eviction differ conceptually, under PIE the courts have treated relocations as subject to the same standards as evictions due to an interpretive convergence, and not a definitional collapse.

5 Conclusion

There is a distinction between an eviction (termination of the right to occupy) and a relocation (movement within or across land without termination). These processes are analytically distinct, but practically convergent and not truly identical under PIE. The convergence is legal (same statutory treatment) and not factual (same consequences) and, hence, their separateness. While relocation and eviction differ conceptually, under PIE the courts have treated relocations as subject to the same standards as evictions due to an interpretive convergence, and not a definitional collapse.

The definition of suitable alternative accommodation in section 1 of ESTA coincides with the meaning of suitable alternative accommodation as it has been developed by the courts in the context of PIE. As such, occupiers should be provided with alternative accommodation that meets stringent requirements. This is because it is fundamentally the most effective way to uphold the land owner's constitutional right to property, while not infringing the unlawful occupier's constitutional right of access to adequate housing. The argument is that the key consideration when it comes to determining the standard of suitable alternation accommodation for both evictions and relocations under ESTA and PIE is that the alternative accommodation must be 'safe and overall not less favourable than the occupier's previous situation'. As such, a consistent core standard emerges. While the core standard is identical, the weight given to particular factors (employment, earnings, vulnerable groups) may vary by context. Courts balance these flexibly, rather than applying them mechanically. Finally, the evidence shows substantial overlap, but also contextual variations (especially under ESTA relocations) on the standards. In other words, the standards substantially converge, but with context-specific applications.