

When to provide and when not to provide suitable alternative accommodation to evicted ESTA (Extension of Security of Tenure Act 62 of 1997) occupiers: A reflection on the case of *Baron v Claytile (Pty) Ltd*¹

SUMMARY

This case note considers where the duties and responsibilities of the private landowner and the state to provide suitable alternative accommodation for evicted ESTA occupiers, begin and end. It also evaluates the standard of suitable alternative accommodation that should be provided to lawfully evicted ESTA occupiers. The case note concludes that the duties and responsibilities of the private landowner to provide suitable alternative accommodation to lawful ESTA occupiers begin when the landowner has granted these occupiers permission, or where the ESTA occupiers have obtained a right of occupation on the private landowner's property. These duties and responsibilities end when the ESTA occupiers' employment or occupation has been terminated fairly and lawfully in terms of the Act. However, in exceptional circumstances, a positive obligation could rest on the private landowner to assist ESTA occupiers with securing or providing suitable alternative accommodation. The case note further indicates that when the ESTA occupiers' employment or occupation has been terminated, the state's duties and responsibilities to provide suitable alternative accommodation to evicted ESTA occupiers begin. Whether provided by the state or by the private landowner, the suitable alternative accommodation for evicted ESTA occupiers should meet the stringent standards set out in Act.

1 Introduction

The Constitutional Court in *Daniels v Scribante* 2017 4 SA 341 (CC) (paras 37–53) (“Daniels case”) considered the effect of certain provisions of the Extension of Security of Tenure Act 62 of 1997 (“ESTA”) (see generally Pienaar “Farm Workers: Extending Security of Tenure in terms of Recent Legislation” 1998 *Southern Public Law* 423-437; Keightley “The Impact of the Extension of Security of Tenure Act on an Owner's Right to Vindicate Immovable Property” 2017 *South African Journal on Human Rights* 277-307). The court had to establish what could be expected, in relation to the

1 This case note is based partly on ideas developed from the author's doctoral thesis at Stellenbosch University. The case note also forms part of the background for a paper presented at the South African Property Law Teachers Colloquium hosted by the Faculty of Law at the North West University from 10-11 November 2022 in Potchefstroom. Participants at this Colloquium provided valuable comments and suggestions, which the author appreciates. The author gratefully acknowledges the valuable feedback received from the anonymous reviewers and Elsa Crous when editing the case note. Any remaining shortcomings are the author's own.

standard of housing, of a private landowner where the landowner has been enjoined by section 25(6) of the Constitution of the Republic of South Africa 1996 ("the Constitution") to provide accommodation to lawful ESTA occupiers (*Daniels* case para 49). Subsequently, the Constitutional Court in *Baron v Claytile (Pty) Ltd* 2017 5 SA 329 (CC) ("Baron case") again considered the provisions of ESTA to determine when a private landowner and the state can be expected to provide suitable alternative accommodation to evicted ESTA occupiers (*Baron* case paras 35-38). Before a private landowner can house ESTA occupiers, the occupier-landowner relationship is based on the initial consent (express or tacit) of the landowner, or on an occupier's right in law (i.e. the landowner granted permission for the occupier to live and work on the landowner's property) (section 6(1) of ESTA). If the private landowner, out of his own accord, allowed an ESTA occupier to *live* on his or her land, the landowner is enjoined by section 25(6) of the Constitution to provide accommodation to the lawful occupier on his or her land (*Daniels* case para 49). The private landowner also has a right to apply to court, in appropriate circumstances, for an eviction order (preamble of ESTA; Sections 9, 10 and 11 of ESTA). Coupled herewith is the question of what happens when consent is lawfully withdrawn, or when the right to reside and work on the private landowner's property is lawfully terminated by the landowner, and the ESTA occupier is fairly and lawfully evicted. Is the private landowner obliged to continue to house the ESTA occupier, or should the state be called in to provide suitable alternative accommodation? This is the subject matter of this case note, namely, where the duties and responsibilities of private landowners and the state to provide suitable alternative accommodation to evicted ESTA occupiers, begin and end.

In the case of *Baron*, ESTA occupiers were lawfully evicted, and the state offered them suitable alternative accommodation within the resources available to it (*Baron* case paras 29-30). However, the ESTA occupiers objected to the suitable alternative accommodation that the state provided on the basis that the suitable alternative accommodation was not as good as the accommodation the occupiers currently resided in (*Baron* case para 31). The court found that where the state has provided suitable alternative accommodation, the private landowner cannot be expected to continue to provide free accommodation to evicted ESTA occupiers, especially where the landowner's current employees have an immediate need to use the accommodation (*Baron* case paras 49-50). It should be emphasised here that in this instance, it related to evicted ESTA occupiers who were no longer employed by the landowner.

Below, I discuss the meaning of access to adequate housing in light of section 26 of the Constitution. The subsequent section provides an overview of the facts and outcome of the judgment in the *Baron* case (1) to demonstrate when a private landowner should start and stop to house evicted ESTA occupiers, and when the state should begin its obligation to provide suitable alternative accommodation; and (2) to

determine what standard of suitable alternative accommodation exists for evicted ESTA occupiers.

2 The meaning of access to adequate housing for evicted ESTA occupiers

In *Government of the Republic of South Africa v Grootboom* 2001 1 SA 46 (CC) ("Grootboom case"), the Constitutional Court held that the right of access to adequate housing entails "more than bricks and mortar" (*Grootboom* case para 35). More importantly, the right of access to adequate housing includes access to:

"[A]vailable land, appropriate services [which incorporates maintaining the dwelling in a habitable standard] and the financing of all of these, including the building of the house itself. For a person to have access to adequate housing all of these conditions need to be met: there must be land, there must be services, [and] there must be a dwelling." (*Grootboom* case para 35)

Grootboom's description of what it means to have access to adequate housing in South Africa is similar to the characteristics that the United Nations Committee on Economic, Social and Cultural Rights ('CESCR') identified. It is also in line with sections 39(1)(b) and 233 of the Constitution (see Muller and Viljoen *Property in Housing* (2021) 177-178). These characteristics indicate instances where an inhabitant would be regarded as having access to adequate housing for the purposes of article 11(1) of the International Covenant on Economic, Social and Cultural Rights ("ICESCR") (Muller and Viljoen (2021) 177-178). Article 11(1) of the ICESCR provides that:

"The States Parties to the Present Covenant recognize the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions. The States Parties will take appropriate steps to ensure the realization of this right, recognizing to this effect the essential importance of international cooperation based on free consent."

South Africa signed the ICESCR on 3 October 1994 and ratified it on 15 January 2015. Housing, according to the CESCR, will be considered adequate if it is affordable, habitable, accessible, located in proximity to social amenities, culturally adequate, and provide its inhabitant with security of tenure and access to basic services (CESCR's General Comment No 4 (Sixth session, 1991) *The Right to Adequate Housing* (Article 11(1) of the ICESCR), UN Doc E/ 1992/23 para 8(a)-(g)).

The right of access to adequate housing may be linked to other constitutional rights such as equality, human dignity, freedom, and security of the person. This is clear from the Constitutional Court's approach in the *Grootboom* case, which forges explicit potential links between section 26 and section 25(6) of the Constitution. In this regard, the Constitutional Court's approach in the *Grootboom* case confirms the

interrelated, interconnected and mutually supporting nature of all the rights in the Bill of Rights (*Jaftha v Schoeman*; *Van Rooyen v Stoltz* 2005 2 SA 140 (CC) (“*Jaftha* case”) para 24). The link between the right of access to adequate housing and the right to security of tenure was underscored by the Constitutional Court in *Port Elizabeth Municipality v Various Occupiers* 2005 1 SA 217 (CC) (“*PE Municipality* case”) para 19, as follows:

“[L]and rights and the right of access to housing and of not being arbitrarily evicted are closely intertwined. The stronger the right to land, the greater the prospect of a secure home.”

Thus, the need to strengthen the security of tenure of ESTA occupiers living on land or housing belonging to another, is recognised in section 25(6) and built upon in section 26. The right of access to adequate housing and the right to security of tenure cannot be seen in isolation from other rights in the Bill of Rights. (*Grootboom* case para 24). This is because there is a close link between human dignity and socio-economic rights such as the right of access to adequate housing and security of tenure (See *Grootboom* case para 83. See further *Khosa v Minister of Social Development*; *Mahlaule v Minister of Social Development* 2004 6 SA 505 (CC) para 40; *Jaftha* case paras 21 and 24; *Mpange v Sithole* 2007 6 SA 578 (W) para 54). This would mean that there can be no human dignity in a life lived without access to adequate housing or secure tenure (*Grootboom* case para 23; *Daniels* case paras 31–34) because adequate housing is important for the human dignity of all inhabitants, including evicted ESTA occupiers (Compare *Malan v City of Cape Town* 2014 6 SA 315 (CC) para 127).

As such, the state must strive to respect, protect, promote, and fulfil the rights of these categories of inhabitants (section 7(2) of the Constitution; for a discussion of these duties imposed on the state, see generally De Vos *et al* *South African Constitutional Law in Context* (2021) 796–798). This can be achieved by the state taking positive steps that ensure that evicted ESTA occupiers have access to adequate housing (Section 26(2) of the Constitution; *Grootboom* case para 24).

In terms of section 8(2) of the Constitution, “[a] provision of the Bill of Rights binds a natural or 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*” (own emphasis). This means that the Bill of Rights do not apply to every horizontal dispute between purely private parties. The Bill of Rights only apply to private disputes depending on the nature of the right and nature of the duty imposed by the right (De Vos *et al* *South African Constitutional Law in Context* (2021) 418). The purpose of section 8(2) of the Constitution is therefore not to impose on private parties the exact same duties that the state bears in terms of the Bill of Rights, but to ensure that the enjoyment of existing rights by private individuals is not impaired or diminished by other private parties (*Governing Body of the Juma Musjid Primary School v Essay NO* (CCT 29/10) [2011] ZACC 13 (11 April 2011) para 58; *Daniels* case para 40;

De Vos *et al* *South African Constitutional Law in Context* (2021) 418 and 799). This is because private landowners owe constitutional obligations to those who live or work on their property, including in the context of ESTA occupiers evicted from their land (*Grootboom* case paras 34-35). The meaning of access to adequate housing, as espoused above, has laid the foundation for evaluating the obligation to provide suitable alternative accommodation in the *Baron* case.

3 The provision of suitable alternative accommodation with reference to *Baron*

In *Baron*, ESTA occupiers were evicted from private land (*Baron* case para 1). The court had to consider whether the eviction of the ESTA occupiers complied with section 10 of ESTA. More specifically, it had to determine whether the granting of the eviction order against the ESTA occupiers was just and equitable under the circumstances (*Baron* case paras 2 and 4). The ESTA occupiers were all former workers of the brick manufacturing business on the farm, and their right to reside in the accommodation on the farm was linked to their employment (*Baron* case para 8). These employment agreements were terminated based on misconduct on the part of the ESTA occupiers (*Baron* case para 8). Although the ESTA occupiers' accommodation was supposed to be linked to their employment, they continued to reside in the accommodation on the farm despite not being employed by the private landowner for years (*Baron* case para 9). The ESTA occupiers were given written eviction notices to vacate the private land, but they failed to comply with the notices and continued to reside on the private land (*Baron* case para 9). As a result, the private landowner instituted eviction proceedings against them in the Magistrate's Court.

The Magistrate's Court had to consider whether the provisions of sections 8 and 9 of ESTA had been complied with. In considering the interests of the ESTA occupiers and the private landowner, the Court dealt with the ESTA occupiers' concerns as to (1) the disruptions the eviction would cause to their daily lives and their children's schooling; and (2) that the suitable alternative accommodation was not as good as the accommodation the ESTA occupiers currently resided in (*Baron* case para 15). After considering the interests of the parties, the Magistrate's Court found that the eviction would be just and equitable in the circumstances and granted the eviction order (*Baron* case para 9). The ESTA occupiers were ordered to vacate the premises for the following reasons: Firstly, the private landowner had housed the ESTA occupiers free of charge for too long, despite the fact that the occupiers' employment had been fairly and lawfully terminated. Secondly, the private landowner needed the houses for its new employees, as it experienced delays in production due to the late arrival of the new workers. Thirdly, the new workers were sometimes absent from work due to a lack of accommodation for the workers on the farm. Finally, the state indicated that it would make provision for suitable alternative accommodation for the evicted ESTA occupiers (*Baron* case paras 13-14).

The Magistrate's Court's order was sent for automatic review to the Land Claims Court as required in terms of section 19(3) of ESTA and confirmed by that Court (*Baron* case para 15). Not satisfied with the confirmation, the ESTA occupiers lodged an appeal at the Land Claims Court, where it was dismissed. The Land Claims Court held that the constitutional obligation to ensure access to adequate housing rested solely on the state, not on private landowners (*Baron* case para 17). It concluded that the private landowner had already housed the evicted ESTA occupiers for years, and it was supposed to be the state's responsibility to provide suitable alternative accommodation to them (*Baron* case para 18). As there was an immediate need for the private landowner to use the accommodation to accommodate its new workers, the Court found that the appeal had to fail. The ESTA occupiers applied to the Supreme Court of Appeal for special leave to appeal the judgment of the Land Claims Court, and their application was dismissed on the ground that the requirements for special leave to appeal were not met (*Baron* case para 22).

The ESTA occupiers approached the Constitutional Court for relief. One of the issues to be considered by the Constitutional Court was whether a private landowner had an obligation to provide suitable alternative accommodation to evicted ESTA occupiers (See *Baron* case para 28). It is important to note that the question of whether a private landowner could be compelled to provide suitable alternative accommodation to ESTA occupiers after an eviction order in terms of ESTA had been granted was not directly at issue in the *Baron* case. The issue was moot as the state offered suitable alternative accommodation and the question of a positive obligation on private landowners was eventually purely academic (see Bogganpoel "Property" (2017) *Juta's Quarterly Review of South African Law* 2.1 – in Bogganpoel's view, the court's assertions on the positive obligation does not have far-reaching implications due to the fact that the issue was moot in *Baron* and, further, that private landowners would generally argue against it as it can only be used as a precedent within the "narrow scope" provided for in section 10(2) of ESTA).

The court went on to consider the obligation of a private landowner to provide suitable alternative accommodation to evicted ESTA occupiers. It acknowledged, in line with *Daniels*, that ESTA can, in certain instances, place a positive obligation on a private landowner to provide suitable alternative accommodation to ESTA occupiers (*Baron* case para 31). It should be noted that although a private landowner can bear a positive obligation in terms of constitutional rights (as held in the *Daniels* case), it does not imply that private landowners have similar obligations as the state in the fulfilment of constitutional obligations (See *Baron* case para 35. See further, *Lynn v Nene* (LCC95/2016) [2018] ZALCC 21 (29 January 2018) para 61). The court in the *Baron* case concluded that where a private landowner wants to evict an ESTA occupier and there has been no breach or breakdown of the employment relationship, it would be appropriate to expect the private landowner to assist in finding suitable

alternative accommodation (See *Baron* case para 37). If such accommodation cannot be found, a private landowner could, in exceptional circumstances, be required to provide suitable alternative accommodation to evicted ESTA occupiers (See *Baron* case para 37). In this regard, the imposition of such an obligation on the private landowner to provide suitable alternative accommodation is a context-sensitive enquiry, with due regard to all relevant circumstances (*Baron* case para 37; see Pienaar “Land Reform” (2017) *Juta’s Quarterly Review of South African Law* 2.2 in which Pienaar highlights *Baron*’s requirement for a contextual approach and correctly suggests that the legal position would benefit from concrete guidelines, especially concerning precisely when certain duties arise for the private landowner). The effect of the *obiter* statements in *Baron* is that the private landowner can only be freed from this obligation in circumstances where there was a breach of the employment relationship. *In casu*, the employment relationship had broken down and the contract of employment was lawfully terminated. Consequently, the private landowner could not be saddled with an obligation to provide free suitable alternative accommodation to the evicted ESTA occupiers (*Baron* case para 37).

Furthermore, the court cited various judgments as authority for its view that it cannot be expected of a private landowner to indefinitely provide suitable alternative accommodation to ESTA occupiers who have been legally evicted, and where suitable alternative accommodation was provided for by the state (*Baron* case paras 41 and 43, citing *City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties (Pty) Ltd* 2012 2 SA 104 (CC) para 40). The court found that where an offer of suitable alternative accommodation had been made by the state, the ESTA occupiers could not delay their eviction any further by stating that they found the accommodation offered by the state to be unsuitable (*Baron* case paras 43 and 50). Mathiba correctly highlights the shortcoming of the case in failing to use the ESTA occupiers’ previous situation or accommodation as the benchmark for assessing the suitability of the alternative accommodation provided by the state (see Mathiba “Evictions and Tenure Security in South Africa: A Review of *Baron and Others v Claytile (Pty) Ltd and Another* (2017)” (2018) 19 *ESR Review* 14). It is important to point out that the Municipality’s obligation to provide suitable alternative accommodation cannot be avoided simply by submitting reports stating that the accommodation is not available (*Baron* case para 46). As the state had offered suitable alternative accommodation to the evicted ESTA occupiers within the resources available to it, the court found the accommodation to be suitable and ordered that the occupiers vacate the private landowner’s property (*Baron* case para 50).

4 The obligation to provide suitable alternative accommodation as enunciated in *Baron*

The *Baron* judgment dealt with the responsibility to provide suitable alternative accommodation to evicted ESTA occupiers. What becomes

important is the fact that the case demonstrated that such accommodation can be expected from a private landowner in exceptional circumstances. The *Baron* case is also interesting because it made a principled decision on where the private landowner's obligation to provide suitable alternative accommodation to evicted ESTA occupiers should start and end. A private landowner's positive obligation to provide accommodation to lawful ESTA occupiers seems to start when a relationship has been legally established between the landowner and occupier (*Baron* case para 8). This means that there must be consent or a right in law that entitles the ESTA occupier to reside in the accommodation of the private landowner (section 6(1) of ESTA). In such circumstances, a relationship ensues, and the existence of a relationship affects the private landowner's responsibility in this regard. If he or she fails to house an ESTA occupier, the private landowner could be held liable to provide accommodation as enjoined by the Constitution (*Baron* case para 35). Moreover, the private landowner is expected to refrain from unreasonably denying or interfering with an ESTA occupier's right of access to adequate housing (see, for example, *Grootboom* case para 34. See further *Daniels* case para 49; *Governing Body of the Juma Musjid Primary School v Essay NO* para 57; *In re: Certification of the Constitution of the Republic of South Africa 1996* 1996 4 SA 744 (CC) para 78). As such, a private landowner should take positive steps to ensure that ESTA occupiers enjoy access to adequate housing while lawfully on his or her land (section 26(1) of the Constitution).

The *Baron* case also indicates that a private landowner's obligation to provide accommodation ends when an ESTA occupier's employment or occupation with the landowner has been terminated fairly and lawfully (*Baron* case para 14). This can happen in one of two ways. Firstly, employment is ordinarily terminated fairly and lawfully if the employer has given the employee four weeks' notice where the employee was employed for one year or more (section 37(1) of the Basic Conditions of Employment Act 75 of 1997; Du Plessis & Fouché *A Practical Guide to Labour Law* (2012) 59). Secondly, occupation is fairly and lawfully terminated when a private landowner provides the ESTA occupier with a notice to vacate (compare Mohamed *Landlord and Tenant – Rights and Obligations* (2019) 97; Viljoen *The Law of Landlord and Tenant* (2016) 456-458; Glover *Kerr's Law of Sale and Lease* (2004) 572-577), which effectively terminates the occupier's right of residence (Section 8 of ESTA; Muller, Brits, Pienaar and Boggepoel *The Law of Property Silberberg and Schoeman's* (2019); Pienaar *Land Reform* (2014) 402-406). Once a notice to vacate has been served on the ESTA occupier, termination of the right to occupy takes effect (compare Mohamed (2019) 99). If the ESTA occupier refuses to vacate, the private landowner must approach a court for an eviction order (sections 9 and 10 of ESTA; compare Mohamed (2019) 105; see in general Muller, Brits, Pienaar and Boggenpoel (2019) 707-715; Pienaar (2014) 400-411). The right of residence is terminated because a private landowner could suffer undue hardship if an evicted ESTA occupier continues to reside in the

accommodation on the private property for an indefinite period while not paying rent or utility bills such as water and electricity (section 8(3) of ESTA; *Baron* case para 16). Another reason for terminating the private landowner's obligation to house evicted ESTA occupiers could be the fact that the landowner would not be able to accommodate its current employees in the accommodation designed to house those employees in terms of its employment policy (*Baron* case para 16). In such circumstances, it would be unfair to impose a further obligation on the private landowner to house evicted ESTA occupiers, especially when an offer of suitable alternative accommodation has been made by the state (*Baron* case paras 43 and 49).

Where suitable alternative accommodation is not yet available, the private landowner may be expected to house evicted ESTA occupiers until reasonable accommodation is made available by the state (*Baron* case para 41, citing *City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39 (Pty) Ltd* para 40). Significantly, *Baron's* obiter statements provide that it may now be expected of private landowners to assist in finding or actually providing suitable alternative accommodation to evicted ESTA occupiers (*Baron* case para 37), albeit in exceptional circumstances. In this regard, it is proposed that a court must consider an open list of factors when section 10(2) of ESTA is in play in order to determine whether private landowners are obliged to assist in finding or providing suitable alternative accommodation. The relevant factors that are critical for determining whether private landowners are obliged to assist in finding or providing suitable alternative accommodation are discussed below.

Firstly, where the ESTA occupier(s) is a long-term occupier who has resided on the land of the private landowner or any other land belonging to the landowner for 10 years and has reached the age of 60 years or is an employee or former employee of the landowner, and as a result of ill health (compare *Oranje v Rouxlandia Investments (Pty) Ltd* 2019 3 SA 108 (SCA) para 5), injury or disability is unable to supply labour to the landowner, and the landowner seeks to evict this occupier despite no irreparable breakdown in the relationship and no material breach of contract (Van der Sijde "Tenure Security for ESTA occupiers: Building on the obiter remarks in *Baron v Claytile Limited*" 2020 SAJHR 86) and their immediate eviction would render them homeless (*City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39 (Pty) Ltd* para 39). In such instances, it would be sensible to require the private landowner to assist in finding or making available suitable alternative accommodation to the evicted ESTA occupiers (Van der Sijde 2020 SAJHR 86-87; compare *Oranje v Rouxlandia Investments (Pty) Ltd* 2019 3 SA 108 (SCA) para 6). Van der Sijde states that if a private landowner wishes to evict ESTA occupiers where no suitable alternative accommodation is provided by the state, section 10(3) of ESTA is activated (Van der Sijde 2020 SAJHR 86). She correctly argues that section 10(3)(c)(i) of ESTA imposes an obligation on a court to consider the effort of both the ESTA occupier and the private landowner in

securing suitable alternative accommodation (Van der Sijde 2020 *SAJHR* 86). In such circumstances, she rightfully points out that section 10(3)(c)(i) of ESTA imposes some positive obligation on the private landowner that must be complied with before the court grants an eviction order (Van der Sijde 2020 *SAJHR* 86). Depending on the facts of each case, she correctly submits that the positive obligation under section 10(3)(c)(i) of ESTA will be fulfilled by the private landowner if he or she assists the ESTA occupiers in seeking or applying for state-subsidised suitable alternative accommodation, or in exceptional circumstances, by contributing towards or actually providing such accommodation (Van der Sijde 2020 36 *SAJHR* 86). If a court grants an eviction order without suitable alternative accommodation under the circumstances, such an order will undermine the residential stability and access to land that ESTA seeks to create for long-term ESTA occupiers (Van der Sijde 2020 36 *SAJHR* 85).

Secondly, where a long-term ESTA occupier who has resided on the land of the private landowner or any other land belonging to the landowner for ten years, with his or her spouse or dependant, and the long-term occupier has reached the age of 60 years or is an employee or former employee of the landowner, and as a result of death that occupier cannot continue to supply labour to the landowner, and the private landowner seeks to evict the spouse or dependant of the deceased occupier despite no material breach. In such circumstances, the private landowner should be required to assist in finding or providing suitable alternative accommodation, especially if there is no immediate need on the part of the landowner to use the accommodation to house new or current employees (Van der Sijde 2020 36 *SAJHR* 86-87). If a court grants an eviction order without the availability of suitable alternative accommodation, such an order will lead to great hardship (e.g. cause serious disruptions to the on-going schooling of children who are dependant), conflict, and undermine the residential stability of the affected parties (Preamble of ESTA; Van der Sijde 2020 36 *SAJHR* 85).

Thirdly, where the lawful ESTA occupier's right of residence arises solely from an employment agreement and as a result of ill health, injury on duty or disability is unable to supply labour to the private landowner, and the landowner seeks to evict that occupier despite no resignation or dismissal in accordance with the provisions of the Labour Relations Act 66 of 1995, and their immediate eviction will render them homeless (*City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties (Pty) Ltd* para 39). In such a case, the private landowner should be required to assist in finding or providing of suitable alternative accommodation (Van der Sijde 2020 36 *SAJHR* 86-87.) If a court grants an eviction not subject to suitable alternative accommodation, such an order will undermine the principles of equity and fairness underscored by ESTA and the social stability of the ESTA occupier who is evicted through no fault of his or her own (Van der Sijde 2020 36 *SAJHR* 85).

Fourthly and finally, where the private landowner wants to demolish and redevelop the accommodation designed for ESTA occupiers into commercial rental houses or holiday cottages and, as a result, seeks to evict the lawful occupiers to develop the land despite no irreparable breakdown in the relationship and no material breach of contract (Van der Sijde 2020 36 *SAJHR* 87). In such circumstance, the private landowner should clearly be required to assist in finding or, in fact, providing, suitable alternative accommodation (Van der Sijde 2020 36 *SAJHR* 87).

In addition to the above factors, it is also important for the court to consider whether the private landowner is a medium- or large-sized commercial farmer. This is because its financial and business dimension may indicate whether it will be able to assist in finding or financing the provision of suitable alternative accommodation to evicted ESTA occupiers. If the financial records clearly show that it can shoulder such an obligation, it should be required to do so (consider Pienaar "Land Reform" (2017) 3 *Juta's Quarterly Review of South African Law* 2.2). However, it might be difficult if the private landowner operates a small-size family-owned farm. This is because its financial and business dimension might show that it does not have the capacity to shoulder such an obligation (Pienaar "Land Reform" (2017) 2.2).

The *Baron* judgment also demonstrates when the state's obligation to provide suitable alternative accommodation to evicted ESTA occupiers begin, which is when the employment or occupation of the occupier has been legally terminated. (*Baron* case paras 35, 37-38, 40, 42, 44-46). In such circumstances, the state is obliged to provide suitable alternative accommodation to evicted ESTA occupiers, to ensure that they are not rendered homeless because of the eviction (*Baron* case paras 45-46; Mathiba (2018) *ESR Review* 14-15). Therefore, the state cannot simply abdicate its obligation to house evicted ESTA occupiers by submitting reports, which state that there is no suitable alternative accommodation available for them (*Baron* case para 46). This is because the state is, in terms of section 26 of the Constitution and the provisions of ESTA (under section 10(2)), obliged to provide suitable alternative accommodation to evicted ESTA occupiers (*Baron* case para 46; Van der Sijde 2020 36 *SAJHR* 89). It should be mentioned that the state's obligation to provide suitable alternative accommodation to evicted ESTA occupiers must be within the resources available to it (section 26(2) of the Constitution; *Baron* case paras 38, 40 and 50; Mathiba (2018) *ESR Review* 14), taking into account the stringent standard of the suitable alternative accommodation provided for in section 1 of ESTA. This section reinforces a standard of suitable alternative accommodation for evicted ESTA occupiers that the courts should not overlook. This section provides that:

"Suitable alternative accommodation means 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”

It is clear that occupiers evicted in terms of ESTA are entitled to suitable alternative accommodation that meets a stringent standard. In light of section 1 of ESTA, alternative accommodation provided to evicted ESTA occupiers is suitable if, at the very least, it is safe and overall, not less favourable than the accommodation from which the occupiers stand to be evicted. This confirms the minimum standard of suitable alternative accommodation for evicted ESTA occupiers. Moreover, the suitable alternative accommodation must meet the basic needs of the ESTA occupier and that of his or her household. These basic needs include access to safe drinking water, electricity or gas for cooking and lights, sanitation and washing facilities, food storage, regular refuse removal, and sewage site drainage (CESCR's General Comment No 4 (Sixth session, 1991) *The Right to Adequate Housing* (Article 11(1) of the ICESCR), UN Doc E/1992/23 para 8(b); *Baron* case para 33). In the *Baron* case, the suitable alternative accommodation included internal gravel roads and it was fenced with a concrete or steel palisade fence for the physical safety of the occupiers (*Baron* case para 33). This was not a requirement made by the court, but rather a description of the offered suitable alternative accommodation made available by the state. The standard of suitable alternative accommodation for evicted ESTA occupiers is further met if the occupiers' joint earning abilities have been considered by the court. This means that the ESTA occupiers must be able to afford to live in the area from where they stand to be evicted (CESCR's General Comment No 4 (Sixth session, 1991) *The Right to Adequate Housing* (Article 11(1) of the ICESCR), UN Doc E/1992/23 para 8(c)). As such, the ESTA occupiers should be evicted to an area that allows them to meet their personal and household financial expenses connected to suitable alternative accommodation and other basic needs (CESCR's General Comment No 4 (Sixth session, 1991) *The Right to Adequate Housing* (Article 11(1) of the ICESCR), UN Doc E/1992/23 para 8(c)).

In the final instance, the suitable alternative accommodation must also be in proximity to employment opportunities and other economic activities (section 1 of ESTA; *Baron* case para 29, particularly footnote 17; CESCR's General Comment No 4 (Sixth session, 1991) *The Right to Adequate Housing* (Article 11(1) of the ICESCR), UN Doc E/1992/23 para 8(f)). This means that the suitable alternative accommodation must be accessible to the evicted ESTA occupiers in a location that is close to the occupiers' places of employment, and not far from social amenities such as schools, clinics and shopping centres (CESCR's General Comment No 4 (Sixth session, 1991) *The Right to Adequate Housing* (Article 11(1) of the

ICESCR), UN Doc E/1992/23 para 8(e)-(f); *Baron* case para 32). If the suitable alternative accommodation is not sufficient to meet the standard of proximity to work and facilities, evicted ESTA occupiers are entitled to object to the accommodation offer by clearly indicating where they are currently employed and the distance from where they stand to be evicted (*Baron* case para 32). Where an offer of transport has been made (by the private landowner or the state) to allow access to facilities such as schools, the evicted ESTA occupiers should not unreasonably delay their eviction (*Baron* case paras 47 and 50). The evicted ESTA occupiers may object to the alternative accommodation on the basis that it is unsuitable for human habitation and not merely based on preference (compare *Oranje v Rouxlandia Investments (Pty) Ltd* para 20; *Grobler v Phillips* 2023 (1) SA 321 (CC) paras 35-36). When a court determines the suitability of the alternative accommodation, it must also take into account the particular facts and circumstances of each case.

5 Conclusion

The Constitutional Court's judgment in the *Baron* case has provided a valuable context for when the duties and responsibilities of the private landowner and the state to house evicted ESTA occupiers should start and end. The duty of the private landowner to house ESTA occupiers starts when the landowner has granted an occupier permission to occupy, or where the occupier has obtained a right of occupation of the landowner's property. On this basis, the private landowner is responsible in terms of section 25(6) of the Constitution to house lawful ESTA occupiers on his or her land. Failure by the private landowner to house lawful ESTA occupiers may amount to a breach in terms of ESTA. The private landowner's duty to house evicted ESTA occupiers ends when the occupier's employment or occupation with the landowner has been terminated fairly and lawfully. It should be mentioned that where suitable alternative accommodation is not available to evicted ESTA occupiers, the private landowner might be required to house those occupiers until suitable alternative accommodation is made available by the state.

The state's duty to house evicted ESTA occupiers begins when the occupiers' employment or occupation has been legally terminated and the occupiers will be rendered homeless due to the eviction. In this regard, the state is obliged to provide suitable alternative accommodation to the evicted ESTA occupiers in terms of section 26 of the Constitution and section 10(2) of ESTA. However, private landowners may, in exceptional circumstances, be required to assist in finding or actually providing suitable alternative accommodation. Such alternative accommodation should, at the very least, not be less favourable than the accommodation from which the ESTA occupiers stand to be evicted. In assessing whether this standard has been met, a court must further consider whether such accommodation provides the evicted ESTA occupiers with basic amenities (such as access to water, electricity, and sanitation). The joint earnings of the evicted ESTA occupiers as well as

whether the occupiers will reside within reasonable proximity to work and social facilities (such as schools, clinics, and shopping centres) should also be considered.

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