Managerial Adjudication, Constitutional Civil Procedure and *Maphango v Aengus Lifestyle Properties*

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I Introduction

From a day-to-day perspective, civil procedure can be some of the driest and most technical law there is. It may therefore seem a less fertile area for study than more obviously substantive topics, and it can be easy to marginalise its importance under the slogan that form should give way to substance.

[*] Senior Researcher, Institute for International and Comparative Law in Africa, University of Pretoria. My thanks to the editors for the invitation to be part of this volume; to Okyerebea Ampofo-Anti, Michael Bishop, Jason Brickhill, Michael Dafel, Jackie Dugard, Brian Ray, Theunis Roux, Ben Winks, Stu Woolman and the other participants at the CCR conference for their valuable comments and questions; to three of the counsel who appeared in *Maphango*, Nobuntu Mbelle, Warren Pye and Stuart Wilson, for their very helpful responses to my queries; and to two anonymous referees for the CCR. Their input has substantially improved this note (although, as always, the responsibility for any errors remains mine alone). Such collegiality will continue to assist my own engagement with this issue in the future papers that will be necessary to do justice to their comments. I am particularly grateful to Michael Dafel for agreeing to reply to this paper, and for his reply's valuable engagement with the issue of procedural flexibility particularly in the context of eviction cases. Michael sees this flexibility as confined to that specialised context, and in this he and I disagree: I see the trend as a general one borne of considerations that arise in many areas of the Court's work. I therefore see the eviction cases only as a (very) important site of this development, alongside decisions in other areas in which the Justices have reframed cases mero motu, like *Joseph v City of Johannesburg* [2009] ZACC 30, 2010 (4) SA 55 (CC) and *President of the Republic of South Africa v M&G Media Ltd* [2011] ZACC 32, 2012 (2) SA 50 (CC)(see note 40 below). I also see it as part of a much broader trend in which the nature of the work the Constitution requires the Court to perform leads judges to push up against traditional procedural limits, as we see, for example, by the comments in *Mazibuko v City of Johannesburg* [2009] ZACC 28, 2010 (4) SA 1 (CC) on the reception of new evidence on appeal (a finding that the Court, in its turn, treats as confined to the specialised socio-economic rights context, again incorrectly in my view). For more on this emerging trend of reflexive meaningful engagement (across the entire Bill of Rights) between a multiplicity of private and/or public parties with an interest both in a pareto-optimal resolution of a dispute and a settlement that enhances the normative legitimacy of any outcome, see B Ray 'Engagement's Possibilities and Limits as a Socio-Economic Remedy' (2010) 9 *Washington University Global Studies Law Review* 399; S Woolman *The Selfless Constitution: Experimentalism and Flourishing as Foundations of South Africa's Basic Law* (2013). Michael is undoubtedly correct, however, to note that the Court has long been cautious of procedural flexibility, and that these novel procedures must be described, at most, as an emerging trend. A full examination of the trend and these claims, however is a paper in itself, and for that reason and in order to preserve the paper-reply format, I have not extended this note to address them. I look forward to engaging with them, and Michael's important arguments, in future work.

Scholars of South African constitutionalism have not always paid much attention to civil procedure. When they have, it has often been simply to argue that the Court needs to break free of it and be more flexible, informal and collaborative.

If we take the synoptic view, however, alterations in procedure often reveal the dramatic changes in the work that legal institutions are called upon to do. Procedure is the way that courts do things: so when courts are called upon to do new things, or to do old things in new ways in response to broader social changes, we will often find the story written in the development of the rules of procedure. If we are in the midst of such changes, then we should be able to trace them in the way judges find themselves pushing against traditional procedures and developing them in light of new functions and needs. Conversely, it's important to assist the judges by thinking about what procedural forms best fit the new ways in which they find themselves (more or less consciously) being led to operate. Procedure is, after all, part of the law that judges must interpret and develop in line with constitutional values.[1]

Maphango v Aengus Lifestyle Properties (Pty) Ltd is a case in point.[2] The case is nominally (and notionally) about rental law, but the real split within the *Maphango* Court is over issues of procedure and the Court's institutional role. This comment engages that debate. However, while the *Maphango* Court raises numerous issues of constitutional civil procedure, I confine myself here to articulating the constitutional significance of the debate in *Maphango* and to working out answers to some of the issues presented but not fully considered (or perhaps even entirely apprehended) by the decision.

II A Problem in Civil Procedure

Maphango concerned rental contracts that placed limits on the landlord's ability to increase rent, but also permitted their own cancellation. The landlord sought to increase rent by substantially more than the contractual limits by cancelling the old contracts and offering to sign new ones at much higher rents. The majority, per Cameron J, concluded that the issue was best dealt with in terms of a statute, the Rental Housing Act 50 of 1999. It held that this route offered the best way to resolve the dispute as between the parties. The ruling is also in line with the Court's emerging principle of subsidiarity, which prefers statutory routes where available.[3] The majority also concluded, in turn, that it would be best if the

[1] See *Giddey NO v JC Barnard and Partners* [2006] ZACC 13, 2007 (5) SA 525 (CC) at para 16.

[2] *Maphango v Aengus Lifestyle Properties (Pty) Ltd* [2012] ZACC 2, 2012 (3) SA 531 (CC).

[3] On subsidiarity in South African constitutional law, see L du Plessis 'Subsidiarity: What's in a Name for Constitutional Interpretation and Adjudication' (2006) 17 *Stellenbosch Law Review* 209; L du Plessis 'Interpretation' in S Woolman & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, 2008) Chapter 32; AJ van der Walt 'Normative Pluralism and Anarchy: Reflections on the 2007 Term' (2008) 1 *Constitutional Court Review* 77; K Klare 'Legal Subsidiarity & Constitutional Rights: A Reply to AJ van der Walt' (2008) 1 *Constitutional Court Review* 129; Jaap de Visser 'Institutional Subsidiarity in the South African Constitution' (2010) 21 *Stellenbosch Law Review* 90; B Ray 'Evictions, Aspirations and Avoidance' (2013) 5 *Constitutional Court Review* 173. I defend several kinds of subsidiarity: see J Fowkes *Building the Constitution: Constitutional Interpretation in South Africa since 1994* (Dissertation 2014; Book in Progress, forthcoming 2015). For discussion in specific relation to the decision in *Maphango*, see F Michelman 'Expropriation, Eviction, and the Gravity of the Common Law' (2013) 24 *Stellenbosch Law*

statutory questions were considered in the first instance by the Gauteng Rental Housing Tribunal, created by the Gauteng provincial government in terms of the Act. Whatever one's view of these conclusions – for which I think there is much to be said as a general matter but which I will not be defending in this note[4] – they represent at least plausible responses by the Court to its institutional position as one actor among others charged with giving effect to the Constitution, amidst a growing array of statutes and alternative forums.

The difficulty that caused the Court to split, however, was the fact that this way of resolving the case did not correspond to the way that it had been pleaded or the way that it had been framed on appeal. The tenants had only pleaded the Act in a rather peripheral way, framing their case instead mainly in terms of the Constitution and the common law, and it had been decided that way by the High Court and the Supreme Court of Appeal (SCA). They had at no point sought the remedy the Court eventually issued, which was to stay the court proceedings and redirect the dispute to the Tribunal.[5] Indeed, the tenants had initially approached the Tribunal and pursued their case there through a mediation step, but had withdrawn it before the matter was referred to arbitration in order to focus on bringing matters in the High Court.

The Constitutional Court, then, was faced with an appeal that did not frame the case the way the Court believed the issue should constitutionally be framed. What should it do in response? The dissent in *Maphango*, written by Zondo AJ and joined by Mogoeng CJ and Jafta J, held that the Court should play the traditional role of the court of appeal. 'A court', it argued, 'is required to adjudicate only the issues between the parties'.[6] Even if a case might be more advantageously considered in another way, '[t]he Court must respect the choice that the applicants made in circumstances in which they had professional legal advice available to them'.[7] The dissent would have resolved the legal points identified in the appeal from the SCA, upheld the decision in favour of the landlord, and terminated proceedings.[8]

Review 245, 254–263.

[4] Sue-Mari Maass defends *Maphango* as a way to provide flexible tenure protection to vulnerable classes of tenants, at least in the absence of specific statutory provision for it. See S Maass 'Rent Control: A Comparative Analysis' [2012] *Potchefstroom Electronic Law Journal* 41. On the need for flexibility and for statutory reform, see also SM Maass & AJ van der Walt 'The Case in Favour of Substantive Tenure Reform in the Landlord-tenant Framework: *The Occupiers, Shulana Court, 11 Hendon Road, Yeoville, Johannesburg v Steele; City of Johannesburg Metropolitan Municipality v Blue Moonlight'* (2011) 128 *South African Law Journal* 436. The ability of the Tribunal to provide this protection, in the absence of specific statutory guidance, remains to be seen.

[5] As the dissent points out; see *Maphango* (note 2 above) at paras 91–93, 103 and 136. Email communication with counsel confirms that the specific remedy ordered was not proposed by the parties, and also that the issue of the Tribunal's jurisdiction mainly came out only in the applicants' reply in oral argument in the Constitutional Court. On the oral recording of the hearing, see note 40 below.

[6] Ibid at para 145.

[7] Ibid at para 138.

[8] For critical discussion of the approach of the SCA and by the minority in the Constitutional Court to the substantive rental-law questions, see M Dafel 'Curbing the Constitutional Development of Contract Law: A critical response to *Maphango v Aengus Properties*' (2014) 131 *South African Law Journal* 271.

The majority, written by Cameron J, and supported by a brief concurrence written by Froneman J, instead decided to reframe the issue in line with its view of the best constitutional understanding of the case. The concurrence, in particular, emphasised that the Court should take the extant legislative route 'no matter how the case was pleaded' and that the Court's powers to make any just and equitable order 'are not confined by the pleadings'.[9] The majority ruled that the case should be resolved in terms of the Act, not the common law, and then postponed the appeal in order to give the tenants an opportunity to refer the dispute to the Tribunal.[10] If the matter was referred, then the parties would be entitled to return to the Constitutional Court, on papers amended as necessary; if not, the appeal would stand dismissed.

Frank Michelman has suggested that *Maphango* is something of a disappointment because it forgoes an opportunity for 'careful, pointed public ventilation' of important issues.[11] He is thinking primarily about habits of deference and a hide-bound common-law mentality, as well as the issues of subsidiarity that he (rightly) acknowledges may be more important in *Maphango* than common-law deference. In suggesting that issues of pleadings and the appellate role lie at the heart of the matter, I identify an additional subject for his disappointment: Neither the majority nor the minority of the *Maphango* Court convincingly engages with the other on issues of procedure or the role of an appellate court.

The majority judgment does pay attention to the procedural implications of the order and its impact on the parties, as we will see. But it does not say very much about the weight of these considerations. After all, if the rule of law and the supremacy of the Constitution require judges to consider statutes and relevant constitutional points regardless of whether the parties raise them, does this mean that the way a case is pleaded and framed has no weight?[12] If it has some weight, how much? Similarly, if the procedural rules preserving fairness can be overridden in these circumstances, can they be generally broken? Or are there again some limits to this process of reframing: if so, what are they? The majority does not say, and yet there is reason to think we need answers to these questions. If the Court is exercising discretion about the constitutionally best way to resolve the case – as it was in referring the case to a tribunal whose jurisdiction was not compulsory – then it needs to factor in the constitutional weight of any procedural prejudice that would follow from a decision to reframe the case in that way. And, in fact, this proposition holds true even where the effect of a statute *is* compulsory. In a situation where the parties (and the courts below) have neglected a statute, then the appeal court clearly has no discretion and must apply the statute. But there

[9] *Maphango* (note 2 above) at paras 152–153. See also ibid (Cameron J) at para 48.

[10] The order permits '[a]ny of the parties' to lodge a complaint with the Tribunal, but this is surely aimed at the applicants, since the respondents, armed with a presumptive appeal victory, have little incentive to do so if the tenants do not.

[11] Michelman (note 3 above) 263.

[12] On the meaning of 'objective unconstitutionality', and the relative importance of the parties before the Court for determining the denotation of a right and its role in resolving a constitutional matter, see S Woolman 'Application' in in S Woolman & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, 2005) Chapter 31; and, in reply, F Michelman 'On the Uses of Interpretive Charity' (2008) 1 *Constitutional Court Review* 1.

may still be procedural costs to doing so for the first time on appeal, and even if a court does not have discretion in applying a statute, it *does* have discretion about how to go about doing so, including whether to take additional procedural steps. So the constitutional weight of any procedural prejudice should still be part of what informs the court's decision.

The *Maphango* dissent, on the other hand, simply treats as decisive the traditional procedural considerations in favour of fairness, especially in relation to the respondent. It therefore does not even seek to weigh these considerations against the constitutional arguments in favour of the majority's approach. Given the importance of the majority's arguments, the dissent can only truly claim to have the better constitutional argument, all things considered, if it can show that the majority's arguments are outweighed by the dissent's procedural concerns.

Maphango, therefore, shows the need for an understanding of the constitutional weight of these procedural issues that the judgment itself mostly does not offer. If we are sympathetic to the flexible approach of the majority and wish to show that it can meet the procedural objections of the dissent, or if we simply wish to be useful to a Court that will certainly have to keep confronting these issues, then we should seek to fill this gap. In particular, we need to pay more attention to the most obvious way to reconcile the opinions. If traditional procedures ensure fairness, but traditional procedures do not fit other aspects of the Court's work, then first prize would obviously be to find new procedures that can do *both*. This drive to procedural innovation is one larger theme of this paper.[13] If we appreciate the more flexible role being played by the Court in *Maphango* and elsewhere, then we (and the Court) should spend more time thinking about new procedures to fit its new constitutional activities.[14] The tradition-bound minority does not even consider the possibility of *different* fair procedures – and *that,* and not the mere fact that the dissenters are worried about procedure, is why they can be accused of being reactionary.

Where this first prize proves to be unattainable, as it sometimes will, then we will need a procedural debit-credit ledger. These problems with realising our first prize raises the other, broader question that animates this paper: what

[13] See, further, J Fowkes 'Civil Procedure in Public Interest Litigation: Tradition, Collaboration and the Managerial Judge' (2012) 1 *Cambridge Journal of International and Comparative Law* 235, 235–237.

[14] For one view on the relationship between novel constitutional procedures (as well as institutional design) and substantive constitutional outcomes, see S Woolman *The Selfless Constitution: Experimentalism and Flourishing as Foundations of South Africa's Basic Law* (2013). I (and the *Maphanga* majority) share Woolman's belief that creative, non-traditional ways of acting can help courts tackle complex problems where their traditional institutional limitations might otherwise seem insuperable. See Fowkes 'Managerial Judge' (note 13 above); Fowkes *Building the Constitution* (note 3 above) Chapter 10. Woolman's argument, however, is also like the *Maphanga* majority's, in not being very concerned with new *formal* procedures. Part of his aim is to move past the 'largely process-driven theorizing' of experimental constitutionalism to a 'more substantive view of justice' – Woolman *Selfless Constitution* at 382–86 – and he is sometimes similarly impatient with traditional procedures (ibid at 443) or inclined to replace them with ad hoc arrangements (ibid at 473) without considering the procedural costs of breaking them. His arguments, in many respects ground-breaking, nevertheless also share the existing literature's focus on direct access and remedies (ibid at 283–85, 426–27). The aim of this paper, conversely, is to argue that such welcome creative efforts should be accompanied by careful attention to formal rules and in particular formalities in the context of pleading. Insofar as Woolman calls on judges using novel approaches to articulate 'frameworks' which can include 'fairly strict procedural requirements' (ibid at 426, 461, 465) I take him to be gesturing in the same direction, and look forward to engaging with and building on his arguments in future work.

are the limits of public interest considerations when judges hear cases between private parties? It is increasingly settled law that public interest cases are simply to be run in the way that best serves the public interest. This public interest does not disappear in cases between private parties, especially if they engage in constitutional interpretation. But we need to decide how to reconcile the broader public interest with the interests of the parties to the dispute, where the two are in tension – as they can be when a court reframes an issue in a way that threatens to cause procedural unfairness. Both themes require us to examine the constitutional significance of pleadings, formal procedures, and party autonomy.

III Constitutional Arguments for Civil Procedure as an Instrumental Good

One thing the substance over form slogan misses, when used to attack traditional procedures, is that traditional procedures are there in the first place because they serve substantive goals.[15] Let us start by considering this *instrumental* constitutional value that procedure can have – a key concern of the dissent's opinion.

Most obviously, adherence to formal procedures serves the goal of fairness as between the parties. If the case is confined to what is in the pleadings, then the respondents know what case they have to meet, and both sides are clear about what evidence to lead. Judges disrupt this formal equality if they can reframe the case on appeal.

There are, however, fairly obvious ways to respond to this difficulty if one is willing to be innovative. Multi-stage proceedings on appeal can give parties an opportunity to present argument on new points. Courts may wish to refer the hearing of new issues to another forum if need be. However, the fact that one feels the need for some sort of procedural response – and that it seems important to worry, as the dissent does, about whether the *Maphango* respondent in particular had a proper opportunity to contest the Court's reframing – suggests that the issue of fairness between the parties has constitutional weight.[16]

We might express this proposition in terms of the FC s 34 right of access to courts.[17] If traditional procedure, based on pleadings, protects a certain level of fairness in dispute resolution, then a change to adopt a more free-wheeling procedure that protects fairness less would constitute a retrogressive step, or a limitation of FC s 34. It would, accordingly, require constitutional justification in terms of FC s 36. *Van der Walt v Metcash* suggests a further argument in terms of

[15] Fowkes 'Managerial Judge' (note 13 above) 235–236. See also, in the context of criminal procedure, *S v Shaik* [2007] ZACC 19, 2008 (1) SACR 1 (CC), 2008 (2) SA 208 (CC) at para 41 ('[W]hile it is true that the Constitution does not envisage a legal system that places form above substance, procedural rules are there to ensure the fair conduct of a trial by all the parties.')

[16] See *Maphango* (note 2 above) at para 143.

[17] I call this conscious effort to try and express arguments as constitutional arguments an application of the interpretative premise. Since the arguments considered here are traditionally legal, the application of the premise in this context does not require the normative justification it can require elsewhere. See further Fowkes *Building the Constitution* (note 3 above) especially Chapter 2.

equality, FC s 9, and the FC s 1*(c)* founding value of the rule of law.[18] According to *Metcash*, parties have a general right to the normal procedure used by courts.[19] Departing from the normal rules of civil procedure would therefore require constitutional justification.

Adherence to procedures also serves the goal of fairness in relation to other actors. Following the normal pleading process permits others to learn about the litigation and join it, especially if it involves constitutional issues. This issue might be especially relevant in a case like *Maphango* where a court reframes a largely common-law dispute as an entirely statutory one in which government actors might be thought to have a more direct interest. As with fairness between the parties, one can readily imagine procedural innovations to respond to these problems; once again, that we feel the need to do so is suggestive of their constitutional weight.

One might read this idea, too, into FC s 34. That argument would run as follows: a plaintiff has the right to have a dispute *resolved*, which is potentially undermined if less care is taken to ensure that relevant actors are part of the process. If so, then the same *Van der Walt* argument would apply. It would mean that a person whose case is reframed receives a potentially less efficacious form of dispute resolution than the standard arrangement. However, both arguments have a more limited bite here. The parties' FC s 34 rights would not be significantly affected unless the absence of other actors prevents the court from being able to resolve the parties' dispute. (It is also unlikely that an outside actor could be that central to the case without it also being true that the parties would have been under an obligation to join that party initially, however they had framed the dispute). The more complete argument here acknowledges the importance of institutional comity. Institutional comity requires notification of interested state actors. Why? The judicial duty to uphold the Constitution requires courts to do so in the constitutionally best manner, and thus to involve all parties whose participation is relevant to the optimal resolution of the issue.[20] In addition, the importance of *perceived* fairness, both in relation to the litigants and in relation to other interested and affected parties, means that there is a further constitutional reason for judges to take steps to maintain the appearance of fairness when they

[18] *Van der Walt v Metcash Trading Ltd* [2002] ZACC 4, 2002 (4) SA 317 (CC). On the rule of law, generally, see F Michelman 'The Rule of Law, Legality and Constitutional Supremacy' in S Woolman & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, 2006) Chapter 11. On the place of the rule of law in terms of FC s 1, see J Fowkes 'Founding Provisions' in S Woolman & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, RS 6, 2014) Chapter 13.

[19] *Van der Walt* (note 18 above) at para 24.

[20] *Mabaso v Law Society of the Northern Provinces* [2004] ZACC 8, 2005 (2) SA 117 (CC) at paras 13–14. Note that in *Mabaso* the applicant failed to comply with the procedures for notifying the relevant Ministers of a statutory challenge, and the Court cured the defect by notifying the Minister, who indicated her willingness to abide the Court's decision. The Court did, however, indicate that it was only taking this step to cure the applicant's non-compliance because the Rules were new at that stage and that it would 'not ordinarily take steps to remedy the failure by an applicant to comply' with the rule.

depart from the established procedures usually considered 'fair' in a particular system.[21]

Finally, one ought to consider the costs in time, legal fees, and the delay in resolving a dispute imposed on litigants by a judicial reframing of the sort conducted in *Maphango*. This issue might be addressed in terms of the same FC s 34 argument. To the extent that traditional procedures are there to narrow, clarify and expeditiously resolve disputes, it would be a retrogressive step or a limitation of FC s 34 to abrogate those procedures in a way that frustrates that effect.

More creatively, we might also express this point in terms of the right to property. If private parties are effectively being compelled to use the litigation that they are funding to serve some broader public, constitutional interest they did not raise, that might be understood to be a deprivation for the purposes of the property right test. Even if such a proposition seems highly speculative, it remains an interesting way to express the limits of the public interest in private litigation.

IV Constitutional Arguments for Pleading Autonomy as a Good in Itself

In addition to these instrumental considerations, it is also important to consider the constitutional significance of party autonomy as a good in itself. If civil litigation is an exercise in dispute resolution, preventing self-help, then we might think that its most important function is to give each party a day in court and an opportunity to state their case. Given this understanding, it would be logical to let the pleadings shape the trial: the parties should stand or fall by whatever arguments they chose to advance, just as two boxers are judged by the punches that they actually throw and two students by the exams that they actually write. It would also, by implication, be a mistake to interfere too much in the combat.

But in South Africa today (as elsewhere), we understand the dispute resolution function to have a broader public significance. We will be less willing to accept that a private injustice should go un-remedied just because of a pleading error. We believe the whole society has an interest in avoiding injustice.[22] We also understand civil proceedings to have a law-making function, and we will be unwilling to let this law-making function be distorted by the pleading choices of two private parties. Both concerns are, of course, ultimately constitutional, and

[21] Woolman puts this two-fold proposition as follows: enhanced inclusion overcomes informational deficits that courts often experience and simultaneously increases the normative legitimacy of the outcome for all parties to a matter. See Woolman *The Selfless Constitution* (note 14 above) eg at 199–202. He thus raises the possibility that novel procedures can maintain or enhance perceived fairness if parties feel that they are being included and listened to. The 'if', however, is important, and if a judge begins by departing from the normal procedures that the litigants expect, then she may start off on the back foot in this regard – and must take special care to compensate procedurally as a result, as I argue below.

[22] See S Woolman 'Category Mistakes and the Waiver of Constitutional Rights: A Response to Deeksha Bhana on *Barkhuizen*' (2008) 125 *South African Law Journal* 10 (Woolman's argument against unilateral waiver of fundamental rights includes a similar premise that our entire society has an interest in the Court's construction of any given person's rights).

we would not accept that the force of the Constitution should depend on how private individuals choose to plead.

Pursued to its logical end, this line of thinking might lead us to treat the pleadings as having no independent force whatsoever. That is, once the litigation is launched, the effect of the parties' pleadings in shaping it would become entirely contingent on the court's view of what would be the best constitutional step to take next.

This logical conclusion is not a merely hypothetical possibility. Public interest litigation in India (PIL), for example, effectively treats pleading in this way at least some of the time. Judges override the wishes of the parties, raise issues mero motu, and define the case in terms of the problem to be solved rather than in terms of the legal issues pleaded by the parties. While South African public interest litigation has not reached this stage, judges in this context have shown the same tendency to treat parties' pleading choices as subordinate to the public interest. Decisions such as *Campus Law Clinic* make it clear that the right to bring cases in the public interest is contingent on the court's agreement that it is in the public interest for the case to be framed that way.[23] Indian law goes further. Where the *Campus Law Clinic* Court rejects a public interest application that fails to meet this test, Indian judges are willing to restructure the litigation in line with their view about how the case should, instead, be heard.[24] Some modest signs of this sort of restructuring in the South African case law exist, and the *Maphango* majority offers further support for a court-driven understanding of public interest in the conduct of litigation.[25]

However, since *Maphango* is not a public interest case, can party autonomy be overruled quite so readily? *Carmichele* tells us that judges should consider constitutional points whether the parties raise them or not, in the context of the development of the common law.[26] *Carmichele* is based ultimately on arguments about constitutional supremacy and the judicial duty to give effect to it, which apply generally. *Shilubana* echoed these arguments in the context of developing customary law. The duty to interpret statutes in light of the spirit, purport and objects of the Bill of Rights, specifically, and in terms of the Constitution generally, exists whether or not such arguments feature in the parties' pleadings.[27] So pleadings are not decisive in private cases. But are they *irrelevant*? In other

[23] *Campus Law Clinic, University of KwaZulu-Natal Durban v Standard Bank of Africa Ltd* [2006] ZACC 5, 2006 (6) SA 103 (CC).

[24] For this argument about *Campus Law Clinic*, as well as a broader survey of the issues in Indian PIL, see J Fowkes 'How to Open the Doors of the Court – Lesson on Access to Justice from Indian PIL' (2011) 27 *South African Journal on Human Rights* 434; Fowkes 'Managerial Judge' (note 13 above) at 237–39, and further sources there discussed. *Maphango*'s reframing of the case offers some encouragement to the argument of the former paper.

[25] For example, the Court sometimes calls for argument on points it raises (*Doctors for Life International v Speaker of the National Assembly* [2006] ZACC 11, 2006 (6) SA 416 (CC)) and sometimes invites parties to appear as amici (*Shilubana v Nwamita* [2008] ZACC 9, 2009 (2) SA 66 (CC)). There are also, however, decisions showing that the Court remains content to dismiss an application as a non-ideal vehicle for hearing an issue (*Minister of Safety and Security v Van Niekerk* [2007] ZACC 15, 2008 (1) SACR 56 (CC)).

[26] *Carmichele v Minister of Safety and Security* [2001] ZACC 22, 2001 (4) SA 938 (CC) at paras 34–36.

[27] *Shilubana* (note 25 above) at para 48; Michelman 'Rule of Law' (note 18 above); Michelman 'Interpretive Charity' (note 12 above); FC s 39(2).

words, we accept that the parties' powers to frame the case will ultimately always give way to the need to uphold the Constitution. The question is how quick judges should be to supplant the original pleadings with reframed issues. The answer depends in part on how constitutionally important party autonomy is understood to be.

To understand why the way the parties have pleaded might have some constitutional significance, it is again instructive to look at Indian PIL. Sometimes the parties in Indian PIL can seem mere playthings, with the case they wanted to bring reshaped, sometimes against their wishes, by judges. We may be willing to accept this approach as a way to ensure that the broader public interest is served, but we can also readily see why it might be a bad experience for the litigant. We can also see how, to the extent that the original parties did have a real dispute, this kind of free-wheeling approach might not always conduce to its settlement, as distinct from the settlement of issues of broader public significance that it might implicate. I suspect that even those who are willing to accept this result in the public interest context would feel that something has gone wrong if the traditional dispute-resolving aims of litigation were undermined in this way in private disputes.

If so, then we should be receptive to attempts to articulate this interest in constitutional terms. One could conceivably frame this concern in terms of dignity, or freedom of speech. One might also, more creatively, invoke ideas from public law about the importance of process. For example, given that a dispute resolution is an exercise of public power, one might make an *Albutt*-style argument that it is irrational to carry it out according to a procedure that does not serve the purpose for which the power is granted.[28] A procedure that did not settle the parties' dispute, in some rich sense of 'settle', might therefore be considered irrational and unlawful.[29]

However, the most useful and natural way to express this point is again in terms of FC s 34. FC s 34 is the place where we structurally resolve questions about the litigant's possible dispute resolution options. The section asks us to compare standard adversarialism to other forums that might offer different dispute resolution experiences that may be cheaper, more informal, elicit better information, enjoy greater legitimacy, and so on. Arguments about litigation experiences therefore lie at the core of FC s 34 questions about whether given mechanisms are 'appropriate' and the circumstances under which they may not

[28] *Albutt v Centre for the Study of Violence and Reconciliation* [2010] ZACC 4, 2010 (3) SA 293 (CC). For a survey of the procedural understandings emerging in *Albutt* and in a range of other contexts, see S Rose-Ackerman, S Egidy & J Fowkes *Due Process of Lawmaking: United States, South Africa, Germany and the European Union* (forthcoming 2014) Chapter 3.

[29] I acknowledge that this suggestion is in some tension with the decision in *Van der Walt* (note 18 above): it arguably resembles the relatively expansive understanding of the minority judgment in that case more closely than it does the majority's view. *Albutt*, however, seems to signal a more expansive approach to procedural fairness in the context of rationality analysis. *Albutt* (note 28 above). See also *The Citizen 1978 (Pty) Ltd v McBride* [2011] ZACC 11, 2011 (4) SA 191 (CC) at paras 76–77; *Democratic Alliance v President of the Republic of South Africa* [2012] ZACC 24, 2013 (1) SA 248 (CC) at paras 33–37, 39, 41–45; Rose-Ackerman et al (note 28 above) at Chapter 3; M Murcott 'Procedural Fairness as a Component of Legality: Is a Reconciliation Between *Albutt* and *Masetlha* Possible?' (2013) 130 *South African Law Journal* 260.

be so. It is also a natural place to read in the content suggested by the arguments from dignity, free speech and fair procedure just considered.[30] So imbued, we might understand FC s 34 as a right to meaningful, dignified, objectively satisfying dispute resolution. The upshot is that if we worry about the litigant's experience of the litigation when we are choosing whether to replace traditional adversarialism with resolution in other forums, we should also worry about it when we are replacing traditional adversarial procedures in the ordinary courts with something rather less traditional.

V Custodial Responsibility

The constitutional arguments for the instrumental and intrinsic value of procedure have important application in a range of circumstances (including, in several respects, in public interest cases as well). But I want first to consider in more detail a particular implication of these arguments in *Maphango*, where the Court decides that it is constitutionally best to override the framing of a case by private litigants.

The traditional model is that parties bear responsibility for their own arguments in private litigation. I suggest that where a court overrides parties' pleadings, and takes over from them the task of shaping the case, it acquires a special custodial responsibility. To the extent that it wishes to arrogate to itself this power, a court must take special account of the parties' interests in its subsequent exercise of that power.

This type of argument should be familiar enough from other contexts. For example, if a party is unrepresented in court, then we relax the normal rule of party responsibility to some degree and expect the judge to take special care to ensure that the unrepresented party gets a fair hearing. The effect of a judicial override of a party's pleadings is analogous because it, too, means that the case is being run in a manner not selected for the party by her own legal professional. A similar judicial obligation to take special care of the party's interests should therefore be understood to arise.

This custodial responsibility might also be understood as the corollary of the court's responsibilities in the context of class actions and public interest cases. In those contexts, the judge is understood to have a responsibility to ensure that the would-be representatives of the class or the public interest act in the best interests of the wider group. This responsibility takes a somewhat different form when a judge in a private litigation reshapes that litigation in order to pursue broader public, constitutional aims. The judge should be seen to have an equivalent responsibility to ensure that the interests which form the underlying

[30] *President of the Republic of South Africa & Another v Modderklip Boerdery (Pty) Ltd* [2005] ZACC 5, 2005 (5) SA 3 (CC), 2005 (8) BCLR 786 (CC)(FC s 1's commitment to the rule of law – and legality – is read together with FC s 34 to ensure that the state carries out its obligations to all parties in the underlying dispute about evictions, property rights, housing, forced removals and a failure by state officials to execute court orders.) See, further, *Chief Lesapo v North West Agricultural Bank and Another* [1999] ZACC 16, 2000 (1) SA 409 (CC), 1999 (12) BCLR 1420 (CC).

basis for the court hearing the case – the interests of the parties – are served by the proceedings.[31]

There are several signs that the *Maphango* Court feels a degree of such custodial responsibility. The dissent obviously feels the obligation; it just understands no way to discharge it except by adherence to traditional procedures. The majority argues at some length that the Tribunal, with its broad terms of reference, offers a remedy that would serve the interests of both parties.[32] More speculatively, we can also detect in the majority a concern that the tenants may have an important grievance, but not one that the judges feel can be addressed via the common law.[33] That suggests that in reframing the case the *Maphango* Court has the interests of the parties firmly in mind, along with the broader constitutional points about subsidiarity, institutional comity and so forth. This set of concerns can be pleasingly understood in terms of a FC s 34 argument: the majority is overriding the parties' pleading choices in circumstances in which it believes this will, inter alia, best serve their FC s 34 rights.

Finally, the majority acknowledges that the tenants made a decision to withdraw from the Tribunal. It emphasises, however, that they only did so on the grounds that they wanted to focus their limited resources and energy on one forum at a time.[34] The dissent attaches little significance to this detail – formally, a withdrawal's a withdrawal.[35] The idea of custodial responsibility, however, offers an explanation for its significance: it matters that the tenants did not make a decision *against* the Tribunal. The tenants' withdrawal did not reflect a belief that the Tribunal offered an inadequate remedy or was for some other reason unacceptable to them. Sending them back to the Tribunal, is therefore not a particularly serious overriding of their pleading choices.

In this light, the custodial responsibility, rather agreeably, can be seen to grow weaker the less the Court actually contradicts the parties' preferences. Thus it seems weaker where the *Maphango* Court acts in a manner designed to harmonise the parties' interests with the broader constitutional considerations. It also seems weaker the more the Court subsequently complies with their preferences about later steps. Conversely, the responsibility gets stronger the more the situation is one in which private parties are being compelled to litigate a case and take step after step on the public's behalf. Of course, the parties always have the option to

[31] This argument means that the question of precisely what type of standing a litigant is understood to rely upon might have weighty consequences in a *Maphango*-type scenario.

[32] Indeed, one gets the sense that the Court would have liked to require the parties to undertake the functional equivalent of the engagement remedy it uses in the context of eviction. That it does not simply order engagement is no doubt due to the Tribunal's jurisdiction, which covers rental disputes but (since 2007) explicitly does not include eviction cases – Rental Housing Act s 13(14).

[33] The majority prefaces its discussion of the statutory regulation of rental disputes by stating that 'At common law, there can be no doubt that a lessor was entitled with no let or hindrance to terminate a lease on notice', suggesting a view that the applicants might not find relief in the common law alone. *Maphango* (note 2 above) at para 29. The majority also argues that the statutory remedy is much broader, more nuanced, and better takes account of the interests of both parties, suggesting a belief that the limited provisions of the common law might not encompass the applicants' objections, or, conceivably, adequately embody important interests of the respondent either. Ibid at paras 49–53.

[34] Ibid at para 45.

[35] Ibid at paras 140–143.

withdraw their case. But it would hardly be fair if a private party were prevented from getting her dispute resolved because she decided she could not afford the cumbersome steps foisted upon her on behalf of the public by a judicial reframing of the case. This potential outcome implies that cost considerations should have increasing weight in the Court's mind, and perhaps that the Court will have an escalating obligation to appoint *amici curiae* the more dramatically its reframing serves to complicate or lengthen a case.[36] It also implies that the Court should be more reluctant to reframe issues the longer the case persists, and require a progressively stronger constitutional reason for doing so. We could, as in the criminal law of *autrefois acquit* and *convict*, impose some absolute rule – such as a maximum of one reframing and redirection per cause of action – which would serve to limit the extent to which private individuals can have their cases reshaped in the public interest. But this rule looks too blunt, and also out of step with the flexible 'interests of justice' standard the Court usually invokes. The escalating and context-sensitive idea of custodial responsibility offers a better way to express this concern.[37]

VI Procedure Leading up to the *Maphango* Decision

Armed with these constitutional arguments, and the idea of the custodial responsibility in particular, I turn to consider some of the more specific questions that *Maphango* raises. Let's begin with the procedure followed by the judges in reaching the decision itself. The Court's approach to its own procedures in general has been criticised as insufficiently flexible and creative.[38] The sort of reframing conducted in *Maphango* makes for a fairly straightforward argument for more flexibility: if the Court wishes to reframe cases in constitutionally optimal ways, it must compensate for this choice procedurally.

The most obvious concern is the dissent's argument that the respondent did not get an adequate opportunity to present argument on the remedy ultimately ordered by the Court, because at no point was a stay pleaded. As the dissent points out, if the applicants had asked for a stay in the Constitutional Court, they (and the Court) would have been firmly required to confront issues of delay and prejudice to the respondent.[39] The respondent would have had an opportunity for dignified protest (or, alternatively, for helpful acquiescence). The fact that the initiative for a stay came from the Court should not rob the respondents of this opportunity, and it does not seem that they had one. The Court did not call for

[36] On these amici 'in the traditional sense', see G Budlender 'Amicus Curiae' in S Woolman & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition 2005, OS) at 8–1, 8–4.

[37] This flexible approach also better accommodates the fact that the *timing* of reframing, too, is a matter of degree: it can occur (or start to) at various stages of litigation after the close of pleadings, including in earlier courts. Potential prejudice to the parties is presumably reduced the earlier this occurs, and thus the custodial responsibility of the relevant judges will be proportionally weaker.

[38] See sources cited above in Fowkes 'Managerial Judge' (note 13 above) at 240; and Fowkes 'Indian PIL' (note 24 above) at 462–463.

[39] *Maphango* (note 2 above) at paras 104, 110–111, 136.

further argument on the question of the stay, and it appears that the issue was not extensively canvassed at the hearing.[40]

The most overt defense of this approach appears in the concurrence of Froneman J. He argues that the matter had to be recast as a statutory matter, asserts in so many words that this caused the respondents no prejudice, and also notes that the course taken was the least prejudicial to the respondent (compared to a referral back to the High Court or dismissal of the relief ordered by the SCA).[41]

That these arguments are made shows some awareness on the part of the Court of the procedural stakes of its reframing, but they are at best a partial answer to the constitutional arguments I have articulated. It shows, at most, that the Court was concerned with the impact of its decision on the parties, and anxious that the procedure followed not be perceived as objectively unfair. The custodial responsibility demands more, however. Hearing from the respondent regarding the reframing represents a constitutional good in itself. The Court's approach also neglects subjective perceptions of fairness, which are naturally implicated when a court takes a novel procedural step without fully hearing both parties on it.[42]

Perhaps the *Maphango* majority simply thought it unnecessary to call for further argument on the issue of the stay. Perhaps the judges saw referral to the Tribunal as tantamount to an appeal court's referral of a matter back to the court of first instance for re-hearing in light of the legal findings made on appeal. The parties would not usually be entitled to be heard in relation to that routine step (and it

[40] I have not yet, at time of writing, had an opportunity to review the recording of the public hearing itself, having somewhat surprisingly been informed by the Registrar's Office of the Constitutional Court that these recordings may only be accessed by the public on written application placed before the Justices. However, email communication with counsel confirms that the issue was not extensively canvassed at the hearing, particularly since most of the discussion on the Tribunal's jurisdiction appears to have occurred only in the applicant's reply (see note 5 above). The simple fact of the dissent's concerns bears this out. The impression of worrying procedural uncertainty is further confirmed by the fact that this type of situation is not confined to *Maphango*. In *President of the Republic of South Africa v M&G Media Ltd* [2011] ZACC 32, 2012 (2) SA 50 (CC), for example, the Court conducted a similar constitutional reframing of a case and referred it back to the High Court, while hearing from the respondents only on some aspects of this decision. See O Ampofo-Anti & B Winks 'There and Back Again: The Long Road to Access to Information in *M&G Media v President of the Republic of South Africa*' (2013) 5 *Constitutional Court Review* 465.

[41] *Maphango* (note 2 above) at paras 153–157.

[42] The process in *Maphango* can be interestingly contrasted with the approach in *De Beer v Raad vir Gesondheidsberoepe* 2004 (3) BCLR 284 (T), where Bertelsmann J raised the constitutionality of a statute mero motu and, in the fullest discussion of the issue in existing case law, set out careful procedural guidelines for such cases. These included consultation with the parties over the framing of the constitutional issue and affording counsel an opportunity to research the issue. On this decision, see M Chaskalson, G Marcus & M Bishop 'Constitutional Litigation' in S Woolman & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, 2008) Chapter 3, at 3–6 to 3–7. The Supreme Court of Appeal's subsequent judgment in the case concerns the application of the statutory provision (which Bertelsmann J ultimately concluded was not unconstitutional) and does not discuss this procedural question. See *De Beer v Raad vir Gesondheidsberoepe van Suid-Afrika* [2005] ZASCA 115, 2007 (2) SA 502 (SCA). See also *Director of Public Prosecutions, Transvaal v Minister for Justice and Constitutional Development and Others* [2009] ZACC 8, 2009 (4) SA 222 (CC) (discussing the principles for when a court may raise a constitutional issue mero motu).

might be practically problematic if they were), and the majority may have viewed referral to the Tribunal as a multi-institutional version of the same idea.

That reading is not unappealing. But if the majority indeed held this view, then it underestimated the stakes of the decision. The procedure adopted in *Maphango* is also not nearly as routine as a referral for rehearing is. Its implication is that hereafter rental disputes (in Gauteng at least) should go first to the Tribunal. *Maphango* is thus the disruptive decision that calls for a different procedure to be routine, not the decision that itself embodies that new procedure. And even if its procedure were intended to become routine, it certainly was not routine at the time of decision. It is when courts do novel things that the most care needs to be taken to preserve fairness and the perception of it. The custodial responsibility demanded more of the *Maphango* majority here.

VII Procedure After the Maphango Decision

The procedural details of the steps that were to follow the Court's ruling also take a little working out. The order postponed the appeal to give the tenants an opportunity to approach the Tribunal. It held that if no approach were made to the Tribunal, the appeal would fail. It did not decide what should happen if the tenants did approach the Tribunal and they or the landlord wished to protest the result. However, it did state that they would be able to return directly to the Constitutional Court.

As it turned out, the applicants did approach the Tribunal, and thereafter the case was settled. But given that the *Maphango* Court crafted its order without knowing the subsequent outcome, it is important to consider the procedural implications of the approach it chose.

Let us start with the first possibility: that the applicants do not approach the Tribunal and the appeal fails. The majority made no ruling that the SCA was right about the common-law questions, so on what basis does the appeal fail? One could argue that the majority is wrong and that the appeal should not be thought to fail in these circumstances. If that were the position, then any party could nullify a decision by the Court to redirect a case to another forum by simply declining to go and then arguing that this revives the original appeal questions. The better answer, therefore, is that *Maphango* is a *procedural* ruling. A failure by the applicants to take the next procedural step articulated by the Court is like any other serious procedural breach: ultimately, grounds for resolving the case against the offending party.[43]

What then of the second possibility, that the tenants do approach the Tribunal and it issues a decision, but one of the parties is dissatisfied with it? *Maphango* says that the parties are entitled to return to the Constitutional Court. This anticipated scenario looks sensible. All the judges agree that it would be cumbrous and unduly burdensome to require the applicants to begin again in the High Court, when the Court's decision had already imposed additional costs and delays on them. It is

[43] *Giddey* (note 1 above) at para 16 ('[F]or courts to function fairly, they must have rules that regulate their proceedings. Those rules will often require parties to take certain steps on pain of being prevented from proceeding with a claim or defence.')

also sensible for the further reason, not noted by the judges, that some rather tangled questions of jurisdiction and *functus officio* arise if the High Court were to be asked to consider a different legal framing of the same cause of action on a matter it and a superior court had already pronounced upon in judgments still the subject of an unresolved appeal.

That said, however, the right to return to the Constitutional Court has its own complexities. The *Maphango* ruling holds that the case should be resolved in terms of the statutory mechanism. So if the matter were to return to the Court, it would be resolved within the framework of those statutory terms, and it would be those substantive questions that the Court would have to resolve – in light of the Constitution – in order to finally dispose of the appeal. But these questions are not the questions the High Court and the SCA decided. So the Court would be deciding the new questions without the benefit of decisions by other courts, something it usually considers undesirable.[44] How is *Maphango* to be reconciled with this standard rule?

The implication might be that the Court should only reframe a case on appeal and redirect it outside the ordinary courts if it would be willing to hear the issue directly, in terms of the usual direct access test, and should the parties be dissatisfied with the outcome in the alternative forum. But *Maphango* offers no hint of this line of thinking. In any case, this route seems to curb unduly the subsidiarity considerations that favour reframing. Those considerations do not go away just because a case does not meet the Court's stringent direct access test. Conversely, the implication might be that the Court should grant direct access much more generally than usual when it reframes cases. But again, why exactly should this be so? The Court has principled reasons for its direct access test, and whatever their merits, those reasons also do not go away just because subsidiarity considerations in favour of reframing and redirecting a case are present. We might then draw the conclusion that the two constitutional arguments, against direct access and for subsidiarity, are to be balanced against each other. However, the *Maphango* majority gives no sign that it engaged in such a balancing act either.

I suggest that the idea of custodial responsibility provides an answer here. In terms of that argument, the Court acquires special duties to safeguard the interests of the parties when it reframes cases. A decision by the Court to refer a case on appeal outside the ordinary court system imposes burdens on parties, in time and costs and potential new legal complexities, and those burdens will usually be increased if parties are not permitted to return directly to the Constitutional Court. Thus, the custodial responsibility gives the Court a principled constitutional reason to grant direct access more readily in cases it redirects outside the ordinary courts.

[44] For an overview of the leading cases, see K Hofmeyr 'Rules and Procedure in Constitutional Matters' in S Woolman & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, 2007) Chapter 5 at 5–18 to 5–19.

VIII The Role of an Appeal Court

Next, what should we make of the dissent's argument that an appeal court should confine itself to resolving the legal questions it has been asked to resolve? The argument has some appeal at first glance. Upon closer scrutiny, it is actually rather weak.

It would, of course, be a worrisome trend if appeal courts began to leave legal points hanging or failed to resolve the legal dispute between the parties. This outcome would prima facie be bad for legal certainty and contrary to the constitutional right to dispute resolution. But *Maphango* would only have that result if the matter is not ultimately resolved, whether by the Tribunal or on the Court's further direction if the parties return to it.[45] Assuming the dispute is resolved, it is hard to see why it is very important to the parties that it be resolved in the particular legal terms in which they pleaded it or framed it on appeal. They, presumably, care about the outcome, not the legal details.

One might object that some private parties do care about the particular legal terms used to resolve to a dispute. One might think of repeat players, for example, who may face a recurrent kind of legal dispute in their line of work and want it resolved in a particular way.[46] They might well prefer a legal ruling in terms of common law, for example, to one that required each case to be referred to a new and unfamiliar tribunal with broad and equitable jurisdiction.

This objection looks to have merit – but in *that* case, it seems much more reasonable to override that party's wishes. Consistent with the condition that the resolution of the underlying dispute is itself not being compromised, the party still enjoys the adequate dispute resolution she is entitled to in terms of FC s 34. What she is not entitled to, is the right to set the terms of law reform: she may seek to have a legal point resolved in her favour, but she cannot expect her interests in a particular legal resolution of the case to trump the general imperative to develop the law in a constitutionally optimal manner. A party who prefers a common-law rule to a statutory tribunal may argue for this, but she does not get to trump legislative and judicial determinations to the contrary. A private litigant more concerned with strategic litigation is behaving very much like a public interest litigant, and it is, analogously, more acceptable to make her right to run her case conditional on it being in the public interest for it to be run that way.

For these reasons, Zondo AJ's argument that an appeal court should decide the questions put in front of it does not follow from premises about the parties' legitimate expectations. The argument also does not follow from the decisions he cites in which the Court was reluctant to depart from the pleadings. For one thing, all but one of these decisions involves *one of the parties* attempting to

[45] The fact that we do not have finality about the legal questions decided by the SCA does not matter, of course, because we *do* have finality that they were constitutionally not the proper questions.

[46] For 'repeat players', see M Galanter 'Why the "Haves" Come Out Ahead: Speculations on the Limits of Legal Change' (1974) 9 *Law & Society Review* 95.

reframe a case on appeal in some way.[47] These can be distinguished from cases like *Maphango*, where *the Court itself* raises the new issues, and in these cases it has shown itself willing to take compensatory procedural steps such as calling for argument and notifying new parties.[48] It is, in principle, perfectly consistent for the Court to have resisted attempts by parties to reframe cases as not serving the interests of justice while deciding that in *Maphango* a reframing would best serve those interests.

This argument would be a good deal weaker if the Court, in response to those earlier attempts by parties to reframe cases, had ruled that it could never consider an improperly pleaded issue. In fact all the decisions the dissent cites recognise exceptions to the rules that they announce. They hold that while constitutional issues should be properly pleaded, the Court has discretion to hear improperly pleaded issues or evidence, exceptionally, where this is in the interests of justice.[49] Indeed, in no less than four of the six decisions that the dissent cites, the Court did not ultimately treat the procedural irregularities in those cases as a bar to considering the new issue or evidence.[50] The strongest support for the dissent is *Bel Porto*, the only case the minority cites in which the impulse to alter the case as pleaded did not come from the parties: there, the majority firmly rejected Ngcobo J's lone suggestion to award relief that the relevant party had not sought at any stage. However, *Bel Porto*, too, accepted that the Court could depart from this rule in exceptional cases, as it had in *Prince*; the majority simply did not think *Bel Porto*'s facts warranted such a departure.[51]

Deciding on the precise scope of this sort of exception, and the extent to which it represents an extension of existing common-law procedural exceptions, is an important question that exceeds the scope of this note. The significance of these decisions for *Maphango* is that they show a consistent concern with ensuring that issues are heard properly: with proper argument and factual foundation, and

[47] *Maphango* (note 2 above) at paras 111–114. See *Prince v President of the Law Society of the Cape of Good Hope* [2000] ZACC 28, 2001 (2) SA 388 (CC); *Carmichele* (note 26 above); *Alexkor Ltd v Richtersveld Community* [2003] ZACC 18, 2004 (5) SA 460 (CC); *Phillips v National Director of Public Prosecutions* [2005] ZACC 15, 2006 (1) SA 505 (CC); and *Barkhuizen v Napier* [2007] ZACC 5, 2007 (5) SA 323 (CC). For the exception see note 51 below.

[48] See citations to aforementioned cases (note 25 above).

[49] The cases cover different situations, including attempts to raise new evidence, new constitutional challenges to statutes, and new constitutional points, and so the details of tests set out by the Court differ somewhat as a result, but in all cases it is recognised that the rule admits some flexibility. See *Prince* (note 47 above) at paras 21–23; *Carmichele* (note 26 above) at para 31; *Bel Porto School Governing Body v Premier of the Western Cape Province* [2002] ZACC 2, 2002 (3) SA 265 (CC) at paras 117–119; *Alexkor* (note 47 above) at para 44; *Barkhuizen* (note 47 above) at para 41; *Phillips* (note 47 above) at paras 37–44. In *Phillips,* it might appear to find that failure to plead an issue properly is an absolute bar to the Court's considering it. *Phillips* (note 47 above) at paras 37–39. However, the *Phillips* Court explicitly states that this result is only 'ordinarily' the rule. Ibid at para 43 (Court cites passages from *Shaik v Minister for Justice and Constitutional Development* [2003] ZACC 24, 2004 (3) SA 599 (CC) at para 40 which recognise that the rule is flexible.)

[50] See *Prince* (note 47 above) at paras 24–30; *Carmichele* (note 26 above) at paras 50–60; *Alexkor* (note 47 above) at paras 45–46; and *Barkhuizen* (note 47 above) at para 41.

[51] *Bel Porto* (note 49 above) at paras 115–119. Ngcobo J agreed with the majority that the rule to apply was that stated in *Prince* and simply disagreed on its application to the facts of the case. Ibid at paras 250–252.

without procedural unfairness or other prejudice to the parties involved. The implication is that *if* the Court decides to address a new issue, notwithstanding that it was not pleaded in the normal way, it must satisfy itself that it can do so without violating these conditions and it must take those steps necessary to ensure that no violation occurs. That implication coheres with the argument made in this note. If *Maphango* is inconsistent with these earlier decisions, then it is because it may not have taken sufficient steps to ensure these conditions were met, as argued earlier. It is not inconsistent with them merely because it is considering issues not raised in the pleadings in the ordinary way.

In light of this, perhaps the dissent's concern is better understood as an argument about judicial accountability rather than one about what procedures parties are entitled to follow and to expect. It might simply be thought better if judges stick to their appeal court jobs and do not go off reframing cases to suit their personal law-reform agendas.

If this account offers the strongest interpretation of the minority's argument it does not ground nearly as strong a conclusion as the one Zondo AJ seeks to draw. Historically, to be sure, common-law systems have considered it vital for judges to stay detached from proceedings until the verdict, but this is hardly a necessity for maintaining judicial accountability. That rule was a product of particular circumstances, including the presence and role of the jury, that have changed. Common-law systems around the world today accept far more active judicial involvement in shaping cases, as the procedures in continental systems have long done.[52] In addition, settled and convincing precedents in South Africa exist for some judicial power to raise constitutional issues mero motu.[53]

It is true that this changing judicial role can pose novel problems for judicial accountability. A glance at the Indian jurisprudence, for example, will again show that this possibility is far from hypothetical.[54] But as with its objections about procedural fairness, the dissent offers no reason to think that the constitutionally best way to respond is by sticking to party-controlled tradition. Indeed, it is doubtful that it could. Instead, all it shows is that we have some reason to worry about the implications for judicial accountability of the power to reframe, just as we have some reason to worry about its implications for procedural fairness. This worry should prompt the question: if we are willing to permit judges to reframe cases, what sorts of constitutional limits should they observe when they do? Once again, a theory of custodial responsibility offers a useful answer to this question.

IX Custodial Responsibility and Subsidiarity

How should we understand the constraints on the judicial power to reframe private cases? Naturally, one constraint is imposed by the subsidiarity arguments themselves. If they are weak or absent, no constitutional reason exists to reframe

[52] For further argument on this point, and additional sources to support this proposition, see Fowkes 'Managerial Judge' (note 13 above) and (note 60 below).

[53] See aforementioned sources (notes 22 and 43 above).

[54] See Fowkes 'Indian PIL' (note 24 above) at 453–454, 463 (For further argument on this point, and for additional supporting sources.)

a case and make the parties argue accordingly, and still less to send their case to another forum. However, while this is a crucial constraint, an argument for the importance of reframing cases does not speak to the countervailing need to ensure that the interests of private parties are not lost in the process.

The custodial responsibility has important implications for what a court must consider before it decides to reframe and redirect a case. I hope to have demonstrated that the *Maphango* Court majority has begun to think along these very lines.

A decision to reframe and redirect can impose a variety of potentially prejudicial consequences on parties, over and above the obvious costs in time and money. The decision in *Maphango*, for example, means that what the parties would be entitled to from ordinary courts, after having gone to the Tribunal, would ordinarily only be a review. It also means that if the case had been decided by the Tribunal and one of the parties had been dissatisfied with the result there, but did not wish to incur the further delay of working back up through the courts, they would have had to accept what the Court itself considers an inferior resolution of their dispute: the ultimately decisive legal issues would have been settled by the Court without the benefit of prior decisions by other judges. In both ways, the parties would potentially be getting less than they signed up for.

The custodial responsibility implies that the Court needs to think about all these consequences before it reframes and redirects a case, since they follow necessarily from the choice to do so. It is not enough, in other words, to consider only the issue usually raised as a necessary constitutional constraint on subsidiarity arguments, which is whether the alternative forum itself offers a constitutionally acceptable remedy.[55] The judge must also consider the surrounding consequences, procedural and otherwise, for the whole dispute resolution process that will result from its decision to reframe and redirect the case. Only if the Court makes these sorts of determinations can it pretend to have enquired as to whether its alternative resolution of the dispute will resolve the parties' dispute better, or, if not, that any disadvantages to the parties can be creatively remedied or seen to be outweighed by other constitutional goals. Absent these determinations, it cannot claim that its decision to reframe the case is compatible with the Constitution, especially the parties' FC s 34 rights. The idea of custodial responsibility represents (and calls attention to) this particular element in the constitutional equation in such a case.

X Conclusion

Until the early eighteenth century, English law considered defence counsel in criminal trials an evil to be avoided.[56] Civil jury trial was once considered imperative in England. Over the course of the nineteenth century, it declined and

[55] This line of argument extends Karl Klare's earlier case for keeping the constitutional adequacy of the alternative forum firmly in view in subsidiarity discussions. See Klare (note 3 above) at 147–152.

[56] J Langbein 'The Prosecutorial Origins of Defence Counsel in the Eighteenth Century: The Appearance of Solicitors' (1999) 58 *Cambridge Law Journal* 314.

is now only vestigial.[57] Jury trial in the United States was once thought so essential that it was treated as a constitutional right that could not be limited. Today, the jury trial is considered so cumbersome that the right is circumvented in virtually all cases.[58] At times, common-law judges have been abjured to keep silent until they hand down judgments; at others, to intervene as they deem necessary.[59]

The examples could be multiplied, but the lesson is clear: procedure evolves in response to novel circumstances or different normative conceptions of due process. It would be ahistorical simply to cling to tradition, just as it would also be ahistorical to suggest that the proper response to new pressures is necessarily to remove procedure or reduce it to flexible indeterminacy.[60] Civil procedure is a part of the common law that needs to be constitutionally developed, and a part of the statutory law that needs to be interpreted and applied in accordance with the Constitution. The need to consider the manner of its evolution is a constitutional imperative. *Maphango* contributes significantly to that debate, while also illustrating why we need to have it. The decision primarily shows us that the discussion about the development of constitutional procedure remains in its incipient stages.

What is certain, however, is that *Maphango* reflects the weakening of traditional strong party control of the shape of private cases. Given the majority's decision to act in the face of Zondo AJ's argument, *Maphango* is precedent for the proposition that the traditional conception of the role of an appeal court should not prevent courts from departing from parties' pleading choices when judges decide that it is constitutionally better to frame the case another way.[61] This more flexible approach is to be welcomed. Indeed, where adherence to tradition would imply judges deferring to a private party's constitutionally inferior framing of a case, reframing will come to be seen as nothing less than a judicial duty. But this approach is based, ultimately, on an argument about what best promotes the Constitution. Because issues of procedure and party autonomy have constitutional weight, both instrumentally and intrinsically, they must be part of this determination. The *Maphango* majority, and those who follow it, will not be able to fully justify their decision to take (aspects of) a private case out of the hands of its litigants unless they can conclude that these procedural considerations are outweighed, or unless

[57] C Hanly 'The Decline of Civil Jury Trial in Nineteenth-Century England' (2005) 26 *Journal of Legal History* 235.

[58] See, eg, J Langbein 'On the Myth of Written Constitutions: The Disappearance of Criminal Jury Trial' (1992) 15 *Harvard Journal of Law and Public Policy* 119.

[59] See, eg, J Langbein, R Lerner & B Smith *History of the Common Law: The Development of Anglo-American Legal Institutions* (2009); J Resnik 'Managerial Judges' (1982) 96 *Harvard Law Review* 374. The evolution of these expectations is quite complex. See, eg, R Lerner 'The Transformation of the American Civil Trial: The Silent Judge' (2000–2001) 42 *William and Mary Law Review* 195.

[60] It would also, of course, be foolish to depart from traditional procedures unless we have some reason to think that the proposed alternatives would work better. See, eg, E Hurter 'Seeking Truth or Seeking Justice: Reflections on the Changing Face of the Adversarial Process in Civil Litigation' (2007) *Tydskrif vir die Suid-Afrikaanse Reg* 240; Fowkes 'Managerial Judge' (note 13 above).

[61] It should be noted, however, that the three *Maphango* dissenters continue to take a more restrictive view of the question than their colleagues. See, eg, *Mazibuko v Sisulu* [2013] ZACC 28, 2013 (6) SA 249 (CC) at paras 138–39 (joined in dissent by Mhlantla AJ); *MM v MN and Another* [2013] ZACC 14, 2013 (4) SA 415 (CC)(joined by Nkabinde J).

they can compensate for any prejudice by procedural flexibility and creativity. If judges in this position do not recognise their custodial responsibility and act upon it, their claim to be adopting the constitutionally best course of action will remain in doubt.