On the Flexible Procedure of Housing Eviction Applications

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I Introduction

I read James Fowkes' article as a call for more judicial honesty when courts elect to venture beyond the confines of the parties' chosen pleadings.[1] He is, of course, in good company. Writing in *Chirwa*, Langa CJ expressed concern with the majority's 'mischaracterisation' of the issues.[2] In that matter, the majority of the Constitutional Court opted to reframe the applicant's dismissal by a state employer as one which should be dealt with in terms of labour law despite the applicant pleading her case in terms of administrative law. The Chief Justice held that '[w]hatever we think of the wisdom of her election to avoid the specialised provisions of the [Labour Relations Act], we must evaluate the claim as it was presented to us.'[3] This line of reasoning keeps faith with South Africa's adversarial system and the need for judicial accountability. Typically, parties are solely responsible for the manner in which they present their case to a judge who in turn is required to limit his or her findings to the evidence and legal arguments presented. This system seeks to safeguard fairness to the parties, and places a check on judicial activism. It constrains judges from unduly arrogating power to themselves by raising issues, *mero motu*, in order to forward their own law reforms.[4]

Fowkes raises this concern of judicial reframing in the context of private party litigation.[5] In essence, he argues for a more principled approach for determining the justifiable extent to which judges may vary the dispute presented by the parties. In this regard, his paper is most useful. He has succinctly set out the possible advantages and disadvantages of bestowing a discretion on judges to

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[1] J Fowkes 'Managerial Adjudication, Constitutional Civil Procedure and *Maphanga v Aengus Lifestyle Properties*' (2013) 5 *Constitutional Court Review* 309.

[2] *Chirwa v Transnet Limited* [2007] ZACC 23, 2008 (4) SA 367 (CC) at para 158.

[3] Ibid.

[4] See E Hurter 'Seeking Truth or Seeking Justice: Reflections on the Changing Face of the Adversarial Process in Civil Litigation' (2007) 2 *Tydskrif vir die Suid-Afrikaanse Reg* 240, 242–4; W de Vos 'Developments in South African Civil Procedural Law over the Last Fifty Years' (2002) 11 *Stellenbosch Law Review* 343, 345–6; and W de Vos and DE van Loggerenberg 'The Activism of the Judge in South Africa' (1991) 4 *Tydskrif vir die Suid-Afrikaanse Reg* 592, 594.

[5] The term 'private party litigation' or 'private party dispute' in this article denotes civil dispute litigation where the state is not a litigant.

reframe a case as presented. His article however goes further. Fowkes provides a solution (or at least a framework) for assessing the justifiable parameters of judicial reframing. He argues for the recognition of a theory he has termed the courts' 'special custodial responsibility'. This theory, if it finds application, seeks to reconcile the possible advantages and disadvantages of judicial reframing, and, in doing so, seeks both to inform and limit the powers of judges to recharacterise and redirect the case so that is presented in a more suitable manner.

The central feature of the theory is that judicial reframing is permitted provided that the court procedurally compensates for doing so. For instance, if a court considers that the matter had not been presented in the way it ought to have, then it can opt, if it is justifiable to do so, to reframe the factual and legal questions for answering and solicit new evidence and arguments by means of further hearings, the appointment of *amici curiae*, the joinder of interested parties, or the remittance of the matter to another forum. If I am correct in my understanding, the custodial responsibility theory can be viewed as a balancing exercise where the importance of reframing the case in a more appealing manner is weighed against the costs and inconveniences of requiring additional procedural steps. It is therefore a value-driven and context-specific enquiry.

Fowkes finds traction for his theory in the decision of *Maphango v Aengus Lifestyle Properties (Pty) Ltd*.[6] In this matter, the Court was called upon to assess if a landlord is entitled to an eviction order where it had cancelled residential lease agreements for the sole purpose of securing higher rentals. I will return to the facts and holdings of *Maphango* later. At this stage, however, it requires mentioning that the ground on which the *Maphango* Court decided the matter was not explicitly pleaded as a defence in the initial High Court application. Fowkes believes that the *Maphango* Court, in reframing the case, was acting in terms of what he describes as their custodial responsibility.

I do not share the view that the Court reframed the dispute requiring adjudication in this matter, and I therefore do not consider it necessary to explain the case in terms of a theory or doctrine of custodial responsibility that justifies and details the parameters of judicial reframing. Rather, the procedure adopted and the remedy ordered by the majority of the *Maphango* Court is best explained by the Court's previous housing eviction jurisprudence.

Part 2 focuses on the Court's housing jurisprudence. I conclude that the Court has embraced a generally flexible approach for entertaining housing eviction cases, which is primarily due to the inquisitorial and value-driven legal framework mandated by FC s 26(3) and housing security legislation. This approach not only requires judicial officers to assume a managerial, inquisitorial and fact-finding role. It also requires parties to a housing eviction dispute to engage with one another in a meaningful and honest manner in an attempt to reach mutually acceptable solutions. Both of these innovations which have come to define housing eviction case law depart from the more orthodox civil procedure typically witnessed in private disputes. In Part 3, I offer an alternative reading of *Maphango.* My reading of *Maphango,* and the seeming departure from the initial pleadings, suggests that

[6] [2012] ZACC 2, 2012 (3) SA 531 (CC).

the Court's approach reflects the flexibility and the inquisitorial nature that is required in housing eviction applications as opposed to a more systematic belief that the Court has the inherent power to reframe cases. Nevertheless, I concede, in Part 4, that some of the features of the custodial responsibility theory proposed by Fowkes may be detected in other decisions handed down by the Constitutional Court.

II The Flexible Procedure of Housing Eviction Disputes

The Final Constitution ('FC') has fundamentally altered the law of evictions in South Africa. Whereas in our pre-democratic society a landowner was entitled to an eviction order at the sight of an unlawful occupier (because it was accepted that landowners had exclusive right to use their land unless consent had otherwise been given), the Final Constitution now places significant limitations on the ability of a landowner to secure an eviction order.[7] In particular, FC s 26(3), which reads '[n]o one may be evicted from their home, or have their home demolished, without an order of court made after considering all the relevant circumstances', now entrenches procedural and substantive safeguards to occupiers who, without consent, reside on another's land. Although this provision still permits the eviction of unlawful occupiers, it is clear that eviction may not occur until a court has made such an order having considered all the relevant circumstances. FC s 26(3) therefore bestows a discretion on the courts: it allows a judge to refuse an application for an eviction order if the circumstances of the case militate against the granting of the application.

In addition, the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act (PIE),[8] which was enacted pursuant to FC s 26(3), provides further procedural and substantive safeguards to persons facing evictions. Like FC s 26(3), PIE not only prohibits evictions without judicial authorisation but also necessitates an enquiry into the relevant circumstances of the case to determine if it is 'just and equitable' to order an eviction. For present purposes, it is not necessary to fully elaborate on the provisions of PIE. However, a few salient features are worthy of mention. PIE requires that an eviction order against unlawful occupiers may only be granted where the court is 'of the opinion that it is *just and equitable* to do so, after considering *all the relevant circumstances*.'[9] PIE prescribes a non-exhaustive list of factors the court should consider during the enquiry. Such factors embrace the rights and needs of the elderly, children, disabled persons and households headed by women.[10] If the unlawful occupiers have occupied the land for more than six months, then the court must also consider the availability of alternative land.[11]

[7] AJ van der Walt *Constitutional Property Law* (2005) 412. See, for example, the Prevention of Illegal Squatting Act 52 of 1951.

[8] Act 19 of 1998.

[9] PIE ss 4(6), 4(7) & 6(1) (emphasis added).

[10] PIE s 4(6) & s 4(7). See also s 6(3).

[11] PIE ss 4(7) and 6(3)*(c)*. In private party disputes, this ordinarily requires the joinder of the state to determine if the state is in a position to provide alternative housing. See, for example, *The Occupiers of Shorts Retreat, Pietermaritzburg v Daisy Dear Investments Pty Ltd* [2009] ZASCA 80, 2010 (4) BLCR 354 (SCA) at paras 12–14.

The courts are also free to assess any other relevant circumstance as well as the weight to be accorded to that circumstance. In addition, if a court determines that it is just and equitable to grant an eviction order, then the court also has a broad discretion to determine a just and equitable date for the execution of the eviction order.[12]

Port Elizabeth Municipality v Various Occupiers[13] is widely regarded as the leading case on the interpretation of PIE.[14] This matter concerned an eviction application by the state in terms of s 6 of PIE for the removal of approximately 68 people who were residing on privately owned land. The *Port Elizabeth Municipality* Court refused to grant the eviction order because it was not satisfied that it was just and equitable to do so. In evaluating the relevant circumstances of the case, the Court gave particular regard to the following facts: (a) that the residents had occupied the land for a lengthy period; (b) there was no intent to put the land to productive usage; (c) the municipality had not attempted to engage with the occupiers; and (d) the group of occupiers was small, homeless and in need.[15] In addition, the *Port Elizabeth Municipality* Court laid down two procedural elements designed to guide the manner in which housing evictions applications are handled by courts. I discuss these next.

A 'Active Judicial Management' and the Relaxation of Civil Procedure Rules

One of the most definitive and innovative features introduced in *Port Elizabeth Municipality* is the Court's emphasis that judges should not confine themselves to the traditional umpire role when entertaining housing eviction applications. Sachs J, writing for a unanimous court, held that courts are under a constitutional obligation to consider all circumstances when judging what is just and equitable, and this requires the court to be fully appraised of all the circumstances of the case.[16] The requirement that all circumstances should be in the knowledge of the court leads to the relaxation of civil procedure rules in two material ways.

[12] PIE s 4(8). A similar framework was created in the Extension of Security of Tenure Act 62 of 1997.

[13] [2004] ZACC 7, 2005 (1) SA 217 (CC).

[14] S Liebenberg *Socio-Economic Rights: Adjudication Under a Transformative Constitution* (2010) 273. *Port Elizabeth Municipality* is concerned with evictions at the instance of an organ of state. I have argued elsewhere that *Port Elizabeth Municipality* also, to a large extent, finds application to evictions sought against non-state actors. See M Dafel 'The Negative Obligation of the Housing Right: An Analysis of the Duties to Respect and Protect' (2013) 3 *South African Journal on Human Rights* 591, 609.

[15] *Port Elizabeth Municipality* (note 13 above) at para 59. See L Chenwi 'Putting Flesh on the Skeleton: South African Judicial Enforcement of the Right to Adequate Housing of Those Subject to Evictions' (2008) 8 *Human Rights Law Review* 105, 127–8 (The author summarises the relevant considerations courts should take into account when determining whether to grant an eviction order. Chenwi lists them as follows: manner in which the occupation was affected; duration of the occupation; availability of suitable alternative accommodation or land; reasonableness of offers made in connection with suitable alternative accommodation; timescales proposed; willingness of occupiers to respond to the alternatives offered; extent to which serious negotiations have been attempted; and the gender, age, occupation and health of occupiers.)

[16] *Port Elizabeth Municipality* (note 13 above) at para 32. The Court made this holding in respect to defining the term 'must have regard to' as mentioned in s 6.

First, 'technical questions relating to onus of proof should not play an unduly significant role in its enquiry'.[17] Eviction applications, the Court reasoned, are not 'resolving a civil dispute as to who has rights under land law' but are rather a constitutionally value-driven enquiry as to whether 'in upholding and enforcing land rights it is appropriate to issue an order which has the effect of depriving people of their homes'.[18] Second, in order to secure the 'necessary information, the court would therefore be entitled to go beyond the facts established in the papers before it'.[19] In this regard, the *Port Elizabeth Municipality* Court concluded that 'when the evidence submitted by the parties leaves important questions of fact obscure, contested or uncertain, the court might be obliged to procure ways of establishing the true state of affairs, so as to enable it properly to "have regard" to relevant circumstances.'[20]

In addition to the relaxation of these civil procedure rules, the *Port Elizabeth Municipality* Court continued to state that housing eviction applications may require the courts to assume a more managerial role when justice and equity require:

> The court is thus called upon to go beyond its normal functions, and engage in active judicial management according to equitable principles of an ongoing, stressful and law-governed social process. This has major implications for the manner in which it must deal with the issues before it, how it should approach questions of evidence, the procedures it may adopt, the way in which it exercises its power and the order it might make.[21]

Port Elizabeth Municipality therefore stands for the proposition that courts are expected to assume a more inquisitorial, managerial, responsive and fact-finding role to ensure that eviction orders are granted only when it is just and equitable to do so. If judges confine themselves to the more traditional role observed in other adversarial civil proceedings, so the Court held, then courts run the risk

[17] Ibid.

[18] Ibid.

[19] Ibid.

[20] Ibid. This approach was recently endorsed by the SCA in *The Occupiers, Shulana Court, 11 Hendon Road, Yeoville, Johannesburg v Steele* [2010] ZASCA 28, 2010 (9) BCLR 911 (SCA) (The SCA rescinded a High Court eviction order on the basis that the High Court did not have regard to all 'relevant circumstances' as required by PIE. The applicants, who stood to be evicted, did not appear to defend the eviction application in the High Court application, but the SCA reasoned that the High Court still ought to have enquired about the rights and needs of the elderly, children, disabled persons and households headed by the women as required by PIE.)

[21] Sachs J described the new role of judicial officers as 'complex, and constitutionally ordained' in *Port Elizabeth Municipality* (note 13 above) at para 13. The Court's complex, supervisory role is on display in *Joe Slovo Community, Western Cape v Thubelisha Homes* [2009] ZACC 16; 2010 (3) SA 454 (CC) ('*Joe Slovo I*'). However, the procedural remedy the Court introduced necessitated a second round of negotiations and a novel resolution. See *Residents of Joe Slovo Community, Western Cape v Thubelisha Homes and Others* [2011] ZACC 8, 2011 (7) BCLR 723 (CC) ('*Joe Slovo II*'). For further discussion of these two cases, see S Woolman *The Selfless Constitution: Experimentalism and Flourishing as Foundations of South Africa's Basic Law* (2013) 326–327, 460–466.

of not fulfilling the 'delicate task' entrusted to them by the legislature.[22] The SCA reiterated these words in *Occupiers of Short Retreat*. Jafta JA held that 'PIE obliges the courts to be innovative and if it becomes necessary, to depart from the conventional approach.'[23]

In conclusion, courts entertaining housing eviction applications are mandated in terms of FC s 26(3) and PIE to consider all relevant circumstances before granting an eviction order. To the extent that this information is obscured or not forthcoming from the parties, courts are required to ascertain this information through other means. Typically, this entails the postponement of the eviction application either to allow for the collection of further information, for further engagement amongst parties, or to order the joinder of other interested parties.

B The Duty to Engage

The second procedural innovation of *Port Elizabeth Municipality* is the Court's articulation of the state's duty to engage with unlawful occupiers; and the Court's holding that the extent and outcomes of the engagement are relevant circumstances in terms of PIE. Following its holding that courts must assume a managerial role, the Court held that 'one potentially dignified and effective mode of achieving sustainable reconciliation of the different interests involved is to encourage and require the parties to engage with each other in a proactive and honest endeavour to find mutually acceptable solutions.'[24] The Court reasoned that engagement, like informal discussions and mediation, has the potential to narrow the areas of dispute and facilitate mutual give-and-take. Moreover, engagement processes 'enables parties to relate to each other in pragmatic and sensible ways, building up prospects of respectful and good neighbourliness for the future'.[25] The Court concluded:

> Given the *special* nature of the competing interests involved in eviction proceedings launched under … PIE, absent special circumstances it would not ordinarily be just and equitable to order eviction if proper discussions, and where appropriate, mediation, have not been attempted.[26]

The *Port Elizabeth Municipality* Court also noted that in appropriate circumstances the courts should order that mediation be attempted between the parties before the court itself determines the merits of the eviction application.[27]

[22] See also Liebenberg (note 14 above) at 278–9 (She argues that *Port Elizabeth Municipality* suggests a 'fluid, dialogic relationship between property rights and housing rights as opposed to an implacable confrontation between two static, fixed rights', and that '[t]his relational, context-sensitive adjudication of conflicts between rights is one of the features of a transformative approach to the adjudication of constitutional rights.').

[23] *The Occupiers of Shorts Retreat* (note 11 above) at para 14 and note 7. It is perhaps worthy to note that Jafta J (having been promoted to the Constitutional Court) seems to depart from this view in *Maphango*, where he signs onto the minority judgment.

[24] *Port Elizabeth Municipality* (note 13 above) at para 39.

[25] Ibid at para 43.

[26] Ibid (emphasis added).

[27] Ibid at para 45.

In *Port Elizabeth Municipality*, the Court ultimately found that an order requiring the parties to engage with one another was not appropriate as 'much water has flowed under the bridge'.[28] The duty to engage was first ordered in *Olivia Road*.[29] In this matter, the Constitutional Court refused an eviction order on the ground that the City of Johannesburg had failed to enter into meaningful engagement with the unlawful occupiers before initiating the eviction application in the High Court. As a result, the Court issued an interim order that was aimed at ensuring the City and occupiers engaged with each other meaningfully in an attempt to resolve certain of the issues that were raised in the pleadings.[30] This order culminated in an agreement between the City and the occupiers that obliged the City to render the 'properties "safer and more habitable" in the interim' and 'provide all occupiers with alternative accommodation in certain identifiable buildings'.[31]

The *Olivia Road* Court relied on its earlier decision in *Port Elizabeth Municipality* to justify the engagement order. Yacoob J, writing for the Court, summarised the position as follows:

> [A]s I have already pointed out, it is the duty of a court to take into account whether, before an order of eviction that would lead to homelessness is granted at the instance of a municipality, there has been meaningful engagement or, at least, that the municipality has made reasonable efforts towards meaningful engagement. … The absence of any engagement process would ordinarily be a weighty consideration against the grant of an ejectment order.[32]

Olivia Road has had a natural ripple effect. In *Lingwood v The Unlawful Occupiers of R/E of Erf 9 Highlands*, the High Court applied the duty to engage to non-state actors seeking to have unlawful occupiers located on private land evicted.[33]

Given that disputing parties are not ordinarily required to enter a dialogically engaging process in a meaningful and honest manner aimed at securing consensus amongst the parties before approaching a court, the *Olivia Road* Court's articulation of the duty to engage meaningfully in housing evictions cases is a departure from the orthodox rules of civil dispute resolution. Moreover, engagement orders are also a way for courts to manage highly emotionally disputes that have no clear solution. The *Port Elizabeth Municipality* and *Olivia Road* decisions make it clear

[28] Ibid at para 47.

[29] *Occupiers of 51 Olivia Road, Berea Township and 197 Main Street Johannesburg v City of Johannesburg and Others* [2008] ZACC 1, 2008 (3) SA 208 (CC), 2008 (5) BCLR 475 (CC).

[30] Ibid at para 5.

[31] Ibid at paras 24–25.

[32] Ibid at para 21. The *Joe Slovo I* and *II* Courts adopted a similar approach. See *Joe Slovo I* and *Joe Slovo II* (note 21 above).

[33] *Lingwood v The Unlawful Occupiers of R/E of Erf 9 Highlands* 2008 (3) BCLR 325 (W) at para 33. See also S Wilson 'Breaking the Tie: Evictions from Private Land, Homelessness and a New Normality' (2009) 126 *South African Law Journal* 270, 290; Dafel (note 14 above) at 610–611; Woolman (note 21 above) at 323–331, 440–442.

that the duty to engage arises as a result of the 'just and equitable' value-driven enquiry required by PIE and FC s 26(3).[34]

III *Maphango v Aengus Lifestyle Properties*[35]

It is against this backdrop that the majority's decision in *Maphango* is best understood. In this section, I first briefly canvass the case's relevant facts and procedural history. Thereafter, I caution against over-reading *Maphango*, and suggest that the majority's approach was well in line with the Court's prior eviction case law. Before commencing with the discussion, it is however important to note that *Maphango* is a procedurally complex matter. The complexity of the case arises primarily from the fact that both the tenants and the landlord initiated different cases in different forums and raised different causes of action. It therefore must be borne in mind that the case concerned two procedural trajectories, but, as the majority of the *Maphango* Court held, the two cases could not be separated as they both dealt with the same factual dispute and legal interest.

A The Facts and the Decisions[36]

Maphango was primarily concerned with a decision of a landlord to cancel residential lease agreements for the sole aim of securing higher rentals. Following renovations to the apartment building, the landlord believed it necessary to increase the rent. The increases fell somewhere between 100–150 per cent over the existing rentals. This escalation was necessary to cover the overhead costs and secure a reasonable rate of return. However, the lease agreements contained rent escalation clauses that only permitted increases of rentals at a rate of between 10–15 per cent per annum. In order to evade the clauses, the landlord elected to terminate the lease agreements and offer the tenants new lease agreements that were similar to the original agreement save for significantly higher rentals. Some of the tenants, who could not afford the higher rentals, believed they were at risk of being rendered homeless.

The tenants, aggrieved by the actions of their landlord, lodged a complaint with the Gauteng Housing Tribunal. They alleged that they were threatened with eviction without a court order and subject to unfair and exploitive rental and service charges. The Tribunal has jurisdiction to entertain disputes, which may be lodged by either the landlord or the tenant, involving conduct that constitutes an 'unfair practice'. The term 'unfair practice' is defined broadly to include 'any

[34] Cf Woolman (note 21 above) at 260–292, 318–357, 422–480 (Contends that the trend toward meaningful engagement reaches across a broad swath of substantive provisions in the Bill Rights – including political participation rights, the right to equality, the freedom of cultural and linguistic practices and the right to education.)

[35] *Maphango* (note 6 above).

[36] For a more extensive analysis of the facts, arguments and decisions in *Maphango* see SM Maass 'Conceptualising an Unfair Practice Regime in Landlord-Tenant Law' (2012) 27 *South African Public Law* 652; MR Phooko 'A Critical Analysis of the Decision of the Constitutional Court: *Maphango v Aengus Lifestyle Properties*' (2012) *Obiter* 702; and M Dafel 'Curbing the Constitutional Development of Contract Law: A Critical Response to *Maphango v Aengus Lifestyle*' (2014) *South African Law Journal* 271.

act or omission by a landlord or tenant in contravention of the [Rental Housing] Act' or 'a practice prescribed as a practice unreasonably prejudicing the rights or interests of a tenant or a landlord'.[37] With respect to the latter part of the definition, the Gauteng regulations of the Tribunal prescribe unfair practice to include, among other things, 'oppressive or unreasonable conduct'.[38]

A finding of an 'unfair practice' by the Tribunal leads to several significant consequences. Two effects are relevant for the case at hand. First, landlords are precluded from cancelling lease agreements in situations which are classified as constituting an 'unfair practice'. Section 4(5)*(c)* of the RHA stipulates that a landlord may only terminate a lease if the grounds of termination are stipulated in the agreement and furthermore 'do not constitute an unfair practice'. Second, in terms of s 13(4) of the RHA, the Tribunal, upon finding the existence of an 'unfair practice', has the power to order a wide array of remedies. These solutions encompass the power to order compliance with the RHA, refer the matter for investigation to a competent body if it appears there is a contravention of the law, or to make any other order that is just and fair with the aim to terminate the unfair practice. This last-mentioned remedial power includes the power to make any just and fair order, which includes, but is not limited to, ordering the discontinuation of overcrowding, unacceptable living conditions, exploitive rentals, or the lack of maintenance. In addition, the powers of the Tribunal, upon finding that the conduct of either the landlord or the tenant is an 'unfair practice' within in the meaning of the RHA and its regulations, extend to determining the new rental payable. The RHA states that new rental amount should be determined taking into account the prevailing economic conditions of supply and demand, and the need for a realistic return on investment for investors in rental housing.[39]

Before the matter was heard by the Tribunal, however, the landlord instituted eviction proceedings in the High Court. Citing the need to focus on the eviction application in the High Court, the tenants elected to withdraw their claim before the Tribunal. The Tribunal was therefore deprived not only of an opportunity to make a ruling on whether the landlord's actions constituted an 'unfair practice' but also of issuing an appropriate remedy if it reached such a finding.

In the High Court eviction application, the landlord contended that since the lease agreements were lawfully terminated, the tenants were now unlawful occupiers and therefore stood to be evicted. In response, the tenants' principle defence was that the lease agreements were in fact not lawfully terminated and they were therefore not unlawful occupiers. They argued that the landlord acted against public policy as it was unfair to cancel a lease merely to secure higher rentals.[40] In the alternative, the tenants argued that if it was found that the lease agreements were lawfully terminated, it would not be just and equitable in terms

[37] Section 1 of the Rental Housing Act 50 of 1999 (RHA).

[38] Reg 14(1)*(d)* and reg 14(2)*(e)* of the Gauteng Unfair Practice Regulations Notice 4004 of 2001, *Provincial Government Gazette Extraordinary* 124 of 4 July 2001.

[39] RHA s 13(5).

[40] The standard for setting aside an agreed upon contractual provision is a high threshold. See *Sasfin (Pty) Ltd v Beukes* 1989 (1) SA 1 (A) 9B–G. ('[T]he doctrine should only be invoked in the clearest of cases in which the harm to the public is substantially incontestable, and does not depend on the idiosyncratic inferences of a few judicial minds').

of PIE to order their eviction on the grounds that some tenants would be rendered homeless and other tenants would be forced into lower standards of living. The High Court found that the lease agreements were lawfully terminated, and the tenants stood to be evicted. The High Court did, however, postpone the eviction application of some of the tenants to ascertain if alternative accommodation could be made available by the state. It appears that the High Court did not consider potential findings by the Rental Housing Tribunal to be a relevant circumstance in terms of the 'just and equitable' enquiry required by PIE.

On appeal to the Supreme Court of Appeal ('SCA'), the tenants for the first time raised the 'unfair practice' argument in terms of the RHA. Disputing the High Court's finding that the lease agreements were lawfully terminated, the tenants argued that the landlord was precluded from cancelling the agreement because its decision to cancel the lease agreements for the sole purpose of securing higher rentals constituted an 'unfair practice' in terms of the RHA because it amounted to 'oppressive or unreasonable conduct'. Brand JA, writing for the court, dismissed the argument on two grounds. First, a singular act of cancelling a residential lease cannot constitute a 'practice' as the term rather 'envisages incessant and systemic conduct by the landlord which is oppressive or unfair'.[41] Second, the landlord's conduct could not in the circumstances be 'denounced as unreasonable or unfair, let alone oppressive' because the landlord was running a business venture and was not expected to run at a loss.[42] The tenants did not pursue arguments based on PIE in the SCA.

The tenants appealed the matter to the Constitutional Court. The tenants once again contended that the termination of the lease agreements given the circumstances amounted to an 'unfair practice' as it constituted 'oppressive and unreasonable' conduct. The lease agreements were therefore never lawfully terminated, and, as a result, the eviction order should be set aside. This contention split the *Maphango* Court.

The majority opinion, authored by Cameron J, emphasised that despite neither the landlord nor the tenant fully appreciating the force of the RHA in litigating their dispute, 'it would be wrong for this Court to take a narrow view of the matter that ignores the importance and impact of the statute'.[43] The majority therefore proceeded to determine if the applicants' grievance is in principle capable of resolution by the Tribunal. First, the majority disagreed with the SCA's interpretation that 'practice' cannot denote a singular event because 'it has long been established in our law that a "practice" may consist in a singular act' as it accords 'with the ordinary meanings of the word'.[44] The majority of the court, however, elected not to pronounce on the second ground of the SCA's dismissal: namely that it was not 'oppressive or unreasonable'. The *Maphango* majority

[41] *Maphango v Aengus Lifestyle Properties* [2011] ZASCA 100, 2011 (5) SA 19 (SCA) at para 34.

[42] Ibid at paras 25 and 34. This finding was, however, disputed by the applicants. They claimed that the landlord had to prove this contention and had not done so. See Applicants' Heads of Argument in the Constitutional Court at para 14.

[43] *Maphango* (note 6 above) at para 48.

[44] Ibid at para 57.

believed that the Tribunal should make such a determination.[45] The Tribunal should also be afforded an opportunity to make an appropriate order should it find that the landlord's conduct did amount to an unfair practice. At the same time, Cameron J noted that the Tribunal could also determine new rental rates if it finds in favour of the landlord's claim that the current rentals were 'uneconomic and unsustainable'.[46]

As a result, the majority ordered that the tenants (and the landlord) be provided with an opportunity to raise the 'unfair practice' argument before the Housing Tribunal and to allow the Tribunal to determine whether or not the landlord's conduct in cancelling the leases for the sole purpose of securing higher rentals constituted an unfair practice. The basis on which the majority justified the remittal order is important. The majority held that the High Court entertaining the eviction application in terms of PIE, given the underlying nature of the dispute, should have raised the applicability of the RHA itself. Cameron J reasoned that the Tribunal's determination as to whether the landlord's termination of the tenants' leases solely in order to secure higher rates of return constituted an unfair practice would be material to any subsequent decision on whether to grant an eviction order. FC s 26(3) requires that an eviction order be granted 'after considering all relevant circumstances'. A Tribunal's determination that the landlord's termination of the tenants' leases was an unfair practice would certainly qualify as a relevant circumstance.[47]

Despite the procedural complexity of the case, the ratio of the *Maphango* Court was simply that the High Court, instead of granting the eviction orders, ought to have rather 'postponed the eviction application to enable proceedings before the Tribunal to determine whether the termination of the leases was an unfair practice'.[48] It should have done so because such a determination is a 'relevant circumstance' that the High Court was required to consider in order to determine whether the eviction application ought to succeed.[49] This line of reasoning remains true regardless of the fact that the tenants did not themselves raise the relevance of the RHA and the possible findings by the Tribunal.

The minority disagreed with the majority's view on this last point. It concluded that the tenants' failure to raise the 'unfair practice' argument in the High Court precluded them from doing so now. The rationale – alluded to at the outset of

[45] Ibid at para 58.

[46] Ibid at paras 59–60.

[47] Ibid at para 61.

[48] Ibid.

[49] Ibid at para 62. The majority did also, however, justify the order on another broader ground. Cameron J held that the rule of law requires courts to apply legislation that applies to a dispute and litigants cannot ignore relevant legislation. Ibid at para 48. Furthermore, Froneman J, in his concurring judgment, held that it would be a 'denial of constitutional responsibility for any court to decide a matter without considering legislation where it was aware of applicable legislation. This would be so no matter how the case was pleaded.' Ibid at para 152. Froneman J further held that '[c]ourts deciding constitutional matters may, and in some circumstances are obliged to, make any order that is just and equitable [in terms of section 172(1)*(b)* of the Constitution]. These powers are not confined by the pleadings.' Ibid at para 153. These holdings seem, however, to be more a response to the minority's decision to exclude consideration of the RHA on appeal on the ground that the applicants did not raise it from the outset.

this reply – is that a time-honoured commitment to procedural fairness demands that defendants should not be required to answer new allegations in appeal proceedings.[50] In keeping with this first line of argument, the minority judgment found it inappropriate to remit the matter back to the Housing Tribunal. Neither party had requested such an order. 'The Court', Zondo AJ held, 'must respect the choices that the applicants made in circumstances in which they had professional legal advice'.[51]

B An Alternative Reading of Maphango

Having outlined the procedural and factual matrix of *Maphango* above, I suggest that, although it is not completely clear from the judgment, the majority's incorporation of the 'unfair practice' argument in the appeal proceedings and issuing of an order which neither party requested is in conformity with the generally flexible approach that is observed in housing eviction cases. The ratio of the majority makes this clear. I do not believe that the majority's approach is a radical innovation or departure requiring new doctrinal justifications. *Maphango* conforms to the Court's previous position in such cases as *Port Elizabeth Municipality*. In fact, it is squarely in line with it. It is rather the minority's failure to recognise the flexible approach that is observed in housing eviction applications to identify and to evaluate all relevant circumstances that fails to keep faith with the Court's existing housing law jurisprudence.

I would, again, caution against a reading of *Maphango* that suggests that courts are entitled, outside the context of evictions, to raise arguments absent from the parties' elected pleadings. As a general principle, the court's flexibility in housing eviction jurisprudence is a result of the express wording of FC s 26(3), their mandate to ensure a 'just and equitable' order in terms of PIE, and the severe socio-economic consequences often associated with the loss of housing.

IV 'Interests of Justice' and the Court's Broad Discretion to Determine its Own Processes

I now return to Fowkes' notion of the courts' 'custodial responsibility'. I have been unable to identify a purely private party dispute before the Constitutional Court where the Court entertained a wholly new issue on appeal, whether litigant- or court-raised, or where the Court radically departed from traditional adversarial civil procedure. I am therefore reluctant to conclude that there is evidence to support the existence of a custodial responsibility theory at this stage. However, this is not to suggest that the proposed theory has no basis whatsoever. It is rather that the Court elects to justify procedural variation in different terms and on a different basis.

[50] Ibid at paras 103–14.
[51] Ibid at para 138.

The Court has on several occasions indicated that it possesses a discretionary power to regulate its own processes.[52] Such power may, of course, involve a departure from traditional rules of procedure either on an ad hoc basis, or to create new processes. Deviation from established procedure is, however, a power that must be 'exercised sparingly'.[53] The Court relies on its power to act in the 'interests of justice' – drawn from FC s 173. Section 173 of the Constitution states: 'The Constitutional Court, the Supreme Court of Appeal and the High Court of South Africa each has the inherent power to protect and regulate their own process, and to develop the common law, taking into account the *interests of justice*.'[54]

In this regard, Fowkes' proposed theory may find some support. Given that the custodial responsibility theory seeks to explain procedural variation in private party disputes, I highlight two judgments below, both of which were private party disputes, which discussed the power of the court to alter procedure.

In *Betlane*, Mogoeng J (as he then was) noted that '[a]n abandonment of orders does not automatically deprive this Court of its inherent jurisdiction to hear matters which raise constitutional issues of importance, when it is in the interests of justice to do so'.[55] In this matter, the respondent landlord abandoned orders that restrained the applicant tenant from appealing an eviction order. The abandonment, which took place prior to the Constitutional Court hearing oral arguments, resulted in the issue being rendered moot. Despite this, however, the *Betlane* Court suggests that in some instances 'when it is in the interests of justice to do so', it may proceed with a matter despite the absence of live case or controversy. This position reflects the Court's existing jurisprudence on mootness.[56] However, one must read this statement with caution. Not only was this dictum made *obiter*, the Court seems to contradict itself in the exact same paragraph. After stating that the 'interest of justice' may well require an issue to proceed after abandonment, the *Betlane* Court in the same breath found that since the issue has 'now been rendered moot … it is therefore not in the interests of justice for this matter to be heard'.[57]

The Court also discussed its discretion to determine its own processes in *Pioneer Foods*.[58] Although this matter was concerned with the procedural requirements for certifying a class action, the Court did enunciate certain rules regarding its own regulation of civil procedure. The Court noted that although FC s 34 guarantees the right of individuals to have their dispute entertained by a court of law, the right 'does not include the choice of procedure or forum in which access

[52] See *S v Thunzi* [2010] ZACC 12, 2011 (3) BCLR 281 (CC) at paras 49–51; *South African Broadcasting Corporation Limited v National Director of Public Prosecutions* [2006] ZACC 15, 2007 (1) SA 523 (CC) at paras 35–36; *S v Pennington* [1997] ZACC 10, 1997 (4) SA 1076 (CC) at paras 22–23.

[53] Ibid.

[54] FC s 173 (Emphasis added.)

[55] *Betlane v Shelly Court CC* [2010] ZACC 23, 2011 (1) SA 388 (CC) at para 23.

[56] See, for example, *MEC for Education: KwaZulu-Natal and Others v Pillay* [2007] ZACC 21, 2008 (1) SA 474 (CC), 2008 (2) BCLR 99 (CC) at para 32; *Independent Electoral Commission v Langeberg Municipality* [2001] ZACC 23, 2001 (3) SA 925 (CC), 2001 (9) BCLR 883 (CC) at para 11.

[57] *Betlane* (note 54 above) at para 23.

[58] *Mukaddam v Pioneer Foods (Pty) Ltd* [2013] ZACC 23, 2013 (5) SA 89 (CC).

to courts is to be exercised'.[59] Jafta J reasoned that the non-inclusion of choice of procedure in the access to court right stems from the fact that FC s 173 bestows on the Constitutional Court, the Supreme Court of Appeal and the High Court 'the inherent power to protect and regulate *their own process* … taking into account the interests of justice'.[60]

The power of courts to regulate their own procedures does not grant them unfettered discretion to set out whatever procedures they wish. These powers are cabined by the important rider – 'in the interests of justice'. In this regard, two holdings of the Court are important. First, the primary function of any rule of court is to ensure the 'attainment of justice'.[61] Accordingly, the rules must be designed to 'facilitate access to courts rather than hindering it'.[62] Second, rules must allow for flexibility: '[r]igidity has no place in the operation of court procedures'.[63] The *Pioneer Foods* Court reiterated, verbatim, its position in *PFE International*:

> Since the rules are made for courts to facilitate the adjudication of cases, the superior courts enjoy the power to regulate their processes, taking into account the interests of justice. It is this power that makes every superior court the master of its own process. It enables a superior court to lay down a process to be followed in particular cases, even if that process deviates from what its rules prescribe. Consistent with that power, this Court may in the interests of justice depart from its own rules.[64]

These two cases suggest that the Court is in principle willing to alter traditionally observed civil procedures, and, where they elect to do so, the yardstick for the departure from existing rules is the 'interests of justice'. The Court has indicated that this determination is dictated by the factual predicate of a given case. There may well therefore be instances where the Court deems it necessary to entertain new arguments on appeal or reframe the case so that it is presented in a more appropriate manner. However, when viewed alongside the Court's consistent reluctance to entertain new issues on appeal or to grant direct access, it remains clear that the 'interests of justice' will not readily be invoked to justify a departure from existing rules of civil procedure. As the Court frequently notes in the context of direct access applications, 'exceptional reasons' must exist before it is willing to hear a matter as the court of first and last instance.[65] At this stage, as a general

[59] Ibid at para 28.
[60] Ibid.
[61] Ibid at para 32.
[62] Ibid.
[63] Ibid at para 39.
[64] Ibid quoting *PFE International v Industrial Development Corporation of South Africa Ltd* [2012] ZACC 21, 2013 (1) SA 1 (CC) at para 30.
[65] See, for example, *Mkontwana v Nelson Mandela Metropolitan Municipality* [2004] ZACC 9, 2005 (1) SA 530 (CC) at para 11. See further *Dormehl v Minister of Justice* [2000] ZACC 4, 2000 (2) SA 987 (CC) at para 4 (The court states '[s]ince a high court has jurisdiction in constitutional matters and is the court which ought ordinarily to be approached to deal with constitutional matters at first instance, compelling reasons are required to justify a different procedure. An applicant for direct access must establish that there are such reasons, and that the circumstances of the case justify a departure from the ordinary rule, and the granting of direct access.'); and *Bruce and Another v Fleecytex Johannesburg CC* [1998] ZACC 3, 1998 (2) SA 1143 (CC) at para 9 (The court held that 'compelling reasons are required to justify a different procedure and to persuade this Court that it should exercise its discretion to grant direct access and sit as a court of first instance').

rule, the interests of justice require parties to raise all issues from the outset, and courts should themselves not reframe the case.

V Conclusion

The Constitution Seventeenth Amendment Act of 2012 came into force recently, and the Constitutional Court's jurisdiction now extends to non-constitutional matters.[66] The Court has the jurisdictional competence to entertain an appeal 'on the ground that the matter raises an arguable point of law of general public importance which ought to be considered by' the Constitutional Court.[67] Since the exercise of governmental power invariably raises a constitutional issue – our rule of law and legality jurisprudence tells us so – the Court's jurisdictional extension ostensibly means that it will entertain more common-law disputes between private parties where no particular substantive provision of the Constitution is in play. (Good reasons, as Frank Michelman pointed out long ago, exist to assume that the Court always possessed such plenary powers.) James Fowkes' timing for questioning the role of appeal courts in private disputes is therefore apt. Going forward, his description and analysis of the advantages and disadvantages of allowing and disallowing new matters on appeal, whether raised by the court or a party, is extremely useful.

But let us return to the matter at hand: what to make of *Maphango*? I have read the case far more narrowly than James. FC s 26(3) and the 'justice and equity' enquiry mandated by PIE dictate that courts should have regard to all relevant circumstances before they grant an eviction order. To ensure that all relevant circumstances are placed before the court and that the order is just and equitable, the Constitutional Court has endorsed a flexible, responsive, inquisitorial and managerial process in disputes concerning housing evictions. However, this relaxation of general civil procedure rules, while fitting comfortably with the Court's prior housing eviction jurisprudence, should also, as a general matter, be viewed as limited to eviction cases.

[66] The constitutional amendment came into force on 23 August 2013.
[67] Constitution s 167(3)*(b)*(ii).