

M du Plessis & S Peté

Kafka's African nightmare — bureaucracy and the law in pre- and post-apartheid South Africa*

Summary

This article sets out to examine the legal system of both pre and post-apartheid South Africa, through the lens of Franz Kafka's seminal novel "The Trial". The central contention of the article is that Franz Kafka's nightmare vision serves not only as a historical point of reference anticipating the insanity of the apartheid legal bureaucracy, but also acts as an injunction to South Africa's judges and lawyers to ensure that the legacy of the apartheid period does not negatively affect service delivery in post-apartheid democratic South Africa. The article begins with a discussion of the truly Kafkaesque nature of law in South Africa during the apartheid era. The main legislative pillars of the apartheid system are discussed, as well as the human cost exacted by apartheid policies. The article then moves to a discussion of the South African legal system following the apartheid era. While acknowledging the massive shift away from the nightmare of apartheid, certain disturbingly Kafkaesque trends are noted within the bureaucracy serving the democratic South African state. Various efforts by the South African legislature and courts to combat these trends are analysed and discussed, including various legislative measures enacted since the demise of apartheid, and the development of innovative supervisory interdicts by the courts.

Opsomming

Kafka se Afrika-nagmerrie — Burokrasie en die reg in voor- en na-apartheid Suid Afrika

Hierdie artikel ondersoek die regstelsel van beide voor- en na-apartheid Suid-Afrika, deur die lens van Franz Kafka se bekende roman "The Trial" (Die Verhoor). Die sentrale argument van die artikel is as volg. Franz Kafka se nagmerrie-visioen dien nie alleenlik as 'n historiese verwysingspunt wat die kranksinnigheid van apartheid se regsbyrokrasie voorspel nie. Dit dien ook as 'n opdrag aan Suid-Afrika se regsgeleerdes, om te verseker dat die nalatenskap van die apartheid-era nie dienslewing in die nuwe demokratiese Suid-Afrika benadeel nie. Die artikel begin met 'n bespreking van die eg Kafka-agtige

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M du Plessis, Associate Professor of Law, University of KwaZulu-Natal, Howard College campus, Durban 4041, South Africa.

S Peté, Associate Professor, Faculty of Law, University of KwaZulu-Natal, Howard College Campus, Durban 4041, South Africa.

aard van die reg in Suid-Afrika gedurende die apartheid-era. Die sentrale regspilare van die apartheidstelsel word bespreek, asook die menslike prys wat deur die apartheidbeleid geëis is. Daarna volg 'n bespreking van die Suid-Afrikaanse regstelsel na afloop van die apartheid-era. Alhoewel 'n reuse verskuiwing weg van die apartheidsnagmerrie erken word, word sekere onrusbarende neigings binne die burokrasie wat die demokratiese Suid-Afrikaanse staat bedien, uitgelig. Die artikel ondersoek en bespreek verskeie pogings aangewend deur die Suid-Afrikaanse regstelsel om hierdie tendense teë te werk, insluitende verskeie regstappe toegepas sedert die einde van apartheid, asook die ontwikkeling van innoverende toesighoudende interdikte deur die hof.

1. Introduction

Franz Kafka's unfinished novel 'The Trial' plunges the reader into a harrowing and grotesque world. The main protagonist, Josef K, awakes to find himself in a kind of living nightmare, confronted by an ominous legal bureaucracy which comes to control and eventually destroy his life. Kafka captures perfectly the absurdity, as well as the menacing evil, which characterises the legal systems of totalitarian regimes, as they isolate and suffocate those subject to their power and control. Published in 1925 shortly after the author's death from tuberculosis, the work presages the horrors which were to engulf the world following the rise of the totalitarian regimes in Europe in the years leading up to the Second World War. The work serves still as a warning of what happens when a legal system is infiltrated and corrupted by evil.

It is not only in the totalitarian regimes of Europe during the latter part of the twentieth century that Kafka's nightmare vision of a legal system corrupted by evil finds resonance. It will be contended in this paper that the legal system of apartheid South Africa may be characterised as 'Kafkaesque' in the true sense of the word.¹ While not attempting to provide a comprehensive history of the apartheid legal system, the first part of this paper examines certain elements of this system in order to illustrate the truly Kafkaesque nature of the nightmare which enveloped South Africa during the apartheid years.

The first part of the paper sets the context for the second part, which focuses on South Africa's emergence from the nightmare of apartheid. It examines some of the ways in which the South African legal system, and in particular the courts, have begun to deal with bureaucratic delays in the delivery of justice and government services. In view of South Africa's apartheid past, we contend in this paper that the South African legal system must be particularly sensitive to the issue of bureaucratic obfuscation and delay. During the first decade of South Africa's democracy, the challenge has been to shine a spotlight into the nooks and crannies of the apartheid bureaucracy, in order to instil a new culture of human rights and service delivery. It will be contended that Franz Kafka's nightmare vision set out in 'The Trial' serves not only as a historical point of reference anticipating the insanity of the apartheid legal bureaucracy, but also acts as an injunction to South Africa's judges and lawyers to ensure that the legacy of the apartheid period does not negatively affect service delivery in post-apartheid democratic South Africa.

1 The *Concise Oxford Dictionary* 1990 defines the word 'Kafkaesque' as follows: adj. (of a situation, atmosphere, etc) impenetrably oppressive, nightmarish, in a manner characteristic of the fictional world of Franz Kafka, German-speaking novelist (d. 1924).

2. The apartheid period

2.1 A Kafkaesque nightmare

The apartheid legal system did not emerge from thin air when the National Party came to power in South Africa in 1948.² It was preceded by almost three hundred years of colonial oppression, which served to dispossess many black South Africans of their land and their dignity. The assumption of power by the National Party did, however, mark the beginning of a particularly brutal period of oppression, during which the South African legal system became deeply embroiled in the application and enforcement of apartheid policies.³ At the outset it is worth quoting Steve Biko, the leader of the Black Consciousness movement, who was to die in particularly brutal circumstances while in police detention.⁴ In a particularly Kafkaesque passage, Biko comments as follows on the nature of the South African legal system during the apartheid period:

No average black man can ever at any moment be absolutely sure that he is not breaking a law. There are so many laws governing the lives and behaviour of black people that sometimes one feels that the police only need to page at random through their statute book to be able to get a law under which to charge a victim.⁵

The section which follows is an illustration of some of the more Kafkaesque aspects of the South African legal system during the apartheid period.

2.2 The *Immorality Act* and *Mixed Marriages Act*

Writing in 1981, David Harrison estimated that since 1950, there had been over ten thousand convictions under the *Immorality Act*⁶ and commented that 'prosecution has trailed in its wake social disgrace, family break-up and many

2 The National Party came to power in 1948 under the leadership of Dr. D. F. Malan. In 1954 Malan was succeeded as leader of the National Party by J. G. Strijdom, who in 1958 was replaced by Dr. H. F. Verwoerd. These three Afrikaner nationalist leaders may, it is submitted, be regarded as the prime architects of the policy of apartheid.

3 Soon after coming to power the National Party introduced a series of apartheid laws (described as 'South Africa's Nuremburg Laws' by Brian Bunting in his book *The Rise of the South African Reich*), in order to implement its twisted vision of a white South Africa serviced by black migrant workers. The three legal pillars underpinning the apartheid system were the *Population Registration Act* 30 of 1950, the *Prohibition of Mixed Marriages Act* 55 of 1949 and the *Group Areas Act* 41 of 1950.

4 Biko died in police detention on 12 September 1977 after being brutally assaulted by his captors and thrown naked into a police van, which then set off on a long journey with the fatally injured Biko in the back.

5 Biko 1978: 75.

6 According to Omond 1986: 33, more than 11,500 people were convicted of contravening the *Immorality Act* between 1950 and 1980, and more than twice that number were charged.

cases of suicide'.⁷ The *Mixed Marriages Act* and the *Immorality Act* formed an important part of the foundation of the apartheid system.

The *Prohibition of Mixed Marriages Act* 55 of 1949 outlawed marriages between whites and the members of any of the other racial groups. In terms of the *Immorality Amendment Act* 23 of 1957, 'unlawful carnal intercourse' as well as 'any immoral or indecent act', between a white person and a member of any of the other racial groups, was strictly forbidden. The Act did not apply to persons who were not South Africans, as long as both partners were foreign.⁸ In terms of Section 16 of the *Immorality Act*, an offender found guilty of 'unlawful carnal intercourse' or 'any immoral or indecent act' was liable to be sentenced to imprisonment for up to seven years with hard labour, and up to ten lashes when the male was under 50 years of age.⁹ Omond notes that, in some cases, even a kiss between people of different races could lead to a conviction in terms of the Act.¹⁰ In order to apprehend persons ostensibly engaged in unlawful carnal intercourse across the racial divide, the South African Police were driven to adopt truly bizarre methods, which may be described as truly Kafkaesque:

Special Force Order O25A/69 detailed the use of binoculars, tape recorders, cameras and two-way radios to trap offenders. It also spelled out how bed sheets should be felt for warmth and examined for stains. Police were also reported to have examined the private parts of couples and taken people to district surgeons for examination.¹¹

The lives of couples who found themselves separated by the arbitrary and shifting racial divide put in place by the apartheid authorities, were characterised by paranoia, secrecy and fear.

2.3 Racial classification and the *Population Registration Act*

The *Population Registration Act* 30 of 1950 originally classified South Africans as 'white', 'Coloured' or 'Native'.¹² In terms of Proclamation 46 of 1959 the 'Coloured' group was further divided into 'Cape Coloured', 'Cape Malay', 'Griqua', 'Indian', 'Chinese', 'other Asiatic' and 'other Coloured'. The tests which were used to determine the race of a particular person were 'appearance', 'general acceptance' and 'repute'. In 1962 it became obligatory for both 'appearance' and 'general acceptance' to be considered together (as opposed to using one of the tests) to determine a person's race. At a practical level, various pseudo-scientific 'tests' were used to determine race. Roger Omond (in a particularly Kafkaesque extract) describes certain of these 'tests':

7 Harrison 1981: 172. Omond notes that over the twenty-year period prior to the publication of his book in 1986, at least sixteen white men had committed suicide by gassing, hanging, shooting, drowning or taking insecticide after being charged under the *Immorality Act*. See Omond 1986: 33-34.

8 Omond 1986: 30.

9 Omond 1986: 32.

10 Omond 1986: 33.

11 Omond 1986: 33.

12 The term 'Native' was later changed to 'Bantu', and later still to 'black'.

Fingernails have been examined. Combs have been pulled through people's hair: if the comb is halted by tight curls, the person is more likely to be classified Coloured than white. In July 1983 an abandoned baby, named Lize Venter by hospital staff, was found near Pretoria. To classify her by race, as the Population Registration Act demands, a strand of her hair was examined by the Pretoria police laboratory: she was then classified Coloured.¹³

Omond points out in another passage that there were no hard and fast rules as to how the courts applied the criteria of 'appearance' and 'general acceptance' in determining a person's race:

In 1981 a Johannesburg magistrate convicted a woman previously thought white for living in a "white" area. The magistrate said she was Coloured because she had "a flat nose, wavy hair, a pale skin, and high cheekbones". The conviction was set aside by the Supreme Court judges ruling that while the woman was not obviously white, she was "generally accepted" as such.¹⁴

For persons not classified as 'White' the apartheid system was a Kafkaesque nightmare. In February 1980 the absurdity of the apartheid system was amply demonstrated when Alwyn Schlabusch, the Minister of the Interior, in answering a question in the South African Parliament regarding racial reclassifications during the previous year, stated as follows:

A total of one hundred and one Coloured people became white; one Chinese became white; two whites received Coloured classification; six whites became Chinese; two whites became Indians; ten Coloured people became Indians; ten Malays became Indians; eleven Indians became Coloured; four Indians became Malays; three Coloured people became Chinese while two Chinese were reclassified as Coloured people.¹⁵

Many families were split apart, with different members of the same family classified in such a way as to fall on different sides of the racial divide. The anguish caused by this absurdly Kafkaesque and inhumane system is difficult to imagine. Omond states, for example, that: 'Dark-skinned children of Coloureds trying to pass for white are said sometimes to have been abandoned or sent to relatives of a deeper hue.'¹⁶ People sometimes crossed the racial divide more than once, as is indicated by the following passage which would not seem out of place had it appeared in one of Kafka's novels:

In late 1984 ... a 'white' father was re-classified Coloured — the fifth time he had crossed the racial divide. His 'Indian' wife also changed and was classified Coloured. The change meant that the couple, Vic and Farina Wilkinson, could live together legally as man and wife. Mr Wilkinson was originally classified 'mixed', then 'European' (white), then Coloured, then white, and finally Coloured.¹⁷

13 Omond 1986: 26.

14 Omond 1986: 25.

15 Quoted in Harrison 1981: 173-174.

16 Omond 1986: 27-28.

17 Omond 1986: 28.

2.4 Living separately — the *Separate Amenities Act* and *Group Areas Act*

The *Reservation of Separate Amenities Act* 49 of 1953 required the provision of separate buildings, services and conveniences for the different racial groups.¹⁸ By the end of the 1950s the poison of the apartheid system had penetrated into every corner of South African daily life. The use of all public facilities, from stations and post offices, to park benches and public toilets, was strictly controlled according to the race of the person wishing to use the particular facility. There were signs everywhere, indicating that this or that seat, or entrance, or cubicle, or beach, was reserved for the use of this or that particular racial group.

Even the beaches were segregated strictly according to race. Signs were erected along the sea shore, indicating that this beach was for the use of 'whites only', while that beach was for the use of 'Coloureds only' or 'Indians only'. Problems arose (strongly reminiscent of the type of problems which might confront the protagonist of one of Kafka's novels) in relation to black nursemaids looking after white children on a 'whites only' beach. According to Omond, a black nursemaid was entitled to use a 'whites only' beach, as long as she had white children in her care. He states that:

It was reported in Natal in 1984 that blacks were allowed to walk on any beach as long as they did not swim or look as if they were intending to swim.¹⁹

Great embarrassment was caused to the apartheid regime by the patently absurd implications of what came to be known as 'beach apartheid'. Omond cites the following examples which arose in the early 1980s:

In April 198... during the South African lifesaving championships in Port Elizabeth, members of two black clubs were allowed use of all 'whites only' facilities for three days. In September 1983 apartheid signs between the Wilderness and Mossel Bay were removed for an international symposium on the Antarctic attended by more than 180 delegates from all over the world. The chairman of the symposium said requests had been made to the government to have "any potentially offensive signs temporarily removed".²⁰

The *Group Areas Act* 41 of 1950, enacted shortly after the National Party came to power in 1948, was one of the legal pillars of the apartheid system. The ultimate purpose of this Act was to divide South Africa into separate areas, each reserved exclusively for the use of a particular racial group. In practice, the Act was designed to ensure that the white group maintained control over the most economically productive areas of the country. A massive exercise in social engineering, the Act was to result in displacement and misery for thousands of ordinary South Africans. In 1985, the apartheid government itself estimated that a total of 126,176 families had been moved out of their homes in terms

18 Omond 1986: 53.

19 Omond 1986: 63.

20 Omond 1986: 62.

of the Act.²¹ As in the case of many apartheid laws, the *Group Areas Act* was sometimes absurdly Kafkaesque in its implementation. The Act applied to the dead as well as the living, as is clear from the following tragic and absurd case:

In September 1985 a victim of unrest in East London, Joseph Menold, had to be taken away from a mass funeral service to be buried in a Coloured cemetery a few hundred yards away from where 17 other — but African — unrest victims were buried.²²

The *Prevention of Illegal Squatting Act* of 1951 complemented the *Group Areas Act*. This latter Act allowed the apartheid state to resettle Africans living in areas zoned for whites, into the remote reserves set aside for the different African tribal groups (the so-called homelands' or 'Bantustans'). Dan O'Meara states that:

Millions of black people were eventually forcibly ejected from "white" land in terms of these measures. They were usually dumped unceremoniously to "adapt or die" in remote and primitive "resettlement areas". The generally appalling conditions in these "dumping grounds" regularly produced excruciating poverty, rampant disease and crippling infant mortality. The intense human suffering in places such as Dimbaza, Limehill, Soetwater and hundreds of others provoked international outrage and led to charges of genocide against the NP government.²³

2.5 Influx control, pass laws and Bantustans

The *Native Laws Amendment Act* of 1952 and the *Natives (Urban Areas) Amendment Act* of 1955 put in place the legal mechanisms to restrict the right of access by Africans to 'white areas'. In order to qualify to live in a white area, a black applicant had to qualify under Section 10 of the infamous *Bantu (Urban Areas) Consolidation Act*. Documentary proof had to be provided by the applicant of uninterrupted residence in the area for at least 10 years, or that the applicant had worked for the same employer for an uninterrupted period of at least 15 years. Those fortunate enough to qualify were known in the jargon of the apartheid bureaucrats as 'Section Tens'. Despite the best efforts of the apartheid bureaucracy, thousands of people desperate for work continued to pour into the cities. In the impoverished homelands to which they were relegated by the apartheid machine there was no work, but in the cities they were regarded as 'illegal', and were liable to be arrested, imprisoned, fined and deported. The main mechanism of control was the hated 'dompas' or reference book, which every African over the age of sixteen was required to carry at all times, in terms of the *Natives (Abolition of Passes and Co-ordination of Documents) Act* 67 of 1952. Dan O'Meara points out that:

Until the formal abandonment of influx control in 1986, literally hundreds of thousands of Africans were convicted every year for not having a reference book in their possession. When coupled with the establishment

21 Omond 1986: 37.

22 Omond 1986: 40.

23 O'Meara 1996: 69.

of labour bureaux throughout the country, this enabled the state to begin to control and channel the flow of black labour as required in the various sectors of the economy.²⁴

The physical and psychological wounds which this inhumane system inflicted on black South Africans are incalculable. Once again, the effects may rightly be described as Kafkaesque:

Subjected to forced removals from the “black spots”, endless pass raids, the mind-numbing racist bureaucracy in the labour bureaux, Africans were constantly reminded who was baas in the land of their forefathers. And as Verwoerd pressed ahead with his planned “self government” for the “ethnic homelands”, black South Africa was given the news that it was soon to be deprived of even this third-rate citizenship. The baas decreed that as “temporary sojourners” in a whites-only country, blacks were no longer even considered to be South Africans. They would be given “separate freedoms” in places many had never seen.²⁵

The use of courts of law to enforce a gigantic and absurd programme of social engineering meant that the South African legal system became increasingly Kafkaesque. Speaking of the Black Sash²⁶ Advice offices in the early 1980s, Harrison points to the bureaucratic nightmare of the apartheid system:

Here, every day, they are confronted with thirty years of Nationalist government. Here, every day, they witness the toll on family life the system takes, the misery of the contract worker who seeks to have near him the children who are growing up without him; the incomprehension of the wife who asks only to live with the man she legally married; the tears of the young man, a boy really, who does not understand why, since he cannot find work, he is classified as ‘idle’ and must now leave his parents and be sent to a homeland he has never seen ... Here the language is of ‘10(1)(a) and (b) and (c)’, of affidavits to prove employment, of letters to prove residence, of witnesses to prove birth, of certificates to prove existence. The labelled files in the Johannesburg office tell the story of the rows of patient black South Africans who wait: ‘Workman’s Compensation’, ‘Name Change’, ‘Employer’s Abuse’, ‘Pensions’, ‘Administration Board’, ‘Farm Labour’, ‘Bribery and Corruption’, ‘Work Permit’, ‘Endorsed Out’.²⁷

2.6 Emergency measures — security, banning and detention

The apartheid regime made use of an arsenal of security legislation to harass and disrupt its opponents. Under the general umbrella of this legislation, organisations and individuals opposed to apartheid were banned, detained without trial, tortured and killed. It is not possible to provide a complete overview of all the security laws passed during the apartheid era, but it is worth mentioning

24 O’Meara 1996: 70.

25 O’Meara 1996: 111.

26 The ‘Black Sash’ was founded in 1955 to protest against the removal of Coloured people from the common voters roll.

27 Harrison 1981: 254.

certain of the more draconian of the laws, such as the *Suppression of Communism Act of 1950*²⁸ and its successor the *Internal Security Act 79 of 1976*.²⁹

The apartheid regime made frequent use of detention without trial in order to silence its opponents. Many of those detained were tortured, and there were many deaths in detention. In terms of the *Criminal Procedure Act of 1965*, potential state witnesses in political trials could be detained without trial for a period of up to 180 days. An even more draconian provision was put into effect by the *Terrorism Act 83 of 1967*, which allowed for indefinite detention without trial of those suspected of being 'terrorists'. Detainees could be held until they had replied 'satisfactorily' to all questions put to them under interrogation. The *Terrorism Act* could be said to be truly Kafkaesque, in that it placed the onus on the accused to prove his innocence, rather than on the prosecution to prove his guilt.³⁰

The apartheid regime also made use of banning and banishment to silence its opponents. Many organisations and individuals were affected. Individuals who were banned might be ordered to resign from political organisations, prohibited from attending gatherings, confined to certain magisterial districts, or subjected to house arrest.³¹ Banishment orders were used to isolate political opponents in remote rural areas in order to stifle their opposition to the apartheid system. Motlhabi points out that certain banning orders were drafted in such a way that they in effect amounted to banishment of the person concerned.³²

3. The provisions of the Constitution aimed at combating bureaucracy

The brief examination of some of the more bizarre and cruel aspects of the apartheid legal system set out above provides the context within which efforts during the post apartheid period to combat the legacy of apartheid's Kafkaesque

28 The *Suppression of Communism Act of 1950* was extremely broad in its scope, being aimed not only at the suppression of Communism as a narrowly defined political ideology, but also at the suppression of any doctrine 'which aims at bringing about any political, industrial, social or economic change within the Union by the promotion of disturbances or disorder, by unlawful acts or omissions or by means which include the promotion of disturbance or disorder, or such acts or omissions or threats.'

29 The *Internal Security Act 79 of 1976* replaced the *Suppression of Communism Act of 1950* and was amended and extended as the struggle against apartheid intensified. The Act provided for preventative detention for periods of twelve months. These periods of detention could be successive and indefinite. Potential state witnesses in political trials could be detained for periods of up to six months.

30 The *Terrorism Act* provided for a minimum sentence of five years upon conviction, and courts of law were prohibited from pronouncing upon the validity of any detention order, or ordering the release of any particular detainee, while such detainee was still being interrogated or awaiting charges to be brought against him — See Motlhabi 1984: 28-31.

31 Motlhabi 1984: 32-33.

32 Motlhabi 1984: 33.

legal and administrative bureaucracy may be judged. The aims of the apartheid regime were effected in large part through the actions of the public administration. Put differently, the power of the apartheid bureaucracy was ultimately the power of its public administrators. Whether as functionaries acting as senior officials passing regulations and by laws, or as lowly officials exercising discretion under pass laws or security legislation, the bureaucratic public administration was in charge of giving life to the grand designs of its apartheid masters. Administrative law — the law that was meant to govern the actions of the public administration — was all too often rendered an ineffective check on the apartheid bureaucracy. A variety of reasons might be proffered to explain the ‘dismal science’ that was administrative law.³³ South African administrative law was founded on the common law — courts reviewed the exercise of public power based on their inherent jurisdiction; in so doing, they developed and applied judge-made rules of review with which the exercise of public power was to comply. A decision maker’s action could be set aside if he abused his discretion, failed to properly apply his mind, or failed to follow the rules of natural justice. But because the apartheid Parliament was supreme, the courts’ common law review powers were often ineffectual. Various strategies were adopted by the apartheid state to ensure that the public administration was given free reign, particularly in relation to laws governing racial segregation, national security, and a host of other apartheid legislation. Three examples suffice. First, Parliament often passed bland legislation which gave administrators wide power to make regulations which were considered to “be in the best interests of the country”. For example, the State President was empowered to declare by proclamation that a state of emergency existed; and to draft regulations which appeared to him to be necessary to maintain law and order. To this end regulations were promulgated allowing for arrest and detention without trial, seizure of newspapers, banning of organizations, and so on. Second, the enabling Act itself often conferred wide discretionary powers on officials to act upon their subjective discretion: for example, the *Internal Security Act* allowed a police officer, “who had reason to believe” that a person had committed or intended to commit the offence of terrorism, to detain the person without warrant for purposes of interrogation. Third, while the courts were able to review delegated legislation and administrative action on various common-law grounds, the apartheid Parliament would frequently oust the Court’s jurisdiction of review by passing ouster clauses. For example, section 29(6) of the *Internal Security Act* provided that “No court of law shall have the jurisdiction to pronounce upon the validity of any action taken in terms of this section”. It did not help that certain judges were executive-minded and therefore failed to properly scrutinize the actions of the apartheid bureaucracy.³⁴

33 For a readable account of the “dismal science” that was administrative law in the apartheid years see: Govender 2004: 81-7.

34 For but one example of the state of administrative law in the face of wide powers accorded to apartheid officials, see the much criticised decision of the Appellate Division in *Omar v Minister of Law and Order* 1987 (3) SA 859 (A); see also the academic criticism thereof by various authors in the section entitled “Focus on Omar” 1987 *South African Journal on Human Rights* 295-337 and the discussion in Devenish *et al* 2001: 297-299.

With the advent of the Constitution, the law pertaining to the South African public bureaucracy has been transformed. In the context of the administrative law, the Bill of Rights in the 1996 Constitution has had particularly profound consequences. In the words of a leading administrative lawyer, "Administrative law has been revolutionised by the Constitution".³⁵ For a start, the Bill of Rights has conferred several rights of importance on individuals *vis-à-vis* the public administration. In terms of section 34 everyone now has a right to have disputes settled by a court or other independent tribunal. An obvious implication of section 34 is that ouster clauses excluding the jurisdiction of the Courts in respect of the acts of the State bureaucracy would no longer be tolerated. So too, as we shall see further below, section 34 entitles a South African citizen to demand that a Court of law avoid bureaucratic delays in its decision-making process. Section 34 thus acts to ensure that a litigant receives access to a court to challenge any decision that affects her rights, and ensures that a decision emanates from a court of law in a reasonable period of time.

A further important right is section 32's guarantee of access to information held by Government. The import of the right has been expressed as follows by Jones J in *Phato v Attorney-General, Eastern Cape, Commissioner of the South African Police Services v Attorney-General, Eastern Cape*:³⁶

The purpose of [section 32] is to exclude the perpetuation of the old system of administration, a system in which it was possible for government to escape accountability by refusing to disclose information even if it had a bearing upon the exercise or protection of rights of the individual. This is the mischief it is designed to prevent ... Demonstrable fairness and openness promotes public confidence in the administration of public affairs generally. This confidence is one of the characteristics of the democratically governed society for which the Constitution strives.³⁷

Section 32's right of access to information has now been detailed in an Act of Parliament, namely, the *Promotion of Access to Information Act 2 of 2000*, an Act which in its preamble speaks to the Kafkaesque nature of the apartheid bureaucracy by acknowledging the "secretive and unresponsive culture" of the pre-democratic era and which asserts that one of the Act's objects is to "foster a culture of transparency and accountability in public and private bodies".

Furthermore, all persons by section 33 of the Bill of the Rights now have a right to just administrative action, a right which entitles "everyone" to "administrative action that is lawful, reasonable and procedurally fair" and which obliges the Government to provide written reasons to "everyone whose rights have been adversely affected by administrative action". The effect of section 33 of the Constitution cannot be underestimated. As the Constitutional Court made clear in *Pharmaceutical Manufacturers Association of SA: In re Ex parte President of the RSA*³⁸ the "Constitution ... was a legal watershed. It shifted constitutionalism,

35 Hoexter 2002: 4.

36 1995 (1) SA 799 (E). See also *Jeeva v Receiver of Revenue, Port Elizabeth* 1995 (2) SA 433 (SE).

37 815D-F.

38 2000 (2) SA 674 (CC).

and all aspects of public law, from the realm of common law to the prescripts of a written constitution which is the supreme law.”³⁹ According to the Court, the constitutionalisation of administrative law means that courts in the new South Africa, unlike their counterparts during the apartheid years, “no longer have to claim space and push boundaries to find means of controlling public power. That control is vested in them under the Constitution, which defines the role of the courts, their powers in relation to other arms of government and the constraints subject to which public power has to be exercised”.⁴⁰

The right to lawful, reasonable and procedurally fair administrative action under section 33 too has been given “effect to” by an elaborate Act of Parliament entitled the *Promotion of Administrative Justice Act* 3 of 2000. It is worth noting the emphasis of the Act, as expressed in its preamble, of being aimed at promoting an “efficient administration and good governance” and creating “a culture of accountability, openness and transparency in the public administration”.

The goal of an efficient administration that acts within the law has been furthered by the creation of a number of state institutions. The Public Protector is constitutionally obliged to be independent and impartial: by corollary the Constitution forbids any organ of state, state official or private person from interfering in the performance of the functions of the Public Protector.⁴¹ The jurisdiction of the Public Protector is very wide and includes the power to investigate, either on his own initiative or on receipt of a complaint, allegations of improper conduct in state affairs, in the public administration or in any sphere of government that is alleged or suspected to be improper or to result in impropriety or prejudice.⁴² The Public Protector thus holds the potential to be an effective means of guarding against inefficient or improper bureaucratic conduct. As a further guardian of the public in respect of State activity, an Auditor-General assists in ensuring the proper management and use of public money. The Auditor-General acts as an ombudsman under section 188 of the Constitution to ensure the proper auditing of and reporting on the accounts, financial statements and financial management of all national and provincial state departments and administrations, as well as municipalities.

All of these administrative rights and institutions are intended to work towards securing a range of standards in the public administration, standards which are clearly textualised in the Constitution itself. Section 195 of the Constitution commits the public administration to:

1. promoting and maintaining a high standard of professional ethics;
2. promoting the efficient, economic and effective use of resources;
3. development-orientated and accountable public administration;

39 Para 45.

40 Para 45.

41 Section 18(4). See also sections 11(1) and (4) of the *Public Protector Act* 23 of 1994 which make contravention of this requirement a criminal offence, and prescribe maximum penalties of one years' imprisonment, a fine of R40,000 or both a fine and imprisonment.

42 See in general section 6 of the *Public Protector Act* 23 of 1994.

4. fostering transparency by providing the public with timely, accessible and accurate information.

The net effect of all this is the following. The fundamental principles of administrative law that had been developed by the courts during the apartheid years in the exercise of their common law review powers are now entrenched (the right to reasons, and to administrative law that is fair and lawful). And the review power of the courts (or other tribunals) is now entrenched. Parliament is thus no longer supreme. It is the Constitution that is supreme. Certain consequences for the public administration flow from the Constitution's supremacy. The first is that participation in the process of governmental decision-making is encouraged. The second is that rational decision making is expected as opposed to naked power. The third is that the administration is obliged to act in an open, accountable and transparent manner. And the last is that the administration is accountable to the courts — 'a culture of justification' has been established. As the Constitutional Court has succinctly put it:

The Constitution is committed to establishing and maintaining an efficient, equitable and ethical public administration which respects fundamental rights and is accountable to the broader public. The importance of ensuring that the administration observes fundamental rights and acts both ethically and accountably should not be understated. In the past, the lives of the majority of South Africans were almost entirely governed by labyrinthine administrative regulations which, amongst other things, prohibited freedom of movement, controlled access to housing, education and jobs and which were implemented by a bureaucracy hostile to fundamental rights or accountability. The new Constitution envisages the role and obligations of government quite differently.⁴³

4. The courts and the effort to combat bureaucracy

Notwithstanding the Constitutional and Legislative commitments to non-bureaucratic behaviour by South African government officials, South Africa has not been immune from examples of official bungling and high-handed decision-making and obstruction. This is perhaps to be expected, given immense socio-economic challenges faced by the administration, and the political and racial history that is South Africa's burden. While it might be difficult to suggest that the exercise or abuse of administrative power has reached the same consistently Kafkaesque levels witnessed under apartheid, there are disturbing examples of administrative failure by the new South African state, particularly in relation to social assistance cases, where victims have suffered bureaucratic delinquency that is certainly Kafkaesque in nature.

In this section we briefly outline some of the more egregious examples of latter-day delinquency and highlight the way in which Courts have refused to countenance bureaucratic bungling. We focus on examples of Court intervention after 1994 where South African judges have attempted to curb Kafkaesque

43 See *President of the Republic of South Africa and Others v South African Rugby Football Union and Others* 2000 (1) SA 1 (CC) para 133.

tendencies within a faceless and aloof bureaucracy, in favour of open, accountable and justified decision-making on the part of governmental authorities.

4.1 Judicial creativity in the face of a “delinquent state”⁴⁴

Despite South Africa’s constitutional commitments to open and participatory democracy, immense problems exist in the system of social assistance. As Clive Plasket has pointed out:

One of the major causes of these problems is the fact that the system of social assistance was fragmented by apartheid, so that after 27 April 1994 the new national and provincial governments had to integrate these different systems into one system for each of the nine provinces. The hardships that this process has visited on many poor people, as well as corruption, gross inefficiency and an often appallingly callous attitude on the part of officials to those who require social assistance, has meant that social assistance issues have become something of a focal point for those lawyers and human rights activists who are interested in seeing that proper effect is given to the socio-economic rights that form an important part of the Bill of Rights.⁴⁵

The problem in some provinces, particularly the Eastern Cape Province, has been a grossly inefficient bureaucracy “staffed by many who appear to be callously indifferent to the suffering of those who qualify for social assistance”.⁴⁶ This slothfulness and indolence has drawn withering comments by judicial officers faced with cases brought by public interest law firms against government department. For instance, the Supreme Court of Appeal, per Cameron JA, has described the Department’s inefficiency in the following terms in *Ngxuza v Permanent Secretary, Department of Welfare, Eastern Cape*:⁴⁷

The papers before us recount a pitiable saga of correspondence, meetings, calls, appeals, entreaties, demands and pleas by public interest organisations, advice offices, district surgeons, public health and welfare organisations and branches of the African National Congress itself, which is the governing party of the Eastern Cape. The Legal Resources Centre played a central part in co-ordinating these entreaties and in the negotiations that resulted from them. But their efforts were unavailing. The response of the provincial authorities, as reflected in the papers included unfulfilled undertakings, broken promises, missed meetings, administrative buck-passing, manifest lack of capacity and at times gross ineptitude.

To the learned Judge of Appeal, the conduct of the Eastern Cape government was “contradictory, cynical, expedient and obstructionist ... as though it were at war with its own citizens”.⁴⁸

44 See generally Rycroft & Bellengere 2004: 321.

45 Plasket 2003: 495. See also, more generally, De Villiers 2002.

46 Plasket 2003: 521.

47 2001 (4) SA 1184 (SCA).

48 Para 15.

As a result of this “persistent and huge problem with the administration of social grants”, Conradie J has had cause, in another matter dealing with social assistance, to explain that “the courts have become the primary mechanisms for ensuring accountability in the public administration of social grants”.⁴⁹ Accountability of the public administration has been achieved in two ways. The first step has involved citing not only the political head of the department in his or her representative capacity as a respondent, but also the individual functionary to whom the particular responsibility has been delegated under the enabling legislation. The second development has been to hold that the political heads of departments and other public functionaries might be declared in contempt of court where judgment debts sounding in money against the State were not paid.

These two developments in the field of social assistance are obviously not limited to social welfare matters but are applicable in any case in which a Court is confronted with unduly bureaucratic forms of behaviour that manifest in the public administration. These developments go hand in hand with a third measure, and one which is generally available to a Court when confronted with any form of recalcitrant or incompetent official behaviour. This development pertains to the manner in which the Courts have been willing to criticise bureaucratic behaviour, and, where necessary, police the response by officials to the orders issued by judges. The policing role of courts has been achieved through innovative court orders. Judges have crafted supervisory interdicts which have ensured that officials are obliged to report back to Courts on their efforts to comply with the order, thereby allowing the Courts to exercise a monitoring role over the administration in cases that affect individual rights. Supervisory interdicts have received endorsement by the Constitutional Court. In this respect the Constitutional Court said the following in *Minister of Health v Treatment Action Campaign (No 2)*:⁵⁰

The power to grant mandatory relief includes the power where it is appropriate to exercise some supervisory jurisdiction to ensure that the order is implemented. In *Pretoria City Council v Walker*, Langa DP said:

‘[T]he respondent could, for instance, have applied to an appropriate court for a declaration of rights or a mandamus in order to vindicate the breach of his s 8 right. By means of such an order the council could have been compelled to take appropriate steps as soon as possible to eliminate the unfair differentiation and to report back to the Court in question. The Court would then have been in a position to give such further ancillary orders or directions as might have been necessary to ensure the proper execution of its order.’

This Court has said on other occasions that it is also within the power of Courts to make a mandatory order against an organ of State and

49 Per Froneman J in *Nontembiso Norah Kate v The Member of the Executive Council for the Department of Welfare, Eastern Cape*, Case No, 1907/03, South Eastern Cape Local Division, unreported.

50 2002 (5) SA 721 (CC). See also para 5 of the Court's order in *Minister of Home Affairs v National Institute for Crime Prevention and the Re-integration of Offenders (NICRO)* 2004 (5) BCLR 445 (CC) para 80.

has done so itself. For instance, in the Dawood case, a mandamus was issued directing the Director-General of Home Affairs and immigration officials to exercise the discretion conferred upon them in a manner that took account of the constitutional rights involved. In the August case a mandatory order, coupled with an injunction to submit a detailed plan for public scrutiny, was issued by this Court against an organ of State — the Electoral Commission.⁵¹

This power afforded to judges to supervise their Court orders has been an important tool by which bureaucratic bungling or intransigence has come to be policed. Two examples suffice.

The first is yet another decision emanating from the Eastern Cape where in *The State and Mfizeko Zuba and 23 Similar Cases*⁵² a Full Bench of the High Court faced a review of several cases where juvenile offenders had been sentenced to a term of incarceration in a reform school. The problem in the case stems from the fact that there were no reform schools built in the Eastern Cape, and accordingly, because of problems faced in placing juveniles in reform schools outside of the Province, juveniles spent long periods of time in places of safety, prisons or police cells awaiting the imposition of their sentence. The Government's response was laconic: it stated that the Department of Education in the Province intended to establish a reform school but that it would be a long process requiring consultations with sister departments and proper planning. Notwithstanding an earlier order of the Court directing the Heads of Department of Education and Social Development in the Eastern Cape to submit reports on the steps they had taken to ensure that the problem was remedied, an inadequate report was received from the Department of Education, and the Department of Social Development chose simply to ignore the Court order.

In *Zuba* the Court, per Plasket J, condemned the inadequate response by the Departments to the plight of the juveniles. Finding that in proper cases new approaches to remedies are called for because the usual remedies (such as the declarator, prohibitory interdict, the mandamus and award of damages) "may not be capable of remedying, or appropriate to remedy, systemic failures or the inadequate compliance with constitutional obligations",⁵³ Plasket J ordered a structural or supervisory interdict. The interdict obliged the submission

51 *Minister of Health v Treatment Action Campaign (No 2)* paras 104-105, footnotes omitted. The Constitutional Court has treaded warily in regard to supervisory orders and, while accepting that they might be used in appropriate cases, referred in the *Treatment Action Campaign* Case to the decision of the Nova Scotia Court of Appeal in *Doucet-Boudreau v Nova Scotia (Department of Education) Doucet-Boudreau v Nova Scotia (Minister of Education)* (2001) 203 DLR (4th) 128 as if to underline its reticence. The Court noted that "Canadian courts have also tended to be wary of using the structural injunction" (para 110). That decision has since been overruled by the Supreme Court of Canada in *Doucet-Boudreau v Nova Scotia (Minister of Education)* [2003] 3 SCR 3. The Constitutional Court has in any event seen fit to move beyond its cautious approach. See the discussion below of *Sibiya*.

52 EDC CA 40/2003 (2 October 2003).

53 Para 37.

of quarterly reports until the completion of the project from the *Director: Special Needs in Education* in the Department of Education on the progress achieved towards the conversion of a particular school into a youth care facility in the form of quarterly reports that had to be submitted to the Court until the completion of the project. These reports were to be submitted to the Judge President of the Court, the Inspecting Judge of Prisons, the Child Justice Project and the Centre for Child Law at the University of Pretoria and the Director of Legal Resources Centre, Grahamstown. The obligation to file the reports was to persist until the Director is released from the obligation in writing by the Judge President. In addition, the *Superintendent-General of the Department of Education* in the Province was also directed to submit quarterly reports, until completion of the tasks, setting out the progress achieved towards the establishment of a reform school in the Eastern Cape and the development of a protocol to be followed when designating and transferring juvenile offenders who have been sentenced to reform school. The competency to make such an order, said Plasket J, was derived from the Constitution itself. In the words of the learned judge: "judicial innovation may be necessary to properly and effectively remedy constitutional infractions by fashioning new remedies."⁵⁴

The second case involves a recent decision of the Constitutional Court delivered on 25 May 2005 in *Sibiya and others v Director of Public Prosecutions: Johannesburg High Court*.⁵⁵ The case involves the rather Kafkaesque scenario of persons who had been sentenced to capital punishment under an old-order provision of the South African *Criminal Procedure Act*⁵⁶ and then, following the Constitutional Court's decision in 1995 in *S v Makwanyane*⁵⁷ declaring the death penalty to be unconstitutional, waited ten years in vein for the Government to commute their sentences of death. The Court, clearly irritated by the delay, emphasised that the process for the substitution of the death sentence had been unsatisfactory and had taken far too long. The Court ordered the Government to take all the necessary steps to replace all death sentences as soon as possible. In a move signalling its displeasure with the bureaucratic delays that had already been occasioned, the Court decided to order its most strictly tailored supervisory interdict to date. Yacoob J stated that:

This court has the jurisdiction to issue a mandamus in appropriate circumstances and to exercise supervisory jurisdiction over the process of the execution of its order. It is appropriate in this case for this to be done. The question of a supervisory order was raised with counsel at the hearing of the case. None raised any objection to a supervisory order.⁵⁸

In the circumstances the Constitutional Court ordered the Government "to take all the steps that are necessary to ensure that all sentences of death imposed before the 5 June 1995 are set aside and replaced by an appropriate

54 Para 39.

55 Under case number 45/04.

56 Act 51 of 1977: section 277.

57 *S v Makwanyane* 1995 (3) SA 391 (CC).

58 Para 62 with reliance on *Minister of Health and Others v Treatment Action Campaign and Others* (2) 2002 (5) SA 721 (CC); 2002 (10) BCLR 1075 (CC) paras 104-107.

alternative sentence ... as soon as possible” and to “report to this Court concerning all the steps taken to comply with ... this order by not later than 15 August 2005”. The Court indicated what it expected by way of content of the report and made it clear that it would be willing to continue supervising its order until such time as there was sufficient Government compliance by warning that “[t]his Court will issue further directions in relation to supervision of the execution ... of this order as circumstances may require.”⁵⁹

4.2 Dilatory judicial behaviour: the Supreme Court of Appeal’s judgment in the *Pharmacies* case

We have already pointed out that one of the changes brought about to the public administration by the Constitution is through the entrenchment of a right of access to court in section 34. Not only does section 34 ensure that ouster clauses are inimical to the new South African legal order, the guarantee of access to court in section 34 also demands the highest judicial standards of those who are tasked with acting as judges and magistrates in the judicial arm of government. Any hint of bureaucratic delay or obstructionism on the part of the judiciary would be inimical not only to the rule of law in South Africa, but would now also probably fall foul of a litigant’s right of access to court. This is made clear by the recent decision of the Supreme Court of Appeal in *Pharmaceutical Society of South Africa v Minister of Health; New Clicks South Africa (Pty) Limited v Minister of Health and Another*⁶⁰ where the Court elaborated on the duty of Courts to ensure that they provided decisions within a reasonable period of time consistent with a litigant’s right of access to court.

The applicants had approached the SCA in circumstance where a full bench of the Cape High Court had failed for a period of three months to hand down its judgment refusing or granting leave to appeal in a case of national importance⁶¹ where all the parties had agreed that the matter was urgent and where one of the judges (the Deputy Judge President) of the full bench had delivered a reasoned dissenting judgment on the merits (as good an indication as any that there was a possibility that a court other than the court of first instance could come to a different decision to that of the majority judges).

The Supreme Court of Appeal held, with reference to sections 20(1) and 20(4)(b) of the *Supreme Court Act* 59 of 1959, that in civil proceedings emanating

59 As it turns out, the sting in the tail of the Court’s supervisory interdict proved necessary: by the return date the Government had failed to properly commute all the sentences and requested an extension of time. At the time of writing the case unfortunately drags on, but at least the Constitutional Court’s order has ensured that it will continue to play a monitoring role as each step of the drama unfolds.

60 2005 (3) SA 238 (SCA).

61 The case dealt with the lawfulness of regulations promulgated by the Minister of Health under section 22 G of the *Medicines and Related Substances Act* 101 of 1965. Amongst other things, the regulations determined a maximum dispensing fee for pharmacists and according to the applicants threatened the viability of pharmacies with consequential effects on the right of access to health care for the public under section 27 of the Constitution.

from high courts, everyone had a right of appeal against judgments or orders. This right was not absolute. Leave to appeal was a condition for exercising the right to an appeal.⁶² The court, whose judgment was sought to be appealed, first had to be approached for leave. If that was granted, the condition was fulfilled. If it was refused, the party wishing to appeal had a right to petition the SCA for leave. However, although a ruling by the court below was a jurisdictional fact, this did not mean that the filing of an appeal or an application for leave with the SCA was a nullity simply because the court below had not yet given its ruling.⁶³ According to the SCA, the *Supreme Court Act* now had to be read in the light of the Constitution.⁶⁴ More particularly, section 39 of the Constitution enjoined courts, when interpreting the Bill of Rights, to promote the values underlying an open and democratic society based on human dignity, equality and freedom; and when interpreting any legislation, to promote the spirit, purpose and objects of the Bill of Rights. While the Bill of Rights did not explicitly guarantee a right of appeal in civil proceedings, section 34 did entrench a general right to a 'fair' hearing.⁶⁵ Applied to the provisions of the *Supreme Court Act*, the Supreme Court of Appeal held that this meant that the proceedings there described had to be procedurally 'fair'. In the words of the Supreme Court of Appeal (per a unanimous bench):

The Supreme Court Act assumes that the judicial system will operate properly and that a ruling of either aye or nay will follow within a reasonable time. The Act — not surprisingly — does not deal with the situation where there is neither and a party's right to litigate further is frustrated or obstructed. The failure of a lower court to give a ruling within a reasonable time interferes with the process of this court and frustrates the right of an applicant to apply to this court for leave. Inexplicable inaction makes the right to apply for leave from this court illusory. This court has a constitutional duty to protect its processes and to ensure that parties, who in principle have the right to approach it, should not be prevented by an unreasonable delay by a lower court. In appropriate circumstances, where there is deliberate obstructionism on the part of a court of first instance or sheer laxity or unjustifiable or inexplicable inaction, or some ulterior motive, this court may be compelled, in the spirit of the Constitution and the obligation to do justice, to entertain an application of the kind presently before us.⁶⁶

In the same judgment, the Supreme Court of Appeal expressly disapproved of dicta by Patel J in the High Court decision in *Botha v White*⁶⁷ in which an attorney was censured for 'attempting to precipitate' delivery of reasons for judgment. The court held that those who believed that requests for 'hurried justice' should be met with judicial displeasure, castigation and the severest censure and that any demand for quick rendition of reserved judgments was tantamount to interference with the independence of judicial office and disrespect

62 Para 22.

63 Para 22.

64 Para 29.

65 Para 30.

66 Para 31.

67 2004 (3) SA 184 (T).

for the judge concerned, were 'seriously mistaken'.⁶⁸ According to the Supreme Court of Appeal parties are entitled to enquire about the progress of their cases and, if they do not receive an answer or if the answer is unsatisfactory, they are entitled to complain.

The judicial cloak is not an impregnable shield providing immunity against criticism or reproach. Delays are frustrating and disillusioning and create the impression that judges are imperious. . . . It is in fact judicial delay rather than complaints about it that are a threat to judicial independence because delays destroy the public confidence in the judiciary.⁶⁹

The decision stands as an important example of the Constitution shielding litigants from bureaucratic processes that delay or frustrate the achievement of justice before the Courts. Aside from the Supreme Court of Appeal's invocation of section 34 of the Bill of Rights to proclaim that proceedings must be procedurally fair, the decision affirms that judges have an ethical duty to give judgment or any ruling in a case promptly and without undue delay and litigants are entitled to judgment as soon as reasonably possible. Otherwise the most quoted legal aphorism, namely that 'justice delayed is justice denied', would become a mere platitude. Compelling parties to await judgment for an indefinitely extended period would clearly weaken public confidence in the whole judicial process.⁷⁰ Left unchecked, it would be ultimately subversive of the rule of law.⁷¹

5. Conclusion

South Africa has come a long way from the nightmare apartheid years, during which the Kafkaesque nature of its legal system acted as a prop for destructive, racist and demeaning policies. With one of the world's most progressive Constitutions in place, and independent judges policing the public administration, South African citizens are afforded a shield against bureaucratic practices that undermine rights and devalue the dignity of persons. While South Africa has awakened from the nightmare, certain Kafkaesque tendencies remain entrenched

68 *Pharmaceutical Society of South Africa v Minister of Health; New Clicks South Africa (Pty) Limited v Minister of Health and Another* para 39.

69 *Pharmaceutical Society of South Africa v Minister of Health; New Clicks South Africa (Pty) Limited v Minister of Health and Another* para 39.

70 *Pharmaceutical Society of South Africa v Minister of Health; New Clicks South Africa (Pty) Limited v Minister of Health and Another* para 39. Note that the Constitutional Court has recently confirmed the Supreme Court of Appeal's decision regarding the unreasonable delay by Judge President Ngoope and Judge Yekiso (the majority) in deciding the leave to appeal application. See the decision of the Constitutional Court in *Minister of Health and Another v New Clicks and Others*, Case No. CCT 59/04, 30 September 2005. See in particular the decision by Chaskalson CJ paras 68-82.

71 Note that the Judge President of the Transvaal Provincial Division has issued the following practice direction (reported at 2004 (6) SA 84 (T)): 'An enquiry by an attorney wanting to know when a reserved judgment will be delivered is to be directed to the Deputy Judge President of each Division. In the case of an unrepresented party such request shall be similarly directed.'

within the state bureaucracy. Bureaucratic bungling and delay is perhaps to be expected in a state such as South Africa, which has inherited a skewed social and economic system, needing massive correction and requiring enormous energy and dedication on the part of public administrators. That is not to say, however, that gross bureaucratic bungling has been condoned or swept under the carpet during the first decade of democracy. As we have attempted to demonstrate, the record of South African courts during this period indicates a welcome change from the apartheid past. While it is widely acknowledged that the apartheid judiciary failed to protect individuals against the excesses of state power, under the new Constitution judges have been empowered to regulate and control the public administration, in order to ensure that the rights of individuals are meaningfully protected. Where — as was apparent from the facts of the social assistance cases discussed above — the public administration has exposed citizens once again to the nightmare of bureaucratic delay, obfuscation and callousness reminiscent of the apartheid past, the Courts have demanded higher standards of the executive. In the process, the courts have exposed and shamed bureaucrats who have failed the citizenry they were elected to serve. As Plasket points out:

The cases have shown that the courts are capable of holding officials to the foundational principle of legality and the equally important rules of procedural fairness. ... More than that, however, one finds in the cases ... an increasingly open articulation of the culture of justification that is also at the heart of the Constitution. What emerges with particular clarity is that those who have approached the court for assistance have been viewed as holders of rights, and fundamental rights at that, and not merely as supplicants seeking privileges that may be granted or withheld at the whim of a faceless bureaucracy.⁷²

The judges have also been willing to craft innovative remedies and to grant supervisory orders in the battle against slothful, indolent and obtuse bureaucratic behaviour. Superior court judges have been willing not only to cross swords with the executive branch, but where appropriate — as in the *Pharmacies* case — have been bold enough to condemn courts below them for unnecessary delays in the administration of justice.

In short, the necessary legal structures, principles and attitudes are in place to ensure that Kafkaesque behaviour is kept to a minimum in post-apartheid South Africa. Where such behaviour manifests itself, the Courts are willing and able to act firmly to uphold the rights of individuals, reminding those employed within the public administration of their constitutional commitment to provide “efficient administration and good governance”, as well as to promote a “culture of accountability, openness and transparency in the public administration or in the exercise of a public power or the performance of a public function”.

72 Plasket 2003: 523.

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