IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)

Case No: 24087/15

In the matter between:

SONKE GENDER JUSTICE	Applicant
and	
THE GOVERNMENT OF THE REPUBLIC OF SOUTH AFRICA	First Respondent
HEAD OF CENTRE	Second Respondent
POLLSMOOR REMAND DETENTION FACILITY	

REASONS DELIVERED THURSDAY, 23 FEBRUARY 2017

SALDANHA J:

[1] One of the many challenges faced by the new democratic order in 1994 was the notoriously overcrowded and inhumane conditions that prevailed in several of the correctional facilities throughout the country. In recognition of and consistent with its foundational values the new democratic state boldly entrenched in the new constitution, *"that everyone who is detained, including sentenced prisoners has the right…. to conditions of detention that are consistent with human dignity, including at least exercise and the provision, at state expense, of adequate accommodation, nutrition, reading material and medical treatment…"* and *"not to be treated or punished in a cruel, inhumane or degrading way."* These rights as well as all the other rights enshrined in the Constitution heralded a dramatic break with the past and were premised on the immutable principle of human dignity and in respect of awaiting trial detainees, their right

to the presumption of innocence. These rights informed the very protections enacted by the state when it legislated a new Correctional Services Act No 111 of 1998 (the Act). It set as its core purpose and object the establishment of a correctional system that contributed to the maintenance and protection of a just, peaceful, and safe society by *"... detaining all inmates in safe custody while ensuring their human dignity."*

[2] This application brought almost two decades into the constitutional democracy attempts to address the conditions at the Pollsmoor Remand Detention Facility (RDF) in Cape Town, which was described by a judge of the Constitutional Court after inspecting the facility in April 2015[1] as *"appalling."* A further inspection almost a year later in April 2016, by the Public Services Commission in response to the findings by Judge Edwin Cameron's records that *"The inspection found that, generally the conditions in the cells were alarming and not fit for human habitation."*[2] The second applicant, who notwithstanding his opposition to the application, admitted as late as 29 November 2016, that for various reasons, the Western Cape Department of Correctional Services considered the situation to be *"... a serious crisis..." and* acknowledged its inability to comply with various provisions of the Correctional Services Act. The first applicant, The Government of the Republic of South Africa, inexplicably elected not to oppose the application and maintained a deafening silence in the proceedings.

[3] On the 5th December 2016, this court granted the following order against both respondents:

---

[1] Justice Edwin Cameron and a team of law clerks from the Constitutional Court conducted a visit of The Pollsmoor Correctional Facility on the 23rd April 2015 in term of Section 99 the Correctional Services Act 111 of 1998.
[2] The Public Service Commission in conjunction with the Judicial Inspectorate for Correctional Services conducted an inspection of the Pollsmoor RDF in April 2016. The Judicial Inspectorate for Correctional Services is established and appointed in terms of Section 85 and 86 of the Act.

"1 It is declared that the First Respondent has failed to provide the inmates of Pollsmoor RDF with exercise, nutrition, accommodation, ablution facilities and health care services of a standard that complies with the requirements of the Correctional Services Act 111 of 1998, and that such failure is inconsistent with the Constitution.

2 The First Respondent is to show cause, at 10h00 on Wednesday 21 December 2016, why the Court should not order it forthwith to reduce the number of persons detained at the Pollsmoor Remand Detention Facility to not more than 120% of the current approved accommodation number. The First Respondent must serve and file any affidavits which it wishes in this regard by no later than Wednesday 14 December 2016, and the Applicant may answer by no later than midday on Monday 19 December 2016.

3 The First Respondent is ordered to develop a comprehensive plan, including timeframes for its implementation, which addresses and will put an end to:

3.1 the deficiencies in the provision of exercise, nutrition, accommodation, ablution facilities and healthcare services to the inmates of Pollsmoor RDF; and

3.2 the deficiencies identified in Prison Visit Reports by Justice Cameron, dated 27 July 2015, and 13 August 2015, (the Cameron Report).

4 The First Respondent is ordered by 31 January 2017, to file the plan and a report on affidavit to this Court, setting out:

4.1 What it has done to bring an end to the unlawful conditions described above;

4.2 *What it has done to respond to each of the recommendations in the Cameron Report;*

4.3 *What further steps it will take to bring an end to the unlawful conditions and when it will take each such further step; and*

4.4 *What further steps it will take to respond to each of the recommendations of the Cameron Report and when it will take each such further step,*

and within the same period to provide the Applicant with a copy of that report.

5 *The Applicant may serve and file an answer to the First Respondent's report by not later than 28 February 2017.*

6 *The First Respondent may serve and file a reply to the Applicant's answer by not later than 14 March 2017.*

7 *The Second Respondent is ordered by 31 January 2017, to submit to this Court, and to make available to the Applicant, the Area Manager's findings and reports from the weekly inspections of cell accommodation required to be performed to ensure that every cell conforms to the minimum requirements for the incarceration of prisoners, for the period December 2012 to date.*

8 *The Respondents are ordered jointly and severally, the one paying the other to be absolved, to pay the costs of this application, including the costs of two counsel where so employed."*

[4] The rule *nisi* in paragraph 2 of the order was not sought as part of the relief by the applicant and arose during the course of the proceedings on the 5th December 2016, and will be dealt with separately in this judgment.

The Parties

[5] The applicant is a not for profit Section 21 registered company. It was established in 2006, to promote the development of a just and democratic society in South Africa through the strengthening of government and civil society. It has amongst other activities also worked in correction facilities where it focused on the training, counseling and advocacy in respect of disease prevention, gender based discrimination, victimization, abuse and violence. It has engaged with correctional officials, inmates (both sentenced inmates and remand detainees) and has monitored the implementation of government policy in correctional centres, conducted awareness campaigns amongst civil society organizations, engages in research and advocacy on penal reforms. The applicant's research and advocacy work also involves addressing the causes of poor health conditions in correctional centers as well as the effects of overcrowding. The deponent to the founding affidavit on behalf of the applicant, its executive director Mr Dean Peacock described himself as an activist, academic, and expert advisor on issues relating to amongst others HIV AIDS and social justice. He claimed to have extensive experience in, and knowledge of prison related issues particular in regard to conditions of detention and prison reform. He worked directly with inmates and has also published his research about the nature of sexual and gender based violence in prison. He has conceptualized and overseen all of the applicants work in South African prisons since 2007.

[6] The first respondent is The Government of the Republic of South Africa who bears constitutional and statutory responsibilities for the safe custody of inmates in conditions consistent with the law. The applicant claimed that the multiple organs of government are constitutionally required to act together in a coordinated fashion to carry out the government's responsibilities. The government's statutory obligations include that of the responsibilities of the Minister of Justice and Correctional Services (and the National Department of Correctional Service) in terms of the Correctional Services Act 111 of 1998, "the Act"). The second respondent is the Head of Centre, Pollsmoor Remand Detention Facility who at the time of the institution of the application was occupied by Mr Cecil Jacobs in an acting capacity.

Standing

[7] The application was brought in terms of section 38 of the Constitution of South Africa, and in particular, section 38(a),[3] in its own interest as an entity that works to improve the environment in correctional services and conditions of detention and who has taken an active interest in such conditions at the Pollsmoor RDF.

[8] The applicant also brought the application in terms of section 38(b)[4], in the interest of the class of detained persons within the correctional services system who cannot act in their own name and who were affected by the conditions of detention at Pollsmoor, and thirdly, in terms of section 38(d),[5] in the public interest. The applicant contended that it was in the public interest that the detention facilities at the Pollsmoor RDF are constitutionally compliant and that the rights, freedoms, and dignity of detained persons are protected. The applicant pointed out that awaiting trial inmates were a transient

---

[3] *"(a) anyone acting in their own interest;"*
[4] *"(b) anyone acting on behalf of another person who cannot act in their own name;"*
[5] *"(d) anyone acting in the public interest; …"*

population and that if the application was brought by any particular detainee it could be subject to the risk of being rendered moot by relocation to another facility or be granted bail and thus released. The applicant contended further that the constitutional and statutory breaches affected the rights of Pollsmoor RDF detainees' generally and not just particular individuals. Although the applicant gathered and tendered the evidence from some detainees at Pollsmoor RDF in support of the application, the application was primarily brought by the applicant rather than any individual detainee.

The opposition to the application, or rather, the lack thereof

[9] The first respondent, notwithstanding the seriousness of the relief sought by the applicants against it, elected not to oppose the application. The second respondent against whom only the relief in paragraph 4 of the Notice of Motion was sought opposed the application in its entirety and claimed that he was authorized to do so by his seniors to whom he was accountable to in the Department of Correctional Services, and in particular the National and Provincial Commissioners of Correctional Services. The second respondent, referred though, at various instances in his answering affidavits to be acting as the *"respondents."* Counsel for the second respondent at the hearing emphatically stated, that the second respondent had not sought to represent, or in any way oppose the application on behalf of the first respondent. The second respondent raised various points *in limine* which he contended were fatal to the application and as correctly noted by the applicant, both the respondents had simply failed to put up any substantive defence to the relief sought against them. The second respondent had literally at the eleventh hour before the hearing of the application sought leave to file a supplementary affidavit and at the same time sought a postponement of the application which he claimed was to give the respondents *"sufficient time to comply with various recommendations made by Cameron J in his report."*

[10] It is perhaps necessary to set out a brief roadmap of the proceedings in order to appreciate the conduct of the respondents in the matter.

The proceedings

[11] The application was instituted on the 11th December 2015, and the Notice of Motion and supporting affidavits and annexures were filed on the same day on the first respondent care of the state attorney as well as on the Head of Centre at the Pollsmoor Remand Detention Facility at the Pollsmoor Management Area. On the 18th March 2016, the state attorney filed a Notice to Oppose on behalf of the second respondent and his answering affidavit. The applicants filed a notice in terms of Rule 16A on the Registrar of the High Court on the same day which was likewise served on both the first and second respondents through the state attorney. On the 5th May 2016, the applicant filed a replying affidavit and on the same day served it on the state attorney in respect of both first and second respondents. There was no response to the Rule 16A notice. On the 10th November 2016, an order was obtained from the Judge President in which the matter was allocated for hearing on the 5 December 2016, in the Fourth Division. The order provided for the filing of heads of argument by the 21st November 2016, by the applicant and by the second respondent on the 28th November 2016.

[12] The applicant's heads of argument was filed on the 22nd November 2016. On the 29th November 2016, the second respondent filed a *"Notice in terms of Rule 6(5)(e) and Rule 27" in which he sought leave to file the supplementary affidavit and the request for a postponement.*

[13] The matter was heard on the 5th December 2016, and the relief sought by the applicant was granted together with the rule *nisi* in paragraph 2 of the order.

[14] The Minister of Justice and Correctional Services filed an affidavit in response to the rule *nisi* supported by affidavits by the second respondent and the National as well as the Regional Commissioners of Correctional Services. The rule *nisi* was heard on return date, 21 December 2016, *and* was discharged. An order in substitution of the rule nisi was taken by agreement between the Minister of Justice and Correctional Services and the applicant.

The *in limine* challenges

Vagueness

[15] The second respondent contended that the applicant had failed to properly describe the first respondent inasmuch as section 40 of the Constitution defines *"Government of the Republic"* as

(i) *"in the republic government is constituted as national, provincial and local spheres of government which are distinctive inter dependent and inter related."*

[16] The second respondent claimed that although, he was authorized to depose to the answering affidavit on behalf of *"the respondents"* he could not, and did not represent the first respondent in these proceedings, nor could he take any decision on behalf of the first respondent. He claimed that the applicant had failed to properly identify whether the reference to first respondent was the national, provincial, or local government. He also claimed that the applicant had moreover, failed to properly identity or at all, the organs of government which it alleged were responsible for carrying out the constitutional responsibilities in respect of correctional services. He contended therefore, that the

application was *"vague and embarrassing"* and on that basis alone it ought to be dismissed with costs. This point was neither pursued, nor elaborated upon by counsel for the second respondent in either the heads of argument, or at the hearing of the application. Counsel for the applicant pointed out that there was ample precedent for the citation of the Government of the Republic of South Africa as respondent[6] and more importantly, it was the national government that **bore** constitutional and statutory responsibility in respect of the issues raised in the application and in the relief sought. Moreover, it was common cause that Correctional Services was a matter of national competence, and therefore no responsibilities devolved upon either, provincial, or local government level. In my view, the second respondent's complaint of vagueness was without any substance and merit.

Non-joinder

[17] The second respondent contended that inasmuch as the applicant had recognized that the relief it sought *"... requires the involvement of various organs of government"* and inter alia, that the report of Justice Cameron referred to the involvement of *"Parliament that must take action to alleviate inhumane conditions at Pollsmoor by allocating more funds,"* and that the applicant referred to and placed reliance on reports of various other Judges who conducted visits to the Pollsmoor RDF in terms of section 99 (1) of the Correctional Services Act[7]. The Department of Public

---

[6] The applicant referred to an *electronic Jutastat research of the South African Law Reports that revealed 41 cases in which the Government was sued for the enforcement of constitutional rights. See for example Coetzee v Government of the Republic of South Africa; Matiso and others v Commanding Officer, Port Elizabeth Prison, and other 1995 (4) SA 631 (CC) (the right to personal freedom- imprisonment for debt); Florence v Government of the Republic of South Africa 2014 (6) SA 456 (CC) (the right to land restitution); Western Cape Forum for Intellectually Disability v Government of the Republic of South Africa and another 2011 (5) SA 87 (WCC) (the right of intellectually disabled children to education); Government of the Republic of South Africa and others v Grootboom and others 2001 (1) SA 46 (CC) (the right of access to housing).*

[7] *"**99 Access to correctional centres***

(1) A judge of the Constitutional Court, Supreme Court of Appeal or High Court, and a magistrate within his or her area of jurisdiction, may visit a correctional centre at any time."

Works was also required to co-operate with the Department of Correctional Services to address the infra-structural problems identified at the Pollsmoor RDF that the applicant had failed to join in the proceedings all such parties that had an interest in, and were implicated in the relief sought. In response, the applicant pointed out that on a rough count approximately twenty different government and non-governmental institutions would have had to be joined as respondents to the application on the contention by the second respondent. Counsel for the applicant correctly submitted that such claim by the second respondent was misconceived inasmuch as it was the first respondent that was cited and sued as the institution that bore the relevant constitutional and statutory duties. The applicant also pointed out that the very complaint of the second respondent demonstrated that in some cases it was more appropriate to sue the Government rather than each department of state which had been allocated some of the functional responsibility for fulfilling the rights in question. In my view, the second respondent's complaint of the non-joinder of the plethora of institutions and persons was likewise without merit.

INADMISSIBLE HEARSAY EVIDENCE

The reports of the Justices' of the Constitutional Court

[18] Notwithstanding that the second respondent himself referred elaborately and sought to rely in the introductory paragraphs of his answering affidavit on remarks made by Justices Froneman and Van Der Westhuizen, erstwhile judges of the Constitutional Court, in their reports on earlier inspections by them of the Pollsmoor RDF, the applicant complained that none of the Justices including Justice Cameron had been joined as co-respondents in the matter, and that inasmuch as the content of their reports were hearsay, any reference and reliance on the reports by the applicant should be struck out as inadmissible hearsay.

[19] In its replying papers, the applicant submitted that the reports of the justices were admissible evidence and that a substantial part of the reports consisted of their first hand observations. The reports were moreover public documents and were made by public officers in the exercise of a public duty. The reports were moreover, intended for public use to promote lawfulness and accountability and besides the fact that the public had the right of access to the reports, which were in any event, widely available on the website of the Constitutional Court.

[20] The applicant submitted that to the extent that the reports were technically hearsay, it was in the interests of justice that they be admitted by the court as evidence in terms of section 3(1)(c) of the Law of Evidence Amendment Act 45 of 1998. In that regard the applicant submitted that;

(i) Given the nature of the proceedings which was to enforce the rights of some of the most vulnerable members of society (detainees) who did not have ready access to resources necessary to enable them to complain to a court of the violation of their rights.

(ii) The nature of the evidence being reports by judges of the highest court in South Africa on their observations on official visits to the correctional facility.

(iii) The purposes for which the evidence was tendered, namely to demonstrate a generalized and systemic illegality which was consistent with the breaches alleged by other individual witnesses.

(iv) The probative value of the evidence which the applicant contended was extremely high given the source (justices of the Constitutional Court) and the fact that no evidence was produced which contradicted what was said in the reports.

(v) The fact that the applicant self-evidently was not in the position to require the justices to give evidence and that, in effect, it would have been inappropriate to do so.

(vi) The fact that there was no prejudice to the respondents which had for a considerable period of time been in possession of the reports and were in a position to have rebutted the contents of the reports if they were not the truth.

(vii) The importance of putting an end to systemic unlawfulness of the conditions at the Pollsmoor RDF.

[21] The second respondent did not at all respond to this application for the admission of the reports as admissible hearsay evidence and made no further reference to the objection on this ground in both the heads of argument and at the hearing of the matter. In my view and cognizant of the very useful discussion of the application of the provisions of Section 3(1) by **Du Plessis J in Hewan v Kourie NO And Another 1993 (3) SA 233 pages 236D to 241E** the applicant had furnished cogent reasons for the admission of the contents of the reports. It appeared that the second respondent's attempt at striking out the content of reports of the Justices was a desperate grasp at straws and no more than opportunistic.

Historical background to the Pollsmoor Correctional Facility.

[22] The central feature of the Pollsmoor Correctional Facility is its hopelessly inadequate infra-structure and ever deteriorating capacity to accommodate detainees in circumstances that accord with their rights under the constitution and more specifically the provisions of the Act. The facility has been, and remains plagued by over-crowding which is one of the central causes of other deprivations that the applicant raised in the application.

[23] In a narration of the history of Pollsmoor the applicant referred to its various levels of accommodation over the years. The facility was first opened in about 1979. It is comprised of four sections, one of which was the Pollsmoor Maximum Centre in which both sentenced and awaiting trial inmates were held. On the 1st March 2012, in accordance with the Act, the Pollsmoor Remand Detention Facility was established[8] and was thereafter only to accommodate remand detainees. The applicant pointed out that before it was established as a remand detention facility, the Pollsmoor RDF was known as the *"Pollsmoor Admissions Centre"* and was initially designated as a maximum security prison, and was also colloquially referred to as *"Pollsmoor Maximum."*

[24] The Pollsmoor Management Area consists of four other demarcated centres/facilities; Medium A Centre, Medium B Centre, Medium C Centre, all of which accommodates sentenced inmates. The Female Centre, separately accommodates both sentenced and awaiting trial inmates.

[25] The conditions of detention for remand detainees are regulated by Chapter 3 of the Act which is headed *"Custody of all inmates under conditions of human dignity."* The Act defines *"inmate"* as *"any person, whether convicted or not, who is detained in custody in an correctional center or remand detention facility or who is being transferred in custody or is en route from one correctional center or remand detention facility to another correctional center or remand detention facility."*

---

[8] in terms of Notice 148 of 2012 Government Gazette 35071 of the 27th February 2012]

[26] The Pollsmoor RDF accommodates men aged 21 and older. According to the Regional Commissioner of the Western Cape the approved accommodation rate for the Pollsmoor RDF was fixed at 1619 as from the date of establishment of the facility.[9] It appeared though, that the figure of 1619 did not correspond with an *"approved accommodation"* figure for the Pollsmoor RDF of 1429 "used in the Western Cape Correctional Centre Population Statistics also referred to as the weekly *"unlock statistics*" that is released weekly by the Department. The applicant's lawyers had sought clarification from the Correctional Services Manager by way of a request in terms of PAIA[10] as to the basis on which the *"official capacity"* was determined. No response was received. The second respondent in his answering affidavit claimed somewhat surprisingly that he bore *"no personal knowledge of the unlock statistics" with reference to "Annexure DP3" and/or its source..."*[11]

[27] The applicant claimed that historical information on the accommodation rates were difficult to source, and that it was forced to have resorted to the use of secondary information such as an article written in 2006 by L Muntingh and C Giffard[12] which was based on information from the Judicial Inspectorate for Correctional Services (JICS). Needless to say, the second respondent also objected to the use of such information as hearsay. Muntingh and Giffard recorded that in 1995, the Pollsmoor Admissions Section had an approved accommodation rate of 1,619 with an occupancy at 186%. They claimed that at that stage the Pollsmoor awaiting trial section was the most overcrowded prison in the country. They pointed out though, that five years later in 2000, the rate had

---

[9] The statistical information referred to by the applicant was obtained directly from the Departments own statistical resources some of which had been made available by the Department on request of the applicant's attorneys (Lawyers for Human Rights) through applications in terms of the Promotion of Access To Information Act 2 of 2000 (PAIA).
[10] Promotion of Access to Information Act 2 of 2000 (PAIA).
[11] The *"unlock statistics"* were attached to the founding affidavit as Annexure DP3.
[12] "The Effect of Sentencing on the Size of the South African Prison Population." Civil Society Prison Reform Initiative. Report commissioned by the Open Society Foundation for South Africa. October 2006. Copyright OSF-SA

dropped to 160%. The second respondent without disputing these statistics in response simply claimed that the reference to the article was inadmissible.

[28] The applicant claimed that the unlawful conditions of detention at the Pollsmoor RDF had first come to the attention of this division of the high court in the matter of **Lee v Minister of Correctional Services 2011(2) SACR 603 (WCC).**[13] The matter was subsequently dealt with in both the SCA and the CC (where Justice Cameron wrote on behalf of the minority). The plaintiff had been detained, awaiting trial for four and a half years, from 1999 to 2004. During that time he had contracted tuberculosis. In the judgment of the high court, De Swardt AJ referred to the evidence of the expert witnesses who described the conditions of detention at Pollsmoor awaiting trial section as;
"[t]he average overcrowding in 2003 was around 234% to 236%. Overcrowding meant that disease could be spread more easily, and as far as TB was concerned, the more people were packed into a cell, the greater the prospects that bacteria which were coughed up would infect other inmates. [The medical expert] regularly saw overcrowded cells in the maximum security prison and testified that his first impression was one of dinginess and squalor, because blankets are often used to protect or cover up places within a cell. He described the situation as dehumanizing."

[29] I might add that the overcrowded conditions at the Pollsmoor facility, in particular, was common knowledge amongst most legal practitioners in the Western Cape for decades before 1994, when attending upon and consulting with their awaiting trial clients at the facility.

---

[13] **Lee v Minister of Correctional Services (CCT 20/12) [2012] ZACC 30; 2013 (2) BCLR 129 (CC); 2013 (2) SA 144 (CC); 2013 (1) SACR 213 (CC) (11 December 2012)**

[30] In the years following the damning decisions in **Lee**, the level of over-crowding at Pollsmoor appeared to have increased, except as pointed out by the applicant in 2004, when the occupancy rate was 212% according to the Muntingh and Giffard. In 2005, the number of inmates at Pollsmoor had risen to 3979 putting the occupation rate at 246%. The applicant also referred to the observations made in the reports of Justices Froneman and Van der Westhuizen with regard to the overcrowded conditions at the facility.

[31] In 2010, Justice Froneman reported; *"[Pollsmoor RDF] was designed to accommodate 1619 persons. On the day of our visit it housed 4215 male detainees, 3891 of whom were awaiting trial. The condition of the cell was representative of others in the center. It was designed for about twenty people, but housed about 80 people. There is only one toilet in the cell. To a relatively similar degree, this was also the case in respect of cells holding awaiting trail prisoners in the other centres. It takes little imagination to recognize that these kind of conditions give rise to the general complaints raised by awaiting trail detainees held in the other centres too, namely the lack of proper sanitary facilities, the lack of sufficient toiletries, that complaints about alleged assaults and indignities inflicted by warders were either ignored or not investigated properly, and that health matters needed more attention."*

The applicant pointed out that the figures cited in Justice Froneman's report corresponded with an occupation rate of 216% at the time.

[32] On the 18th December 2012, Justice Van Der Westhuizen[14] visited Pollsmoor RDF and reported; *"On the morning of the visit the centre housed 3342 inmates. The centre is 208% overcrowded... Each unit has a stated capacity of 28 inmates, but normally*

[14] Justice Van Der Westhuizen is the current Inspecting Judge appointed in terms of the Act.

contain approximately 50. There is a toilet and a shower in each unit... the overcrowding in the units is obvious. From what one could tell through the doors of the cells, ventilation and lighting are poor with clothes being hung out to dry in much of the available space inside the unit... The disturbingly high level of overcrowding would not come as a surprise to those who are familiar with the state of prisons in South Africa. It is even more deplorable, though, when present in awaiting trail centres such as this... As with most awaiting-trial detention centres there is a lack of structured activity at Pollsmoor. More of the access to work and development programmes available to sentenced offenders need to be integrated into programmes for awaiting-trial offenders."

[33] The applicant obtained the occupancy rates for the years 2011 to 2014, through the PAIA process from the Department and in applying the approved rate tabulated; the occupancy as follows";

(i) *"In July 2011 there were 4135 inmates at Pollsmoor RDF, putting the centre at 255% capacity;*

(ii) *In July 2012 there were 3846 inmates at Pollsmoor RDF, putting the centre at 237% capacity;*

(iii) *In July 2013 there were 3649 inmates at Pollsmoor RDF, putting the centre at 225% capacity; and*

(iv) *In July 2014 there were 3557 inmates at Pollsmoor RDF against an approved accommodation of 1427, putting Pollsmoor RDF at 249%."*

[34] The weekly unlock statistics for the Western Cape on the 5th January 2015, reflected that the Pollsmoor RDF had an occupancy of 4136 detainees at 290,7%.[15] The

[15] against the *"approved rate of 1429"*

"unlock statistics" further reflected that at the 1st February 2015, the RDF accommodated 4361 detainees at an occupancy of 305.2%.

[35] Other than the denial of any knowledge of the *"unlock statistics"* the second respondent had not challenged the correctness of the successive occupancy figures and percentages provided by the applicant.

[36] The Public Service Commission in their report recorded the number of inmates at the Pollsmoor RDF during their visit in April 2016, as 4538 against the approved capacity rate of 1619.

[37] The Minister of Justice and Correctional Services in an affidavit deposed to on 19 December 2016, claimed that as at the 5th December 2016 (the date of the hearing) the occupation rate at the Pollsmoor RDF was 246.94%.

The Regulatory Framework

[38] Conditions of detention in South African prisons are regulated by both domestic and international law and standards. As already referred to, the Constitution in sections 12(1)(e)[16] and 35(2)(e) specifically refers to conditions of detention under which both sentenced and detained inmates must be held, whereas several other rights in the constitution inter alia the right to dignity and associated rights such as privacy, the presumption of innocence, the rights of children, religion, culture etc. also informs the obligations of the first respondent. The Correctional Services Act 111 of 1998, comprehensively provides for a correctional system, the custody of all inmates under

[16] the right , ...
"(e) not to be treated or punished in a cruel, inhuman or degrading way."

conditions of human dignity; the rights and obligations of un-sentenced offenders, a judicial inspectorate, independent correctional centre visitors and various other related matters. Regulations in terms of the Act were also issued under GNR323 on 25 April 2012, GG No. 35277 ("Correctional Services Regulations"). Detention is also regulated in part by the so-called "B Orders," issued by the National Commissioner in terms of section 134(2)[17] of the Act. The *"B Orders"* are not gazetted and appear to have no more than the status of internal policy documents.

---

(2) The National Commissioner may issue orders, not inconsistent with this Act and the regulations made thereunder, which must be obeyed by all correctional officials and other persons to whom such orders apply, as to-
(a) the conditions for and circumstances under which payment to an inmate, or the taking into safekeeping, release or disposal of money, valuables or other articles belonging to an inmate, may take place;
(b) the bathing or showering of inmates;
(c) hygienic requirements of bedding;
(d) the provision of special diet;
(e) the provision of clothing and bedding on admission;
(f) the wearing of attire for religious or cultural purposes;
(g) access to the services of a medical practitioner of the prisoner's choice;
(h) the supply at State expenses of medical assistance devices not including surgical implants;
(i) reports on problems concerning environmental health conditions and health-related issues;
(j) the manner in which the Head of the Correctional Centre must allow an inmate to notify his or her spouse, partner or next-of-kin when the inmate is transferred;
(k) recreational activities to be provided for the benefit of the mental and physical health of inmates;
(l) the establishment and maintenance of libraries;
(m) the recording of identification particulars of an inmate;
[Para. *(m)* substituted by s. 83 *(c)* of Act 25 of 2008 (wef 1 October 2009).]
(n) the taking of the fingerprints and photographs of an inmate for identification purposes;
[Para. *(n)* substituted by s. 83 *(c)* of Act 25 of 2008 (wef 1 October 2009).]
(o) the manner in which mechanical restraints are to be applied;
(p) the reporting of incidents and actions taken where non-lethal incapacitating devices were used;
(q) the handling of firearms;
(r) the reporting of firearm use;
(s) general safety measures for handling firearms;
(t) the types of weapons other than non-lethal incapacitating devices and firearms to be used by correctional officials;
(u) the use of batons;
(v) the procedures for the use of pyrotechnical equipment;
(w) amenities to be made available to inmates;
(x) work which may be performed by a sentenced offender on Sundays or other days of rest and gratuity for such work;
(y) a discharge report of an inmate under medical treatment;
(z) the restrictions on amenities for unsentenced offenders;
(aa) the appointment of correctional officials on probation;
(bb) health and security requirements of an applicant for appointment in the Department;
(cc) the written contract of employment to be provided to every correctional official upon appointment;
(dd) the conditions under which a correctional official may do remunerative work outside the Department;
(ee) the conditions for the issuing, wearing and maintenance of articles of departmental dress and equipment;
[Para. *(ee)* substituted by s. 83 *(d)* of Act 25 of 2008 (wef 1 October 2009).]
(ff) the termination of service of correctional officials;
(gg) the conditions under which a correctional official may resign from the Department;
(hh) .....
[Para. *(hh)* deleted by s. 83 *(e)* of Act 25 of 2008 (wef 1 October 2009).]
(ii) categories of leave and deviations from leave conditions;
(jj) the payment of subsistence allowances and the deviations from qualifying conditions;
(kk) the conveyance at State expense of the personal and household effects of a correctional official who is transferred;
(ll) the powers, functions and duties of the Board of Trustees of the Facilities Fund;
(mm) the constitution and performance of functions of a committee to control a departmental canteen;

[39] The United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (UNCAT) came into force in December 1984. It was ratified by the South African government on 10 December 1998.

[40] As a state party to UNCAT, South Africa is obliged to:

[40.1] *"undertake to prevent... act of cruel, inhuman or degrading treatment or punishment which do not amount to torture...when such acts are committed by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity"* [Article 16];

[40.2] *"ensure that education and information regarding the prohibition against [ill treatment] are fully included in the training of law enforcement personnel, civil or military, medical personnel, public officials and other persons who may be involved in the custody, interrogation or treatment of any individual subjected to any form of arrest, detention or imprisonment"* [Article 10]; and

[40.3] *"keep under systemic review interrogation rules, instructions, methods and practices as well as arrangements for the custody and treatment of persons subjected to any form of arrest, detention or imprisonment in any territory under its jurisdiction, with a view to preventing any cases of [ill treatment]"* [Article 11].

(nn) the obtaining of information of statistical value and research;
(oo) the conditions under which the Head of the Correctional Centre must allow certain persons access to the correctional centre;
(pp) generally, all matters necessary or expedient for the application of this Act or the regulations.
[Sub-s. (2) substituted by s. 41 *(l)* of Act 32 of 2001 (wef 14 December 2001).]

[41] The United Nations Standards on Minimum Rules for the Treatment of Prisoners (UNSMR), adopted by the United Nations Congress on the Prevention of Crime and the Treatment of Offenders in August 1955, sets out the conditions for humane detention.

[42] The applicant pointed out that although the UNSMR is not legally binding on states, the international community considers it as a relevant and important set of standards for the treatment of people in custody, and many of the provisions of the UNSMR are reflected in the Act.

[43] In 2012, the International Committee for the Red Cross published an updated set of guidelines in the form of a handbook for the purpose of evaluating prison conditions ("ICRC Guidelines"). The handbook is entitled *"Water, Sanitation, Hygiene and Habitat in Prisons."* which the applicant contends offers useful suggestions of a more technical nature in respect of the requisite standards of conditions of detention necessary to ensure humane detention.

[44] In 2002 the South African government hosted a meeting of experts and delegates from African states in Cape Town at which a resolution known as the **Robben Island Guidelines** was adopted.[18] The meeting resolved, inter alia;

---

[18] *"The African Commission…*
Recalling the provisions of:
- *Article 5 of the African Charter on Human and Peoples' Rights that prohibits all forms of exploitation and degradation of man, particularly slavery, slave trade, torture, cruel, inhumane or degrading punishment and treatment;*
- *Article 45(1) of the African Charter which mandates the African Commission to, inter alia, formulate and lay down principles and rules and fundamental freedoms upon which African Governments may base their legislations;*
- *Articles 3 and 4 of the Constitutive Act of the African Union wherein States Parties undertake to promote and respect the sanctity of human life, rule of law, good governance and democratic principles;*

Recalling further its Resolution on the Right to Recourse Procedure and Fair Trial adopted during its 11th ordinary session, held in Tunis, Tunisia, from 2nd to 9th March 1992;
Noting the commitment of African States to ensure better promotion and respect of human rights on the continent as reaffirmed in the Grand Bay Declaration and Plan of Action adopted by the 1st Ministerial Conference on Human Rights in Africa;
Recognising the need to take concrete measures to further the implementation of existing provisions on the prohibition of torture and cruel, inhuman or degrading treatment or punishment;

"B. Safeguards during the Pre-trial Process

...

31. Ensure that all persons deprived of their liberty have access to legal and medical services and assistance and have the right to be visited by and correspond with family members.

C. Conditions of Detention

States should:

33. Take steps to ensure that the treatment of all persons deprived of their liberty are in conformity with international standards guided by the UN standard minimum rules for the treatment of prisoners.

34. Take steps to improve conditions in places of detention, which do not conform to international standards.

35. ...

36. ...

37. Take steps to reduce over-crowding in places if detention by inter alia, encouraging the use of non-custodial sentences for minor crimes.

7. Right to humane treatment

(a) States shall ensure that all persons under any form of detention or imprisonment are treated in a human person."

Mindful of the need to assist African States to meet their international obligations in this regards;
Recalling the recommendations of the Workshop on the Prohibition and the Prevention of Torture and Ill-treatment, organized jointly by the African Commission and the Association for the Prevention of Torture, on Robben Island, South Africa, from 12th to 14th February 2002;
Adopts the Guidelines and Measures for the Prohibition and Prevention of Torture, Cruel, Inhuman or Degrading Treatment or Punishment in Africa (The Robben Island Guidelines)..."

[45] The European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, the treaty body established under the Council of Europe tasked with visiting places of detention, has, in much the same fashion as the ICRC, developed standards through which to evaluate conditions of detention (ECPT Guidelines).

THE STATUTORY REQUIREMENTS

Accommodation

[46] In terms of section 7 of the Act:

"[46.1] detainees must be accommodated in conditions that are adequate for human dignity, and that meet the requirements prescribed by regulation in respect of floor space, cubic capacity, lighting, ventilation, sanitary installations and general health conditions.

[46.2] inmates may be accommodated in single or communal cells, depending on the availability of accommodation."

[47] Regulation 3(2)(a) and (c) of the Correctional Services Regulations require that cell accommodation must:

"[47.1] have sufficient floor and cubic capacity space to enable an inmate to move freely and sleep comfortably within the confines of the cell; and

[47.2] be sufficiently lighted by natural and artificial lighting to as to enable inmates to read and write."

[48] Sub-Order 2, B Orders requires that the minimum permissible cell area per inmate, excluding areas taken up by ablution facilities, walls and pillars and personal lockers (not built in) in the cell, must be 3.344m^2 in respect of ordinary communal cells

and 5.5m^2 in respect of ordinary single cells. The minimum permissible air space per inmate that is over the age of ten years in a cell in 8.5m3.

[49] In term of Regulation 3(2)(e)(i), every inmate must be provided with a separate bed and with bedding which provides adequate warmth for the climatic conditions.

[50] Single beds must as far as possible be provided to all prisoners. Where this is not possible, adequate felt sleeping mats must be provided.

[51] The management of overcrowding of correctional facilities is the responsibility of the Heads of Correctional Facilities and Area Managers, in conjunction with Provincial Commissioners. Certain facilities, or sections thereof should not be highly overpopulated while other sections or facilities are under-utilized. Inmates must be evenly distributed.

[52] Cell accommodation must be inspected by the head of the correctional centre on a weekly basis to ensure that every cell conforms to the minimum requirements of incarceration. The Area Manager, the second respondent, is required to undertake a similar inspection on a weekly basis. This requirement is an important measure aimed at achieving compliance and accountability and it is for this reason the applicant claimed it sought an order that the second respondent be compelled by the court to make available the findings and reports on these weekly inspections, for the period of the past three years.

[53] The UNSMR reinforces the South African statutory requirements:

[53.1] Article 10(1) states that all accommodation, especially sleeping accommodation, *"must meet all requirements of health"* and that *"due regard must*

be paid to the cubic content of air, temperature, floor space, lighting, heating and ventilation."

[53.2] Article 11(a) provides that prisons must have windows sufficiently sized to allow fresh air to enter the prison, regardless of artificial ventilation systems.

[53.3] Article 19 states that in accordance with local and international standards, all prisoners must be provided with a separate bed.

[54] The ICRC Guidelines recommend that:

[54.1] There should be a minimum of 3.4m2 of space per prisoner in shared dormitory-style prison cells;

[54.2] 40-50 people should be the absolute upper range of prisoners housed within a single room, and that even that number should only occur when the conditions are adequate(such as proper ventilation and lighting); and

[54.3] Given the importance of natural light to physical and mental health, the total size of a cell windows and openings should be at least ten percent of the floor space. Further, windows should allow in such natural light as is sufficient to all detainees to read during daylight hours.

Ablution facilities

[55] Regulation (3)(2)(d)(i) requires that there be sufficient, accessible ablution facilities. These must be available to all inmates at all times.

[56] Ablution facilities must:

[56.1] *"include access to hot and cold water for washing purposes; and*

[56.2] be partitioned off in the case of communal sleeping accommodation."

[57] Where cells are not provided with running water and flush toilets, stainless steel water containers and sanitary buckets must be provided. Water containers and sanitary buckets must be cleaned and disinfected daily.

[58] The UNSMR require the following in respect of ablution facilities:

[58.1] sanitary installations that are adequate to enable every prisoner to comply with the needs of nature when necessary and in a clean and decent manner, and

[58.2] all parts of a prison regularly used by prisoners shall be properly maintained and kept scrupulously clean at all times.

[59] The ICRC Guidelines recommend that:

[59.1] showers and personal washing areas must be sufficient to allow for basic hygiene; and

[59.2] prisons should provide no less than one toilet for every 25 detainees;

[59.3] detainees should have access to toilets 24 hours per day, and toilets should be in *"working order with cleaning agents available at any time."*

[60] The ECPT Guidelines state the following:

[60.1] Access to *"proper toilet facilities and maintenance of good standards of hygiene are essential components of a humane environment";*

[60.2] Prisoners should have adequate access to shower or bathing facilities, as well as running water.

[61] The ECPT Guidelines notes as a concern that *"when it finds a combination of overcrowding, poor regime activities and inadequate access to toilet/washing facilities in*

the same establishment", the *"cumulative effect of such conditions can prove extremely detrimental to prisoners"*,

Exercise

[62] Section 11 of the Act provides that every inmate *"must"* be given the opportunity to exercise sufficiently in order to remain healthy, and is entitled to at least one hour of exercise daily, which must take place in the open air, weather permitting.

[63] The ECPT Guidelines, recognizing the *"crucial importance"* of a *"satisfactory programme of activities"* including work, sport and education, and recommended that remand detainees should spend at least eight hours per day outside their cells.

Reading material

[64] Section 18(1) and (2) of the Act require that all inmates be allowed access to available reading material of their choice, unless particular material constitutes a risk or is not conducive to his or her rehabilitation. Reading material may be sourced from the prison library or sent personally to the inmate.

[65] Regulation 13(1) requires that every correctional centre, where practicable, establish and maintain a library containing literature of constructive and educational value.

[66] The UNSMR requires every prison to have a library for all prisoners to use. The library must be adequately stocked with both recreational and instructional books, and all prisoners must be encouraged to use it.

Nutrition

[67] In terms of section (1) and (5) of the Act:

[67.1] Each inmate must be provided with an adequate diet that will promote good health.

[67.2] Food must be well-prepared and served at intervals of not less than four and a half hours and not more than 14 hours between the evening meal and breakfast in each 24 hour period.

[68] Regulation 4 requires that an inmate's diet must provide for the balanced distribution of food items according to the following groups: grain, fruits and vegetables, dairy, meat and protein and fats. For adult males the daily kilo calorie content must be a minimum of 2500, of which 0.8 grams per kilogram of body weight per day must be from the protein group.

[69] The UNSMR provide that a prison administration must provide, at usual hours, every prisoner with food of nutritional value adequate for health and strength. Such food must be of wholesome quality and well-prepared and served.

Health-care

[70] In terms of section 12(1) of the Act, inmates have the right to adequate medical treatment at state expense, within the Department's available resources, based on the principles of primary health care, in order to allow every inmate to leady a healthy life. Regulation 7(1)(a) states that the standard of primary healthcare available in correctional centres must, at least, be on the same level as that rendered by the State to members of the community.

[71] Regulation (2) and (3) provide that the services of a medical practitioner and a dental practitioner must be available at every Correctional Centre, and a correctional centre's medical practitioner is responsible for the general medical treatment of inmates and must treat an inmate referred to him or her as often as may be necessary.

[72] In terms of Regulation 7(4), a registered nurse must attend to all sick sentenced offenders and remand detainees as often as is necessary, but at least once a day.

[73] Regulation 3(2)(f)(ii) states that inmates that are suffering from mental or chronic illness, or whose health will be affected detrimentally by detention in a communal cell, or whose health status poses a threat to other inmates, must be detained separately on request of the Correctional Medical Practitioner or registered nurse.

[74] The UNSMR specify that a medical officer shall attend to the physical and mental health of prisoners, including daily visits to all sick inmates who complain of illness, and *"any prisoner to whom his attention is specifically directed."*

[75] This regulatory framework tabulated in detail by the applicant was not disputed by the second respondent in his answering affidavit save for it been noted and was not in the least challenged during the course of argument.

THE CONDITIONS AT POLLSMOOR RDF

[76] In support of its claim of the first respondent's breach of its constitutional and statutory obligations as well as its violation of its international obligations, the applicant recorded in detail observations made by its members during the course of attendances

at the Pollsmoor RDF. The applicant also referred to numerous allegations by witnesses who were inmates during the period April to July 2015, and some who had already been released, all of whom deposed to affidavits in support of the application. The applicant referred also to observations made by its attorney of record, Lawyers for Human Rights, reports received from Independent Correctional Centre Visitors (ICCV,)[19] references to complaints recorded in minutes of meetings of the ICCV committees, the statistical information provided by the Department of Correctional Services itself and most significantly, the observations made by Justice Cameron in the inspection visit to the facility during April 2015. The second respondent in his answering affidavit made no attempt at dealing with any of the allegations and observation of violations referred to by the applicant and sought simply to discredit the reliability of the individual witnesses, refuted the admissibility of the reports of the independent visitors and minutes of the ICCV meetings as inadmissible hearsay evidence as it did with the report of Justice Cameron. The second respondent went further, and without directly contradicting the allegations and observations made by the witness, simply denied their claims and repeatedly stated that such disputes of fact should be referred to oral evidence and reserved his right to do so. The repeated refrain by the second respondent to the allegations and observations were bare denials, and the applicant was pedantically put to *"the proof thereof"* notwithstanding, that as Head of the Pollsmoor RDF, much of the conditions under which inmates lived would have been within his knowledge.

[77] The applicant dealt separately with each of the violations it contended were committed by the first respondent, in particular, with regard to the conditions of incarceration of the inmates. In the light of the relief sought and granted in the application,

---

[19] Appointed in terms of section 92 of the Act.

it is in my view necessary to set out in some detail the nature of the complaints by the various witnesses, mindful though, that they are untested, albeit deliberately unchallenged by the second respondent.

Accommodation

[78] The applicant demonstrated by comparison that if one assumed the *"approved rate"* of accommodation that ensured each detainee in a communal cell enjoyed the *"minimum permissible cell area"* of 3.344m^2, with an occupancy at the Pollsmoor RDF at its lowest for 2015 (as reflected in the weekly unlock statistics), each detainee had 1.3m^2 of space. When Pollsmoor RDF was at its maximum capacity, over the same period each detainee occupied only 1.10m^2 of space, just over one third of the space to which each detainee was legally entitled to.

[79] Mr Ricardo May, an awaiting trial inmate at Pollsmoor RDF since the 14 November 2014, claimed that there were about 70 people in cell number 213, in Section D2 where he was accommodated. His sentiment was that there were no words to describe how *"crowded it is in the cell."* Mr Rafiek Dreyer an awaiting trial inmate at Pollsmoor RDF since April 2014, was also held in cell 213, and confirmed that it was extremely overcrowded. He claimed that he felt *"claustrophobic all the time."* Mr Athenkosi Myoli spent three months at Pollsmoor RDF from April 2009. He had thereafter entered into a plea of guilty arrangement by agreement with the state and served a sentence of imprisonment. He claimed that there were not enough beds in the RDF cells for every inmate, and that they had to share beds or sleep on the floor. Inmates who were affiliated to gangs were given preferential treatment by fellow gang members. He therefore resorted to joining a gang to make life easier for himself. He claimed that it was extremely cold in the cells during the winter months. Each inmate

was only given one blanket and they were forced to use their clothing to cover broken window panes against the wind. Mr Patrick Mzamo Sidelo had been employed as an education trainer with the applicant. He held the position for seven years which involved the training of inmates and correctional officials on matters relating to tuberculosis, HIV and gender based violence. He worked at the Pollsmoor RDF from 2009 to 2013, but due the poor conditions which became too much of a health risk for trainers, the applicant terminated his placement at the RDF. He claimed that the cells *"looked and smelled terrible. They were overcrowded with approximately 50 more detainees in a cell during the day."* He confirmed Myoli's observations with regard to the overcrowding in the cells and the extreme conditions not only during winter, but in summer as well. He confirmed that detainees were forced to share beds. Mr Mvelisi Sitokisi spent approximately four months awaiting trial at Pollsmoor RDF. He likewise claimed that cell 546 in section A where he was held, was only big enough to accommodate 30 detainees, but that there were approximately 65 inmates in the cell at any given time. Inmates were required to share beds, or sleep on the floor. Newly arrived inmates were made to sleep on the floor while those affiliated to gangs were given preferential treatment. He claimed to have slept on the floor during his entire detention at Pollsmoor.

Ablution facilities

[80] The applicant pointed out that the *"very combination of circumstances against which the ECPT Guidelines had cautioned against was present at Pollsmoor."* Mr Malcolm Brown who had been awaiting trial at Pollsmoor RDF since August 2014, likewise claimed that he had to share *"a small bed"* with another person. The toilets were dirty and inmates urinated in the shower. There was no privacy in using either the toilet or the shower, the cell smelt bad and the windows were inadequate for proper ventilation. The one toilet was not sufficient for all of the detainees in the cell and they were forced

to use a bucket. The smell was disgusting. Dreyer claimed that there was an inadequate supply of toilet paper, cleaning materials and soap. He too remarked that the cells were in a disgusting condition that impacted on his health and that of the other inmates. Both Myoli and Setokisi also referred to the lack of soap to wash themselves with and the abuse by gang members of such provisions.

Exercise

[81] This was one of the central complaints by the applicant and the various witnesses, and was likewise emphasized in the report by Justice Cameron. Mr Alistair Amsterdam had been awaiting trial at Pollsmoor RDF since May 2014, and claimed with a measure of resignation that detainees *"just sat around and slept all day with nothing to do except to look forward to mealtimes."* He added that they did not get to go to a library, and there were no opportunities to play any sport outside the cells. Mr Clayton Paulse, awaiting trial at Pollsmoor RDF since June 2014 complained that his body *"felt stiff and that on average they got out of the cell for no more than an hour per week."* Mr Malcolm Brown who had been awaiting trial at Pollsmoor RDF since August 2014 claimed that in the last month of his detention he had not been afforded any access to the exercise yard. Dreyer remarked that the boredom *"made people crazy."* Myoli and Sitokisi likewise confirmed the lack of access to exercise on a daily basis.

Reading material

[82] The Pollsmoor RDF facility had no more than an informal library which the second respondent subsequently used as a distribution point after receipt of a generous donation of books. Paulse claimed that during the day they had remained in the cell as they were *"not allowed out."* There were no activities, neither games, nor any library for them to use. Boredom prevailed. He claimed that he just sat in the cell all day, *"got stressed*

and depressed." Dreyer likewise referred to the lack of library facilities and the impact of boredom on fellow inmates.

Nutrition

[83] The applicant claimed that detainees were routinely deprived of adequate food. Brown claimed that many of the inmates had not received food that they were entitled to. Dreyer explained that there was not enough food and that the "gangboys" (gangsters) sold meat to detainees who had cash. Paulse claimed that they received meals twice a day with the second served between 1 and 2pm. He saved some of the food from the second meal to eat later in the evening. Other inmates, who ate all their food at once, later complained of hunger. Sitokisi remarked that because food was served to them in their cells there was no way to ensure that everyone obtained the same and a fair amount of food. He claimed that gang members would take most of the food and left very little over for others,

Health care

[84] Paulse claimed that his health had deteriorated after arriving at Pollsmoor RDF. Prior to his arrest he was on treatment for tuberculosis but had not received his daily prescribed medication at the Pollsmoor RDF. He also complained about the lack of air in cells, and the impact of second degree smoke. Mr Peter Maraidjies had been an awaiting trial inmate at Pollsmoor RDF since 2014. He claimed that there were people in the cell with him who he believed *"had tuberculosis."* Many others, he observed had skin infections. He, had boils on his skin which was both extremely itchy and painful. He claimed that notwithstanding having been seen by a doctor, he was not given any medication. Dreyer claimed that at one stage he had a serious kidney problem and experienced lots of pain. When he eventually saw a doctor, he complained that he was

not properly examined and was merely given mild pain killers. He also complained of having had a bad toothache and despite having put his name down to see the dentist in September 2014, he had still not been attended to. Both Myoli and Sitokisi likewise complained about the medical conditions at the Pollsmoor RDF. Myoli claimed that he was not screened for HIV or tuberculosis upon admission. Sitokisi claimed that upon his arrival he had informed the RDF staff that he was HIV positive. He claimed not to have received any anti-retroviral treatment and as a result his CD 4 count had dropped and his viral load increased. Sitokisi claimed that upon his release he attended at a clinic where he was also tested positive for TB. He has since been receiving treatment for TB, but claimed that he had not been able to work since his release from Pollsmoor RDF.

The impact of the conditions of detention on inmates

[85] The applicant contended that the conditions of detention took an emotional, physical and psychological toll on awaiting trial inmates. In this regard it referred to the comments made by Myoli about having been compelled to spend almost 24 hours on end in an overcrowded cell. Myoli had claimed that detainees often got frustrated and became aggressive. He himself had experienced feelings of frustration. He claimed that his incarceration in the conditions described at Pollsmoor RDF resulted in depression, but he felt that it was pointless to complain and the treatment they received, inmates believed that the correctional officers would not do anything to assist them.

[86] The applicant tendered the expert opinion of Ms Arina Smit, a social worker who was familiar with the conditions at the Pollsmoor RDF. She was of the opinion that the effect of the conditions of detention on inmates were dehumanizing. She claimed that prolonged exposure to the conditions that prevailed at Pollsmoor RDF were closely associated with the establishment of complex trauma amongst inmates that could lead

to complex post-traumatic stress disorders that resulted from inmates having to be continually on the alert, vigilant and on the defense. Smit claimed that prolonged stress of such a nature lead to shifts in the chemistry of the brain where unhealthy levels of cortisol were elevated. That rendered detainees increasingly susceptible to illnesses and disease on a physical level as well as being susceptible to the syndrome of post-traumatic stress at a psychological level.

The inspection by Justice Cameron[20]

[87] Justice Cameron found that;

"Entering cells in the remand detention centre proved to be a shocking experience. The conditions we witnessed can, with deliberate understatement, only be described as appalling."

The overcrowding is extreme. To know, statistically, that there is 300% overcrowding does not prepare the outsider for the practical reality. Again, with understatement, it can only be described as horrendous..."

[88] That appeared to be the haunting reality of the conditions in the cells at Pollsmoor RDF when visited by Justice Cameron and his law clerks on the 23 April 2015. His observations, findings and recommendations were set out in a comprehensive report that he had forwarded to the Regional Commissioner Mr D Klaas, Deputy Regional Commissioner Mr F Engelbrecht, Pollsmoor Management Area Commissioner, Mr Mketshani, and the second respondent. Upon its public release, the report received wide

[20] The comprehensive report by Justice Cameron was attached to the application and as already indicated formed the lightning rod for the application and the relief sought by the applicant.

spread publicity in the press and elicited much public concern about the conditions at the Pollsmoor Correctional Facility.

[89] The applicant contended, and not without merit, that the very observations and findings by Justice Cameron had largely confirmed the complaints of the witnesses that it had tendered in support of the application. Moreover, the strong sentiments expressed by Justice Cameron about the conditions at Pollsmoor RDF was echoed almost a year later in April 2016, by the Public Service Commission who as already indicated, referred to the conditions at the Pollsmoor RDF as *"inhumane."*

[90] At the time of the visit by Justice Cameron, the Pollsmoor RDF accommodated 4198 inmates. The facility was literally reeling from overcrowding at a rate in excess of 300%. The staff compliment for that day was at 1424 with a vacancy of 129. The Pollsmoor RDF serves 14 courts across the Southern Cape Peninsula and 400 inmates on average attend court each day with approximately 70 released on a daily basis.

[91] An average number of 65 inmates occupied each of the communal cells, with Justice Cameron remarked that the overcrowding was *"practically undoubtedly and daily degrading and hazardous for every detainee subjected to it."* He observed that the cells were not only cramped, but filthy, and that inmates were forced to share single beds on triple bunks. Those unable to secure a bed slept on the floor. In one of the cells there were only 24 beds for 60 inmates. There were no linen on the beds and inmates reported that *'bedding and mattresses had never been washed'* Many complained of skin boils and scabies with severe itchiness. The ablution facilities were recorded as *"deplorable"* with 50 to 60 inmates required to use one toilet and one shower. The toilets had no seats and the showers no showerheads. There was no privacy. The drains in the first

three cells, visited were blocked, the toilets did not flush, and inmates were forced to flush the toilets with buckets of water. Inmates in some instances used the sinks to bath in, and it appeared that they were also used to urinate in. The sinks leaked and reeked of urine in some of the cells. There were consistent reports that there was no hot water to shower with. An inmate remarked, *"Even in the middle of the day, the cells were dark, dingy and cold"* and lacked natural light. The artificial lighting in the cells appeared inadequate and several windows were broken. The air was described as *"thick with a palpable lack of ventilation."* Inmates were forced to eat inside cramped cells with no chairs and tables to sit at.

[92] An inspection of cell 350 in Block E2 revealed that at least 55 inmates were crammed into it. It contained triple level bunks with single mattresses and a number of windows were broken. The blankets appeared filthy. There was no hot water to either shower or wash with. Detainees reported that there were *"inadequate cleaning supplies."* There were reports of assaults by correctional staff with an inmate alleging that he had been given *"a beating of a lifetime"* by one of the staff members who he pointed out as part of the accompanying delegation. Inmates complained of the lack of exercise and claimed that they had not been let out of the cells for up to three to four weeks. One detainee claimed *"I've been in this room for two years it is not right."* Detainees reported complaints of serious problems with the plumbing and showers that did not drain due to blockages. So too, were the complaints of a lack of hot water confirmed upon testing. Several inmates complained of neglect by the medical staff of their injuries and infections. Some pointed out visible injuries and infections. Other complained of not been given an adequate opportunity to consult with the doctor on duty. The blankets appeared to be infested with germs and lice. Others of the inmates complained that the blankets were dirty upon their arrival and had never been changed.

They claimed that the blankets were the cause of the spread of infections. That was confirmed by Dr. Michael the doctor on duty at Pollsmoor RDF during his briefing of the delegation. Many inmates complained about what they regarded as the inadequate quantity and the quality of the food. The last meal was provided in the early afternoon between 13h00 and 14h00 and some inmates complained of being hungry at night as their next meal was only at breakfast.

[93] In the inspection of cell 346 in Block E2, the inmates pleaded with the visiting delegation for the opportunity to exercise and claimed that they had not been let out of the cell for an entire month. Justice Cameron sought confirmation from the accompanying personnel who explained that *"once a month"* was an exaggeration, but conceded that no exercise had on occasion been afforded for *"at least two weeks possible or more"*. There were more allegations by inmates of assaults and the lack of clean bedding. Some complained that their illnesses were largely neglected and also complained of the lack of attention when eventually seen by certain of the medical staff. They also complained that those with severe illnesses were not allowed to obtain treatment at an outside hospital. Many detainees complained about having to wait for long periods for prescribed medication. A *"sickly, melancholy"* looking inmate was pointed out to the delegation by other inmates.

[94] The delegation noted that many of the inmates in cell 346 echoed the complaints received from the other cells, in particular with regard to the unhygienic conditions, the lack of cleaning materials, the lack of access to books and in particular to a library. The report recorded a despairing sentiment expressed by one of the inmates as; *"We're human beings, but we're treated worse than animals."*

[95] An inspection of Cell B3 revealed similar conditions to those in other cells. Two inmates reported that they had been awaiting trial for up to five years. Only two of the inmates in the cell reported that they have been tested for HIV. No condoms were available. Inmates also complained about light fittings and that television sets had been removed from the cells. The staff explained that some inmates resorted to smoking the gas contained in the light fittings and in television sets, and that weapons had also been found to have been fashioned from the fittings and condom dispensers.

[96] Justice Cameron noted that, not only were the cells overcrowded, but that it was apparent that there was a serious shortages of staff. The staff members that accompanied the delegation claimed that the lack of capacity was a major concern that impacted in particular on their vulnerability when carrying out their duties. They explained that the presence of organized gangs was as much of a problem at the Pollsmoor RDF as in other correctional facilities in the Western Cape.

[97] Management at the Pollsmoor RDF explained that the recruitment of staff was a major problem, largely caused by what they alluded to as the *"quota system."* This impacted on the staff complement and the requirements for the filling of vacant positions. Staff also complained of the lack of recognition and promotion and the impact that it had on their morale resulting in ever increasing resignations.

[98] Justice Cameron reported on a detailed discussion they had with the medical staff. Pollsmoor's onsite pharmacy served not only all five facilities, but also the Malmesbury and Goodwood Correctional Centres. The pharmacist and his assistant explained that the medical stock was provided through the public procurement process and through contracts with wholesalers. Supplies often ran out which forced the

pharmacy to secure supplies from local retail pharmacies. That meant that it was unlikely for there to be a complete *"stock out"* although it was preferred that drugs be procured through government contracts because of the cost factor. The pharmacist acknowledged though that there were frequent *"run outs"*, or shortages of drugs for the treatment of TB, hypertension and diabetes. There also appeared to be a regular shortage of vitamin B6 and penicillin, thus forcing the pharmacist to provide alternative medication. He also referred to the period leading up to the end of the financial year as the most tumultuous time in the receipt of an adequate supply of medication as the pharmacy was not allowed to order stock after a certain date leading to the financial year end. A stock auditor who serves Pollsmoor as well as the other centres, should, in the ordinary course have visited each centre at least once a month to check on the level of stock and to determine the need. Such visits had not occurred for a long time reported the medical staff. The delegation regarded this as an important concern that required attention because of repeated shortages of stock. The Associate Director of Health Care at the Admission Centre reported that there were 276 inmates that were on anti-retroviral treatment (ARVs). When asked, the inspecting team was told that a large number of detainees require ARVs, but were yet to be properly diagnosed. The nursing staff confirmed that scabies was a common affliction caused largely by the living conditions in the cells.

[99] The delegation was also informed by the JICS personnel that accompanied them that there were approximately 40 detainees being held in the RDF, because of their alleged undocumented migrant status. The migrants who were being held in administrative detention were accommodated in the cells with awaiting trial inmates. This was in breach of the international standards. The team was also informed that some of the migrants were detained for periods longer than allowed in terms of the

Refugees Act 130 of 1998.[21] It was suggested that a separate cell be demarcated for migrants.

[100] The team also visited the female remand detention facility. They recorded that the facility was in an equally poor condition as the male cells. Ninety four women were crowded into poorly aerated cells. Some of the women shared beds and slept on the floor on thin mattresses that had a repugnant smell. There was no working toilet, a clogged sink and only cold water. They were shown tattered and torn sheets and blankets which were also infested with lice. They noted that the cell was infested with cockroaches. The women also complained that as remand inmates they were not afforded library books, or magazines to read.

[101] Justice Cameron noted though, that the female inmates had given a far more favourable account of their day to day lives than their male counterparts. The female inmates also had one hour of exercise per day in a courtyard.

[102] The delegation had been invited to attend a debriefing session after the inspection with the management of the RDF. It was convened by the Regional Commissioner Mr. Delekile Klaas, who voiced an *"undisguised concern about what the inspection had revealed."* He required immediate responsive action while putting the structural and personnel challenges into perspective. He gave a provided the background to the facility, and explained its ever deteriorating infrastructure. The major repair works had to be attended to by the Department of Public Works whose relationship with the Department

[21] The initial arrest warrants were valid for a period of thirty days and thereafter a further warrant was required to be issued by a judge or a magistrate to extend the period of detention in terms of the statute. They were informed that the lack of efficient decision making by the Department of Home Affairs led to some detainees being kept in excess of lawfully permitted periods.

of Correctional Services, Mr Klaas described as *"a challenge"*. He pointed out that plumbing appeared to be the most serious structural problem and that there were also problems in the sewerage system because of the old cast iron pipes, structural damage, and the lack of adequate water pressure. That resulted in toilets not being able to be flushed. There was also an insufficient supply of hot water due to an inadequate number of functioning geysers. Mr Klaas acknowledged too the electrical problems. He confirmed that the Pollsmoor Centre was losing staff for a variety of reasons. He reflected on what was observed during the inspection, and readily conceded that overcrowding was a major problem in both the male and female sections. He pointed out though, that overcrowding was not unique to Pollsmoor, but a national problem. Justice Cameron remarked that Mr Klaas appeared to have been *"clearly shocked at the conditions we found, particularly that detainees were kept in their cells all day without exercise."* Mr Klaas gave immediate and emphatic instructions that daily exercise for the inmates were to be reinstated. He also acknowledged that cleanliness and hygiene were serious problems and instructed that the staff address these concerns immediately. He explained that budget constraints was a primary factor that limited the ability of the management at Pollsmoor to improve the conditions at the facility. The budget had declined and no additional funds were made available by national treasury. He undertook to take up the issue of filthy blankets and to ensure that adequate washing machines were obtained for the washing of linen and clothing by inmates.

[103] Justice Cameron recorded that Mr Klaas required that immediate attention be given to the following issues

(i) *"Increased exercise to inmate to at least once every day. The staff required to report that the prisoners were in fact receiving that amount of exercise*

(ii) *An increased number of meals from two per day to three.*

(iii) Improved access to medication.

(iv) That a meeting be convened with the Pollsmoor doctors nurses and pharmacists to understand their needs and reasons for short comings and provide a more enabling environment."

[104] In his report Justice Cameron raised very pertinently what he regarded as the obvious question as to whether the Department was adhering to its own norms and standards.

The Department's Action Plan(s)

[105] In response to the inspection by Justice Cameron, the Area Commissioner Mr Ntobeko Clifford Mketshane produced an action plan on the 7th August 2015 which was developed to address all of the deficiencies identified across the centres. *"The action plan"* which was welcomed by Justice Cameron was also attached to his own report.

[106] The plan was produced in a table format under the following headings, *"Problem, Corrective Measures/Action, Responsibility, Timeframe, Progress"* with a last column headed; *"Challenge."*

[107] The applicant claimed that it had considered the details of the action plan, but dismissed it as being for *"the most part ambitious and lacking in specific timeframes."* It pointed out that matters which were required to be addressed immediately had yet to be dealt with and there was no specific time frames given for the execution of the remedial action. The applicant expressed its skepticism at the implementation of the action plan and concern as to whether the Department would speedily put an end to the conditions highlighted by Justice Cameron.

[108] The applicant responded to each of the measures/corrective action recorded in the action plan;

(i) Correctional officials assaulting detainees; The Department undertook to conduct an investigation of allegations that personnel assaulted detainees and with specific reference to a Mr Hartle, the official pointed out as having assaulted one of the detainees. The Department noted that during the period 2014/2015, twenty-nine cases of alleged assault by correctional staff on inmates were registered at the Pollsmoor RDF. Only three resulted in criminal charges, and were reported to the SAPS at Kirstenhof. The Department recognized as a challenge that not all inmates readily reported assaults and so too, did not all officials. The applicant pointed out that in its experience, it was unlikely that officials would report assaults as inmates feared reprisals. The action plan provided a time frame of 21 days, but had not indicated what exactly would be done within that period to address and resolve the problem. The applicant noted that an investigator was appointed, but it was not evident as to whether this was an independent person or a member of staff. The applicant claimed that nothing was done about the recommendation by Justice Cameron of a ***"no tolerance policy"*** towards correctional staff who allegedly assaulted inmates and claimed that there was no indication as to what exactly the Department was doing to put an end to assaults and when exactly it would seek to achieve that.

Exercise

[109] A program of exercise had been re-evaluated to increase the frequency of exercise. This program had been *"prioritized"* and administrative staff was to be used to

assist with exercise. The applicant pointed out that there was no indication about the actual outcome of the re-evaluation and that there was moreover no indication whether, the frequency of exercise had since increased and if so, whether the statutory requirements had been complied with. A number of challenges were listed by the Department that it claimed militated against compliance with the statutory requirements.

Medication and access to medical treatment

[110] Justice Cameron had recommended that the Department's stock auditor visit Pollsmoor immediately, and regularly thereafter, to address the shortages of medical stock. The applicant pointed out that the recommendation did not appear to have been addressed and the Department had instead simply stated that it *"Increased the emergency ward stock at the centre clinics."* There was no indication as to what level of increase had occurred, or how it was to be maintained, or improved. The applicant pointed out that there was vagueness as to the *"program" put* in place to increase access to medical care by inmates. The Department indicated in the action plan that a program be put in place to rotate access per section on an assigned day. The applicant contended that the system put in place by the Department was no different to that when visited by Justice Cameron. The Department also recorded a number of challenges with regard to the problem in particular, the lack of capacity, over-crowding and the lack of isolation cells, amongst others.

Food

[111] The applicant pointed out that the action plan did not address what the Department was doing and would do to meet its statutory obligations to provide *"an adequate diet to promote good health as prescribed in the regulations."* The Department explained that it was not able to comply with section 8(5) of the Act which prescribed

when meals had to be served, the concern raised very sharply by Justice Cameron. The Department recorded as one of its challenges the shift system that was in place that militated against its ability to comply with the provision of food at three separate intervals. It placed on record though, that Justice Cameron and his team had during the visit insisted on eating from the same food that was served to inmates and were satisfied with both its quality and taste.

The provision of beds.

[112] The applicant pointed out that Justice Cameron had remarked that it was an elementary requirement that a bed be provided to every inmate. The action plan recorded that in the 2014/ 2015 financial year mattresses and blankets had been ordered and that 3830 mattresses had were received. The Department listed as its central challenges the problem of overcrowding, the limited infra-structure and the practicality of having beds in every cell. It also highlighted as amongst its challenges the impact on its facilities caused by delays through the finalization of court cases, investigations by the South African Police, the lack of implementation of alternative sentencing measures and the incarceration of foreign nationals; all of which it reasoned constituted to the over-crowding of its facilities.

Filthy blankets

[113] The applicant pointed out that all that was recorded was that an application had been made for capital resources to upgrade existing laundry facilities. No detail was provided as to when the application would be made and when it would be implemented. The Department again listed its challenges of the over-crowding and the lack of laundry capacity and also to what it referred to as the malicious damage of blankets by inmates.

Hot water

[114] The Department recorded that contractors were appointed by the Department of Public Works to attend to the problem, heat pumps were serviced and faulty elements were replaced. It acknowledged that it was not able to comply with the imperative of providing hot water and repeated its challenge of the over-crowding and the current infra-structure.

Sink, showers and toilets

[115] The Department recorded that blocked drains and toilet flushing systems were fixed. It also recorded an increase in turnover time as soon as breakages were reported. The applicant noted that no new working showers and toilets were installed despite this having been pointed out as a necessity. The Department explained that the RDF did not have any space to put in any new sinks, showers and toilets and because of over-crowding it was unable to resolve this matter.

Light and ventilation

[116] The Department recorded that light bulbs were replaced on a daily basis. The second respondent was urged to inspect cells on a regular basis and report faulty lights for repair and replacement. Faulty lights are attended to daily by an electrician. The Department again recorded as its challenges, over-crowding, the lack of ventilation and what it regarded as the malicious damage to light fittings by inmates. It explained that shutters were placed outside the cell windows for security reasons.

Hygiene

[117] The Department recorded that soap and cleaning materials were being issued to inmates. The applicant pointed out that during the interviews with the inmates by Justice

Cameron it was demonstrably evident from the infested bedding and the physical condition of many inmates with infectious skin conditions that the supply of cleaning material was insufficient. It also pointed out that the action plan had not indicated how the position had improved but that the Department had merely repeated the refrain of the challenges of over-crowding and the high turnover of detainees.

Access to library and reading material

[118] The Department recorded as a corrective measure, that books were available on request. The applicant pointed out that the Department had merely noted that management had taken *"note of"* the advice of the judge and would make a submission to the head office for *"possible consideration."* This, the applicant pointed out was a wholly inadequate response to an ongoing breach of a statutory requirement.

Systemic issues

[119] Justice Cameron had also referred to a number of systemic issues which were required to be addressed in the medium to long term, and significantly not only by the Department of Correctional Services but by a number of stakeholders and organs of government.

[120] The applicant contended that the Department's response to these issues were equally inadequate in that: there were no proposals made, let alone any action taken to deal with the extreme over-crowding which was at the root cause of many of the breaches of the law.

The applicant contended that it appeared that the Department contemplated that the extreme over-crowding would simply continue and there appeared to be no considered response to the possible transformation of the existing infra-structure into livable cells.

[121] In response to the recommendation that the Department of Correctional Services urgently seek the co-operation of the Department of Public Works to find practical ways of addressing the plumbing, electrical and other infra-structural problems the applicant criticized the Department for merely stating; *"the concerns of the judge is noted"* and that the matter would be referred to the head office to interact with the Department of Public Works.

In relation to the staffing problem, the applicant pointed out that there was no mention of any program to retain skilled staff despite Justice Cameron's emphasis that the Department focus its efforts at doing so.

[122] In the answering affidavit deposed to by the second respondent on the 18 March 2016, he contended that the conditions at the Pollsmoor RDF did not at that date resemble that which had been described in the report by Justice Cameron and claimed that the conditions had substantively improved. He attached and referred to a further *"action plan"* dated 15th February 2016, prepared by the Pollsmoor management team.

[123] The applicant contended that this *"second"* action plan did not produce any facts that contradicted that which had been complained about in respect of the first action plan. It claimed that a perusal of the first and second action plans had revealed no material difference in content in relation to most of the issues raised in the report.

[124] The format of the second action plan was distinctly different from that of the first plan. All the responses to the observations and recommendations by Justice Cameron in the second plan were in my view rather unhelpfully conflated under a single column *"DCS response"*, as compared to the first plan. The second action plan did also not

appear to directly address the shortcomings identified in the founding affidavit deposed to in December 2015, on behalf of the applicant. In its response to the allegations against correctional staff of assaults on detainees and the serious concern raised about it by Justice Cameron, the revised action plan recorded that the *"processes of the application of the use of force"* were addressed with all of the staff. Copies of policy documents were provided to all personnel. In my view that intervention hardly demonstrated a seriousness of the response to the allegations. The action plan again records statistics of complaints received, processed and referred to the SAPS for criminal investigation. In respect of exercise by inmates the revised plan recorded that the inmates were afforded *"limited exercise"*, and that consideration was been given to reducing the period to 30 minutes. The challenges with regard to infra-structure and staff shortages remained the same. In respect of the provision of basic medical supplies and medication there appeared to have been an improvement in particular with regard to an increase in the emergency ward stock. The Department recorded that the turn-around time for the issuing of prescriptions had decreased to 48 hours after the appointment of an additional pharmacist and two community service pharmacists. The stock of medical supplies had improved. A pharmacy had been opened at the Goodwood Correctional Centre which decreased the demand on Pollsmoor. The Pollsmoor pharmacy in addition, only served Malmesbury. A Pharmaceutical Therapeutic Committee has been established to continuously monitor pharmaceutical services. The staff compliment at the admissions centre had increased to eight nurses. The RDF had also entered into a partnership with TB, HIV Care. No details are given as to exactly what the partnership entailed. An additional eight counsellors had been appointed, so too were laboratory technicians, a nurse mentor, four data capturers and a radiographer to assist with the HIV and TB programme. Councilors were screening inmates from court and those with TB, HIV symptoms were isolated, tested, and where necessary referred to the clinic for further

management. MDR cases were also identified and managed at the Brooklyn Chest Hospital. The revised plan also recorded that there had been an official visit to the Pollsmoor RDF by the Minister of Health and the Minister of Justice as well as Correctional Services with regard to the TB situation. There was no formal report on the visit. It was noted though, that the Minister of Health had donated a G16 Gene Expert Machine, a TB diagnostic tool, and that a laboratory had since been opened at the Pollsmoor Centre. In respect of the food issue it was noted that the inmates received nutritious meals, but not in accordance with the intervals prescribed in the Act. In respect of the provision of beds, the Department had done away with the use of triple bunks because of safety concerns. All inmates were provided with mattresses and blankets for sleeping. The Department recorded that eight hundred and thirty mattresses had been received as well as eleven thousand blankets during November 2015. The Department reported that not all inmates had beds due to space constraints and those who did not, were provided with mattresses. In respect of the concerns raised about filthy blankets, the Department recorded that the washing cycle of blankets and bedding had been increased with the Goodwood facility assisting Pollsmoor with laundry services. A laundry machine had also been installed at the RDF for the washing of blankets and a program was being developed by floor managers. In respect of the provision of hot water there had been an engagement with the Department of Public Works and geysers were fixed but still lacked the capacity to serve 4000 inmates. The budget had been increased for the day to day maintenance. In respect of sinks, showers and toilets. The Department again recorded that the infra-structure was inadequate to provide for any increase in the installation of additional sinks, showers and toilets.

[125] A maintenance plan had been put in place to address day to day breakages. With regard to light and ventilation the Department recorded that due to the behavioural

challenges by inmates glass bulbs were being phased out for more durable plastic alternatives. In respect of hygiene and the issuing of soap and cleaning materials the Department recorded that the issuing of such items were being recorded in a register.

[126] In respect to access of a library and reading material, the Department recorded that there was a small informal library that was being used as a distribution point for books. Books were being alternated amongst the various units and an official was allocated to attend to the process. Pollsmoor also received a donation of about 4000 books in February 2016. In respect of preventative medical measures, the Department recorded that condoms were available and placed in accessible areas in each of the units. TB screenings and awareness campaigns were also been carried out. The Department referred to the partnership it had entered into on TB and HIV. HIV testing and counseling campaigns were provided to inmates on a daily basis. Care meetings were being held to identify gaps in the processes and training in the prevention and control of infections had been conducted for officials and nurses.

[127] The Department recorded that the process for the filling of vacant positions had been prioritized and that 673 officials were being trained in line with the WSP. The revised plan acknowledged the challenge of over-crowding and that strategies were being explored to alleviate the problem. Bail protocols were being implemented on a daily basis. Eight court officials were appointed at different courts to deal with non-custodial applications in terms of section 62,[22] of the Criminal Procedure Act 51 of 1977

---

[22] "***62 Court may add further conditions of bail***
Any court before which a charge is pending in respect of which bail has been granted, may at any stage, whether the bail was granted by that court or any other court, on application by the prosecutor, add any further condition of bail-
(a) with regard to the reporting in person by the accused at any specified time and place to any specified person or authority;
(b) with regard to any place to which the accused is forbidden to go;
(c) with regard to the prohibition of or control over communication by the accused with witnesses for the prosecution;

bail reductions as well as section 49(G)[23] of the Act applications were submitted to courts on a monthly basis. A table was provided to indicate the number of referrals for bail between April 2015, and 2016 under section 63(1)[24] of the Criminal Procedure Act.

[128] Whilst this court acknowledges that there had been some improvement in the Departments responses and implementation of the issues raised by Justice Cameron as reflected in the second action plan, the situation had not substantially changed and did not detract from the continued unlawfulness of the conditions under which inmates were being held at the Pollsmoor RDF. That as much, was confirmed by the subsequent visit by the Public Service Commission in April 2016, to the facility in which it expressed the view that the RDF was *"not fit for human habitation"*. The Public Service Commission had also listed a number of recommendations with very specific time frames (many of which were prescribed within a period of 60 days.) This court was not furnished with the response by the Department to the Public Service Commission's recommendations.

[129] The second respondent in a belated supplementary affidavit referred to a third update of the action plan by the Department. That plan was updated on the 17 August

---

(d) with regard to the place at which any document may be served on him under this Act;
(e) which, in the opinion of the court, will ensure that the proper administration of justice is not placed in jeopardy by the release of the accused;
(f) which provides that the accused shall be placed under the supervision of a probation officer or a correctional official.
[Para. (f) added by s. 38 of Act 122 of 1991 (wef various dates in respect of different magisterial districts - see Schedule appearing after this Act).]

[23] ***"49G. Maximum incarceration period***
(1) The period of remand detainee must not exceed two years from the initial date of admission into the remand detention facility, without such matter having been brought to the attention of the court concerned in the manner set out in this section."

[24] ***"63 Amendment of conditions of bail***
(1) Any court before which a charge is pending in respect of which bail has been granted may, upon the application of the prosecutor or the accused, increase or reduce the amount of bail determined under section 59 or 60 or amend or supplement any condition imposed under section 60 or 62, whether imposed by that court or any other court, and may, where the application is made by the prosecutor and the accused is not present when the application is made, issue a warrant for the arrest of the accused and, when the accused is present in court, determine the application."

2016. The applicant claimed that given the time constraints and the lateness of the supplementary affidavit, it was not able to have commented on the content of the third action plan at all. From a perusal by the court of the document it appeared that there were no material differences in respect of that report with that of the second plan prepared in February 2016. There were however, some areas of improvement, but in my view it did not significantly indicate that all the serious issues raised in the report by Justice Cameron had been properly attended to.

Rodent infestation

[130] On the 19 September 2015, shortly after the release of the Cameron report it was reported in the media that an infectious disease, leptospirosis, which is carried by rat urine, had caused the death of two inmates at Pollsmoor's RDF, and that the detainees accommodated there had been transferred to alternative accommodation. In response to the press reports, the applicant's attorneys wrote to the second respondent and the Deputy Commissioner of Remand Detention (Ms B Rotmann) with regard to the report of the infestation and the transferal of inmates from Pollsmoor RDF to other centres.

[131] It appeared that the Departments weekly unlock statistics for the Western Cape had remained the same for the remainder of September and the first two weeks of October. During the first week of October, employees of the applicant received information from the ICCV`s based at Pollsmoor, that inmates from Pollsmoor Medium A were being transferred to other correctional centres in the province in order to make space for Pollsmoor RDF detainees to occupy Medium A while Pollsmoor RDF was being cleaned and fumigated.

[132] On 22 October 2015, the Regional Commissioner responded to the letter in which he stated:

"The highest percentage of remand detainees transferred from the Remand Detention Facility had been resettled in correctional centres within the Pollsmoor Management Area. The total transferred from Pollsmoor RDF to other centres will most definitely be reconsidered after the fumigation project has been concluded. However, at this stage it is not guaranteed that all of them will return to Pollsmoor as pending cases and proximity to courts served by Pollsmoor will be determining factors."

[133] The second respondent, in response to the report of the deaths of inmates at Pollsmoor RDF perfunctory stated in his answering affidavit, *"Besides stating that I am aware that one inmate at the RDF died of leptospirosis in and around October the rest of the contents of this paragraph which in any event is based on inadmissible hearsay is noted."* It is apparent that the second respondent failed to take the court into his confidence in dealing with the issue of the rodent infestation, in particular what had caused it and exactly what measures and steps were put in place to prevent its recurrence. Most significantly was the second respondent's explanation that as a result of the fumigation processes that needed to take place at the Pollsmoor RDF, inmates were moved into other management areas at the Pollsmoor facility. No further details were provided of the relocation.

[134] Once again, the second respondents dismissal of the claims made by the applicant as inadmissible hearsay was indicative of the manner in which the second respondent repeatedly dealt with serious concerns raised by the applicant and its witnesses, and more importantly displayed an unfortunate dismissiveness about his accountability in respect of the problem that lead to the rodent infestation. What was

apparent though, was that it was forced to, and did in fact take drastic measures by relocating the inmates at the Pollsmoor RDF at short notice in order to clean and fumigate the premises.

The respondents attempts at discrediting the witnesses.

[135] The response by the second respondent to the claims made by the various witnesses with regard to the conditions under which they were held at Pollsmoor RDF, suggested that their claims could simply not be relied upon because some of them had admitted to being members of gangs, while others had been charged with serious offences. The second respondent moreover, just denied their description of the conditions in the RDF and their individual experiences without in anyway, or with any detail contradicting their claims. The second respondent as Head of the Pollsmoor RDF was in the best position and given his access to the staff and records at the facility to have dealt with, where appropriate, with each of the issues raised by the witnesses. He made no attempt at doing so and was content to simply declare that there was a dispute about their claims and reserved the right to seek that the disputes be referred to oral evidence. He set no basis, or grounds of the alleged disputes of fact and his counsel wisely did not attempt to press the matter further during the course of argument.

[136] The second respondent also complained that the evidence collected by the applicant was not taken up with him first. He implied that because the witness statements were commissioned by *"amongst others"* members of the Legal Resource Centre and the Womans' Legal Centre, it reflected a *"one sided"* and selective approach on the part of the applicant. The second respondent had, in my view, completely failed to appreciate the role and function of a commissioner of oaths. The applicant correctly submitted that

the complaints against the members of the Legal Resource Centre and the Womans' Legal Centre who commissioned the affidavits were both unjustified and inappropriate.

[137] The applicant pointed out that in its founding affidavit it had set out at length its engagement since 2014, with the office of the second respondent and the Pollsmoor management generally with regard to the conditions at the Pollsmoor RDF. It disputed that it had attempted through the evidence of the witnesses to provide a *"one sided"* view of the conditions at the RDF, *or* that the second respondent was not afforded the opportunity of responding to the claims by the witnesses. As already pointed out, the second respondent had all the opportunity of doing so in these proceeding but squandered it. The second respondent moreover, lost sight of the fact that these being motion proceedings in which a declaratory order was being sought against the first respondent, (and to the extent that the second respondent felt aggrieved thereby) it was incumbent on the second respondent not simply to deny and dispute the averments made by the applicants and its witness, but to have properly dealt with each of the claims.

[138] The second respondent claimed further that if any of the inmates had complained to him, his staff, or the Independent Correctional Centre Visitor (ICCV) the complaints *"would have been recorded, investigated and proper and necessary steps would have been taken."* The applicant pointed out that the tenor of the complaints were reflected in the successive reports of the various justices of the Constitutional Court as well as in the minutes of the various meetings of the ICCV.

[139] The second respondent contended that the *"uncontrollable situation"* at the Pollsmoor RDF with regard to over-crowding and related concerns, were directly as a result of challenges that were not peculiar to the Western Cape. The fact that the

Pollsmoor RDF was at the receiving end of investigative activities of the South African Police Services, the National Prosecuting Authority all pointed to delays in the criminal justice system and caused partly by the courts. The applicant emphasized that it did not dispute the fact that the conditions of detention at Pollsmoor RDF was in part as a result of the functions of others and in the criminal justice system as a whole. There however remained the duty on both the first and second respondents to specifically comply with the law and the particular legislation regarding the conditions of detention of arrested persons.

[140] Inasmuch as the second respondent was required to conduct weekly cell inspections, to prepare reports in compliance with the minimum standards of detention and reporting as required by the B Orders he had simply failed to deal with the matter at all in his answering affidavit. Moreover, he gave no explanation as to whether such inspections had been conducted by him and whether he had in fact compiled the reports. Most tellingly, he had failed to indicate to the court what his position was with regard to the provision of the reports as required in prayer 4 of the Notice of Motion, and if not, what the reason for such refusal was.

[141] During the course of argument, counsel for the second respondent informed the court that the second respondent *"was not averse"* to providing the reports in accordance with the relief sought, but that he required time to first collate all of the information.

[142] Section 63 A of the Criminal Procedure Act 51 of 1977, provides for the release, or amendment of bail conditions of accused persons on account of conditions in a correctional facility if the Head of the prison is satisfied *"that the prison population of the facility is reaching or has reached such proportions that it constitutes a material and*

imminent threat to the human dignity, physical health or safety of the accused in question." The second respondent was silent with regard to what efforts, if any, he or his office has made to invoke these provisions in the light of his admitted overcrowding of the Pollsmoor RDF over the many years. If, in fact, he had resorted to the use of the provisions he did not disclose the outcome to the court.

The filing of the supplement answering affidavit and the notice of application for a postponement of the matter.

[143] As alluded to earlier, as late as the 29th November 2016, literally four court days before the hearing of the application, and after counsel for the applicant had already filed heads of argument, the second respondent sought leave to file a supplementary affidavit and filed an application for the postponement of the matter.

[144] In the supplementary affidavit no explanation was provided by the second respondent for its late filing. He simply claimed that the information contained in the supplementary affidavit with regard to further developments in response to the inspection and the report by Justice Cameron were sufficiently important for the court to have regard to the supplementary affidavit. The developments referred to were:

(i) The further action plan dated the 17th August 2016 to which I have already referred to.

(ii) The establishment of a national multi-disciplinary task team with effect from the 30th September 2016 to investigate and analyze the impact and the implications of over-crowding on the correctional services system under the chairpersonship of Deputy Commissioner, Mr Willie Damons.

(iii) The permanent appointment of the second respondent to the position of Head of Pollsmoor RDF. The second respondent claimed that brought certainty and stability at a managerial level at the Pollsmoor RDF.

(iv) An investigation and report by the Public Service Commission in collaboration with the Judicial Inspectorate of Correctional Centres in April 2016, and to which I have already referred to earlier.

(v) The appointment by the Regional Commissioner Western Cape Mr Delekile Klaas of a fact finding delegation in August 2016, to do a comparative investigation and assessment of the three largest detention facilities within DCS, namely Johannesburg RDF, Kgosi Mampuru RDF located in Pretoria and Pollsmoor RDF.

(vi) The establishment on the 23 September 2016, of a multi-disciplinary national task team for Pollsmoor by and under the auspices of the National Commissioner (the Pollsmoor National Task Team) headed by the Deputy Commissioner Chief Security Officer whose task is to consider and work towards the implementation and findings of the recommendations of Justice Cameron`s and the PSC report (it is not clear whether this multi-disciplinary task team is the same as that to be headed by Deputy Commissioner Willie Damons).

[145] No explanation was provided by the second respondent as to why this information had not been placed before the court earlier and made available to the applicant until only after the applicants counsel had filed his heads of argument and no less than four days before the hearing of the matter. The applicant pointed out that the filing of the supplementary affidavit at such a late stage had deprived it of the ability to review its contents and reply thereto, if necessary. The applicant suggested that the late filing appeared to be calculated to force the applicant to agree to a postponement which was

what the second respondent really sought. The application for the postponement was strenuously resisted. The applicant maintained that having regard to the continuing and daily breaches of the constitution and the Act as well as the resultant grave and ongoing breaches of the rights of inmates detained at Pollsmoor RDF, the applicant was prepared to forego the opportunity of filing a further replying affidavit. The applicant pointed out though that the belated supplementary affidavit had in fact strengthened the case for the relief sought by the applicant. In this regard I have already alluded to the sentiment expressed in the report by the Public Service Commission after its visit to the Pollsmoor RDF in April 2016. Moreover, the applicant pointed out, that more than 6 years have elapsed since the concerns and issues raised by Justice Froneman in his visit to the Pollsmoor facility and report on the 30th April 2010. The applicant contended further that the supplementary affidavit did not detract from what was patently clear that there had not been any material improvement in any of the four critical areas of breach such as over-crowding including ablution facilities, the provision of three separate meals according to the law, the provision for daily exercise and the failure to provide adequate access to health care services. The applicant pointed out that there was no claim at all made by the second respondent of proper compliance with the constitution and the Act other than that the complaints raised by Justice Cameron and others were being attended to as *"a work in progress."* The second respondent had moreover, admitted the breaches, but had simply asked for more time to deal with it, in particular a further six months after which the second respondent would report on what was done.

[146] Counsel for the applicant submitted that the applicant did not underestimate the task and challenges contained in the report of Justice Cameron and the other reports to bring the conditions at the Pollsmoor RDF to within the law. It recognized that the

Department of Correctional Services was only one of a part of the executive that would have to participate in ensuring that which was needed was achieved. It reiterated for that very reason the first respondent was cited as "The National Government."

[147] The applicant pointed out that it was remarkable and disturbing that the first respondent had chosen not to participate at all in these proceedings and had simply decided to *"abide the decision of this court"* (as stated in the heads of argument filed on behalf of the second respondent). That, the second respondent deliberately choose to do in the face of serious allegations against it of having acted in breach of the constitution and the Act was in itself a matter of serious concern. The first respondent had not denied any of the claims made against it by the applicant, yet it had not sought to justify its conduct, or explain it, and more significantly what the National Government would do about the breaches. Counsel for the applicant referred to the dicta of the unanimous court in **Van Straaten v President of the Republic of South Africa and Others 2009 (3) SA 457 (CC) para 9** where the following comments were made:

"This is not the first occasion that the state has not responded to a matter that is before this Court. This failure on the part of the state is regrettable. The state has an obligation to respond to court processes. It cannot simply disregard court processes. It must lead by example."

[148] Section 165(4) of the Constitution provides that organs of State *"must assist and protect the courts to ensure the independence, impartiality, dignity, accessibility and effectiveness of the courts."* In the matter of **Tongoane and others v Minister of Agriculture and Land Affairs and Others 2010 (6) SA 214 CC @ 118** Ngcobo CJ said

"These are not idle words randomly inserted into the Constitution, they must be given meaning."

[149] Counsel for the respondent submitted that the meaning to be given to section 165(4) was that when the first respondent is brought before the court and accused of serious systemic and ongoing illegalities, it may not simply *"lie low and say nothing and absent itself from the proceedings and the hearing."* He pointed out that if the courts are able to carry out their functions effectively they need the government to respond to the charges against it and if (as in this case they are not disputed) they must assist the court in crafting an appropriate remedy. This court shared that sentiment.

The relief sought

[150] Counsel for the second respondent contended that it was inappropriate for the court to grant the declaratory relief sought[25], and a structural interdict. He contended that the court in doing so, may well be threading in breach of the doctrine of the separation of powers.[26] Counsel for applicant contended that on the evidence presented in the application and the lack of it by the respondents that it was indisputable that the

---

[25] Section 172 (1)(a) of the Constitution provides;

(1) When deciding a constitutional matter within its power, a court –

(a) must declare that any law or conduct that is inconsistent with the Constitution is invalid to the extent of its inconsistency ; and

(b) may make an order that is just and equitable, including…."

[26] See remarks by Snyders JA in Government of the RSA v Von Abo 2011(5) SA 262at para 29

"[29] In paras 4 and 5 of the first order the court below prescribed to the appellants, as representing the executive, the result their diplomatic protection should achieve for the respondent and the time frame within which to do so, and appointed itself the overseer of the executive. The order violates the legal principles laid down in *Kaunda* and the form of the order illustrates some pitfalls that were illustrated in *Modderfontein Squatters, Greater Benoni City Council v Modderklip Boerdery (Pty) Ltd (Agri SA and Legal Resources Centre, Amici Curiae); President of the Republic of South Africa and Others v Modderklip Boerdery (Pty) Ltd (Agri SA and Legal Resources Centre, Amici Curiae)* 2004 (6) SA 40 (SCA) (2004 (8) BCLR 821; [2004] 3 All SA 169), namely:25

'As mentioned, the Court below granted, in terms of s 38 and s 172(1), a declaratory order and a mandamus in the form of a structural interdict (ie an order where the court exercises some form of supervisory jurisdiction over the relevant organ of State). . . . Structural interdicts . . . have a tendency to blur the distinction between the Executive and the Judiciary and impact on the separation of powers. They tend to deal with policy matters and not with the enforcement of particular rights.'

This is not to conclude that a structural interdict is never appropriate where the exercise of executive functions is concerned, but in this case it served to encroach on the functions of the executive.26

first respondent had systematically breached and continued to breach the rights of detainees at the Pollsmoor RDF. Section 172(1)(b) of the Constitution empowers a court when deciding any constitutional matter within its power to make any order that was just and equitable. The applicant first sought a declaration[27] that the first respondent has failed to provide the inmates of Pollsmoor RDF with access to daily exercise of one hour, meals in accordance with the statute at three separate times a day, proper and adequate accommodation, ablution facilities and health care services of a standard that complied with the requirements of the Correctional Services Act and that such failure was inconsistent with the Constitution.

[151] Counsel for the applicant submitted that there were instances where a simple declaration, or a simple mandatory order, would not be just and equitable relief under the Constitution and that a structural interdict had to be considered by the court. Such instances he contented included:

(i) Where it was necessary to secure compliance with a court order. This included where it was *"inadvisable for the court to assume"* that the order would be carried out promptly.[28] This was such a case, the applicant contended.

Repeated reports by justices' of the Constitutional Court had not produced a substantive change, let alone a plan for change which would have brought to an end the systemic illegality.

(ii) Where the consequences of even a good faith failure to comply were so serious that the court should be at pains to ensure effective compliance. The applicant

---

[27] See the remarks of Froneman J albeit in the context of relief sought under PAJA in **Bengwenyama Minerals v Genorah Resources 2011 (4) SA 113at paragraphs 84-85.**

[28] See remarks by Yacoob J in **Sibiya v Director of Public Prosecutions, Johannesburg 2005(5) SA 315 para 61-62.**

submitted that this was indeed such a case given the nature and consequences of the breach and more importantly the vulnerability of the people affected by the breach.

(iii) Where immediate compliance was not possible and the creation and implementation of a plan was necessary in order to achieve compliance. This the applicant contended, would result in the reality that the breach would continue for some time and that the order of court in recognizing this was required to put in place an appropriate supervisory mechanism to ensure that the breach continues no longer than is necessary

[152] The applicant submitted that inmates belonged to a highly vulnerable group who did not have readily access to resources which were necessary to enable them to insist on their rights being respected. This the applicants contended was demonstrated by the continued existence of an extended period of time of inhumane and unlawful conditions at the Pollsmoor RDF. The applicant pointed out that non-governmental organizations such as the applicant were able to carry out some monitoring of the treatment of inmates, but were not able to obtain comprehensive and up to date information as demonstrated in the interaction of its lawyers with the respondents. The applicant pointed out that other agencies which had the task of oversight of the treatment of detainees, such as the Judicial Inspectorate were similarly not able to bring this unlawful situation to an end. The inhumane and unlawful treatment of detainees continued despite the best efforts of those to whom the applicant referred to. In my view of all of the reasons contended for by the applicant, it was both, just and equitable to have granted a supervisory order which required the first respondent to develop a comprehensive plan to address the deficiencies which forms the subject matter of the application and the report by Justice Cameron and to make the plan available so that:

(i) The inmates were able to know what their rights are;

(ii) The adequacy of the plans can be determined (if necessary through the court); and

(iii) Compliance with the plans can be ensured (if necessary likewise through the court).

[153] The applicant submitted that it was the first respondent that bore the duties referred to, and it was the first respondent that was required to determine what tasks must be performed and which organ of government was required to take action to end the state of illegality. It was not possible for the court to make a determination in that regard. It was for the first respondent to account to the court and the public for what it did and will do and various organs of state in order to comply with its obligations. Applicant submitted that under the circumstances, and given the history of the matter including, the inadequate responses of the respondents to the report of Justice Cameron, that the first respondent be required to file the reports as was contemplated in the Notice of Motion. The applicant had, in my view more than sufficiently established the basis for the declaratory relief and given the nature and circumstances of the declaration made it was appropriate that the supervisory relief be granted.

The Interim Order

[154] Arising out of the hearing on 5 December 2016, the court made the following interim order:

"2. The First Respondent is to show cause, at 10h00 on Wednesday, 21st December 2016, why the Court should not order it forthwith to reduce the number of persons detained at the Pollsmoor Remand Detention Facility to not more than 120% of the current approved accommodation number. The First Respondent must serve and file

any affidavits which it wishes in this regard by no later than Wednesday, 14th December 2016, and the Applicant may answer by no later than midday on Monday 19 December 2016."

[155] The relief contained in the rule *nisi* had not been sought by the applicant in its Notice of Motion, and as alluded to arose during course of the proceedings of the 5th December 2016, in the interaction between the court and counsel for the second respondent in particular, and also with counsel for the applicant. The court put to counsel for the respondent its grave concern about the rodent infestation that arose after the inspection by Justice Cameron, and enquired from him what the likelihood of it being repeated with fatal consequences in the over-crowded conditions at the Pollsmoor RDF. Counsel for the second respondent was unable to give the court any assurance that there was no risk of a further rodent infestation and the likelihood of a repeated fatality(ies). For that reason, the court was of the view that in the event of it making a declaratory order that the first respondent was in breach of its obligations under the constitution and in terms of the Act, the first respondent be given the opportunity to show cause why an order should not be made that the first respondent forthwith reduce the number of inmates detained at the Pollsmoor RDF to no more than 120% against the approved rate. The return date for the rule *nisi* was agreed between the parties and the court for the 21st December 2016.

[156] In response to the rule nisi, the Honourable Mr Tshililo Michael Masutha, the cabinet minister responsible for the portfolios of Justice and Correctional Services deposed to an affidavit. He explained that the Department of Correctional Services was responsible for the operation and management of correctional services which was under the control of the National Commissioner whom he noted had not been joined in the

proceedings. He stated that by virtue of his position as a member of the national executive he was best able to depose to the affidavit and furnish information to the court relevant to the material issues raised by the rule nisi. He confined himself only to the rule *nisi* and not to any of the other relief granted by the court on the 5 December 2016, against the respondents. Briefly stated, the Minister contended that the order envisaged in the rule *nisi* was neither practical, not feasible and moreover was neither in his view competent for the court to issue given the constraints of the Department and that the order would negatively impact on the remaining prison population in the Western Cape. The Minister set out extensively the broader context of the provision of correctional services not only within the Western Cape, but in the country and the constraints under which the Department operated. He emphasized the broader socio-economic conditions in the Western Cape, the high levels of crime, the prevalence of organized gangs both in and outside correctional facilities and the overall impact of all of these factors, amongst others, on the delivery of services by the Department. He claimed that the problems experienced by the Department of Correctional Services had to be addressed at a social, political and planning level and required the input of not only the first respondent, but other stakeholders including communities, business, and non-governmental organizations. He submitted that the problems could not be addressed by a court order in a single case, and that there had been insufficient evidence of the situation at other facilities in the Western Cape which would have been detrimentally affected by an order confirming the rule *nisi*. In short, he submitted that the problem of over-crowding at Pollsmoor could not reasonably and fairly be addressed by the court arbitrarily ordering the Department to reduce the numbers of inmates at the Pollsmoor RDF and in consequence forcing an increase in numbers of inmates at other facilities in the Western Cape together with the inordinate financial cost of such relocations. The Minister likewise dealt with the concerns raised by the second respondent about staffing at the Pollsmoor

RDF and that there were processes put in place to attend to the recommendations by Justice Cameron. He likewise contended that the issues raised in the matter was that of policy nature, and fell within the exclusive province of the executive and that the court should be slow in setting out hard and fast rules in terms of how they should be dealt with under the circumstances.

[157] The Minister pointed out though, that the Regional Commissioner had already started the process of addressing and ensuring the gradual reduction of the detainee population at the Pollsmoor RDF as contemplated in the court order. He explained though that for the reasons stated, it was not feasible to reduce the population at the Pollsmoor RDF to no more than 120% of the approved accommodation capacity. The efforts put into this task had in the meantime, he explained yielded the following results:

(i) A total of 567 sentenced inmates had been transferred from Pollsmoor Medium A to other facilities in the region.

(ii) That had already created space for a transfer of 800 remand detainees from the Pollsmoor RDF to Pollsmoor Medium.

[158] The Regional Commissioner was still in the process of considering the best possible options to reduce this figure further. He stated that the Department accepted its responsibilities and ultimate accountability in ensuring compliance with the standards set out in the Act and the constitution. He pointed out though, that under the current circumstances compliance with the legislation could only be realized in a progressive manner. He submitted that efforts within reach of the Department may only reduce the number of remand detainees in the Pollsmoor RDF to at most 150% of the current approved accommodation capacity. He anticipated that together with the Department the process which was part of a national process of reduction of over-crowding in

correctional facilities should be completed within a period of six months. He submitted therefore, that the Department required at least 30 days to conduct a proper assessment of the conditions of all the centres within the region and to consider the feasibility of further shifting more inmates between particular centres which did not have dire security, financial, staff, and other logistical consequences.

[159] The Minister submitted however, that should, the court be inclined to proceed to grant an order in line with the rule *nisi* that the order should *"rather be amended to set the level of reduction to 150% of the currently approved accommodation capacity of the Pollsmoor RDF. The period ordered must also be a reasonable one."* He nonetheless sought a discharge of the rule *nisi*.

[160] In the light of the undertaking by the Minister in both his affidavit and through his counsel at the hearing of the matter, it is not necessary to deal in length with the responses by the applicant. The applicant indicated though, that it accepted the reasons stated by the Minister for it not being practical, financially, and logistically able to comply with the exigency contemplated in the rule *nisi*. The applicant also accepted the undertaking by the Minister to reduce the number of inmates to 150% over a period of 6 months. The applicants however, sought further ancillary relief from the court in particular with regard to the order of the 5 December 2016, in respect of the declaration that the first respondent was in breach of its statutory and constitutional obligations. It contended that the significance of such an order was that it constituted *"new circumstances"* which had now to be considered by courts when considering bail applications, or renewed bail applications by inmates from the Pollsmoor RDF facility. In the light of the substituted order that the court proposed to give with regard to the reduction to 150% over a period of 6 months, this court was not inclined to make any

ancillary order which would have impacted significantly on the administration of justice in the Western Cape with a deluge of new and renewed bail applications by inmates on the basis of the declaratory order made by the court on the 5th December 2016. Moreover the court was particularly mindful that the Provincial Director of Public Prosecutions was not before it and that the ancillary orders sought by the applicant would have impacted significantly on the work, functions and pressure on that office. The applicant did not pursue the relief. In the light of the undertaking by the Minister the parties settled on an agreed order which was made an order of court. I must state though, for the record, that a reduction of the inmate population to 150% of the approved rate does not amount to compliance by the first respondent with its obligations in terms of the constitution and the Act, and moreover, to its international obligations referred to. The undertaking by the Minister must therefore be seen in context and a progressive step to the fulfillment of the first respondent's obligations.

In the result the following order was made:

*"**AMENDED ORDER***

Having heard counsel for the parties, the following order is made:

1. *The rule nisi issued on 5 December 2016 is discharged.*
2. *The Minister of Justice and Correctional Services (**Minister**) and the Department of Correctional Services undertake to reduce the number of persons detained at the Pollsmoor Remand Detention Facility (**Pollsmoor RDF**) to 150% of the current approved accommodation number within six (6) months of the date of this order.*
3. *In line with the Minister's undertaking, the First Respondent is directed to reduce the number of persons detained at the Pollsmoor RDF to 150% of the current approved accommodation number within six (6) months of the date of this order.*

4. *The First Respondent and the Minister are directed to file a status report to this Court on 21 April 2017, informing the Court on the extent of its compliance with the order in paragraph 3.*
5. *The First Respondent and the Minister are directed to file a report to this Court on 30 June 2017, as to whether it has complied with the order in paragraph 3.*
6. *The Applicant shall be entitled to file a response to the reports filed in terms of paragraphs 2 and 3 within 10 days of that report being served.*
7. *The applicant shall, within 10 days of this order serve a copy of the order on the First Respondent by the Sheriff and in due course file a service affidavit by their attorneys.*
8. *Costs are reserved.*

By order of the Court

_____

COURT REGISTRAR"

[161] In the light of the agreement between the parties with regard to the discharge of the rule *nisi* and the substitution thereof with the above order it is not necessary for this court to deal with the broader contentions raised by the Minister of non-joinder in the main application or whether the order contemplated in the rule *nisi* would have amounted to a breach of the separation of powers. What was of particular significance and importance though to the court and no doubt to the applicant who expressed its sense of encouragement in the Minister's willingness to have intervened in the proceedings and assisting the court with the filing of the affidavit in response to the rule *nisi*. His

participation demonstrated a dramatic and welcome shift from the position adopted by the respondents in the main application. Moreover his undertaking which formed the basis of the substituted order was in the circumstances both commendable and constructive.[29]

Saldanha J

[29] The Reasons for the order made by the court was handed down on the 23rd February 2017. The Minister of Correctional Services filed a report on 01 February 2017 in response to the court order of the 5th December 2016. The respondents are therefore at liberty to supplement such report on the matters raised in the Reasons pertaining to the relief. The parties are requested to liaise with one another with regard to such further timelines.