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RIGHTS

A NATION SHOULD NOT BE JUDGED BY HOW IT TREATS ITS HIGHEST CITIZENS, BUT ITS LOWEST ONES - *SONKE GENDER JUSTICE V THE GOVERNMENT OF THE REPUBLIC OF SOUTH AFRICA AND THE HEAD OF POLLSMOOR CENTRE REMAND DETENTION FACILITY*

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The South African Government's failure to address the overcrowding at Pollsmoor Remand Detention Facility (Pollsmoor RDF) was addressed, on 5 December 2016, by the Western Cape High Court in the matter of *Sonke Gender Justice v The Government of the Republic of South Africa and the Head of Pollsmoor Centre Remand Detention Facility*.

The Court declared that the Government failed to provide the constitutional and legislative standard of core services, including nutrition, accommodation, exercise, ablution facilities and health care services (hereinafter referred to as core services) to awaiting-trial inmates. This Court Order signals a great victory for the constitutional right to human dignity of awaiting-trial detainees.

The Court Order requires Government to show by 21 December 2016 why the Court should not order it to reduce overcrowding at Pollsmoor RDF to 120% of its approved accommodation, which is currently at a level of 250%. Furthermore, Government must develop a comprehensive plan by 31 January 2017, with specific timeframes for its implementation, pertaining to the deficiencies of core services to the inmates of Pollsmoor RDF. The Court Order also makes it mandatory for the Head of the Pollsmoor RDF (the Second Respondent) to report on his weekly findings on inspections of cell accommodation. This strict timeframe has to be adhered to otherwise the Government may be found to be in contempt of court.

A unique element of the matter is that Sonke Gender Justice brought the application against the Government of South Africa and not, as one would have expected, against the Department of Correctional Services (the Department) alone. The Government is held accountable for ensuring that all executive branches work together in providing adequate services to awaiting-trial detainees. The complex nature of the matter is not simply an issue of lack of management of funds. The reality is that this issue involves an interplay of service provision by various Departments and therefore requires a co-operative solution. In a report of the budgetary reviews for the first quarter of 2015/16 of the Department of Correctional Services (the Department), it was noted that the Department had failed to solve overcrowding due to the "*incompetence and subsequent liquidation of contractors that had been awarded the infrastructure-development tenders*". This response indicates exactly the complexity of accountability in addressing the problem of overcrowding. A further important aspect to highlight is that this matter does not concern the condition of detention of convicted inmates but only detainees awaiting trial.

The extent of overcrowding at Pollsmoor RDF is fully fleshed out by Sonke Gender Justice, by referring in their founding affidavit to judicial reports by Constitutional Court Judges who visited the facility; supporting affidavits of inmates and statistical data from the Department of Correctional Services (the Department). Pollsmoor RDF is one of the five facilities at Pollsmoor Correctional Centre and specifically accommodates male detainees over the age of 21 awaiting trial. It also serves 19 courts over the Southern Cape Peninsula. The horrendous overcrowding at Pollsmoor RDF was already well recorded in the judicial report of Judge Froneman on his visit to Pollsmoor in 2010, where he noted that Pollsmoor RDF housed 4 215 inmates in a facility which only had a capacity for 1 619 inmates. Judge Froneman also remarked on the stark contrast in conditions of detention of convicted detainees who have access to positive educational and recreational resources, compared to those of awaiting-trial detainees.

The founding affidavit further refers to the scathing report of Judge Cameron's visit to Pollsmoor RDF in 2015, documenting in detail the extreme deprivation of core services to these detainees. The shocking findings of Judge Cameron ranged from cells housing 60 inmates containing only 24 beds, with no sheeting, filthy blankets, very little natural light and broken toilets, forcing the detainees to urinate in the sinks in the same cells where they eat. There was also reports of detainees going out to exercise once in three weeks. To quote Judge Cameron: "*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*". The supporting affidavits of some of the detainees also sketch a bleak picture of detainees sitting idly around in overcrowded, stinking cells, with hardly any means to exercise or access to books.

As pointed out by Sonke Gender Justice, the incidents highlighted above are in clear violation of the *Correctional Services Act* 1998 (the Act) and the Constitution. An example to amplify the point is reference to section 11 in the Act, which provides for every inmate to have at least one hour of exercise daily. The Regulations of the Act and the "B-orders" issued in terms of the Act, also provide that every inmate be provided with a separate bed and bedding and, if single beds are not possible, "adequate felt sleeping mats" must be provided. Both Sections 12(1)(e) and 35 of the Constitution also refer to the humane manner detainees should be treated and specific reference is made to conditions 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.*"

In Judge Cameron's report, "immediate measures" were recommended to address the situation which ranged from providing each detainee with a bed whilst dealing with the external policies which aggravate overcrowding, to the Department of Public Works working with the Department of Correctional Services to address various infrastructural issues. An action plan was compiled in response to Judge Cameron's report but Sonke Gender Justice alleged that it was vague and lacked specific commitments. In order to enforce the constitutional rights of the detainees, an application was launched in December 2015. The reply of the Head of Pollsmoor RDF to the application, showed a clear attack on the

admissibility of both the reports by the Constitutional Court judges, which was described as "hearsay evidence" and the credibility of the supporting affidavits of the detainees to the application. It was also alleged that the Government as a legal entity cannot be sued and that all relevant Departments had to be joined in this application. The response loses sight of the fact that the complexity of this matter can only effectively be solved by Government ensuring oversight of all executive branches involved.

In the current state of affairs it is perhaps easy to forget about the rights of detainees in South Africa. The question of the condition of detention of inmates often provokes diverse opinions, fuelled by outrage at the crime statistics in South Africa and perhaps a general numbness to empathy of those who have been caught committing crimes. This sentiment loses sight of the constitutional duty imposed on all organs of state to treat detainees humanely and with dignity in order to break the cycle of criminal behaviour. This Court Order will realistically remove bureaucratic obstacles in ensuring that these awaiting-trial detainees are treated with dignity. In the words of Mr Mandela, "*A nation should not be judged by how it treats its highest citizens, but its lowest ones*".