IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, JOHANNESBURG

Case number: 17/16317

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: YES / ~~NO~~
(2) OF INTEREST TO OTHER JUDGES: YES / NO
(3) REVISED.

15/6/2018 ..... DATE

..... SIGNATURE

In the matter between:

PARTICIPATIVE MANAGEMENT COMMITTEE (representing 14 applicants)	Applicant
and	
MINISTER OF JUSTICE AND CORRECTIONAL SERVICE	First respondent
NATIONAL COMMISSIONER OF CORRECTIONAL SERVICES	Second respondent
ACTING AREA COMMISSIONER JOHANNESBURG CORRECTIONAL CENTRE	Third respondent
THE HEAD OF JOHANNESBURG CORRECTIONAL CENTRE B	Fourth respondent

JUDGMENT

WENTZEL, AJ:

[1] This is an application brought by Sisfiso Ndlovu ("**Ndlovu**"), together with 13 other applicants, all inmates of the Johannesburg Correctional Centre "B" prison in Meradale against the Minister of Justice and Correctional Services, the National Commissioner of Correctional Services, the Acting Area Commissioner Johannesburg Correctional Centre and the Head of Johannesburg Correctional Centre "B". Ndlovu is the Chairperson of the Participative Management Committee ("**PMC"**) offender structure. The PMC is a structure approved by the Correctional Services Parliamentary Committee to represent inmates.

[2] For convenience, I will refer to the applicants as "*the prisoners*" and the respondents collectively as the "*Department of Correctional Services*" ("**DCS**").

[3] The prisoners seek compliance with sections 8(5), 118(1)(a),121(1) (a) of the Correctional Service Act 111 of 1998 ("the Act"). They also seek that the respondents pay the 5% due to the Sports Recreation Arts and Culture ("**SRAC**") club earned from the canteen for warders and their families designated for prisoner recreation.

[4] I will first deal with the compliance sought with section 8(5) of the Act and will deal with the prison shop thereafter.

COMPLIANCE WITH SECTION 8(5) OF THE ACT

[5] The prisoners' main complaint is that, despite their being entitled, in terms of section 8(5) of the Act, to 3 meals a day, the DCS has, due to alleged staff shortages, served the evening meal, together with the midday meal, in breach of the provisions of the Act.

[6] The DCS avers that it has been precluded by an interdict in a labour dispute with its staff, from requiring that they work over-time and thus, is unable to serve the evening meal to the prisoners. It is, however, argued that the arrangement put in place whereby the evening meal is served together with the midday meal constitutes substantial compliance with the Act.

[7] Section 8(5) of the Act states that:

> "*Food must be well prepared and served at intervals of not less than four and a half hours and not more than six and a half hours, except that there may be an interval of not more than 14 hours between the evening meal and breakfast.*"

[8] In Medium B, the first meal (breakfast) is served at 08H00. The second meal (lunch) is served between 12H00 and 13H00 together with the third meal (dinner). This means that the interval between the last meal of the

day (dinner) and breakfast is 20 hours. This is in direct contravention of section 8(5) of the Act.

[9] I am told that the breakfast consists of porridge, lunch, 5 slices of bread with one boiled egg or butter and jam, with a hot meal of meat and vegetables being served as dinner. This latter meal is designed to sustain the prisoners until breakfast the next morning. Because the evening meal and the midday meal are served together, it means that the prisoners are compelled to have their hot meal at lunch.

[10] The DCS argued that the 5 slices of bread, served together with the midday meal, could easily be kept by the prisoners, and eaten later by them in their cells, as a substitute for the evening meal. The DCS points out that the meals provided are in accordance with the prescribed ration scale and comply with its Nutritional Service Procedure Manual that prescribes that food must be served immediately and attractively in an acceptable manner.

[11] The excuse proffered for the practice of serving dinner at the same time as lunch, to be consumed after lock up, is the severe overcrowding of the prison. I was told that Medium B is the most over-crowded Correctional Centre in Gauteng, being 2010% over-crowded. The Centre was designed to hold 1339 inmates, but holds 2812, with the numbers fluctuating daily as it is also a receiving centre, I assume for awaiting trial prisoners. As at 15 August 2017, a survey showed that there were 2779 inmates, making it

208% over-crowded. Far from improving, therefore, the problem with overcrowding has worsened since last year.

[12] Further exasperating this difficulty is that there is a shortage of staff, especially for night duty. The Correctional Centre has 710 approved posts, of which, there is only finance for 452. Even these posts are not all filled, with only 440 posts having been filled. This means that the DCS works on a skeleton staff who are not able to handle the task of serving supper in the evening as there is only one person who is on duty at night.

[13] This means that there are 440 officials employed for 2768 inmates, fluctuating daily. Of the 440 staff, 159 are internal security officials and 74 are external security officials. The rest are administrative staff.

[14] The approved Departmental official offender ration is 2:1 but currently, within the centre, there is one official for 45 inmates. This is hopelessly insufficient. Apparently, there are five units within the correctional centre, and all five of them only have one or two officials on night duty.

[15] The DCS states that they are not able to change the shifts of those employed so that more staff members can be on duty at night due to an injunction granted by the Labour Court, pending the outcome of the dispute between the DCS and its employees.

[16] In these circumstances, the DCS argue that:

16.1 There has been proper, alternatively substantial compliance with section 8(5) properly construed and its main purpose of providing adequate nutrition is achieved by serving the two meals together, which it is not disputed, are well prepared and are sufficient to promote good health (***Mharaj v Rampersad*** 1964 (4) SA 638 (A); ***Weene Transitional Local Council v Van Dyk*** 2002 (4) SA 653 (SCA); ***African Christian Democratic Party v Electoral Commission*** 2006 (3) SA 305(CC)); and

16.2 the respondents would not be able to comply with any order made that the evening meal be served separately from the midday meal. According to the principle *lex non cogit ad impossibilia*, the respondents should not be ordered to do that which is impossible, and should be excused from having to strictly comply with the Act (**Barkhuizen v Napier** 2007(5) SA 232 (CC) at para [75]).

[17] The prisoners disagree on two fundamental grounds:

17.1 The first is that the evening meal was supposed to be their hot meal, with meat and vegetables sufficient to sustain them until breakfast the following morning;

17.2 The second is that the system imposed on them required them to have their hot meal in the middle of the day, and by the time they got to eat their bread in the evenings, it was horribly stale and

inedible, it not having been fresh when served to them together with their midday meal in the first place.

17.3 Because there was a large gap between the evening meal and breakfast the next morning, it was appropriate that, that meal be served to them in the evening and that their midday snack of bread and jam be served to sustain them during the short hours between lunch and their evening meal.

17.4 It was also stated that prisoners do not have the discipline to keep their bread until the evening and are often tempted to snack on the bread after lunch, leaving them with nothing to eat in the evenings. Many prisoners are also on medication that needs to be taken in the evening with food.

[18] This, the prisoners say, has been further exasperated by the fact that hitherto, a shop was operated at the visitors' area from which visitors and family could purchase what the prisoners refer to as "*delicacies*," up to a maximum of R 600 per inmate, which enabled those who were bought provisions, to have things to snack on in the evenings and thereby, sustain them until breakfast the following morning. This privilege, however, was also stopped by the DCS and even those few who were lucky enough to have snacks to sustain them, were forced to last from midday until 08H00 the next day until they had the next meal. The reason for this was because prisoners were on-selling these delicacies to other prisoners at exorbitant

prices and it was not possible to police what was bought into the prison, a reaon not accepted by the prisoners.

[19] I have a great deal of sympathy for the prisoners' grievances. But that is beside the point. The prisoners are by law entitled to be served three meals a day and to have their hot meal in the evening; depriving them of this right, constitutes not only a violation of the provisions of the Act, but also a fundamental violation of their human rights. It is not sufficient that this requirement is substantially complied with.

[20] The prisoners also point out that they are at the mercy of the DCS and its administrative difficulties cannot be used as an excuse to deny them their fundamental rights. In addition, they do not accept that no prisons in the country are able to provide the evening meal separately from the midday meal and state that other overpopulated centres like Kgosi Mampuru Correctional Centre, Baviaanspoot Correctional Centre and Zonder Water Correctional Centre, to mention but a few, are able to comply.

[21] Our Constitution protects all of our citizens, be they free or incarcerated. Because prisoners are deprived of some of their fundamental rights, or have their rights limited, such as the right to freedom of association, freedom of movement and residence, and freedom of trade and occupation, it is essential that their right to "*conditions of detention that are consistent with human dignity*" guaranteed in section 35 of the Bill of Rights are protected.

[22] Under section 35 (2)(e) of the Bill of Rights, everyone who is detained, including every sentenced prisoner, has the right —

> "*(e) 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.*"

[23] These conditions are given effect and elaborated on by various sections of the Act.

[24] Although Parliament passed the CSA in 1998, it only came into full force in October 2004. Chapter 3 of the Act describes the General Requirements for the treatment of prisoners. These rights apply to all prisoners and as such, lay down the minimum standards for the treatment of prisoners under South African law.

[25] The Commissioner of Correctional Services is the official who is charged with responsibility for managing the Department of Correctional Services. The DCS, established in terms of section 2 of the Act, is responsible for the administration, management and maintenance of prisons in South Africa.

[26] Section 93 (2) of the Act provides:

> "*The Commissioner may delegate any of the powers vested in him by this Act to any correctional official or other person employed in the Department.*"

[27] This provision facilitates prison administration and allows for the head of each prison to deal with prisoners relative to the conditions and resources at each prison.

[28] Section 8 of the Act provides for proper nutrition which includes "*adequate diet to promote good health*". Provision is further made under the section for the proper preparation of the food, serving it at regular intervals and the availability of clean drinking water. This is in line with The United Nations Standard Minimum Rules for the Treatment of Prisoners (SMR), which provides for the right to food that is of nutritional value, adequate for health and well-being, food of wholesome quality and that is well prepared.

[29] The Regulations specify the calorie counts and that the diet must provide for a balanced distribution of food from the five major food groups. This, the DCS avers, it has complied with.

[30] The difficulties that the DCS avers that it experiences in complying with section 8(5) of the Act, however, are difficulties the DCS undertook to remedy in 2005 pursuant to a report commissioned by it into the state of its prisons. It would seem that at least in some of its prisons, if the prisoners are to be believed, the difficulties have been remedied and the prisoners are served their midday and evening meal separately. There can be no excuse for this, some 13 years later, not having been achieved in all the prisons in the country.

[31] This is particularly so as 12 of the financed posts have not been filled. I am not told how many people would be required to be on duty to serve the evening meal, but the filling of at least these 12 posts would go a long way to enabling the DCS to be able to do so. There is no explanation why funding has not been secured for the remaining 233 posts. If these posts were filled, there would be no difficulty in retaining staff to serve the evening meal. This is particularly so as of the 440 posts that have been filled, only 233 are security staff. Of these, 74 are external staff and are thus, presumably not subject to the Labour Court injunction. There is no explanation why these staff cannot be put on duty to serve the evening meal, or further external staff employed to do so, pending the outcome of the Labour Court action.

[32] The issue of overcrowding should also have been addressed, and it is inhumane to keep prisoners in conditions where more than twice the number of prisoners are housed in a facility designed for half the number of prisoners.

[33] Prisoners, whether awaiting trial or sentenced by a Court, are utterly dependant on the state for their care and well-being. The State, who is, responsible for the well-being of prisoners, cannot place people in prison and not care for them properly and in a manner, that violates or compromises their constitutional and statutory rights. A plea of substantial compliance, is not sustainable. The right to nutritious food is entirely separate from the right to be served 3 meals a day, without not more than 14 hours elapsing between dinner and breakfast, and compliance with the

one obligation, does not imply substantial compliance with the other. In truth and in fact, the obligation to ensure that more than 14 hours do not elapse between dinner and breakfast is not complied with at all.

[34] Neither is the purpose of this provision- to ensure that prisoners are sustained and do not go hungry between dinner and breakfast- adequately or substantially achieved as, it is the hot meal that it is intended would be provided at dinner (and not 5 slices of stale bread), that it was intended would sustain prisoners until breakfast the next morning. In addition, in order not to go hungry, prisoners require enormous self- discipline to save their 5 slices of bread given to them at midday, until the evening. With the enormous over-crowding and prevalence of prison gangs, there can also be no guarantee that prisoners will not be deprived of even these rations by other prisoners, who had eaten theirs, particularly where there is only one security official on duty in the evenings.

[35] Because prisons are notorious for serving prisoners inadequate and/or low-quality food, the Act and Regulations are very specific as to what a prisoner must be fed and at what intervals these meals are to be provided. These provisions are there to safeguard a prisoner's dignity and preserve his/her health.

[36] Although, the Bill of Rights in the South African Constitution contains several guarantees aimed at safeguarding the rights of prisoners, it is a known fact that several of South African prisons are horribly overcrowded and that the most basic constitutional rights of prisoners are not

adequately protected. This gap between the guarantees set out in the Constitution and the actual conditions in prisons is a serious matter, not only because prisoners are deprived of their constitutional rights, but also because of the threat that this situation poses to the rule of law. As **Prof De Vos** states, in an article, **Prisoners Rights Litigation in South Africa Since 1994, A Critical Evaluation**:

> *"[i]f the State is failing to provide prisoners with even the most basic rights, and if the mechanisms in place to deal with this problem appear to be woefully inadequate, it points to a breakdown of respect for the highest law - the Constitution itself."*

[37] I agree with this sentiment. It is the sign of an advanced society to recognize that prisoners should be treated humanely and with dignity and sufficient resources should be allocated to correctional services to ensure that this is so. Given South Africa's apartheid past, which permitted detention without trial and torture of political prisoners, the drafters of the South African Constitution ensured that it contains explicit provisions protecting prisoners and guaranteeing their rights, which it is encumbent on the courts to ensure are enforced.

[38] **In S v Makwanyane and Another** (CCT3/94) [1995] ZACC 3; 1995 (6) BCLR 665; 1995 (3) SA 391; [1996] 2 CHRLD 164; 1995 (2) SACR 1 (6 June 1995), Justice Chaskalson confirmed that although a person's dignity is inevitably impaired by imprisonment, this does not mean that a prisoner loses all his or her rights in terms of the Constitution; a prisoner reatains the right not to be mistreated, the right to associate with other prisoners, to exercise, to write and receive letters and the rights of

personality. These rights are subject only to the limitations clause. In paragraph [104], Justice Chaskalson stated:

> "*The limitation of constitutional rights for a purpose that is reasonable and necessary in a democratic society involves the weighing up of competing values, and ultimately an assessment based on proportionality. This is implicit in the provisions of section33(1). The fact that different rights have different implications for democracy, and in the case of our Constitution, for 'an open and democratic society based on freedom and equality', means that there is no absolute standard which can be laid down for determining reasonableness and necessity. Principles can be established, but the application of those principles to particular circumstances can only be done on a case by case basis. This is inherent in the requirement of proportionality, which calls for the balancing of different interests. In the balancing process, the relevant considerations will include the nature of the right that is limited, and its importance to an open and democratic society based on freedom and equality; the purpose for which the right is limited and the importance of that purpose to such a society; the extent of the limitation, its efficacy, and particularly where the limitation has to be necessary, whether the desired ends could reasonably be achieved through other means less damaging to the right in question. In the process regard must be had to the provisions of section 33(1), and the underlying values of the Constitution, bearing in mind that, as a Canadian Judge has said, 'the role of the Court is not to second-guess the wisdom of policy choices made by legislators.'*"

[39] It was also held that:

> "*Dignity is inevitably impaired by imprisonment or any other punishment, and the undoubted power of State to impose punishment as part of the criminal justice system, necessarily involves the power to encroach upon a prisoner's dignity. But a prisoner does not lose all his or her legal rights on entering prison.*"

[40] Justice Chaskalson then proceeded to say:

"A prisoner is not stripped naked, bound, gagged and chained to his or her cell. The right of association with other prisoners, the right to exercise, to write and receive letters and the rights of personality are of vital importance to prisoners and highly valued by them precisely because they are confined, have only limited contact with the outside world, and are subject to prison discipline. Imprisonment is a severe punishment; but prisoners retain all the rights to which every person is entitled under Chapter Three, subject only to limitations imposed by the prison regime that are justifiable under section 33. of these, none are more important than section 11(2) right not to be subjected to "torture of any kind, nor to cruel, inhuman or degrading treatment or punishment."

[41] Although it is the responsibility of prison management to develop a policy that will ensure adequate sanitation and that each prisoner is provided on regular hours, with a well-balanced diet which will accommodate different types of religious and therapeutic or other medical diets for prisoners, the national government bears the responsibility to provide the DCS with financial resources in order to fulfil its constitutional obligations.

[42] It is trite that to facilitate the realization of a right, the State should provide sufficient material and financial resources. As was said in **Government of the Republic of South Africa and Others v Grootboom and Others** (CCT11/00) [2000] ZACC 19; 2001 (1) SA 46; 2000 (11) BCLR 1169 (4 October 2000 an "*effective implementation requires at least adequate budgetary support by national government*".

[43] Overcrowding in prison will automatically affect the quality and quantity of the food given to the prisoners, and as we have seen, the ability to comply with the Act and provide prisoners with 3 meals a day where not more

than 14 hours may elapse between the last and the first meal of the day. It is well recognized that overcrowding has led to much more serious problems including, the absence of a bed, seriously compromised sanitation and health, as well as increased levels of prison violence; it is a problem that urgently needs to be addressed.

[44] In 2005 the DCS stated that it is was in the process of compiling a personnel-provisioning plan for approval of additional funds from the National Treasury for the appointment of personnel, which would address the problems experienced with providing three meals per day.

[45] It is totally unacceptable that now, 13 years later, these difficulties have still not been addressed and funds have still not been allocated. I have very little sympathy with an argument of impossibility of performance in these circumstances. I also have little sympathy that the DCS has insufficient funds to deal with this difficulty with the rampant corruption in the DOC reported in the press and to Parliament.

[46] The time has come for the Government to be taken to task when school children have to study under trees, people continue to live in shacks and prisoners are inhumanely treated, allegedly due to lack of funds - which we know have been lost to corruption. We promised a better and more civilized society in 1994 and the Courts are here to ensure that the fundamental rights we guaranteed to prisoners in our Constitution are protected.

[47] In **Government of the RSA v Grootboom** 2000 (11) BCLR 1169 CC, the Constitutional Court explained the role of the different spheres of government in guaranteeing Constitutional economic rights, which requires co-operation between such departments, including between Treasury and the DCS, where the rights guaranteed are those of prisoners. It was stated:

> "*[20] While the justiciability of socio-economic rights has been the subject of considerable jurisprudential and political debate, the issue of whether socio-economic rights are justiciable at all in South Africa has been put beyond question by the text of our Constitution as construed in the Certification judgment. During the certification proceedings before this Court, it was contended that they were not justiciable and should therefore not have been included in the text of the new Constitution. In response to this argument, this Court held:*
>
> > *'[T]hese rights are, at least to some extent, justiciable. As we have stated in the previous paragraph, many of the civil and political rights entrenched in the [constitutional text before this Court for certification in that case] will give rise to similar budgetary implications without compromising their justiciability. The fact that socio-economic rights will almost inevitably give rise to such implications does not seem to us to be a bar to their justiciability. At the very minimum, socio-economic rights can be negatively protected from improper invasion.'"*

[48] The Constitutional Court emphasised that:

> "*[39] What constitutes reasonable legislative and other measures must be determined in the light of the fact that the Constitution creates different spheres of government: national government, provincial government and local government. The last of these may, as it does in this case, comprise two tiers. The Constitution allocates powers*

and functions amongst these different spheres emphasising their obligation to co-operate with one another in carrying out their constitutional tasks."

[49] I have already expressed my dissatisfaction with the State's response to prisoners' rights and the need to reduce overcrowding. I am equally unsympathetic to claims that budgetary constraints restrict the DCR's ability to comply strictly with their obligations in terms of the Act.

[50] In saying this, I am mindful that in **Government of the RSA v Grootboom** (*supra*) and **Minister of Health v Treatment Action Campaign** (2) 2002 (5) SA 721 C, the Constitutional Court appreciated that the government's responsibility to provide for the various positive rights enshrined in the Constitution can only be done "*within its available resources*". I appreciate that the DCS cannot do what it cannot afford to do, but, steps need to be urgently taken to obtain the requisite funding from Treasury to ensure that this complaint levelled by prisoners across the country is urgently addressed in all prisons.

[51] Whilst the difficulty with over-crowding may require the building of further facilitates, which cannot be done overnight, it is an issue that can no longer serve as an excuse not to provide prisoners with their legislative right to three meals a day. It also does not provide an excuse for not, in the interim, employing temporary staff to ensure that prisoners are not locked up for most of the day and are given an evening meal to sustain them until breakfast.

[52] The protection of prisoners' rights is a hall-mark of a democratic and civilized society. To us, on the outside, it may not be of any significance that a prisoner's lunch and dinner are served together, but, when we put ourselves in the prisoner's shoes, utterly at the mercy of the State that incarcerates them, to have to have their last meal, for all intense and purposes, served between 12H00 and 13H00 and their next at 08H00 the following day, and to have to be locked up at 15H30 before the dayshift ends, would seem to me to constitute an utterly unjustifiable denial of a prisoner's right guaranteed by our Constitution and entrenched in section 8 of the Act. In my view, it constitutes cruel and inhumane punishment to lock prisoners up for 16 hours of a 24 hour day in order to suit the shifts of prison staff. Alternative arrangements should, and must, be implemented.

[53] This was starkly brought home to me by the dignity and eloquence of the prisoner who appeared before me and the need that, not only prisoners like him, but all prisoners, asking for only the most meagre of things- being given 3 meals a day, to have what they call "*delicacies,*" like chips and biscuits, purchased for them by friends and family members at the prison shop and that 5% of its profits generated therefrom be utilized to purchase recreational equipment for them- be guaranteed that the rights afforded them in the Constitution and the Act will be protected by the Courts.

[54] In **Minister of Justice v Hofmeyr** (240/91) [1993] ZASCA 40; 1993 (3) SA 131 (AD); [1993] 2 All SA 232 (A) (26 March 1993), Hoexter JA was acutely aware of this:

"An ordinary amenity of life, the enjoyment of which may in one situation afford no more than comfort or diversion, may in a different situation represent the direst necessity. Indeed, in the latter case, to put the matter starkly, enjoyment of the amenity of life may be a lifeline making the difference between physical fitness and debility and likewise the difference between mental stability and derangement."

[55] A similar sentiment was expressed by Schwartzman J In **Strydom v Minister of Correctional Services**, 1999 3 BCLR 342 (W), who upheld the constitutional rights of prisoners to conditions of detention consistent with human dignity and not to be subjected to cruel and degrading punishment where the DOC removed the applicants' access to electrical sockets, and thus to television, music and radio. In finding against the DOC, he appreciated all too well that for the applicants:

"[15] Access to electricity can never be said to be a necessity of life. Millions in this country live without this amenity but these people, and the rest of the population that has access to electricity, live under circumstances totally different from the occupants of the single cells of the Maximum Security Section of the Johannesburg Prison who, albeit of their own making, face the prospect of spending 18½ hours of each day of what remains of their lives or a substantial portion thereof in what is in effect solitary confinement. For them the prospect of being able to enjoy privileges recognised by the Department of Correctional Services for which access to electricity is an indispensable requirement cannot be characterised as 'no more than a comfort or a diversion' and 'could be an amenity of life that makes the difference between mental stability and derangement' (See Hofmeyr's case, supra). It could also materially affect their prospects of rehabilitation, one of the recognised objectives of imprisonment. To deprive them entirely and in perpetuity of this prospect could also result in their being 'treated and punished in a cruel or degrading manner' (section 12(1)(c) of the Constitution) or their being detained

in conditions that are inconsistent with human dignity (section 35(2) of the Constitution). I accordingly find that the applicant and the other occupants of the Maximum Security Section of the Johannesburg Prison who live in the conditions I have described have a right to enjoy those privileges recognised by the Department of Correctional Services for which access to electricity is an indispensable requirement."

[56] Our prison system is designed, not only to punish, but to rehabilitate. I find a notion that prisoners, because they have committed offences, need not be afforded proper dignity and humane treatment abhorrent. We are a society with human rights for all as a corner-stone of our Constitution, which warrant the protection of the courts; *a fortiori* the rights of those who are utterly at the mercy of the system that incarcerates them.

[57] I find it equally distasteful that the DCS can rely upon a labour dispute with its staff as an excuse not to provide the prisoners with the rights afforded to them under the Act. I do not accept that there are insufficient funds, pending the outcome of the labour dispute, to employ casual staff to enable the prisoners to be served their evening meal. This is particularly so, as a portion of these services have already been outsourced and thus, the employment of further outsourced staff could be utilized to deal with this problem.

[58] It is not a prisoner's problem that the prisons are over-crowded and under-resourced. It is the Government's duty to ensure that prisoners' rights guaranteed in the Constitution and in the Act are protected and enforced. I accordingly, do not accept the DOC's argument that it is not possible that

it comply with the explicit requirements set forth in section 8 of the Act. It has known of the problem for years and has done nothing about it and it is now time that it did.

[59] I am acutely aware that the principles of separation of powers precludes the Courts from encroaching on the prerogative of the executive to determine how, and in what manner, the rights of prisoners, both in the Constitution and in the Act, are enforced. However, this does not preclude the Courts from intervening to protect prisoners' rights. The remarks of Gubbay CJ, the Chief Justice of Zimbabwe, in **Conjwayo v Minister of Justice, Legal and Parliamentary Affairs and Others** 1992 (2) SA 56 (ZS) at 60 G - 61 A are instructive:

> "*Traditionally, Courts in many jurisdictions have adopted a broad 'hands off' attitude towards matters of prison administration. This stems from a healthy sense of realism that prison administrators are responsible for securing their institutions against escape or unauthorised entry, for the preservation of internal order and discipline, and for rehabilitating, as far as is humanly possible, the inmates placed in their custody. The proper discharge of these duties is often beset with obstacles. It requires expertise, comprehensive planning and a commitment of resources, all of which are peculiarly within the province of the legislative and executive branches of government. Courts recognise that they are ill-equipped to deal with such problems. But a policy of judicial restraint cannot encompass any failure to take cognisance of a valid claim that a prison regulation or practice offends a fundamental constitutional protection. Fortunately, the view no longer obtains that in consequence of his crime a prisoner forfeits not only his liberty but all his personal rights, except those which the law in its humanity grants him. For while prison officials must be accorded latitude and understanding in the administration of prison affairs, and prisoners are necessarily subject to appropriate rules and regulations, it remains the continuing responsibility of Courts to enforce the constitutional rights of all persons, prisoners included.*"

[60] In the **Minister of Correctional Services and Others v Kwakwa and Another** [2002] ZASCA 17; [2002] 3 AII SA 242 A, the importance of respecting prisoners' rights as a hall-mark of a civilised society, was fully appreciated:

> "*[28] At a time in our history when crime is rampant and prisons overflowing, the public might feel particularly unsympathetic towards prisoners and even against those who are yet to be tried on criminal charges, thereby undervaluing the presumption of innocence and the judicial process. We cannot dispense with the essential values that make us a civilised society. We are bound to the values entrenched in our Constitution. It is accepted that prison is a bleak place and that prisoners are not entitled to be imprisoned with all the comforts that they enjoyed before their incarceration. The essential question is whether the rights of the respondents have been violated.*"

[61] What then is a Court to do when it finds that prisoners' rights are violated and it is argued by the DCS that it is impossible for it to afford the prisoners such rights? Creative solutions have been adopted by our Courts, which I do not believe encroach on the prerogative of the executive, whilst at the same time ensure enforcement, and the protection of prisoners' rights.

[62] Plasket J, sitting in the Eastern Cape Division, confronted with a series of cases in which juveniles were sentenced to terms of incarceration in a reform school where the state could not implement the sentences because there were no reform schools in the Eastern Cape in **S v Zuba and 23 similar cases** (CA40), 2003, par. 37 and 38 fashioned a:

> *"structural interdict, a remedy that orders an organ of state to perform its constitutional obligations and report [to the court] on its progress in doing so from time to time".*

[63] This was because he found that:

> *"the 'usual' remedies, such as the declarator, the prohibitory interdict, the mandamus and awards of damages may not be capable of remedying ... systematic failures or the inadequate compliance with constitutional obligations, particularly if one is dealing with the protection, promotion or fulfilment of rights of a programmatic nature."*

[64] Adopting this approach, Plasket J. ordered, among other things, that the provincial Education Department report on its short, medium and long-term plans for the incarceration of juvenile offenders, and that a task team working on the establishment of a reform school in the province be identified and submit regular reports to the Judge President and/or the Courts ensure that at least most of those rights are invoked.

[65] In the matter brought by Sonke Gender Justice against the Government of the Republic of South Africa and the Head of Pollsmoor Remand Detention Facility, Saldanha J, sitting in the Western Cape High Court, adopted a similar approach. The Department of Correctional Services (DCS), in particular the Head of Centre of the Pollsmoor Remand Detention Facility, was ordered to develop a comprehensive plan, including timeframes for its implementation, which addressed and put an end to the deficiencies in the provision of exercise, nutrition, accommodation, ablution facilities and healthcare services to the inmates of Pollsmoor Remand Detention Facility (RDF) and the deficiencies

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

[66] The difficulty in not adopting such an approach was highlighted in the matter of **Erlich v Minister of Correctional Services and Others** [2008] ZAECHC 94 (23 June 2008), brought by a prisoner to enforce compliance with an earlier Order made by Erasmus J, *inter alia*, that the DCS comply with section 8(5) of the Act, which the DCS had, for the most part, simply ignored. Commenting on this, Chetty J stated at [6]:

> "*...There would no doubt have been sound policy reasons for the particular time period specified in section 8 and it cannot be a herculean task on the part of the respondents to ensure that at the very least there is substantial compliance with the provisions of section 8. The order sought by the applicant seeks no more than to enforce adherence to the feeding regime prescribed by the legislature.*"

[67] In the face of the non-compliance, a further Order was issued that Erasmus J's Order be complied with. Not satisfied that this would be sufficient to ensure compliance, Chetty J ordered that a copy of the judgment be sent to the Inspector Judge of the Judicial Inspectorate established in terms of section 85 of the Act. He appreciated fully that:

> "*[10] The solution to the dilemma faced by the applicant and, I am sure, and many other inmates, may, given the inaction of the second respondent to complaints lodged by the applicant, not adequately be served by merely making an order in the terms sought by the applicant. In order to give substance to the orders I propose to make I deem it necessary that a copy of this judgement to be forwarded, not*

only to each of the respondents but the Inspector Judge of the Judicial Inspectorate established in terms of section 85 of the Act."

[68] The Department of Correctional Services has faced complaints about the provision of two, as opposed to three, meals to prisoners for some considerable time. It is yet to remedy the situation. In each instance, the excuse proffered, of staff shortages and over-crowding, is the same. It is high time that this be addressed. It was one of the issues highlighted by Justice Cameron, after performing his duties as the Inspector Judge, in his comprehensive report on the appalling conditions at Pollsmoor Prison, which he specifically drew to the attention of the Regional Commissioner.

[69] In the reasons provided by Saldanha J for his judgment delivered on 23 February 2017, the learned judge had this to say about the excuses proffered by the DCS for not addressing Justice Cameron's concerns:

"*[111] The action plan of the Department did not address what the Department was doing and would do to meet its statutory obligations. The Department complained 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. 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.*"

[70] A similar excuse has been proffered in the present matter, and the concern of Justice Cameron, with the concern expressed by Justice Cameron still not addressed. This, despite it being noted by Saldanha J in paragraph [103] of the reasons that Justice Cameron had noted in his

report that the Regional Commissioner (Mr Klaas), who he had taken along on his second visit, required that immediate attention be given to an increase in the number of meals from two to three. It was also recorded that inmates complained of being hungry at night as their next meal after lunch was only at breakfast the following morning.

[71] Indeed, the same reasons for non-adherence to the Act were given to the Court in that matter have given to me in this matter. Saldanha J recorded that:

> *"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 3 separate intervals..."*

[72] Staff shortages were again the excuse proffered for non-compliance in the **Ehrlich** matter (*supra*).

[73] It is now high time that these challenges be addressed and I propose making a structural interdict to ensure that they are addressed to ensure that prisoners' rights to three meals a day, and to a hot meal of meat and vegetables in the evening in order to sustain them until breakfast the following mornings, are enforced. What challenges, be they budgetary or otherwise, that the DCS faces in implementing this program within a reasonable time, can then be evaluated by the Court to whom the DOC will be obliged to report.

THE ENTITLEMENT TO 5% PROFIT EARNED FROM THE CANTEEN

[74] In terms of section 132 of the Act, the DCS has approved the establishment of a canteen inside the Correctional Centre for the exclusive use and benefit of correctional official and their families, which, in terms of the Procedure Manual provides that "*a percentage of 5% of the net profit of the Correctional Centre shop will be paid over to the recreation of the Correctional Centre on an annual basis.*" The DOC admits that this was not done since 2011. No explanation for this has been proffered for this.

[75] The prisoners seek enforcement of this right and an accounting in respect of the profits generated. The DCS challenges their *locus standi* to do so and to enforce SRAC's right to this percentage of the profits has been questioned by the DCS. They aver that only the SRAC has the power to enforce this right.

[76] It is common cause that this 5% was designated to go towards the prison body in charge of SRAC to fund sports and recreation equipment at the prison. This cannot be disputed is a material aspect of prison life and is one of those assumed rights by those outside of a prison, that becomes a fundamental right to those incarcerated.

[77] Regardless as to which entity had the *locus standi* to enforce this right, it is of some enormous significance that it was only after the prisoners in this application sought enforcement of their right to this rather paltry percentage of the profits generated, that this amount was paid. This

notwithstanding that this amount had been outstanding since January 2011. This is utterly disgraceful and I intend to require the DCS to provide a full a proper explanation to the Court for this.

[78] I do not intend to deprive the prisoners of their Constitutional right to access to the Courts to enforce their rights to these funds to be utilised to subsidize recreational activities and equipment on the basis of a technicality that the wrong prison body has sought enforcement of these rights.

[79] The DCS argues that the shop belongs to the Club and that in terms of the DCS circular, the function of the applicant is limited to:

> "*discuss/make proposals/give inputs/deal with collective grievance's, detention and treatment programmes in deliberation with prisoners and in so doing promote participative management*".

[80] It is thus, argued that only the following grievances may be legitimately be pursued by the applicant:

> "*Proposals/discussion/collective grievances regarding detention and treatment programmes, application to privileges of prisoners and defects (structures and equipment).*"

[81] I have little hesitation in finding that the complaint levelled concerning the failure to make 5% of the profits generated from the canteed available for prisoner recreation, is a grievance regarding the application to privileges contemplated.

[82] In any event, since the advent of our Constitution, the requirements of standing have been substantially relaxed to ensure that the right to access to the Courts guaranteed in the Constitution is not unduly restricted.

[83] Prior to the advent of the Constitution, an applicant had to show the required personal (or direct) interest in the decision sought to be set aside. In the case of an application based on a breach of legislation, the applicant was required to show either that he was a member of a class of persons in whose interests the relevant statute was enacted, or that the legislation was enacted in the public interest and he was adversely affected by the breach or the non-compliance **Patz v Greene & Co** 1907 TS 427; **Roodepoort – Maraisburg Town Council v Eastern Properties (Prop) Ltd** 1933 AD 87; **Ferreira v Levin NO and Others**; **Vryenhoek v Powell NO and Others** 1996 1 SA 984 (CC) at para [162]).

[84] However, since the promulgation of our Constitution and the Bill of Rights, the requirements to establish standing have been broadened and are now set out in section 38 of the Constitution, 1996.

[85] Section 38 of the Constitution, embodies "*a radically different approach to standing from that adopted in common-law (or non-constitutional) matters. Courts are therefore required to adopt a broader and less restrictive approach to standing in Bill of Rights matters than they have traditionally done, and continue to do, in common-law matters*" (per O'Regan J in **Ferreira v Levin NO and Others: Vryenhoek v Powell NO and Others**

(CCT5/95) [1995] ZACC 13; 1996 (1) SA 984 (CC); 1996 (1) BCLR 1 (6 December 1995) at para [229].

[86] Indeed, it has been said that section 38 calls for a generous and expansive approach to standing. In **Ferreira v Levin** *supra*, Chaskalson J stated at para [165]:

> *"Whilst it is important that this court should not be required to deal with abstract or hypothetical issues, and should devote its scarce resources to issues that are properly before it, I can see no good reason for adopting a narrow approach to the issue of standing in constitutional cases. On the contrary, it is my view that we should rather adopt a broad approach to standing."*

[87] The Constitutional Court has also repeatedly stressed that this broad approach to standing should also be adopted in matters that involve an infringement of rights other than those protected in the Bill of Rights and would apply to applications to enforce rights guaranteed to prisoners in the Act and its regulations.

[88] In **JDJ Properties V Umngeni Local Municipality** (873/11) [2012] ZASCA 186; [2013] 1 All SA 306 (SCA); 2013 (2) SA 395 (SCA) (29 November 2012), the court explained the correlation between standing and PAJA and the nature of the interest required to establish standing for the purposes of review proceedings:

> *"Whether one is dealing with administrative action as defined in the PAJA is a separate and distinct enquiry to whether a party has standing to challenge an exercise of public power. The first enquiry relates to the nature of the*

public power in issue, while the second relates to the interest that an applicant may have in proceedings and whether that interest is sufficient to enable it to challenge the exercise of the public power concerned."

[89] In order to establish this interest, the prisoners are required to bring themselves within the realm of section 38. Section 38 provides that:

"*Anyone listed in this section has the right to approach a competent court, alleging that a right in the Bill of Rights has been infringed or threatened, and a court may grant appropriate relief, including a declaration of rights. The persons who may approach a court are:*

(a) anyone acting in their own interest;

(b) anyone acting on behalf of another person who cannot act in their own name;

(c) anyone acting as a member of, or in the interest of, a group or class of persons;

(d) anyone acting in the public interest; and

(e) an association acting in the interests of its members."

[90] Although I accept that the prisoners' entitlement to 5% of the profits is not a Constitutional right, it is an adjunct to their rights to humane prison treatment. The applicant is both acting on behalf of the class of persons for whose benefit the privilege was afforded, and is an association acting in the interests of its members as contemplated.

[91] I, thus, find that the prisoners have *locus standi* to both enforce the privilege afforded to them and to demand an accounting in respect of the profits allegedly earned from the operation of the canteen.

[92] The applicants further argue that the canteen was operated by prison employees in contravention of sections 118(1)(a) and 121(1)(a) of the Act which prohibits any correctional official from selling or receiving any benefit from the sale of any article to a prisoner. The canteens approved in terms of section 132(1) are for the exclusive use or benefit of correctional officials or their families. In so far as any profit has been derived from these shops by a correctional official or custody official or someone employed by him/her, this would be unlawful.

[93] I am not, however, on the papers before me, able to establish this, or whether the canteen referred to is the same prison shop which used to be available to prisoners' families and friends to purchase goods to a value not exceeding R600 per prisoner. If the prison officials' canteen and the prison shop are indeed, one and the same thing, there may well be a difficulty in profits being generated from the sale of items to prisoners' family members, but it would have to be shown that these profits benefitted prison staff directly.

[94] In these circumstances, I make an Order as follows:

94.1 Directing the DCS to do all things necessary to ensure that section 8(5) of the Act is complied with and that not more than 14 hours

elapses between the evening meal and breakfast the following morning;

94.2 That the DOC file a status report to this Court within 60 days of this Order as to the steps taken to ensure that the Order in subparagraph 1 is implemented;

94.3 That the DOC file a further status report to this Court within 120 days of this Order as to whether it has complied with this Order, and if not, why not;

94.4 That the applicants are entitled to file a response to the above reports mentioned in sub-paragraphs (2) and (3) above within 15 days of receipt of such reports;

94.5 That the DCS account to the applicants in respect of all proceeds received from the operation of the canteen from 2011 to date of this Order, as well as all expenses incurred and directing that a full statement and debatement of account be filed with this Court within 60 days of this Order;

94.6 Entitling the applicants to approach this Court to Order payment to the SRAC of such further sums as may be owing to it as a result of the audit referred to in subparagraph (5); and

94.7 Directing that copy of this judgment be sent by the DCS to:

94.7.1. the Inspector Judge of the Judicial Inspectorate established in terms of section 85 of the Act within 24 hours of this Order; and

94.7.2. the Participative Management Committee c/o Sifiso Ndlovu, by registered post to Johannesburg Medium B Correctional Facility, Private Bag x 04, Mondeor, 2110 and be dispatched by faxcimile to 011-933 7117 within 24 hours of this Order.

SM WENTZEL

SM WENTZEL, AJ
ACTING JUDGE OF THE
HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION
JOHANNESBURG

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Counsel for the respondents: Adv MTK Moerane SC and N Nharmuravate
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Sifiso Ndlovu, prisoner 213 290 990, Cell 7, A-Single Johannesburg Correctional Service Centre, Medium "B".
Date of hearing: 29 January 2018
Date of Judgment: 15/06/2018