

EHPA Case Study Series:
Included! How change happened for key populations and HIV prevention

Pollsmoor

**Reducing overcrowding in a South African remand
detention facility**

Ariane Nevin¹ and Emily Nagisa Keehn²

1 National Prisons Specialist, Sonke Gender Justice

2 Associate Director, Human Rights Program at Harvard Law School

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1. INTRODUCTION

This case study examines reform that alleviated severe overcrowding and inhumane conditions in Pollsmoor Male Remand Detention Facility (Pollsmoor Remand), a South African incarceration centre for people awaiting trial and sentencing.

From the early 2000s, Pollsmoor Remand has been operating at more than 200% of its approved capacity, with an average occupancy of more than 4 000 people.³ In 2015, after years of lobbying to reduce overcrowding and in the face of inertia on the part of policymakers and legislators, civil society escalated its advocacy and mounted a constitutional challenge in the Western Cape High Court with the case, *Sonke Gender Justice v. the Government of South Africa*.⁴ In 2016, the judge ruled against the government and made a historic order to reduce occupancy to 150% of its capacity over a six-month period.⁵

By February 2017, the Department of Correctional Services (DCS) had already taken steps to reduce overcrowding at the facility from 252% to 174%.⁶ Although these numbers reflected an unprecedented and substantial drop in the real number of occupants in Pollsmoor Remand, the outcome was not an unqualified success; they reduced occupancy by redistributing the overall population of incarcerated people to facilities across Western Cape Province, not by releasing individuals or sending fewer people to remand detention.

This case study describes the complex change process that enabled this reform and the contributions of different forms of advocacy by key actors.

HIV, TB and SA prisons

South Africa has the largest population in the world of people living with HIV – an estimated seven million people.⁷ This epidemic impacts correctional facilities, with some reports indicating that nearly a quarter of the prison population (23%) is HIV positive, although current official estimates are inaccessible.⁸ HIV is a major predictor for TB, the most common presenting illness for people living with HIV and a primary cause of HIV-related death.⁹ South Africa's TB incidence ranking is sixth in the world, and is a serious concern in detention facilities because it is the leading cause of natural deaths amongst incarcerated people, as reported by the Judicial Inspectorate.¹⁰ Incarcerated people living with HIV are especially vulnerable to developing TB – one study from a large prison found that 44.1% of incarcerated people with undiagnosed TB were also HIV positive.¹¹

It is suggested that 'hot-house' conditions in overcrowded correctional facilities contribute to high rates of

3 C Giffard and L Muntingh, *The Effect of Sentencing on the Size of the South African Prison Population* (2006) available at <https://acjr.org.za/resource-centre/The%20impact%20of%20sentencing%20on%20the%20size%20of%20the%20prison%20population.pdf>; Founding papers in *Sonke Gender Justice v Government of South Africa* 24087/15 (unreported).

4 *Sonke Gender Justice v Government of South Africa* 24087/15 (unreported).

5 *Sonke Gender Justice v the Government of South Africa* *ibid* available at <http://genderjustice.org.za/publication/pollsmoor-court-order/>.

6 Department of Correctional Services, *Correctional Services Western Cape Statistics* as on 27 February 2017.

7 'HIV and AIDS in South Africa,' *Avert* available at <https://www.avert.org/professionals/hiv-around-world/sub-saharan-africa/south-africa>.

8 Department of Correctional Services *Annual Report 2009/10*.

9 World Health Organization, *Global Tuberculosis Control* (Geneva: World Health Organization, 2011), p. 61; R. Jürgens, M. Nowak, and M. Day, "HIV and incarceration: prisons and detention," *Journal of the International AIDS Society* 14/26 (2011), p.13; K. W. Todrys and J.J. Amon, "Criminal justice reform as HIV and TB prevention in African prisons," *PLoS Medicine* 9/5 (2012), p. e1001215.

10 Robin Wood, 'What will it take to control TB in South African Prisons?' *NSP Spotlight* (July-August 2013) at 1 available at https://www.spotlightnsp.co.za/download/NSP_Review_7_Web.pdf.

11 'Prisoners, HIV and AIDS' *Avert* available at <https://www.avert.org/professionals/hiv-social-issues/key-affected-populations/prisoners>.

tuberculosis as well as sexual violence and other behaviours that increase HIV risk. In addition, poor prison health facilities further jeopardise adequate care and treatment of prisoners who are already HIV positive.

About this paper

This paper is part of the series **Included! How change happened for key populations for HIV prevention**, commissioned by Evidence for HIV Prevention in eastern and southern Africa (EHPSA) to Sonke Gender Justice. The full series of nine case studies and a discussion paper will be made available on the EHPSA website as it is completed, at <http://www.ehpsa.org/critical-reviews/included>.

Sonke Gender Justice was a key actor in the processes described here and authors have drawn on their documentation of events as well as a literature review and interviews with key actors to analyse the processes and outcomes up until the point of writing in April 2017.

About EHPSA

EHPSA is a catalytic intervention, contributing to national, regional and global processes on HIV prevention for adolescents, men who have sex with men (MSM) and people in prison, through generating evidence of what works and why, and developing strategies to inform policymaking processes. It is a five-year programme funded by DFID and managed by Mott MacDonald.

2. CONTEXT

Prisons in South Africa

With approximately 160 000 incarcerated people, South Africa's prison population is the largest on the African continent and also one of the largest per capita in the world.¹² Roughly one quarter (25.8%) of the number of people in prisons are in remand detention.¹³ In annual reports dating back to 2005, South Africa's prison-monitoring body, the Judicial Inspectorate for Correctional Services (JICS), has reported 'deplorable' levels of overcrowding as a systemic issue in multiple facilities; evidence of the problem dates back two decades.¹⁴

There are two primary contributors to high numbers of people in remand detention: the number of people who are sent to remand – in other words, the number of people arrested and denied bail – and the length of time each person remains in detention awaiting resolution of their trial.¹⁵ The former reflects legislative changes that government pushed through between 1995 and 1998, which made it difficult for people accused of crimes to secure bail. As a result, in those three years there was a 138% national increase in people in remand detention nationally from around 18 000 to 43 000.¹⁶ Since spiking at above 50 000 in 2000, the remand population has hovered at around 40 000.¹⁷

Research has shown that more than half of the remand population stays in custody for longer than three months and nearly 20% remain in custody awaiting trial for longer than a year.¹⁸ The evidence suggests that

12 Institute for Criminal Policy Research, *World Prison Brief, South Africa* (London: Institute for Criminal Policy Research, 2018).

13 *Ibid.*

14 Judicial Inspectorate for Correctional Services *Annual Report 2004-2005* at 5-6.

15 Jean Redpath 'Unsustainable and unjust: criminal justice policy and remand detention since 1994' *South Africa Crime Quarterly* Vol. 48 (2014) at 29-30.

16 *Ibid* at 28.

17 *Ibid* at 28.

18 *Ibid* at 31.

only one out of three people sent to remand are ultimately convicted.¹⁹ Many of these factors are not controlled by DCS, whose facilities are merely the receptacle at the end of a long criminal justice conveyor belt.

To reduce occupancy in the long-term would need to begin with arrests, bail and the criminal trial process, and requires coordinated cooperation across the criminal justice sector, including the South African Police Service (SAPS), the National Prosecuting Authority (the NPA), the courts and finally DCS.

Constitutional and legal framework

Although many challenges plague its correctional facilities, South Africa's constitutional and legal framework, which protects the rights of incarcerated people, is progressive and provides important opportunities for the legal redress described later in this case-study.²⁰ The South African Constitution enshrines the rights to dignity, equality and humane treatment of incarcerated people, including access to justice, adequate accommodation, health care, exercise, food and water, and reading materials. Constitutional rights of prisoners are supported by various statutes, policies and regulations that provide for minimum norms and standards for conditions in prisons and the treatment of incarcerated people.²¹ The Constitution also incorporates, and makes justiciable, international human rights laws that protect incarcerated people. The Mandela Rules – the revised United Nations Minimum Standards for the Treatment of Prisoners – and the African regional equivalent, the Robben Island Guidelines, also constitute persuasive soft law. South African courts have further reinforced the rights of incarcerated people in a number of cases, asserting their rights to life, humane treatment, health care and protection from sexual abuse.²²

In 2009, the Cabinet of the South African executive branch gave DCS responsibility for leading the management of remand detention – prior to this, it had been the responsibility of the South African Police Service (SAPS). The mandate was formalised through the Correctional Matters Amendment Act of 2011, which provides for the management of remand detention by DCS and in separate facilities from prisons for people serving sentences.²³ Following the Act, DCS issued its White Paper on Remand Detention in 2014. A guiding principle in the White Paper is that 'remand detention should never be used to penalise or punish any person' and that 'remand detention requires greater levels of effectiveness and integration in the [criminal justice system]'.²⁴ The White Paper touches on the challenges DCS faces in providing just conditions of detention and describes how an insufficient number of remand-detention facilities to accommodate people contribute to overcrowding, which in turn causes security risks.²⁵ A lack of risk-assessment systems results in all individuals in remand detention being treated as high risk. In addition, detention facilities are gravely outdated – they were built prior to the democratic dispensation when the rights of incarcerated people were much more limited; they were also intended to cater to sentenced populations. DCS further acknowledged that overcrowding exacerbates each challenge it faces, '... with its consequent understaffing and difficulties in implementing any existing policy or new development'.²⁶ As one analyst noted, with severe overcrowding in facilities like Pollsmoor, '... the good intentions of the Remand White Paper become unachievable and irrelevant'.²⁷

19 These data are from 2012. *Ibid* at 32.

20 Constitution of the Republic of South Africa, 1996.

21 Correctional Services Act No. 111 of 1998 and Regulations; Policy to Prevent Sexual Abuse of Inmates in DCS Facilities (2013); Guidelines for the Management of TB, HIV and STIs in Correctional Centres (2013); Department of Correctional Services B-Orders.

22 *Van Biljon and Others v Minister of Correctional Services and Others* 1997 (4) SA 441 (C); *EN and Others v Government of RSA and Others*; *Mapodile v Minister of Correctional Services and Others* 2016; *Lee v Minister of Correctional Services* 2012.

23 Correctional Matters Amendment Act, 2011

24 White Paper on Remand Detention 2014, at 1.3.4.

25 *Ibid* at 10.

26 *Ibid* at 11.

27 L. Muntingh, "Ten years after the Jali Commission: Assessing the state of South Africa's prisons," *South African Crime Quarterly*, No. 58, December 2016, at p.37.

Oversight of prison conditions

South Africa, although far from being a model for effective prison oversight, nevertheless has several mechanisms to monitor, inspect and report on conditions in prisons and the treatment of incarcerated people. Oversight systems are a critical source of credible evidence that rights advocates have leveraged to remedy overcrowding in Pollsmoor Remand.

The JICS is a statutory body led by a judge, with staff who conduct regular monitoring and inspections at prisons and report annually on the state of prisons to the Minister for Justice and Correctional Services.²⁸ The Judicial Inspectorate employs independent correctional centre visitors (ICCVs) – laypersons from the community who monitor facilities on a day-to-day basis and capture individual complaints. They try to resolve complaints either through mediation with the head of the facility, or if that fails, by escalating the complaint to higher level Visitors' Committees, and if necessary, as high as the Inspecting Judge.²⁹ Visitors' Committees bring together ICCVs from the same prison-management area. Their job, among other things, is to consider unresolved complaints from incarcerated people with a view to resolving them, and to facilitate community involvement in prison matters.³⁰

Another mechanism is section 99 of the South African Correctional Services Act, which gives judicial officers – judges and magistrates – the power to visit and inspect any prison in their jurisdiction, interview any incarcerated person and access all prison records.³¹ Following an inspection, judicial officers may bring any matter to the attention of the Minister for Justice and Correctional Services, the National Commissioner for Correctional Services, or the Inspecting Judge. Although many judicial officers do not exercise this power, the South African Constitutional Court set up its own prison-visit programme in 2009.³² Every year, each of the eleven judges on the Constitutional Court bench visits a prison and compiles a report on it. These reports are also made available to the public on the Constitutional Court website. Judges are not given the power to follow up on their recommendations, or to enforce them, however. Section 99 also gives the power to inspect prisons to members of those portfolio committees in the National Parliament and the National Council of Provinces dedicated to correctional services.³³

3. CONDITIONS IN POLLSMOOR REMAND

Pollsmoor Remand is one of several facilities that comprise Pollsmoor Correctional Centre, which is located in Tokai, an affluent suburb of Cape Town. It houses men from across the Cape Town area who have been arrested and denied bail or who cannot afford to pay the bail they have been granted prior to completion of their trial and sentencing. The broader correctional facility also includes centres for sentenced juvenile males (aged 18–21), sentenced men and women, and women awaiting trial or sentencing.³⁴

28 For further information see E. Keehn, N. Nyembe, and T. Sukhija *Evaluation of South Africa's Judicial Inspectorate for Correctional Services: Assessing its independence, effectiveness and community engagement (2013)* Sonke Gender Justice: Cape Town, South Africa, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2791848.

29 For a useful description of complaints mechanisms, see Hettinga, B., Keehn, E., and Nyembe, N, *"It's Frustrating to Us as ICCVs": The role and functioning of visitors' committees of the Judicial Inspectorate for Correctional Services*, Sonke Gender Justice on Behalf of the Detention Justice Forum (2014).

30 CSA section 94(3)

31 CSA section 99(1) and (2)

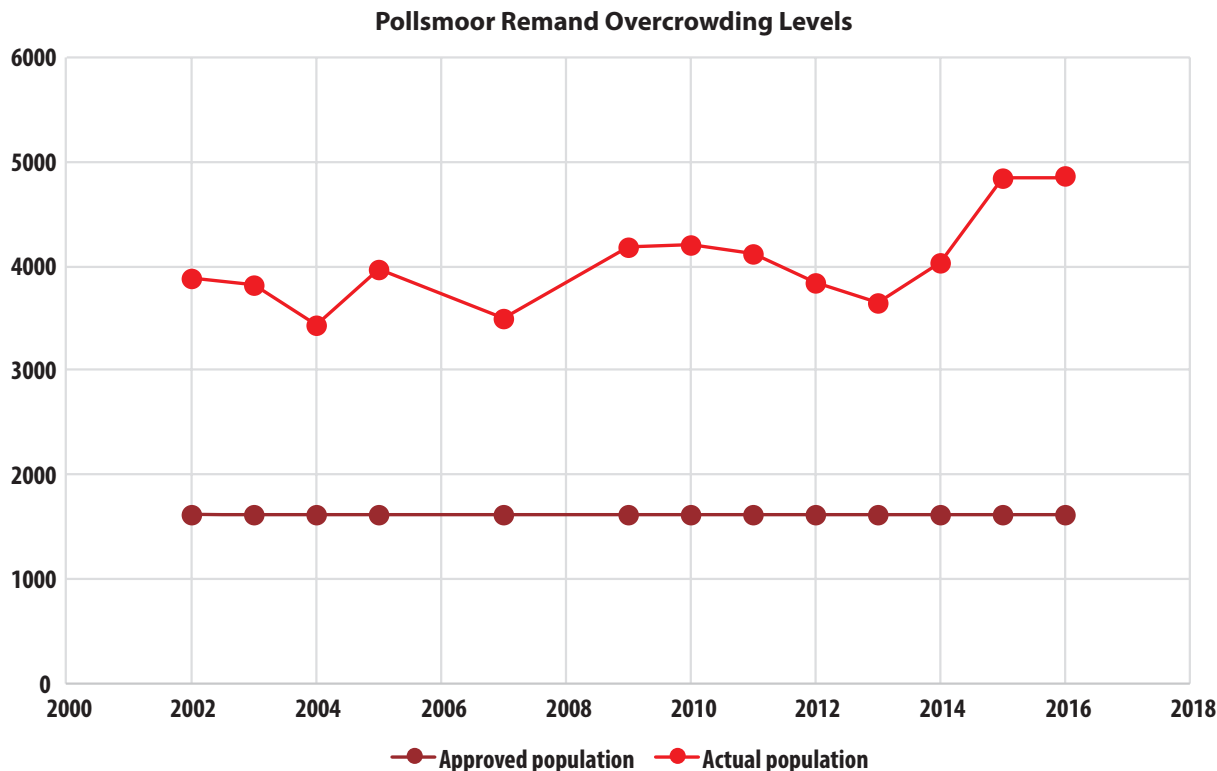
32 'Prison Visits: Constitutional Court Judges' Prison Visits', *Constitutional Court website* available at <http://www.constitutionalcourt.org.za/site/PVisits/PrisonVisits.html>.

33 CSA section 99(3)(a) and (b). Other oversight bodies are empowered to investigate and report on prisons, including those established through Chapter Nine of the Constitution like the South African Human Rights Commission and the Commission for Gender Equality, as well as the Public Service Commission, which is established through Chapter 10 of the Constitution. Despite these myriad bodies that make up oversight of South African prisons, there is no coordinated National Preventive Mechanism for monitoring all places of detention, as is mandated by the Optional Protocol to the United Nations Convention Against Torture, which South Africa helped draft, but has yet to ratify.

34 Justice Edwin Cameron, *Report: Pollsmoor Correctional Centre – Remand Centre and Women's Centre*, available at <http://www.constitutionalcourt.org.za/site/PrisonVisits/Cameron/Pollsmoor-Prison-Report-23-April-2015-Justice-Edwin-Cameron-FINAL-for-web.pdf> (hereinafter 'Cameron Report').

Pollsmoor Remand accommodates adult men over the age of 21 and has an ‘approved accommodation’ of 1 619 people.³⁵ DCS has not explained how it defines ‘approved accommodation’; it might be based on the legal minimum requirement of space per incarcerated person (3.4 square metres) or on the number of beds.³⁶

The figure below, based on DCS statistics and various oversight reports, shows that Pollsmoor Remand operated with levels of overcrowding between 190 and 300% of the DCS ‘approved accommodation’ of 1 619 people for nearly fifteen years.³⁷



Various reports generated by oversight mechanisms have described inhumane conditions as a result of these levels of overcrowding, poor staffing and a lack of financial resources. These include broken toilets and ablution facilities, poor ventilation, little access to exercise or time out of cells and allegations of assaults by correctional staff.³⁸ They also report inconsistent and very limited access to HIV testing, which has left HIV-positive people in detention undiagnosed or unidentified, which in turn hinders access to anti-retroviral treatment.³⁹

These conditions exact a serious toll on the physical and mental health of detainees. In the words of one person detained in Pollsmoor Remand:

There are a lot of sick people inside the cell. We all have bites from lice ... I feel sick and stressed all the time.⁴⁰

35 Annexures to Founding Affidavit, *Sonke v Government of Republic of South Africa and another* (unreported), High Court, Western Cape Division, Case No. 24087/15 available at <http://genderjustice.org.za/publication/sonkes-founding-affidavit/> (hereinafter ‘*Sonke Gender Justice v Government*’).

36 Dean Peacock, founding affidavit in *Sonke Gender Justice v Government* *ibid* at para 28.

37 C Giffard *supra* note 1; Founding papers *Sonke Gender Justice v Government of South Africa* *supra* note 1 at para 31; Judicial Inspectorate for Correctional Services, *Annual Report 2006-2007* at 17; Judicial Inspectorate for Correctional Services, *Annual Report 2007-2008* at page 21; Judicial Inspectorate for Correctional Services, *Annual Report 2009-2010* at 12; Judicial Inspectorate for Correctional Services, *Annual Report 2010-2011* at 13.

38 Cameron Report at para 45, *supra* note 32; Arina Wessels Expert Affidavit, Annexure to Founding Affidavit in *Sonke Gender Justice v Government* *supra* note 27.

39 Supporting affidavits of people in remand detention, *Sonke Gender Justice v the Government* *supra* note 27.

40 E Keehn, C Patel, and C Ballard, “Overcrowded jails deadly, inhumane”, *Bhekisisa*, 6 May 2015 <http://bhekisisa.org/article/2015-06-05-comment-overcrowded-jails-deadly-inhumane>

4. THE CHANGE PROCESS

The confluence of a number of factors ultimately led to a substantial decline in overcrowding levels at Pollsmoor Remand. This section analyses moments and phases in the change process that contributed to this outcome.

Increased scrutiny of conditions in Pollsmoor Remand, 2010–2015

In 2010, Justice Froneman of the Constitutional Court conducted an inspection of Pollsmoor Remand and issued a report stating that the facility was functioning at 260% of its approved capacity and was ‘shockingly overcrowded’.⁴¹ Cells built to accommodate only 20 people were housing 80 people, all sharing one toilet and one shower.⁴² Detained people complained of maltreatment and humiliation by warders; female wardens were allowed to watch male people in remand detention when they were showering, which could be considered sexually abusive voyeurism.⁴³ In 2012, Justice van der Westhuizen visited the facility. His report echoed most of these findings.⁴⁴

However, neither report led to a change in population. Independent correctional centre visitors from Pollsmoor Remand continued to report complaints of extreme overcrowding, neglect and inhumane treatment, even in 2013.

Between 2014 and 2015, the ICCVs at Pollsmoor Remand recorded a number of serious complaints, which they escalated to the attention of the Visitors’ Committee at meetings attended by NGOs.⁴⁵ Around 200 people incarcerated in Pollsmoor Remand co-signed a complaint that outlined how overcrowding forced them to sleep on the floor without mattresses; how the floors were often wet because of leaks in the ceilings; and, how they faced many difficulties accessing basic health services.⁴⁶ One individual leaked photographs of the cells to a journalist and stated that they were ‘living like animals ... and there is nothing [they] can do about it’.⁴⁷

The most recent inspection of Pollsmoor Remand by a Constitutional Court judge took place in April 2015, and was conducted by Judge Edwin Cameron – the judge who had initiated the Constitutional Court’s prison visit programme.⁴⁸ Judge Cameron is a high-profile judge of the Constitutional Court. Before entering the judiciary, he was a highly regarded activist who worked to secure access to antiretroviral treatment for people living HIV.⁴⁹ He is one of few public figures who speaks openly about his homosexual identity and HIV-positive status.⁵⁰

41 Justice Johan Froneman, *Report on Visit to Pollsmoor Correctional Centre on 30 April 2010* at 6.

42 Justice Johan Froneman, *ibid* at 2.

43 *Ibid*.

44 Justice Johan van der Westhuizen, *Visit to Pollsmoor Correctional Centre*, available <http://www.constitutionalcourt.org.za/site/PPVisits/JohannvanderWesthuizen/PollsmoorDecember2012JvdWprisonvisitreport.pdf> (hereinafter ‘Van der Westhuizen Pollsmoor Report’).

45 Minutes of the Pollsmoor/Goodwood Visitors’ Committee Meetings held 3 March 2015, 6 May 2015, 3 June 2015, 1 July 2015, and 5 August 2015 attached as Annexures DP11 and DP 12 to the Founding Papers, *Sonke Gender Justice v Government of South Africa supra* note 2.

46 Correspondence between Sonke Gender Justice and the Head of Admissions, Pollsmoor Remand, 2 October 2014.

47 Mary-Anne Gontsana, ‘Detainee tells of shocking conditions for awaiting trial prisoners’ *Ground Up* (7 May 2015) available at http://www.groundup.org.za/article/detainee-tells-shocking-conditions-awaiting-trial-prisoners_2915/

48 Cameron Report *supra* note 32.

49 ‘Justice Cameron’ Constitutional Court of South Africa available at <https://www.concourt.org.za/index.php/judges/current-judges/13-current-judges/179-justice-cameron-2>.

50 Justice Edwin Cameron, ‘I owe you my life, says judge,’ *Ground Up* (19 July 2016) available at <https://www.groundup.org.za/article/judge-edwin-camersons-jonathan-mann-lecture-aids2016/>.

At the time of his visit, overcrowding at Pollsmoor Remand was acute, at a near-record high of more than 300%.⁵¹ The ‘Cameron Report’ as it is referred to within civil society, was the most damning by far. It stated:

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.⁵²

Judge Cameron described the lack of ventilation as so bad that the air felt so thick, ‘... one felt one could cut it with a knife’ and how cells were so overcrowded that individuals could not move without bumping into one another.⁵³ He went so far as to say that hazardous conditions left DCS ‘vulnerable to constitutional challenge’ in the courts.⁵⁴

He stated that he, his law clerks, and surprisingly even the senior executive correctional staff who escorted them were ‘deeply shocked’ by what they witnessed.⁵⁵ The lack of functioning ablution facilities created a ‘rancid stench’ inside the cells at the facility. As he went from cell to cell, he checked the toilets and found that they did not flush and that people had resorted to using buckets for toilets.⁵⁶ He also found that the sinks did not drain.⁵⁷

Judge Cameron also found a broken health system in Pollsmoor. He spoke with the on-site doctor, who was retired and working on a locum basis, with the assistance of a nurse.⁵⁸ The doctor said he wrote 30 to 40 prescriptions a day, including for chronic medication and TB treatment but that, on average, patients had to wait three to four days for these to be filled. Inmates indicated that the wait was much longer, sometimes up to two weeks.⁵⁹ The pharmacy had only one pharmacist and assistant, insufficient to serve the thousands of incarcerated people at the centre. Together with stock-outs of basic medical commodities like gauze, needles, and gloves, these inadequacies meant medical staff were unable to provide people in detention with minimum health services.⁶⁰

The problem extended beyond the pharmacy, to basic systems for identifying people who required medical treatment, or to provide basic prevention services for HIV. Despite the department’s policy of offering HIV testing for all incarcerated people upon admission, very few of the people in detention with whom Judge Cameron spoke had been tested, and condoms were unavailable.⁶¹ Aside from TB and HIV, scabies, which can be prevented by a warm bath or shower, was a ‘major and frequent medical problem’.⁶² Without functioning ablution facilities or clean bedding, this skin condition became rife.⁶³

Like the first two judges, Judge Cameron filed his report with the Minister and National Commissioner; however, unlike the first two reports, he received action plans and a formal response from them, although the plan itself was vague.⁶⁴ It lacked realistic timelines and did not engage with the way in which overcrowding at the levels in the facility, together with understaffing, had become a barrier to the implementation of the department’s norms and standards, and had left the facility to operate in what was essentially a permanent state of emergency.

51 Cameron Report *supra* note 32 at para 11.

52 Cameron Report *supra* note 32 at para 44.

53 *Ibid* at 32.

54 *Ibid* at para 38.

55 *Ibid* at para 7.

56 *Ibid* at para 73.

57 *Ibid* at para 64.

58 *Ibid* at 11 and 12.

59 *Ibid* at paras 37-38.

60 *Ibid* at para 40.

61 *Ibid* at para 63.

62 *Ibid* at para 41.

63 *Ibid* at 13.

64 Founding Papers, *Sonke Gender Justice supra* note 2 at para

The response of officials to Cameron's report could be due in part to his public profile and his inclusion of humanising accounts and detailed descriptions of the conditions. Another important factor was that Judge Cameron was careful to invite members of JICS and one of the facility's ICCVs, Ms Tania Stuurman, to accompany him on his inspection.⁶⁵ Because Ms Stuurman had first-hand knowledge of the complaints she could direct the judge's attention where it was most urgently required.

Another distinguishing factor is that the Cameron Report attracted the attention of the media, as well as another oversight body, the South African Public Service Commission, which later visited the facility and expressed the view that the cell conditions '... may impact on the safety of inmates and also increase the risk of TB infection.'⁶⁶

NGOs seized on the report as an opportunity to call for solutions to overcrowding, and spoke out individually and through the DJF coalition.⁶⁷ The Inspecting Judge, in the Judicial Inspectorate's 2014/2015 annual report, also affirmed the report's findings.⁶⁸

Despite mounting pressure, the overcrowding levels nevertheless remained at around 250% of Pollsmoor Remand's approved capacity.⁶⁹

Legislative and Policy Reform, 2011–2014

In March 2014, DCS finalised the White Paper on Remand Detention, following substantial amendments to the Correctional Services Act through the Correctional Matters Amendment Act, 2011.⁷⁰ The Correctional Matters Amendment Act clarified the responsibilities of DCS for remand detention, and created a mechanism to reduce the duration of remand detention, by providing for mandatory reviews of detentions after two years.⁷¹ The White Paper embraces international human rights standards for remand detention and states that DCS must ensure that the enjoyment of human rights are limited as little as possible.⁷² The adoption of these reforms was cause for optimism, but without the cooperation of the rest of the criminal justice sector to address the systemic causes of overcrowding, DCS was unable to reduce the remand population or adequately improve conditions of confinement.⁷³

65 *Ibid* at 5 and 6. Acting CEO of the Judicial Inspectorate, Mr Michael Masondo attended the visit, as did the Inspectorate's area coordinator, Mr Troy Titus.

66 Public Service Commission, *Consolidated Report on Service Delivery Inspections Conducted in Department of Correctional Services* (November 2016) at 5 available at <http://www.psc.gov.za/documents/reports/2016/Consolidated%20report%20on%20service%20delivery%20inspections%20conducted%20in%20the%20department%20of%20correctional%20service.pdf>

67 Detention Justice Forum, 'Detention Justice Forum Calls for Urgent Action in Response to Justice Edwin Cameron's Report on Sickening Conditions in Pollsmoor Prison' (7 September 2015) available at <http://detentionjusticeforum.org.za/detention-justice-forum-calls-urgent-action-response-justice-edwin-camersons-report-sickening-conditions-pollsmoor-prison-2/>.

68 Judicial Inspectorate for Correctional Services *Annual Report 2014/2015*.

69 Department of Correctional Services, *Correctional Services Western Cape Statistics as on 21 November 2016*.

70 L. Muntingh *supra* note 22 at p.37.

71 Correctional Matters Amendment, 2011, section 9.

72 White Paper on Remand Detention, 2014, p.11.

73 L. Muntingh *supra* note 22 at p.38.

The Change Process



Litigation: *Dudley Lee v Minister of Correctional Services*, 2012

Important litigation, the *Lee v Minister of Correctional Services* case,⁷⁴ reached the Constitutional Court in 2012. The late Dudley Lee was held in remand for four years at Pollsmoor and claimed damages after he developed pulmonary tuberculosis during his incarceration.⁷⁵ The litigation established that DCS was liable for Mr Lee's illness due to its negligence in failing to adequately screen and treat detained people with TB.⁷⁶ While the case was tailored around recognising and remedying Mr Lee's individual harm, it interrogated the inhumane conditions within Pollsmoor Remand, and spurred some important reform in policy and practice to improve TB and HIV prevention and treatment.⁷⁷ Judge van der Westhuizen's inspection report at the end of 2012 nevertheless lamented that 'the elimination of overcrowding [was] not even planned [for]' at Pollsmoor Remand.⁷⁸

Civil society organisations consolidate, 2012–2015

Within South Africa's public interest advocacy sector, there is a small but dedicated collective of civil-society actors advocating for the transformation of prisons. In 2012, they founded a loose coalition known as the Detention Justice Forum (DJF), which includes roughly 20 organisations and individuals that employ a variety of advocacy strategies, ranging from litigation and protest, to technical policy analysis and training officials, to direct services inside prisons.⁷⁹ The DJF is coordinated by Just Detention International–South Africa (JDI–SA), Sonke Gender Justice (Sonke), the Wits Justice Project, and the National Institute for Crime Prevention and Reintegration of Offenders (NICRO).⁸⁰ Other member organisations include Lawyers for Human Rights (LHR), Africa Criminal Justice Reform (formerly the Civil Society Prison Reform Initiative), the Treatment Action Campaign (TAC), and Zonk'izizwe Odds Development, an NGO founded and run by previously incarcerated people.⁸¹

Several individual members of the DJF, and the forum collectively, have worked to improve conditions in Pollsmoor. Sonke worked within sentenced and remand facilities in Western Cape Province from 2007, including Pollsmoor Remand, where it conducted peer-education programmes for detained people and officials, to address HIV, TB and sexual violence.⁸² Because of its ongoing HIV peer-education programmes, Sonke began attending Visitor Committee meetings for the Pollsmoor Management Area, together with Treatment Action Campaign (TAC) and Lawyers for Human Rights (LHR). From 2014, Sonke, TAC and LHR began tracking the complaints from 200 detained people, regarding the effects of severe overcrowding in Pollsmoor Remand.⁸³

After monitoring these complaints and observing little to no improvement, Sonke, TAC and LHR escalated their engagement with DCS. They urged management at Pollsmoor to invoke section 63A of the Correctional Services Act, which gives it powers to alleviate overcrowding by allowing the head of a prison to pursue the amendment of bail conditions of certain people in detention.⁸⁴ The NGOs escalated their engagement with DCS to the

74 *Lee v Minister of Correctional Services* 2013 (2) SA 144.

75 *Ibid* at para 1.

76 This right is enshrined in section 35 of the Constitution of South Africa, and further developed in *Van Biljon and Others v Minister of Correctional Services and Others* 1997 (4) SA 441 (C), which established that incarcerated people are entitled to receive equivalent and comparable medical treatment afforded to those outside of prisons, and that the state has a higher duty of care towards them because it has incarcerated them.

77 South African Department of Health *Guidelines for the Management of Tuberculosis, Human Immuno-Deficiency Virus and Sexually-Transmitted Infections in Correctional facilities* (2013).

78 Van der Westhuizen Pollsmoor Report *supra* note 44.

79 Read more about DJF at <http://detentionjusticeforum.org.za/about/>.

80 See list of DJF coordinators at <http://detentionjusticeforum.org.za/contact/>.

81 See list of DJF's public members at <http://detentionjusticeforum.org.za/partners/>.

82 Sonke Gender Justice Network, *Annual Report August 1, 2007 – December 31, 2008* at 21.

83 Mary-Anne Gontsana 'Organisations allege dreadful conditions at Pollsmoor awaiting trial facility' *Ground Up* (27 November 2014) available at http://www.groundup.org.za/article/organisations-allege-dreadful-conditions-pollsmoor-awaiting-trial-facility_2478/.

84 Correspondence between Sonke Gender Justice and Western Cape Department of Correctional Services (6 November 2014), Annexure 'DP30' to Founding Papers, *Sonke Gender Justice v Government of South Africa* *supra* note 2.

regional commission and then national commissioner. In early 2015, the National Commissioner responded with justifications for certain conditions and denial of others.⁸⁵

After Judge Cameron's reports corroborated the detainees' complaints, DJF members determined it was necessary to take further action. Sonke's opinion was that efforts to address HIV and TB in prison would be ineffective without addressing the upstream drivers of these epidemics. For example, TB prevention and control is hampered when cells are overcrowded and have poor ventilation and implementing the national policy to address sexual abuse would be nearly impossible when there is insufficient space and staff to house individuals safely.

A death in Pollsmoor Remand, 2015

In September 2015, reports surfaced that a person being incarcerated at Pollsmoor Remand had died the previous month, after contracting leptospirosis, a bacterial infection carried in the urine of rats.⁸⁶ In response, DCS took steps to evacuate and fumigate the facility.⁸⁷ The upsetting story of the death and the consequent evacuation were covered not only by national media but also made it into the international spotlight including the BBC, which sparked further outcry among penal reform advocates.⁸⁸

Civil society organisations take the government to court, 2015

Following the failure of DCS to respond adequately to the attempts NGOs made to engage and further motivated by the leptospirosis-caused death in September, Sonke and LHR determined that litigation was needed. LHR would provide pro-bono legal representation for Sonke, which, as a public-interest organisation working in Pollsmoor, would serve as the client. The two organisations asked individuals who were currently and formerly incarcerated at Pollsmoor Remand to provide sworn testimonies of their experiences inside the facility and enlisted the expert opinion of the head of mental health services at NICRO on the psychosocial effects of overcrowding on incarcerated people.⁸⁹

Recognising that overcrowding is fuelled by factors within and beyond the prison system, Sonke and LHR determined it would be strategic to direct their litigation at government, as opposed to Pollsmoor Management Area or DCS alone. A successful outcome would require multi-sectoral engagement across government, including the Treasury, the Department of Justice, the National Prosecuting Authority and the South African Police Service. The legal team also decided to cite the Head of Pollsmoor Remand, as the person in this post was in exclusive possession of facility data, which would inform future advocacy.

Through litigation, the NGOs hoped to secure a new legal precedent that would provide depth and insight into the obligations of the government in respect of incarcerated people. This legal precedent would contribute to South Africa's jurisprudence regarding incarcerated people and could be used to leverage government action at Pollsmoor Remand and beyond. Another equally important goal of the NGOs was to secure an order against the key stakeholders across different government departments to mandate their cooperation in addressing systemic overcrowding.

The organisations filed the case at the Western Cape High Court in December 2015.⁹⁰

85 Correspondence between Sonke Gender Justice and Western Cape Department of Correctional Services (6 November 2014), Annexure 'DP31' to Founding Papers, *Sonke Gender Justice v Government of South Africa supra* note 2.

86 'Pollsmoor evacuates prison in bid to curb fatal disease' *eNCA* (21 September 2015)

87 Parliament of the Republic of South Africa, Question No. 3705, Response of Minister for Justice and Correctional Services to Question of Mr J.A. Selfe

88 'South Africa's Pollsmoor prisoners evacuated over rat infestation' *BBC Africa* (21 September 2015) available at <http://www.bbc.com/news/world-africa-34316354>.

89 Supporting Affidavit of Arina Wessels, Founding Papers, *Sonke Gender Justice v Government of South Africa supra* note 2

90 *Sonke Gender Justice Annual Report 2015-2016* at 36 available at <http://genderjustice.org.za/publication/sonke-annual-report-2015-2016/>.

Media coverage, 2015

In 2015, with the release of the Cameron Report, the media began to pay more attention to Pollsmoor Remand than it had in the past, and published a flurry of articles on the conditions inside, with titles such as 'Inside Pollsmoor's cells of shame' and 'Pollsmoor prisoners treated worse than animals'.⁹¹

The High Court litigation heightened the media spotlight on Pollsmoor Remand. Intensified media attention went beyond the ambit of the court case to examine the state of South African prisons in general. Media coverage ranged from local, to national, and international outlets. CNN produced a short documentary highlighting the case and providing footage of the appalling conditions inside, which was broadcast internationally.⁹²

A representative selection of national headlines included:

- 'Overcrowded jails deadly, inhumane', *Bhekisisa* (June 5, 2015)
- 'Pollsmoor has 9 000 prisoners too many – dept', *News24* (18 August 2015)
- 'Inside Pollsmoor's cells of shame', *News24* (9 September 2015)
- 'Pollsmoor prisoners treated worse than animals', *Mail & Guardian* (18 September 2015)
- 'Thousands evacuated from rat-infested Pollsmoor prison', *Mail & Guardian* (21 September 2015)
- 'Showdown over Pollsmoor's "appalling" conditions', *GroundUp* (30 November 2015)
- 'How Pollsmoor Prison can Kill you', *Mail & Guardian* (23 December 2015)
- 'HIV-positive prisoner denied antiretroviral treatment', *GroundUp* (3 February 2016)
- 'Shocking reality of conditions at Pollsmoor prison', *Independent Online* (13 February 2016)

Sonke also commissioned a short documentary on the case and the conditions in Pollsmoor, which was made available on the website of the health supplement of the *Mail & Guardian*, a newspaper of record in South Africa.⁹³ The film provided an opportunity for people formerly detained in Pollsmoor Remand and Pollsmoor Women's Remand to discuss their treatment during their incarceration. It also allowed Sonke to explain the ramifications of these conditions beyond the prison system, and their motivations for going to court.

Outcome

Court case

The application was heard by the Western Cape High Court in December 2016, a year after the organisations first launched the case. At the time of the hearing, Pollsmoor Remand was operating at 249% of its approved capacity.⁹⁴ While government indicated that it would not oppose Sonke's application, the head of Pollsmoor Remand opposed it individually on procedural grounds which the judge rejected.⁹⁵

The court found that conditions in Pollsmoor Remand, including the overcrowding, were a breach of the South African Constitution and ordered government to decrease overcrowding to 150% within six months.⁹⁶ The court

91 Mary-Anne Gontsana 'Inside Pollsmoor's cells of shame' *News24* (4 September 2015) available at <https://www.news24.com/SouthAfrica/News/Inside-Pollsmoors-cells-of-shame-20150904>; Ruth Hopkins 'Pollsmoor prisoners treated 'worse than animals'' *Mail and Guardian* (18 September 2015) available at <https://mg.co.za/article/2015-09-17-pollsmoor-prisoners-treated-worse-than-animals>.

92 'Inside South Africa's notorious Pollsmoor prison' *CNN Amanpour* available at <http://edition.cnn.com/videos/tv/2016/02/24/pkg-david-mckenzie-cape-town-jail-amanpour.cnn>

93 Pollsmoor Remand: 'They treated us like animals' *Bhekisisa*, available at <http://bhekisisa.org/multimedia/2016-05-10-pollsmoor-remand-they-treated-us-like-animals>.

94 Department of Correctional Services *Unlock Statistics 5 December 2016*.

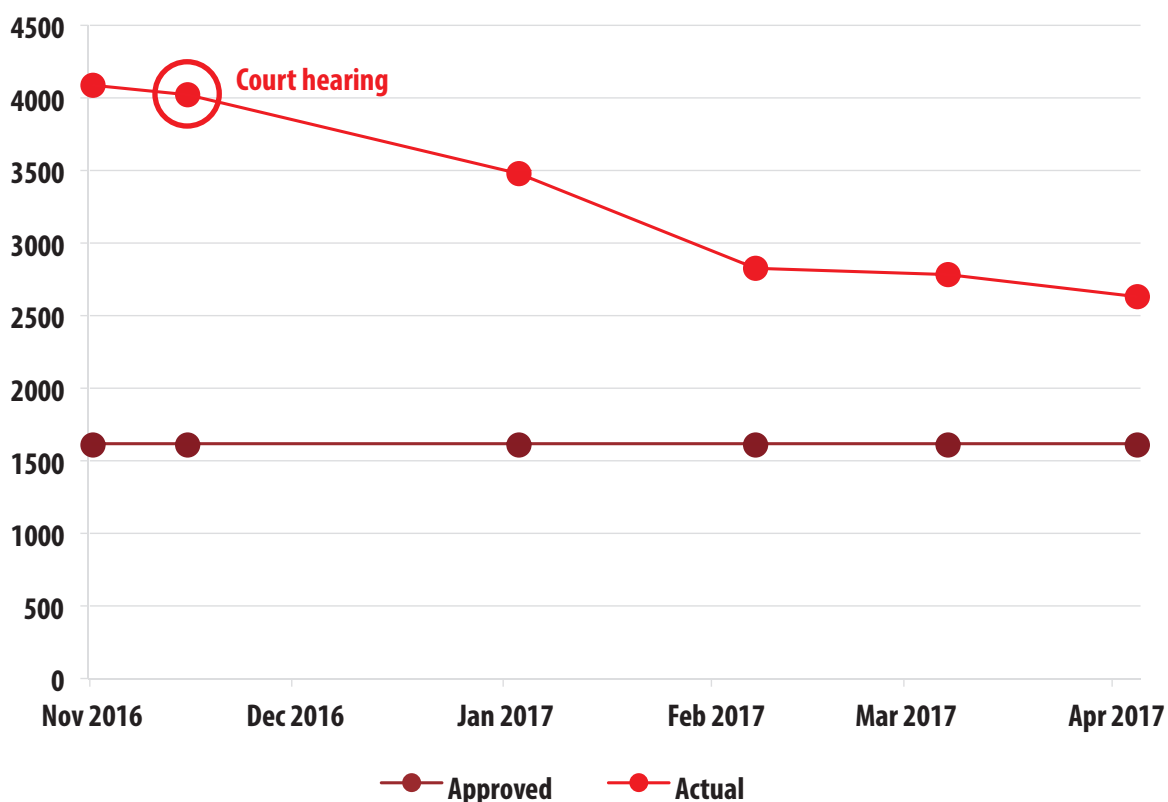
95 Reasons Delivered Thursday 23 February 2017, *Sonke Gender Justice v Government of South Africa supra* note 2 at paras 15-21.

96 Final Order in *Sonke Gender Justice v Government supra* note 30 available at <http://genderjustice.org.za/publication/court-order-pollsmoor-remand-overcrowding-case/>.

order originally required an immediate reduction to 120%, but DCS petitioned the court for a longer timeframe and Sonke and LHR were supportive of this.⁹⁷ The court also ordered the government to develop a comprehensive plan to bring overcrowding in the facility to an end in the long term.⁹⁸ The orders were in the form of supervisory interdicts, which required the government to periodically report back on its progress. In South Africa, this type of interdict is an important accountability tool to ensure compliance with court orders.⁹⁹

Reduction in levels of overcrowding

In response to the court order, the National Commissioner of Correctional Services reportedly instructed Pollsmoor Remand to cease admissions to the facility.¹⁰⁰ The Regional Commissioner for the Western Cape reversed this order in January 2017.¹⁰¹ Despite this, statistics for Pollsmoor Remand showed a steady and significant downward trend in occupancy as can be seen in the figure below. By the end of the end of April 2017, occupancy had dropped to 151%, a dramatic and unprecedented improvement in a short period of time.¹⁰²



It is vital to interrogate what explains this drop and to remember that these are short-term changes in what is essentially a fast-evolving environment. The Minister for Justice and Correctional Services explained that they achieved this reduction in part by relocating people from two facilities in the Cape Town area for sentenced

97 Reasons Delivered Thursday 23 February 2017, *Sonke Gender Justice v Government of South Africa supra* note 2 at paras 156-160.

98 Final Order in *Sonke Gender Justice v Government supra* note 30 available at <http://genderjustice.org.za/publication/court-order-pollsmoor-remand-overcrowding-case/>

99 P Swanepoel *The potential of structural interdicts to constitute effective relief in socio-economic rights cases* (2017), Thesis presented in fulfilment of the requirements for the degree of Masters of Law in the Faculty of Law at Stellenbosch University at 84.

100 'Pollsmoor ordered to keep admitting prisoners' *Constantiaberg Bulletin* (19 January 2017) available at <http://www.iol.co.za/constantiaberg-bulletin/news/pollsmoor-ordered-to-keep-admitting-prisoners-7450354>

101 *Ibid.*

102 Department of Correctional Services *Western Cape Unlock Statistics* (24 April 2017).

offenders, to facilities in Free State and Northern Cape provinces, in order to make room for individuals in remand detention.¹⁰³ DCS may have simply displaced overcrowding to other facilities; it also moved transferred individuals further from their families and communities.

Another concern is that DCS's current plans for reform do not address the *systemic* causes of overcrowding, such as minimum sentencing legislation, a slow criminal justice process, and bail policies that unfairly discriminate against the poor. Prison reform advocates remain concerned that the solution provided in response to the court order is simply a 'band-aid' – one that will ultimately fail to substantially prevent overcrowding beyond the short-term.¹⁰⁴ This concern has been echoed publicly by correctional officials who worry that they may not be able to maintain low levels of overcrowding without addressing its underlying causes.¹⁰⁵

Finally, it is important to note that the litigation caused a backlash for Sonke Gender Justice, other members of the DJF, and for people in detention. DCS withdrew its authorisation for Sonke to work in five Western Cape correctional facilities; Sonke's peer-education training programme on HIV, TB, and gender-based violence for correctional officers and incarcerated people was shut down. When DCS eventually re-authorised access to its facilities in 2017, Sonke no longer had funding to continue its training programme.

103 Department of Correctional Services, *Internal Memorandum to the Director of Legal Services* (18 January 2017) at 3.

104 'Pollsmoor prisoners unhappy about transfers to other jails' *News 24* (30 December 2016) available at <https://m.news24.com/SouthAfrica/News/pollsmoor-prisoners-unhappy-about-transfers-to-other-jails-20161230>.

105 *Ibid.*

5. HOW CHANGE HAPPENED

This case study illustrates that change came following a long process of advocacy for reform of remand detention and conditions of incarceration in South Africa. This section summarises the key actors and key factors that led to the reduction of overcrowding in Pollsmoor Remand.

Key actors

A range of actors whose actions created mounting pressure for reform contributed to this change process ultimately leading DCS to comply with the court order secured through litigation.

The relevant actors involved in this process span civil society, parliamentarians, government, oversight bodies, media, the courts, and individuals who have been or are currently incarcerated. The table below identifies the actors, their institutional role, and their role in contributing to reform.

Actor category	Role	Key actions
People currently or previously in remand detention at Pollsmoor	Victims of rights violations	Made use of accountability mechanisms, provided supporting evidence in court case brought by civil society organisations,
Prison monitoring institutions: Judicial Inspectorate for Correctional Services (JICS), visiting judges, parliamentary committees, ICCVs and Visitors' Committee	Oversight, promoting transparency and bureaucratic accountability	Through monitoring, conducting inspections and reporting, enabled access to information regarding conditions in Pollsmoor Remand
The Courts: judges responding to litigation	Crafting remedies, cutting through deadlocks, monitoring implementation	Provided necessary and important interpretation of the legal framework supporting prisons
Civil society (national NGOs and coalitions, including formerly incarcerated people)	Service provision, advocacy (including litigation), research, coordination	Worked through a coalition which permitted various organisations to coordinate and to complement working styles. Conducted advocacy to support incarcerated people: engaged continuously with Correctional Services, publicised the issue and ultimately brought a court case challenging the conditions.
International and national media	Public awareness raising, popular education	Reported widely and consistently on issues relating to prisons, and specifically Pollsmoor, keeping the issue in the public's attention.
Legislators/parliamentarians	Budgeting, holding government accountable	The parliamentary portfolio committee showed regular interest
Government	Service provision – responsibility to provide for people in remand detention presented through the judicial system	Although initially reluctant to engage, government ultimately implemented measures to quickly decrease overcrowding in line with the court order. Correctional Services Commissioner urges other departments to play their part in addressing structural reasons for overcrowding

Key factors

There are several factors that helped bring about the significant reduction in overcrowding in Pollsmoor Remand in early 2017. It may be tempting to view the Sonke Gender Justice judgment as the primary causal factor, but myriad equally important causal, proximate or contributing factors facilitated the litigation and influenced government to comply with the court order.

Government compliance

An important factor in the successful outcome was government's decision not to oppose the litigation – a decision likely informed by the following considerations:

- **DCS support:** Overcrowding is caused in part by the actions and decisions of police, prosecutors and judicial officers, all outside the control of DCS. Despite its efforts to institute reforms through the Correctional Matters Amendment Act 2011 and the White Paper on Remand Detention, 2014, without the cooperation of the wider criminal justice system, DCS could not improve remand detention management under conditions of severe overcrowding. By the time of litigation, DCS may have viewed the court case as a boon; a tool to allow it to cut through chronic democratic failure to reshape the pipeline to remand detention. This is reflected in statements by DCS in which it commented that it was immediately taking steps to address the issue.¹⁰⁶ DCS noted the formation of national and regional task teams engaging the police, prosecuting authority and judiciary to facilitate change using 'short, medium, and long-term interventions' including managing levels through the government's justice cluster, to improve appropriate use of conversions from incarceration to community supervision, release, and transfers between correctional centres.¹⁰⁷
- **Public support:** A court order would also portray government as being forced to act to improve conditions of incarceration, which it may have hesitated to do of its own accord. In a context of competing priorities, limited government resources, and popular sentiment favouring punitive treatment of people in prisons, the government may have seen the court order as an opportunity to act without stoking public backlash.
- **Lack of preparation:** The litigation came at a time of upheaval in Parliament, mass student protests, and other sources of instability and the government may not have had time to adequately prepare a legal defense.¹⁰⁸
- **Lack of argument:** It is possible that the government considered itself to have no persuasive arguments against Sonke and Lawyers for Human Rights, as the case benefitted from the Cameron Report and intense media attention, and was assigned to be presided over by Judge Saldanha, who was known to be progressive on these matters.¹⁰⁹

Building the evidence

Effective advocacy hinges on the availability of sufficient evidence. Ultimately, the pressure for change – through direct lobbying, the media and the case presented in court – came because of the availability of reliable first-hand evidence on overcrowding in Pollsmoor and South African prisons. With sufficient data, key actors could analyse and establish the acute nature of the problem, its systemic sources, and offer policy prescriptions. It also increased scrutiny on DCS for failing to remedy conditions over time. Several sources produced critical data:

106 Siyavuya Mzantsi 'Pollsmoor Prison conditions declared unconstitutional' *Cape Times* (5 December 2016) available at <http://www.iol.co.za/capetimes/news/pollsmoor-prison-conditions-declared-unconstitutional-2095712>

107 Department of Correctional Services Internal Memorandum: Compliance with Order of Honorable Court: Case No. 24087/15: Remand Detention Facility: Pollsmoor Management Area (18 January 2017).

108 Ranjeny Munusamy 'Countdown to disaster: Leaders fiddle as SA spirals toward upheaval' *Daily Maverick* (21 October 2016) available at https://www.dailymaverick.co.za/article/2016-10-21-countdown-to-disaster-leaders-fiddle-as-sa-spirals-towards-upheaval/#.WmHG_6jXY2w.

109 Indeed, Judge Saldanha comes from a public interest background, having an illustrious career with the Legal Resources Centre.

- **Researchers** from institutions such as the Civil Society Prison Reform Initiative (now called Africa Criminal Justice Reform) at the University of Western Cape's Community Law Centre, produced important policy review articles and reports that illuminated how 'tough-on-crime' approaches to bail and sentencing law caused a spike in the remand detention population.¹¹⁰ Policy experts shared their findings with parliamentarians, policymakers, government, academics and civil society.¹¹¹
- **Oversight mechanisms** such as JICS raised the alarm in its 2005/2006 Annual Report. The reports from Judge Froneman (2010) and Judge Westhuizen (2012) reported on shocking overcrowding. ICCVs provided personal insights and a means to access information from people in detention.
- **Civil society organisations** received information directly, having joined the Visitors' Committee at Pollsmoor, and published actively.
- **Complementary litigation** such as the Dudley Lee case considered the conditions in Pollsmoor. While Dudley Lee was tailored around recognising and remedying Mr Lee's individual harm, it interrogated the inhumane conditions within Pollsmoor Remand, and spurred some important reform in policy and practice to improve TB and HIV prevention, detection, and treatment available in prisons.¹¹²
- **The Cameron Report** marked a critical moment in 2015 because it provided a detailed account of the systemic issues caused by overcrowding and inhumane conditions in the facility and included sharp rebukes of DCS. The international, national and local media covered this report. It drew the attention of the South African and Western Cape provincial legislatures and the Public Service Commission, which subsequently visited the facility to inspect the conditions and affirmed its findings.

Champions for the cause

Inspired, committed, and effective individuals contributed to reform. Constitutional Court judges exercised their right to visit Pollsmoor and publicise their findings, with Judge Edwin Cameron making particularly impactful use of this power. ICCVs obtained reliable first-hand evidence and used it to pressure DCS management. Civil society organisations coordinated their responses through the DJF coalition, which amplified their members' calls for government actions.

Most importantly, individuals currently and previously incarcerated in Pollsmoor Remand made the courageous decision to formally and publicly complain about conditions and advocate for reform, despite the serious risk of retaliation.

Concurrent catalytic events

The leptospirosis death at Pollsmoor Remand captured the public's attention and sympathy and increased pressure on DCS to improve conditions in remand detention. The media reported widely on this death which underscored the urgency for the reduction in overcrowding and improved conditions.

Mass media and investigative journalism

Investigative journalists sought out information from people currently and previously in remand detention and published their stories through international, national, and local media outlets, putting pressure on the government to act, as well as building public interest and support for reform.

110 The population spiked from around 20,000-30,000 in the mid 1990's to over 50,000 in the late 1990's, with a slight contraction to around 40,000 in early 2000's, where it continues to hover. See, C Giffard and L Muntingh, *The Effect of Sentencing on the Size of the South African Prison Population*, the Open Society Foundation, 2006.

111 Portfolio Committee on Correctional Services Report, *Solutions and Recommendations to Prison Overcrowding*, October 2004, see, <http://acjr.org.za/resource-centre/Solutions%20and%20Recommendations%20to%20Prison%20Overcrowding.pdf/view>

112 South African Department of Health *Guidelines for the Management of TB, HIV and STIs in Correctional Facilities* supra note 56.

Litigation

All of the aforementioned actions facilitated the launching of the *Sonke Gender Justice v Government of South Africa* case and compliance with the ensuing order made by the Western Cape Province High Court. The Court ordered the government to take immediate steps to reduce the overcrowding in Pollsmoor Remand and to develop a comprehensive plan to address overcrowding in the facility in the long-term.

The success of the litigation would not have been possible without an enabling constitution and legal framework, and without a strong and independent judiciary. The enabling environment for the litigation was created by the collective advocacy of the DJF, media coverage, the support of the judiciary through the Constitutional Court's prison visitation programme, and the documentation and escalation of complaints by ICCVs in Pollsmoor. Without the sustained efforts of these actors, DCS may have chosen to ignore the court order, as certain arms of the government have chosen to do in other contexts.¹¹³

The court order takes the case study into the present, as all actors are now dealing with the implementation of DCS's plan.

6. CONCLUSION

After years of political inertia, the sudden drop in overcrowding levels at Pollsmoor Remand following the court order indicates that the litigation played an important role in catalysing a reduction in overcrowding. However, although the litigation was necessary, this case illustrates that alone, it would not have been sufficient—it was one piece of the tapestry of interventions over a number of years.

Moreover, these various interventions would not have been possible without an enabling constitution and legal framework that support transparency, accountability, and the human rights of incarcerated people. These elements jointly worked to create the necessary conditions for change. The court orders that resulted from *Sonke Gender Justice v Government of South Africa* are a high-water mark in accountability for constitutional conditions of detention in Pollsmoor Remand. Compliance with the rulings thus far benefits from political will galvanised by the people who were incarcerated in Pollsmoor Remand who chose to speak out, with the support of activists, the concerned members of judiciary, policymakers, and oversight bodies like JICS.

It is vital to temper optimism, however, as these are early days in the wake of the court order, and we will only see the long-term impact of the case over time. DCS reduced overcrowding partly by making space in the sentenced sections of Pollsmoor and relocating sentenced individuals to centres in Northern Cape and Free State. DCS then moved some of the remand population into the sentenced sections of the prison. Most of the underlying structural drivers of overcrowding remain largely unchanged. The police, prosecutors, and the courts – not just DCS – will need to identify systemic solutions. Additional pressure, including follow-up litigation, may be required to move the government toward identifying comprehensive solutions that engage all the relevant government departments.¹¹⁴ Systemic reform on this scale will occur incrementally, and will require sustained efforts by all actors involved.

113 Victoria John 'Motshekga to challenge textbooks ruling' *Mail & Guardian* (3 June 2014) available at <https://mg.co.za/article/2014-06-03-motshekga-to-challenge-textbook-ruling>; Pierre de Vos 'Flouting a court order: Government risks making a paper tiger of the law' *Daily Maverick* (15 June 2015) available at <https://www.dailymaverick.co.za/opinionista/2015-06-15-flouting-a-court-order-government-risks-making-a-paper-tiger-of-the-law/#.WmHJ6KjXY2w>.

114 G. Dereymaeker, 'After the Pollsmoor judgment—recognising repeated failures in our criminal justice system,' *Daily Maverick* (15 December 2016) available at <https://www.dailymaverick.co.za/article/2016-12-15-op-ed-after-the-pollsmoor-judgment-recognising-repeated-failures-in-our-criminal-justice-system>.

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