



## Looking back: 2012 and remand detention

*2012 saw the remand detention landscape shift significantly, during a year in which South Africa's citizens appeared to be frustrated and angry with law enforcement and access to justice. This brief details a few key changes that took place in 2012, that will influence the remand landscape in 2013.*

### **Public perceptions on the criminal justice system**

2012 saw a surge in negative public perception about crime, criminals and the efficacy and fairness of South Africa's criminal justice system. It was a year that saw the South African Police Service embroiled in a series of violent engagements with citizens: Soweto teenager Thato Mokoka was shot dead, allegedly by a student police officer, in February 2012<sup>1</sup>. In October 2012, an 11 year old girl was killed in crossfire when the police were pursuing a suspected criminal in Braamfischerville<sup>2</sup>. The tragedy at Marikana, where 34 people were shot dead by the police, who opened fire while trying to disperse a group of strikers in August 2012, shocked the country and sparked outrage, debate and vitriol<sup>3</sup>. Not the least of the Marikana atrocities was the subsequent arrest of 270 miners for murder, and the irregularities attending their detention and ultimate release after charges were dropped<sup>4</sup>.

Public trust was further undermined by the release of Jackie Selebi, a convicted fraudster, on medical parole, just six months into his 15 year sentence<sup>5</sup>. A range of political commentators released statements detailing skepticism around the legality of such a move, and the possibility that political

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<sup>1</sup> Mail and Guardian, Growing outrage over Soweto teen's death, 16 February 2012 <http://mg.co.za/article/2012-02-16-growing-outrage-over-soweto-teens-death>

<sup>2</sup> SAPA, Government to help bury girl shot by police in Soweto, 21 October 2012 <http://www.timeslive.co.za/local/2012/10/31/government-to-help-bury-girl-shot-by-police-in-soweto>

<sup>3</sup> Mail and Guardian, Marikana families blame deaths on police, Lonmin, 4 December 2012 <http://mg.co.za/article/2012-12-04-marikana-families-blame-police-lonmin>

<sup>4</sup> Mail and Guardian, Freed Marikana miners arrive home, 4 September 2012 <http://mg.co.za/article/2012-09-04-freed-marikana-miners-arrive-home> and Mail and Guardian, Marikana miners' lawyers say murder charges are 'bizarre', 1 September 2012 <http://mg.co.za/article/2012-09-01-marikana-miners-lawyers-say-murder-charges-are-bizarre>

<sup>5</sup> News24, Jackie Selebi granted medical parole, 20 July 2012 <http://www.news24.com/SouthAfrica/News/Jackie-Selebi-granted-medical-parole-20120720>

influence was brought to bear on Selebi's parole decision<sup>6</sup>. However genuine Selebi's illness is, public perception that equality before the law depends on factors *other* than law itself, became further entrenched.

In this environment of distrust and violence, the plight of remand detainees – innocent until proven guilty by South African law – received much attention.

## **Government**

### ***A new Correctional Services Minister***

On 12 June 2012 after a cabinet reshuffle, Mr Joel Sibusiso Ndebele became the Minister for Correctional Services, replacing Ms. Nosiviwe Mapisa-Nqakula. While it is too early to comment on his performance, the Minister appears to be open to engagement, convening a Minister's Colloquium and encouraging interactions with civil society.

### ***A new remand directorate***

Britta Rotmann was appointed to head up the Remand Detention branch within the Department of Correctional Services. The establishment of a Remand Detention branch was a recommendation from a Cabinet Lekgotla in 2009. Ms Rotmann highlighted over-crowding as her priority for the branch, and her human rights background indicates that her responsibilities will be focused on ensuring the protection of detainee rights – a very positive step<sup>7</sup>.

### ***Correctional Services Act of 1998 amendments (known as Correctional Matters Amendment Bill) to be implemented***

2012 saw many of the suggested amendments reach implementation stage. One of the key amendments relating to remand detention in this act is clause 49G(1), which states that:

‘The period of incarceration of a remand detainee must not exceed two years from the initial date of admission into the remand detention facility, without such matter having been brought to the attention of the court concerned<sup>8</sup>’.

It is understood that the Department of Correctional Services is currently compiling a list of all those remand detainees who have passed this incarceration limit; after which, the amendment will come into force.

Other important changes include clause 49E, outlining the procedure to be followed when remand detainees qualify for release on medical grounds; and clause 48, which discusses the issue of uniforms for remand detainees. The issue of uniforms was a high-profile one, as the previous Minister felt that

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<sup>6</sup> News24, Parties divided over Selebi parole, 20 July 2012 <http://www.news24.com/SouthAfrica/Politics/Parties-divided-over-Selebi-parole-20120720>

<sup>7</sup> Ruth Hopkins, Putting remand prisoners' rights first, 1 October 2012 <http://www.journalism.co.za/index.php/wjnews/5091-putting-remand-prisoners-rights-first.html>

<sup>8</sup> Correctional Matters Amendment Act, 2011, p. 14 <http://www.info.gov.za/view/DownloadFileAction?id=146634>

without uniforms, it was easier for remand detainees to 'blend in' after escape attempts. Speaking after a controversial parade of apprehended escapees, the then-Minister was quoted as saying:

'We took a decision that there is a need for remained detainees to wear uniform - a clearly distinct uniform which is worn by our convicted inmates who are serving time. Because they [remand detainees] are dressed like any South Africans...they could have disappeared and mingled with other South Africans. We would not have been able to apprehend them'<sup>9</sup>.

### ***A new white paper***

The Department of Correctional Services released a draft White Paper on Remand Detention Management<sup>10</sup>. This is a landmark document produced after many months of silence from government on the issue of this White Paper. Released late in 2012, this document will become the baseline for the legal framework of how remand detainees are managed by the state.

### ***Legislating on torture***

More than 14 years after South Africa ratified the United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, legislation (the Prevention and Combating of Torture of Persons Bill) criminalising torture has been tabled in Parliament<sup>11</sup>.

This is a very positive step, as although torture and abuse in the prison system has been repeatedly and widely reported on by concerned NGOs, South African has not yet criminalized torture. In a submission to the Portfolio Committee on Correctional Services in November 2011, the Civil Society Prison Reform Initiative expressed concern that torture was taking place at the hands of (or with the acquiescence of) correctional officers. CSPRI highlighted several incidents of reported torture, including allegations made by remand detainees at Grootvlei Prison; and the now-notorious example of Bradley McCullum's case, in which, in July 2005, a mass assault took place at the St Alban's Prison in Port Elizabeth<sup>12</sup>.

The Prevention and Combating of Torture of Persons Bill is set to be finalized in 2013.

## **Litigation**

### ***Victory for Dudley Lee***

December 2012 saw the Constitutional Court overturn a ruling of the Supreme Court of Appeal (SCA) in the matter of *Dudley Lee vs. the Minister of Correctional Services*. The majority of the Court found that the Department of Correctional Services (DCS) negligently caused Dudley Lee to become infected with tuberculosis (TB) while it detained Lee in Pollsmoor prison from 1999 to 2004. The Court therefore held

<sup>9</sup> SABC News, 'Parading' of rearrested escapees slammed, 16 March 2012

<http://www.sabc.co.za/news/a/f8a5c0004a880ffe99ae9dc527a932df/Parading-of-rearrested-escapees-slammed-20121603>

<sup>10</sup> This paper is available at <http://www.dcs.gov.za/docs/landing/Draft%20White%20Paper02.pdf>

<sup>11</sup> Prevention of Torture Bill Requires More Work, Centre for Constitutional Rights [http://www.fwdeklerk.org/cgi-bin/giga.cgi?cmd=cause\\_dir\\_news\\_item&cause\\_id=2137&news\\_id=115725&cat\\_id=all#.UQi-pB1JOAg](http://www.fwdeklerk.org/cgi-bin/giga.cgi?cmd=cause_dir_news_item&cause_id=2137&news_id=115725&cat_id=all#.UQi-pB1JOAg)

<sup>12</sup> Daily News, SA finally set to legislate torture as a crime, 14 June 2012

<http://www.iol.co.za/dailynews/news/sa-finally-set-to-legislate-torture-as-a-crime-1.1318821#.UQi-qx1JOAg>

that the DCS should be liable to Lee – a landmark decision with wider implications for redress for remand detainees who suffer mental and physical health issues while in remand. Concerning conditions, the judgment stated:

‘[8] Pollsmoor is notoriously congested and inmates are confined to close contact for as much as 23 hours every day – this providing ideal conditions for transmission; on occasion, the lock-up total was as much as 3052 inmates and single cells regularly housed three inmates; communal cells were filled with double and sometimes triple bunks<sup>13</sup>’

The judgment supported Dudley Lee’s claims regarding the evidence pertaining to the break-down of the health care system at Pollsmoor and the inadequacy of nutrition which played a role in the development and uncontrollable spread of TB during the applicant’s incarceration. It held that the responsible authorities’ omission(s) constituted a negligent breach of its constitutional and statutory duty to protect the applicant’s rights<sup>14</sup>.

## **NGO momentum**

### ***Detention Justice Forum***

The Detention Justice Forum (DJF) is a civil-society membership organisation comprising NGOs and CBOs which seek to ensure that the rights and well-being of detainees are respected and upheld, as enshrined under the South African Constitution, the country’s laws, and international human rights principles. The DJF has already made an impact on 2012, making submissions and statements on a range of issues, including calling for [Urgent Action In Response To The Recent Death Of Prisoners At Groenpunt And St Albans Prisons](#).

### ***Key conferences***

The Minister’s Colloquium, convened by the Minister of Correctional Services Mr Sbu Ndebele, was held on 19 and 20 November 2012. Matters prioritized for discussion at this meeting included overcrowding in correctional centres, alternative sentencing, and remand detention management, making this Colloquium a key meeting for the remand detention sector<sup>15</sup>. Minister Ndebele’s most promising statement was regarding length of detention of remand detainees:

‘The Correctional Matters Amendment Act (CMAA) (Act 5 of 2011) provided a framework, for the first time, in the effective management of Remand Detainees (RD) in South Africa, addressing, in particular, the length of detention in police cells and in correctional facilities. As at 1 November 2012, there were 45,180 remand detainees and 150,017 sentenced offenders. DCS has decided to develop a nation-wide system solution, which will allow each centre, as well as

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<sup>13</sup> Constitutional Court Judgment, 11 December 2012, p. 5 available at <http://www.constitutionalcourt.org.za/site/leevmc.htm>

<sup>14</sup> Constitutional Court Judgment, 11 December 2012, Section [14], p. 10 available at <http://www.constitutionalcourt.org.za/site/leevmc.htm>

<sup>15</sup> Keynote address by the Minister, Mr. Sibusiso Ndebele, MP National Colloquium on Overcrowding in Correctional Centres, 19 Nov 2012 available at <http://www.info.gov.za/speech/DynamicAction?pageid=461&sid=32534&tid=91559>

the regions and nationally, to accurately calculate the length of detention of each Remand Detainee. The development of this system will ensure that the section can be fully implemented, and it is anticipated to be rolled out in the last quarter of the current financial year (2012/13)<sup>16</sup>.

### Way forward for 2013

Much of 2013 and beyond will focus on following up on government's promises and commitments; and developing good working relationships across NGO and government departments to deliver fair and rights-based access to justice. Key priorities for the remand sector could include the following:

- *A focus on improving forensics:* delays in delivery of forensics results could be contributing to remand detainees' length of detention. Improved forensic results could also swiftly determine guilt or innocence in a range of circumstances, from drunk driving charges to DNA evidence of sexual assault.
- *A serious, collaborative evaluation of the Judicial Inspectorate for Correctional Services:* while not directly related to remand detention, the transparency and independence of this crucial monitoring tool should be thoroughly investigated, beginning with a push for financial independence from the Department of Correctional Services.
- *Monitoring and increasing the effectiveness of bail and bail legislation:* bail is an effective tool to reduce over-crowding, and coupled with thorough and timeous investigation, is a key element of the criminal justice spectrum that can reduce over-crowding and unfair repeat remands.
- *Health in prisons:* with the Dudley Lee judgment comes an obligation on the Department of Correctional Services and NGOs involved in the prisons sector to work together to discover gaps and solutions to the overwhelming TB crises in South Africa's detention centres, both for remand detainees and sentenced offenders.
- *Community paralegals:* Community paralegals have the skills and training to provide basic legal services, as well as a good knowledge of the day-to-day functioning of the justice system; they can be based in smaller communities that conventionally lack access to services, and can provide their services free of charge (provided that a wage of sorts is paid by donors or the state). Community paralegals could significantly affect access to criminal justice services for remand detainees in South Africa, as research on community paralegals' impact in other African countries has been positive<sup>17</sup>. Research into Sierra Leone's paralegal system showed that from 2011 to 2012, paralegals assisted with securing police bail in 50% of cases; with charges dropped in a further 28% of cases. 2013 could see further research and investigation into this issue, and provide a further solution to the challenges facing the remand detention landscape.

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<sup>16</sup> Keynote address by the Minister, Mr. Sibusiso Ndebele, MP National Colloquium on Overcrowding in Correctional Centres, 19 Nov 2012 available at <http://www.info.gov.za/speech/DynamicAction?pageid=461&sid=32534&tid=91559>

<sup>17</sup> For example, see Timap for Justice, <http://www.timapforjustice.org/work/>