



DETENTION JUSTICE FORUM

STATEMENT BY THE DETENTION JUSTICE FORUM

on

the delay in giving effect to the *Sonke* decision on the independence of the Judicial Inspectorate for Correctional Services

In December 2020, the Constitutional Court confirmed the order of constitutional invalidity made by the Western Cape High Court in *Sonke Gender Justice NPC v President of the Republic of South Africa and Others* regarding certain provisions of the Correctional Services Act dealing with the independence of the Judicial Inspectorate for Correctional Services (JICS). These provisions, set out in sections 88A(1)(b) and 91 of the Correctional Services Act, deal with the position of the Chief Executive Officer of JICS, stating that they are accountable to the National Commissioner of Correctional Services for all monies spent, as well as matters relating to their misconduct or incapacity. Furthermore, that the Department of Correctional Services (DCS) is responsible for all of JICS' expenses. These provisions do not give JICS sufficient independence to enable it to effectively oversee the DCS in respect of the conditions of detention and treatment of prisoners. In view of these findings, the Constitutional Court gave Parliament two years to rectify these issues; an approach that has been used previously by the Constitutional Court. The two-year period will lapse on 3 December 2022, which is less than three months into the future.

The delay in giving effect to the *Sonke* decision appears to be symptomatic of a systemic problem on the part of the executive and the legislature. There are at present two other Constitutional Court decisions with pressing deadlines before Parliament, being *EFF and Another v Minister of Justice and Correctional Services* (with the order lapsing on 26 November 2022) and *Smit v Minister of Justice and Correctional Services* (with the order lapsing on 17 December 2022). The prospect that deadlines set by the Constitutional Court may be missed does not reflect well on the democracy and if it is indeed missed, it will reflect a material failure on the part of the executive and the legislature, but more importantly, it will be a body blow to the authority of the Constitutional Court. This has the effect of undermining the rule of law.

The *Sonke* decision dealt with independent oversight and JICS' ability to hold DCS accountable for the treatment of prisoners and their conditions of detention. Although not stated as such, the substantive rights apply to issues of dignity and the absolute prohibition of torture and other ill treatment. The Constitutional Court's decision, requiring an amendment giving JICS the requisite independence is therefore critically important to how we not only view the treatment of people deprived of their liberty, but also the standards of independent oversight and thus accountability. The amendment must proceed to address both structural and functional aspects in the current architecture.

The reasons for the delay seem to centre on the draft bill not being tabled in Parliament in good time by the executive with the latter stating that National Treasury remains to define the nature of the entity that JICS will take on. The issue is not new and has been on the agenda since the matter was originally filed in the Western Cape High Court, which made its decision in September 2019.

With less than three months remaining before the lapsing date, it was reported to Parliament that the Bill will serve before Cabinet on 21 September 2022. That leaves a little more than two months to deliberate on the Bill, call for public comment and deal with such comments properly. It then appears that despite the executive having had 22 months to deal with the issue, public consultation will only be added as an afterthought. This is not acceptable, especially given that in *Doctors for Life*, the Constitutional Court set the standard that there must be a meaningful opportunity for public participation in the drafting of legislation.

Requesting an extension from the Constitutional Court to enable meaningful public consultation has now become an unavoidable but unappealing solution.

The Detention Justice Forum calls on all relevant state actors to make public the plan for meaningful public participation on the draft Bill and all steps necessary to ensure that the Sonke decision is substantively given effect to.

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On behalf of the following members of the Detention Justice Forum:

1. Africa Criminal Justice Reform
2. African Policing Civilian Oversight Forum
3. Centre for Applied Legal Studies
4. Just Detention International – SA
5. The Human Rights Media Centre
6. The Justice and Violence Prevention Programme, Institute for Security Studies
7. Lawyers for Human Rights