

FINAL

PRETORIA

COMMISSION OF INQUIRY INTO ALLEGED INCIDENTS OF
CORRUPTION, MALADMINISTRATION, VIOLENCE OR
INTIMIDATION IN THE DEPARTMENT OF CORRECTIONAL
SERVICES APPOINTED BY ORDER OF THE PRESIDENT OF THE
REPUBLIC OF SOUTH AFRICA IN TERMS OF PROCLAMATION NO.
135/2001, AS AMENDED.

ELEVENTH INTERIM REPORT

PRETORIA MANAGEMENT AREA

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EXECUTIVE SUMMARY

EXECUTIVE SUMMARY

This report, which has been divided into three (3) Chapters, deals with the unlawful activities which fall within our Terms of Reference which were committed by the various members at the Pretoria Management Area.

CHAPTER ONE : ILLICIT RELATIONSHIPS

The first Chapter of this report deals with a senior member of the Department who unlawfully stole an inheritance from a prisoner. The aforesaid amount was stolen after the prisoner had entrusted a bank card with this official who then withdrew monies from the card without the prisoner's knowledge.

The prisoner subsequently discovered this and raised it with other officials who seemed to be reluctant to act against the member. However, the matter was eventually resolved by an agreement between the transgressor and the prisoner on paying back the monies which were stolen by way of monthly instalments. The senior official failed to honour this undertaking and the prisoner reported the matter to the Commission.

1. RECOMMENDATIONS

It is recommended that:

- 1.1 Mrs Mgweba should be suspended immediately;
- 1.2 Criminal charges, namely, theft alternatively, a charge of contravening Section 118(2)(b) of the Correctional Services Act No 111 of 1998 should be laid against Mrs Mgweba;

- 1.3 Mrs Mgweba should be charged in terms of the Departmental Disciplinary Code for contravening Clause 4.7 (Column A) of the Code for theft; and
- 1.4 Messrs Rakoma and Lebeso should be warned about their approach to disciplinary matters. Mr Rakoma's conduct can be interpreted as that of a person who is reluctant to act where prisoners are the complainants and warders are involved.¹

CHAPTER TWO : STABBING OF PRISONER BY MEMBER

The second Chapter deals with a very unsavoury incident in the prison hospital. A nurse who was carrying a knife in his pocket, whilst on duty stabbed a prisoner who had come to seek medical attention from him.

The Commission investigated this transgression and was ready to proceed with the hearing. Certain members of the Department hastily arranged a Disciplinary Inquiry, which was, seemingly, meant to ensure that the member would not be dismissed. He was merely given a written warning.

Fortunately or should it be said unfortunately for the said member, he was only charged with one count of assault on the prisoner and another count of failing to report the said incident to his supervisor. On the facts of the matter there are other more serious charges, which should have been preferred against him, the one being the fact that it is unlawful in terms of the Departmental Regulations to be in possession of a dangerous weapon whilst on duty. Furthermore, bringing a dangerous weapon into the prison flies at the very face of the core business of the Department, namely, the safe custody of prisoners. In other words, his actions

¹ This is also apparent from his role in the assault matter which is in the next chapter of this report (the stabbing of Mr Makgokong).

were breaching the security arrangements at the prison. He could have been charged with this offence, which is a very serious offence, but that was ignored.

It was apparent to the Commission that there may have been an attempt on the side of those members who hastily proceeded with the “half baked” Disciplinary Inquiry to manipulate the said Disciplinary Inquiry and the ultimate outcome thereof.

Accordingly the Commission made recommendations against the aforesaid member (nurse) and also the other members who purported to discipline the said member.

Accordingly the Commission will make the following recommendations:

1. Mr Frans Mokonoto

- 1.1 Mr Mokonoto should be suspended immediately;
- 1.2 Mr Mokonoto should be charged with the following transgressions:
 - 1.2.1 Unauthorized possession of a dangerous weapon whilst on duty (Column A-Paragraph 5.8); and
 - 1.2.2 Breaching of Internal Security of arrangements of the Pretoria Central Prison (Column A-Paragraph 5.10)
- 1.3 Every assistance should be given to the prisoner, Mr Mokgokong to finalise and pursue criminal charges, which have already been laid against Mr Mokonoto with the South African Police Services;

- 1.4 A copy of this report should be handed to the Executive Director of the South African Nursing Council for the Council to decide on action which should be taken against the nurse, Mr Mokonoto in accordance with their professional rules or regulations.

CHAPTER THREE : ASSAULT OF MENTALLY CHALLENGED PRISONER

This Chapter deals with the assault by members of the Department of Correctional Services on a prisoner who is mentally challenged. The prisoner assaulted a member with a belt. The member who had been assaulted, reported to other members who went ahead and assaulted the prisoner under circumstances which did not justify the use of the force by the said members on the prisoner.

At the time when they assaulted him, he was no longer in possession of the weapon. He had either been disarmed or lost possession of the belt. In the premises, there was no need for the excessive force to be used. The prisoner was subsequently hospitalized as a result of the aforesaid assault.

In light of the aforesaid assault, it has been recommended that all of the aforesaid members be charged criminally and also be disciplined internally for the unlawful assault on the said prisoner.

RECOMMENDATIONS

It is recommended that:

- 5.1 Messrs L Frost, A L van Wyk and G P Lourens should be suspended immediately;
- 5.2 Messrs L Frost, A L van Wyk and G P Lourens be criminally charged with assault and that all three (3) of them be charged internally with transgressing Clause 5.7 (Column A) of the Disciplinary Code i.e. assault while on duty;
- 5.3 Mr Anker be used as a witness against the three members in terms of Section 204 of the Criminal Procedure Act, No 51 of 1971. Should he not co-operate then he too should be charged criminally and also internally.

REPORT

INTRODUCTION

The Commission of Inquiry was appointed by the President of the Republic of South Africa in terms of Proclamation No. 135/2001,² to investigate and report on incidents of corruption, maladministration, dishonest practices and illicit relationships between employees and prisoners leading to unlawful activities, violence and intimidation within the Department of Correctional Services.³

The terms of reference directed the Commission to generally investigate the Department and the Commission is also required to inquire into and focus on Pietermaritzburg, Durban Westville, Ncome, Johannesburg, Pollsmoor, Pretoria, St Albans, Bloemfontein and Leeuwkop Management Areas.

The Commission has to date conducted investigations into Durban Westville, Bloemfontein, Pietermaritzburg, Pollsmoor, St Albans, Leeuwkop, Johannesburg and Pretoria Management Areas.

Interim Reports in respect of the Durban Westville, Pietermaritzburg, Bloemfontein and St Albans Management Areas have been filed with the President of the Republic of South Africa and the Minister of Correctional Services.

The *modus operandi* adopted by the Commission in selecting and compiling evidence before the Commission at Pretoria did not deviate from earlier practices of the Commission and included, inter alia, the placing of advertisements in the print media, namely, The Star, City Press and the Pretoria News newspapers, and

² See Government Gazette No. 22718 dated 27th September 2001, read together with Government Notice Gazette No. 23558 dated 27th June 2002.

³ Hereinafter referred to as “the Department”.

the follow up of telephonic reports from members of the prison population and the public. Consultations and interviews were also held with other employees of the Department and members who had information on certain transgressions and who voluntarily offered the information to the Commission. Like before, copies of statements were taken from all the people who could assist the Commission's investigations and those were served on people who were implicated.

This report will deal with a number of complaints which were received by the Commission from prisoners and/or members employed by the Department. The report will be divided into chapters with each individual chapter dealing with a different issue or complaint.

The first chapter deals with the illicit relationship between a member of Correctional Services and a prisoner. The said relationship led to an unlawful financial transaction between the warder and the prisoner which had the effect of bringing the Department into disrepute.

The second chapter deals with the stabbing of a prisoner by a member who is a nurse in the Prison Hospital when the prisoner had visited the hospital for medication. This assault was reported to the Commission by the prisoner on the same day of the incident. Instead of waiting for the Commission's investigation to be finalized and deciding on charges to be preferred against the nurse concerned, members of the Department purported to charge him with only the assault. They also "plea bargained" with him under very suspicious circumstances. The nature of the purported hearing and the circumstances will become clearer in this report.

The third chapter deals with the assault by members of the Department on a prisoner who is "mentally challenged". This assault happened pursuant to the prisoner assaulting a member of Correctional Services with a belt. Instead of

using minimum force for purposes of disarming the prisoner and bringing him under control, they used force under circumstances that did not justify such force. This will become apparent in the evidence which will be dealt with in detail in this report.

These are matters which need the urgent attention of the Department as they have the potential of bringing the Department, if not the Government, into disrepute, unless they are acted upon.

CHAPTER ONE

ILLICIT RELATIONSHIPS BETWEEN PRISONERS AND WARDERS

1. INTRODUCTION & BACKGROUND

This matter deals with the illicit relationship between Mrs Valencia Mgweba and the prisoner, Mr Stoffel Mokwena. Mrs Valencia Mgweba is an Assistant Director at the Pretoria Central Prison, whilst Mr Mokwena is a prisoner who is serving a period of eight and a half years at the Pretoria Central Prison for committing the crime of fraud. The background to the illicit relationship between the two (2) is set out hereinafter.

In 2001, Mr Mokwena received a letter from the Garankuwa Magistrate's Office informing him that he had inherited money from his late parents. He then made arrangements with prison authorities to be taken to Garankuwa Magistrate's Office to make arrangements to receive the aforesaid inheritance. At the Magistrate's office, he was given a cheque in the amount of Six Thousand Nine Hundred and Ninety Six Rand (R6996,00), because he had been appointed as a beneficiary in his parents' estate. He opened an account with the Standard Bank of South Africa Limited and deposited the said cheque. After doing so, he was given an automatic teller machine card ("bank card") and a pin number.

On his return from the bank, he had a discussion with Mrs Mgweba who brought to his attention the fact that he was not supposed to keep a bank card with him in prison. She then took possession of the bank card. According to Mr Mokwena, the bank card was given to Mrs Mgweba for the purpose of checking with the bank after seven (7) days as to whether the cheque in the amount of Six Thousand Nine Hundred and Ninety Six (R6 996,00) had been cleared or not.

It was common cause in the hearing amongst the parties that, subsequent to that Mrs Mgweba withdrew money from the prisoner's bank account for herself.

According to Mrs Mgweba, some of the money was also withdrawn by her daughter.

Later Mr Mokwena became aware of the fact that money had been withdrawn from his bank account. When Mr Mokwena discovered that money had gone missing, he reported the matter to a certain Mr Lebese, who is the Head of Security at the Prison.

He also confronted Mrs Mgweba as he wanted to know who had withdrawn money from his account. As a result, an agreement was reached between Mrs Mgweba and Mr Mokwena that the aforesaid amount would be repaid by way of monthly instalments in the amount of Five Hundred Rand (R500,00). Subsequent to that, Mrs Mgweba paid into Mr Mokwena's account an amount of One Thousand Five Hundred Rand (R1500,00).

According to Mr Lebese when he received this report, he approached Mrs Mgweba about the incident and she denied same.⁴ As a result, he informed a certain Mr Rakoma, another Assistant Director about the allegations against Mrs Mgweba because, according to him, he could not deal with this matter as it involved someone senior to him, an Assistant Director. Mr Rakoma, later told him that he had approached the prisoner, Mr Mokwena, and the prisoner was not co-operating.

However, he was subsequent to that, approached by the prisoner again who told him that Mrs Mgweba had then acknowledged that she owed him the money and that she had made arrangements to pay him an amount of Five Hundred Rand (R500,00) per month. However, Mrs Mgweba only paid for a few months and thereafter failed to pay.

⁴ See paragraph 7 of Exhibit 'R'.

According to Mr Lebese he then approached Mrs Mgweba for the second time and this was confirmed. Mr Lebese's evidence in that regard as set out in his affidavit, which was confirmed in the hearing, was as follows:

“She admitted that she had undertaken to repay the money. She said she could only afford to pay Three Hundred Rand (R300,00) per month as she was having serious financial problems. She once showed me a deposit slip reflecting an amount of Three Hundred Rand (R300,00) on it which was proof that she had deposited the money into Mokwena's account.”⁵

2. ANALYSIS & FINDINGS

It is clear from the above evidence that Mrs Mgweba did admit receiving money from the prisoner, Mr Mokwena, to Mr Lebese. This was never denied or disputed by Mrs Mgweba. In fact, Mrs Mgweba admitted withdrawing the prisoner's money. The circumstances surrounding her admission will be dealt with in more detail later. The aforesaid transaction was in contravention of the provisions of the Correctional Services Act No 111 of 1998 (“the Act”) and the Regulations governing the manner in which the members should conduct themselves in prisons.

There was a lot of evidence as to what really transpired in the various discussions between Mrs Mgweba and Mr Mokwena, however, for purposes of this report, it is irrelevant to deal with those. The reason why it is irrelevant to deal with all of that is because Mrs Mgweba admits that she took the money and intended to repay it, even though she tried to mislead the Commission by stating that it was her

⁵ See paragraph 9 of Exhibit ‘R’.

daughter who withdrew the money and not her. She later, under cross-examination, conceded that she lied and was misrepresenting the facts to the Commission and the true scenario is that she is the one who took the money. Some of the money may have been used for her daughter but she is the one who withdrew some of the money.

Even if it was her daughter who had withdrawn the money, the question is why would she take the card which belongs to a prisoner to her house as she knows that she is not allowed to do so. In any event, she did withdraw the money and that is now common cause. Thus she is liable even on her own version that she only withdrew Three Thousand Rand (R3000,00).

She has contravened both the Regulations and the Act and also committed a common law crime of theft. Accordingly, she needs to be disciplined for having done so. Mrs Mgweba's actions constituted criminal offences, and thus the Department may also lay criminal charges, if it so wishes. Mrs Mgweba is a very senior member of the Department. She joined the Department in the former Transkei and went up the ranks until she reached the rank of a Lieutenant Colonel (an equivalent of an Assistant Director). In the circumstances, the provisions of the Act the Orders, the Regulations and the Disciplinary Code should be well known to her.

As a senior member of the Department, she is expected to uphold the law and the Departmental policies. That being the case, the Department has got to act swiftly in disciplining her to ensure that such behaviour is not repeated by other members of the Department and the Department is seeking to be consistent in its disciplinary measures.

The one other matter which was of concern to members of the Commission was the manner in which Mr Lebesse dealt with this matter. This issue was raised with Mr Lebesse. However, in his evidence he clarified the fact that he had reported the matter to the other Assistant Director and not acted on what he had been told by the prisoner because he is junior to Mrs Mgweba. In the premises, Mrs Mgweba could only be disciplined by the other Assistant Director. The evidence before the Commission is that the other Assistant Director asked the prisoner and the prisoner was not co-operative. As to what is meant by not being co-operative remains an open question, which was never put to Mr Rakoma to whom this incident was reported. In the premises, no action has been recommended against Mr Lebesse.

In the absence of evidence to suggest an ulterior motive by Mr Rakoma, no recommendations will be made against him at this stage of the Commission hearings. However, should any evidence to the contrary come to light, this matter will be revisited.

3. RECOMMENDATIONS

It is recommended that:

- 3.1 Mrs Mgweba should be suspended immediately;
- 3.2 Criminal charges, namely, theft alternatively, a charge of contravening Section 118(2) of the Correctional Services Act No 111 of 1998 should be laid against Mrs Mgweba;

- 3.3 Mrs Mgweba should be charged in terms of the Departmental Disciplinary Code for contravening paragraph 4.7 (Column A) of the Code for theft; and
- 3.4 Messrs Rakoma and Lebeso should be sensitized and warned about their approach to disciplinary matters. Mr Rakoma's conduct can be interpreted as that of a person who is reluctant to act where prisoners are the complainants and warders are involved.

CHAPTER TWO

STABBING OF A PRISONER BY A MEMBER

1. INTRODUCTION

The issue of violence and intimidation within the Department is one of the problematic issues or complaints from both the prisoners and members. It seems the assault on prisoners by members or other prisoners, is common and most members and prisoners who indulge in it, go unpunished. As a result, very few prisoners complain about it. Because of this state of affairs, the prisons are regarded as very violent places or environment. The next two chapters will seek to deal with some of the incidents of violence the Commission came across at the Pretoria Management Area.

2. EVIDENCE BEFORE THE COMMISSION

On the 17th September 2003, a prisoner, Mr France Mokgokong was stabbed by, a male nurse, Mr Michael Louis Khogo Mokonoto. This incident occurred at the G Block Hospital at the Pretoria Central Prison, Pretoria.

It was common cause between the parties that, Mr Mokgokong went to the Prison Hospital to obtain tablets. As to what led to him being stabbed by Mr Mokonoto is not common cause because there are different versions. According to Mr Mokgokong when he asked Mr Mokonoto for the tablets, he responded by saying that:

“I was making him my friend and drew a knife from his pocket and tried to stab me in my stomach. I blocked the knife and he stabbed me on my hand.”

According to Mr Mokonoto, when Mr Mokgokong asked for tablets, he responded by telling Mr Mokgokong that he had been waiting for him to give him his tablets. He then went on to state that:

*“I then tried to grab him and played with him, as I usually did. I was unfortunately in possession of a knife, which I had used to cut my apple in that day.(sic) I mistakenly cut him in his right hand with the knife and saw that his hand was bleeding.”*⁶

After Mr Mokgokong had been stabbed, he was then treated by Mr Mokonoto who cleaned and sutured the wound. He also dressed the said wound with Betadine ointment. According to Mr Mokonoto, he thereafter went on to complete the medical report, which was submitted to the Commission as an exhibit.⁷ However, what is surprising is that on Mr Mokonoto’s own version on the said exhibit, Question No. 1 in section B, was later completed by Dr Tsatsi on the 22nd September 2003. Dr Tsatsi also signed the said medical report regarding the prisoner. Question No. 1 in section B gives the description of the injury as:

“2,5cm deep laceration (sutured) between 5th and 4th finger ® hand.”

The one question which creates doubt about Mr Mokonoto’s version regarding the completion of Exhibit ‘SS1’ is, why didn’t he, Mr Mokonoto, complete the injuries section if he completed the treatment section of the medical report?

⁶ The aforesaid versions were in their affidavits which were submitted or handed in to the Commission as evidence. See Exhibits ‘SS’ and ‘SS4’. Mr Mokgokong also confirmed his version when he testified.

⁷ See Exhibit ‘SS1’.

On the same day, namely, the 17th September 2003, Mr France Mokgokong reported this incident to the Commission investigator, Mr David Goqo. Mr Goqo started taking statements from the various witnesses regarding this incident.

The version of the events as stated by the prisoner, Mr France Mokgokong is corroborated by the prisoner, Mr George Dzimba, who was present at the scene on the said day.⁸

On the 19th September 2003, Mr Marais was called by Mr Rakoma who asked him to look into the prisoner's wound. He accordingly did so and dressed the wound. Thereafter, he made arrangements for Dr Tsatsi to inspect the wound.

On or about 22nd September 2003, Dr Tsatsi did not treat the prisoner she merely inspected the wound after being called by another member Mr Louis Christian Marais, who had heard about this incident from a member by the name of Mr Peter More.

On the 27th October 2003, Mr David Goqo arranged for affidavits to be signed by France Mokgokong, George Dzimba, the witness and the implicated member, Mr Michael Mokonoto. This was done in preparation for the hearing of the matter before the Commission. On the 30th and 31st October 2003, these affidavits were served on Mr Mokonoto. In addition, notices were served on the various people who were to testify as witnesses before the Commission on the 17th November 2003, when this matter was scheduled to be heard.

In the meantime, on 10th November 2003, the Department completed its internal investigation. The investigation report was sent to the senior officials who perused same and commented.

⁸ See Exhibit 'SS3'.

On the 17th November 2003, this matter could not proceed before this Commission because of the unavailability of one of the Commissioners. Accordingly, the matter was re-scheduled to be heard once again on Tuesday, the 9th December 2003.

3. THE DISCIPLINARY ENQUIRY

In the interim, it transpired that on the 27th November 2003, a disciplinary enquiry was hastily arranged to hear the aforesaid matter. The said disciplinary enquiry was chaired by Mr Monyamathe who found Mr Mokonoto guilty of assault or injury to a prisoner. He was given a final warning (valid for six (6) months). The finalisation of the internal hearing was only brought to the attention of the Commission on 9 December 2003.

On the 9th December 2003, the Commission proceeded to hear evidence on this matter from Mr Goqo as to the procedure which was followed. The purpose of the Commission's hearing was now to look into the circumstances surrounding the hearing of the matter and also to investigate whether there was any ulterior motive in speedily proceeding with the disciplinary hearing whilst the matter had been reported and investigated by the Commission and was scheduled to be heard before the Commission. The need to investigate the matter further was prompted by the Commission's disbelief or surprise with the following:

- (a) Mr Mokonoto was merely charged with assault and he was not charged with being in possession of a dangerous weapon whilst on duty. This being a very serious breach in a prison environment. This was another competent charge on the facts of this matter; and

- (b) There was evidence before the Commission that the prisoner, Mr Mokgokong and the other witnesses were neither consulted by the initiator nor called to testify before the disciplinary enquiry; and
- (c) The outcome of the hearing was a mere warning in a matter which, according to the Disciplinary Code, is a dismissible offence;
- (d) Mr Monyamathe, the Chairperson was not competent to give a sanction of a dismissal, on his evidence.

This report will deal with these issues and seeks to examine and resolve same.

The Chairperson of the disciplinary enquiry, Mr John Monyamathe was called to testify. According to him, he is employed by the Department of Correctional Services and had been in their employ for the last fifteen (15) years. He is a senior Correctional Officer. He works as a Unit Manager in Medium A, on the 1st floor, of Pretoria Central Prison. In his evidence, he stated that the person who initiated this matter was a certain Mr Moabi. According to him, Mr Mokonoto had been charged as follows:

1. Contravention of paragraph 5.7 (Column A) of the Code in that he assaulted whilst on duty;
2. Contravention of paragraph 5.8 (Column B) – failure to report an injury or accident.

According to this witness the accused Mr Mokonoto pleaded guilty and as a result the evidence of Mr Mokgokong was never lead. However according to him he did question in his notes which were filed as an Exhibit in the Commission,⁹ the reason why Mr Mokonoto was never charged with being in possession of

⁹ See Exhibit 'SS7'.

dangerous weapon whilst on duty. This would be a charge in terms of Paragraph 5.8 (Column A) of the Disciplinary Code.¹⁰

When being asked by the Commission he also confirmed that the charge breaching of Internal Security arrangements in the prison (Paragraph 5.10- Column A) could have been preferred as well against Mr Mokonoto.

According to exhibit 'SS7', Mr Monyamathe made the following comments in his notes, which are clearly an indication of the problems which he had when he was dealing with this matter.

"The Plea of Guilty is noted against Mr Mokonoto, he also accepted the version of incidents as mentioned by the initiator. However the following questions still need to be answered properly.

Why did Mr Mokonoto carry a knife to such an extent he brought it into prison?

What was it going to be used for?

He knew that it was wrong to carry a knife within the prison premises.

What would be the consequences if he was found carrying a knife before using it and after?

I am not aware why this matter is given to me when it has charges on Column A. However I am to work as appointed."

¹⁰ Column "A" transgressions according to the Department's Disciplinary Code are transgressions which can lead to a dismissal.

The abovementioned questions by the Chairman of the Disciplinary Inquiry are clearly questions which are of concern to this Commission. It is apparent from the evidence which was led before the Commission that the Initiator was appointed by the Assistant Head of Prison, Mr Rakoma. His letter of appointment was sent to him after an investigation, which had been completed by the Prison's investigator, Mr R J Matjiane. The investigator had recommended that Mr Mokonoto be charged with the abovementioned two charges. However, when the comments of the senior officials who perused the report are taken into consideration, it is clear that the issue of the use of a dangerous weapon was of concern and was raised. Mr A M Pudi made reference to this issue in his comments as follows:

“11.1. A knife is classified as a dangerous weapon and therefore can at any time injure any person even the owner. This stands to reason that once a person is producing a knife, the lives of people next to him/her are in danger.

11.2. Mr Mokonoto could have foreseen that a member of DCS, reasonable measure could have been done for him not to produce a knife let alone to play with it.

11.3. No person should be allowed to enter the center with a weapon as part of security, and this must be brought extremely to the attention of all personnel.

11.4. Paragraph 9 (Recommendations) highly recommended.

PUDI A. M. – 10/11/2003.”

Mr L M M Maleka (Centre Co-Ordinator for Operational Support) and Mr Rakoma (the Assistant Head of Prison) also made reference to the on going sensitizing of members about the seriousness of the assaults on prisoners and other

irregularities.¹¹ Notwithstanding that, Mr Monyamathe who is a Senior Correctional Officer and who according to the evidence which has been placed before this Commission could not impose a sanction of a dismissal, was appointed as the Chairperson of the Disciplinary Inquiry.¹² Furthermore even though the issue of the carrying of a dangerous weapon had been raised, the Assistant Head of Prison when commenting and subsequently instructing the officials to lay charges, failed to recommend that such a charge be included in the charge sheet.¹³

In the Commission's hearings in the various parts of the country the issue of the manipulation of disciplinary enquiries to obtain a certain outcome was raised. This has become a reality, instead of just being a perception or suspicion. It is apparent that there is clear manipulation as they decide even before a hearing as to who will hear the matter and what outcome they will like to achieve. In this case it is clear that firstly, even though he had committed two dismissible offences he was only charged with one and the other one was just ignored. Secondly, it is also clear that a Senior Correctional Officer was appointed who could not impose a sanction of a dismissal. This is the very query which the Chairperson, Mr Monyamathe, raised. In the circumstances, the only inference which this Commission can come to, on the proven facts which are before the Commission, is that the appointment of Mr Monyamathe by the Head of Prison was with an ulterior motive of ensuring that the charged person is not dismissed. In absence of any evidence to the contrary that is the ultimate conclusion which the Commission come to and accordingly a charge for corruption should be considered should there be sufficient evidence to sustain a conviction.

¹¹ See Exhibit 'SS6' @ paragraphs 11 and 12.

¹² Mr Rakoma also corroborated this evidence. He produced a Departmental Circular issued by the then Acting Commissioner, Mr N W Tshivhase, dated 30th August 2001, which sets out the powers of the various delegates. See Exhibit 'SS8'.

¹³ See The Department's Investigation Report - Exhibit 'SS6' @ paragraph 11.

Mr Hlelathoa, the Head of Prison, was approached to find out the reason upon which he appointed the Chairperson of the Disciplinary Inquiry. He indicated that it was not him who did but it was Mr Rakoma, the Assistant Head of Prison. Mr Rakoma was called to testify before the Commission.

Mr Moalusi Johannes Rakoma the Assistant Head of Pretoria Central Prison testified that he was the one who appointed Mr Monyamathe the Chairperson of the Disciplinary Inquiry. He had been sitting in Court earlier on when evidence was led by Mr Monyamathe and when questions were asked by the Commission it became clear to him that the entire appointment was irregular. He checked the various documents and on checking the documents he was convinced that he made a mistake in appointing Mr Monyamathe. He conceded that the charges were incomplete and incorrect. He also conceded that he knew that Mr Monyamathe did not have the power to dismiss. He did not apply his mind properly when he signed the letter of appointment.

According to him the letter of appointment was brought to him by one of the secretaries working in Human Resources either Mrs Mosidi or Mrs Venter. When they brought the letter of appointment dated 18th November 2003¹⁴ the Chairperson to be appointed had already been written in. He merely signed without applying his mind thereto.

He also conceded that he was negligent in signing the letter of appointment dated the 18th November 2003 without perusing or having the investigation report before him. This would have enabled him to establish that the person was being charged with dismissible offences. When he appointed the Chairperson he neither had a idea of the preferred charges against the member nor whether the Chairperson would be competent to hear the matter.

¹⁴ See Exhibit 'SS8'.

Mr Isaac Zackaria Moabi, who is a Unit Manager at Medium B and is Correctional Officer Grade 1, was also called to testify. Mr Moabi was the initiator in the aforesaid hearing. He confirmed that he perused the investigating report and was served on the Human Resources Department and the accused member. He prepared the charge sheet after looking at the investigation report. He only charged the accused in accordance with the recommendations in the investigating report, namely, the breach of Paragraph 5.7 (Column A) and breach of Paragraph 5.8 (Column B).

He also confirmed that he is entitled to add whatever charges which he might deem relevant. However in this case he confined himself to what was as contained in the investigation report. When being asked as to why he did not charge him with possession of a dangerous weapon (Column A Paragraph 5.8) he indicated that it never occurred to him. He also confirmed that he could have been charged with the offence of breaching the Internal Security arrangements of the prison (Column A Paragraph 5.10) as well. However, in that regard as well, he never applied his mind when he was drawing the charges.

According to him on 20 November 2003 he served a Notice on Mr Mokgokong and also on the transgressor for them to appear on the 4th December 2003. However he received a call from the transgressor asking him to attend a pre-hearing conference. At the said hearing/conference it was agreed that the matter should be heard on the 27th November 2003, after what he referred to as “plea bargaining”. The plea bargaining led to Mr Mokonoto pleading guilty and eventually being given a final written warning.

When he was asked as to why he only accepted Mr Mokonoto’s version of the events and not the version of the prisoner as set out in his statement he could not

give a clear explanation. It was clear to the Commission that the prisoner's version of the fact that Mr Mokonoto stabbed him with the intention of hurting him and not that it was an accidental stabbing was rejected by Mr Moabi without even hearing the prisoner on this point. This obviously had a bearing on the ultimate outcome of the hearing.

In his evidence he also testified about the fact that at the pre-hearing conference Mr Mokonoto had advised him that the Commission was investigating this matter. However, this statement did not, according to him, make him question Mr Mokonoto's motive of requesting that the matter be brought forward and to plead guilty so that the matter could be finalized speedily. When it was brought to his attention that Mr Mokonoto might have been avoiding appearing before the Commission because he knew that more charges might be brought against him he could not give a very clear explanation.

It also became apparent in his evidence that Mr Moabi in performing his duties, never complied with the provisions of the Code, in that, the investigation report was never served on Mr Marais, Mr Mokonoto's supervisor and line manager. Not only was Mr Marais not notified of the date of the hearing but even Mr Mokgokong, being the complainant, was never notified of the date of the hearing. The entire hearing was a matter arranged between Mr Moabi and Mr Mokonoto.

The Commission was very sceptical of this entire speedy arrangement. The Commission is suspicious of the fact that this was done with the intention of ensuring that Mr Mokonoto gets away with only a written warning. The Commission's conclusion is also derived from the fact that two other serious charges which could have been preferred against Mr Mokonoto were never preferred. Secondly, Mr Mokonoto had to appear before a Chairperson who didn't have the power to dismiss him but could only give a written warning. Thirdly, no

other person who had an interest in the matter was given notice of the date of the hearing. The entire hearing was done behind close doors not even the victim knew that the hearing was proceeding on the 27th November 2003, and fourthly, the Supervisor, Mr Marais was by passed by Mr Moabi and he was never served with the investigation report as anticipated in the Disciplinary Code. Fifthly, Mr Moabi presented Mr Mokonoto's version to the Chairperson of the Inquiry. He did this whilst, according to his evidence, he believed Mr Mokgokong's version which was, according to him, corroborated by the medical evidence.

The Commission cannot find any reason why Mr Mokgokong's version, which is corroborated by Mr Dzimba and which was repeated to the investigator immediately after the incident, should be rejected in favour of Mr Mokonoto's version, which was given days after the incident. Given the circumstances it appears to be an after thought or a fabrication, to try and explain the stabbing.

According to Mr Dzimba and Mr Mokgokong, Mr Mokonoto drew the knife from his pocket. The cutting of the apple, if ever it happened, had happened earlier in the day and is irrelevant in this matter.

The Commission has consistently been receiving complaints about the manner in which disciplinary inquiries are being manipulated within the Department. Some by having an incompetent investigator or an incompetent initiator or an incompetent Chairperson or a chairperson who already comes with a pre-determined mandate or a chairperson who is not competent to give a dismissal sanction or ignoring existing rules and regulations with regard to disciplinary inquiries.

If one considers the totality of the evidence which has been placed before this Commission this is one of those cases where one is left with a suspicion that the

disciplinary inquiry was manipulated. The Commission does not have any evidence to prove that it was being manipulated but this Commission can put it as high as a suspicion if it looks into the history of the disciplinary inquiries in the Department and the manner in which this inquiry was conducted. More so, the inquiry went ahead when the Commission had already started the investigations and had already summoned Mr Mokonoto to appear before the Commission. The only thing which happened was that the Commission's hearing was adjourned. Whilst the Commission hearing was adjourned the members of the Department went ahead and set the disciplinary inquiry down without anyone being notified. The question is why? After setting it down realizing that the date might be too late the matter was brought forward so that it could be dealt with speedily before the Commission could deal with it. However, this might have been an attempt to side step the Commission or it could merely have been a coincidence. Be that as it may, it will not stop the Commission from dealing with this matter.

It is clear that Mr Mokonoto was only brought before the disciplinary inquiry to deal with the charges of assault, and failing to report the assault to his supervisor. However, the other charges which are competent on the facts, which are before the Commission had not been put to him. In the premises there is nothing both in law and the fact, which stops the employer from laying further charges, which should have been laid against him at the beginning. In this regard, the charges which come to mind are those relating to breaching the Internal Security arrangements of the prison (Column A-Paragraph 5.10) and the charge of being in possession of a dangerous weapon whilst on duty (Column A-Paragraph 5.8). Both Mr Moabi and Mr Rakoma conceded that these are competent charges and these charges should have been brought against Mr Mokonoto in this matter. The evidence is overwhelming that these are charges which should have been brought against Mr Mokonoto. However this was never done.

The interesting point with this entire matter is that Mr Mokonoto's supervisor Mr Marais actually raised this point in the affidavit which he gave to the Commission, namely, the fact that bringing a dangerous weapon into prison is an offence on its own.¹⁵ It may be that Mr Rakoma and Moabi never saw Mr Marais' statement, however, one would have expected them to know this as they are seasoned and very senior members of the Department, having worked for the Department for over ten years each. In any event even if they have not joined the Department so long ago, common sense does just confirm that you cannot bring a knife to a prison as it is a dangerous weapon if the prisoners could lay their hands on that it, that could lead to all sorts of consequences, including, placing the lives of other prisoners and members at risk. Furthermore, the very same point was raised by the Chairman of the Inquiry who in his notes questioned why he had been appointed to sit in this matter. He also questioned why the other charges had not been preferred against Mr Mokonoto. Unfortunately his hands were tied by the fact that he had been appointed and he could only act within the four corners of the charge sheet that was placed before him. This again raises the difficulties, which this Department has in dealing with discipline.

Unless this Department acts decisively in this matter and sends the message out there, that even if you do manipulate the disciplinary inquiries if there is a loophole the Department will deal with the matter accordingly.

It might be important at this stage to raise the question as to whether it is competent for the Department to charge Mr Mokonoto again in another disciplinary inquiry. There is nothing in the Code that stops the Department from charging him again. There is also nothing in law which stops the Department from charging him again. He was never charged with these other charges. He was

¹⁵ See Exhibit 'SS2'.

merely charged with an assault thus it is competent for the Department to charge him again.¹⁶

The Commission considered the legal doctrines or defences of "Res Judicata"¹⁷ and "Autrefois Convict".¹⁸ It is the Commission's view that they both don't apply in this matter. Mr Mokonoto was never tried on these charges and was never acquitted.

The Commission strongly believes that the Department needs to send a clear the message in this regard. This is one case where the message has got to be sent out there that such behaviour will not be tolerated. By such behaviour the Commission means the behaviour of members bringing dangerous weapons into prison and also the behaviour of the manipulation of disciplinary inquiries and people getting away with lesser serious offences being preferred against them instead of the real charges being preferred against them.

¹⁶ For "convenience" it is a recommended practice that charges against an individual arising from the same facts should be contained in the same charge sheet. It is not uncommon for people to be charged separately where there are certain circumstances that may have led to that, as is the case in this particular case. The consolidation tends sometimes to be pursuant upon an application where matters were separated. The High Court Rule No. 11 makes provision for such an application. The Courts would for purposes of convenience consolidate them. This will not arise in this case because the matter is not before court and there is no such provision in the Disciplinary Code. In any event the separation was not intentional and the one hearing in respect of the assault charge had been concluded. Furthermore, there was no evidence which had been led because it is sometimes undesirable to separate matters where evidence has been led. In this case, there was merely a guilty plea and no evidence was led. Accordingly, proceeding with another hearing in respect of the other charges which were not preferred, will be appropriate.

¹⁷ "Res judicata" arises where a final judgment has been given in proceedings involving the same subject matter based on same facts and between the same parties. In this matter the subject matter is different. On the general principles see *African Farms and Townships Ltd v Cape Town Municipality* 1963 (2) SA 555(A); *Custom Credit Corporation (Pty) Ltd v Shembe* 1972 (3) SA 462 (A); *Horwitz v Brock and Others* 1988 (2) SA 160 (A) and *National Union of Metal Workers of South Africa (NUMSA) v Andrag Machinery (Pty) Ltd.* (2003) 11 BLLR 1163 (LC).

¹⁸ See section 106(1)(c) of the Criminal Procedure Act 51 of 1977 and *S v Makoko* 1984 (2) SA 62 (0) @ 64H – 65A.

4. FINDINGS

4.1 Mr Mokonoto

Mr Mokonoto breached the Departmental Rules or Regulations by bringing the knife into the prison and using it to stab a prisoner.

4.2 Mr Rakoma

Mr Rakoma breached the Departmental Rules or Regulations and was reckless in the performance of his duties by:

- 4.2.1 The appointment of the Chairperson without giving due consideration to the nature of the charges which were to be preferred;
- 4.2.2 Failure to consider and charge Mr Mokonoto with all the competent charges on the facts;
- 4.2.3 Negligence in the signing of the letter of appointment of Mr Monyamathe without applying his mind and accordingly, not performing his duties with care.

4.3 Mr Moabi

Mr Moabi breached the Departmental Rules or Regulations and was reckless in the performance of his duties as an Initiator by:

- 4.3.1 The drawing of the charge sheet without giving due consideration to the facts and the nature of the charges which could be preferred;

- 4.3.2 Failure to add the other competent charges besides the recommended ones;
- 4.3.3 Failure to comply with the Disciplinary Code in the serving of the notices and investigation report;
- 4.3.4 Following of an irregular procedure in:
 - 4.3.4.1 Plea bargaining; and
 - 4.3.4.2 Bring the hearing forward,
When there is no such provision in the Disciplinary Code;
- 4.3.5 Complicity in the manner in which the Disciplinary hearing was conducted, that is, proceeding with the hearing whilst the Commission was in the process of hearing the matter and agreeing to an unauthorized “plea bargain” with Mr Mokonoto without notifying Messrs Marais and Mokgokong.

5 SPECIFIC RECOMMENDATIONS

Accordingly, the Commission will make the following recommendations:

5.1 Mr Frans Mokonoto

- 5.1.1 Mr Mokonoto should be suspended immediately;
- 5.1.2 Mr Mokonoto should be charged with the following transgressions:
 - 5.1.2.1 Unauthorised possession of a dangerous weapon whilst on duty (Colum A – Paragraph 5.8); and
 - 5.1.2.2 Breaching of Internal Security of arrangements of the Pretoria Central Prison (Column A – Paragraph 5.10);

5.1.3 Every assistance should be given to the prisoner, Mr Mokgokong to finalise and pursue criminal charges, which have already been laid against Mr Mokonoto with the South African Police Services;

5.1.4 A copy of this report should be handed to the Executive Director of the South African Nursing Council for the Council to decide on action which should be taken against the nurse, Mr Mokonoto in accordance with their professional rules or regulations.

5.2 Mr M J Rakoma

Mr Rakoma should be charged with the careless performing of his duties (Column B-Paragraph 2.1).

5.3 Mr Moabi

Mr Moabi should be charged with the careless performing of his duties (Column B-Paragraph 2.1).

6. DISCIPLINARY HEARINGS

A competent Chairperson who is qualified to order a sanction of a dismissal should be appointed to preside over these abovementioned matters. (In light of the complex legal issues which might arise it is recommended that a legally qualified Chairperson be appointed).

7. GENERAL RECOMMENDATIONS

The Commission would deal in detail with Disciplinary Inquiries in its final report. However, in the interim it is necessary to raise the issue of the fact that the people who appoint Chairpersons should be, with immediate effect, warned of the fact that they should apply their minds to the charges which can be preferred against an individual.

The people who appoint Chairpersons of Disciplinary Inquiries should seriously look at:

- 7.1 whether all the charges which can be preferred have been preferred; and
- 7.2 whether the Chairperson who is being appointed is competent to impose the ultimate sanction which can be imposed on the transgression with which that particular individual is being charged.

Similarly, the Initiators and Investigators should ensure that all competent charges on the facts are preferred.

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CHAPTER THREE

ASSAULT OF MENTALLY CHALLENGED PRISONER

1. INTRODUCTION

This chapter deals with the assault and inhumane treatment of a mentally challenged prisoner, Mr Maake. He was assaulted by four (4) warders who are stationed at the Pretoria Central Prison.

The pertinent facts are that the prisoner, Mr Maake became agitated and angry when his request to be moved to a single cell was refused by the officials. His frustration appears to have boiled over and he struck the warder Mr Frost with a belt on his face causing the member to bleed. The four warders who were present at the time of the incident pursued the fleeing prisoner, dragged him back to an office and severely assaulted him.

The implicated warders, although duty bound to attend to the safety and well being of the prisoner, preferred to revert to self-help in assaulting the prisoner for hurting another member.

What was apparent during the Commission hearing was that the warders appeared to be under the impression that the force exercised by them was necessary and just in the given circumstances. It is assumed that their perception of the force being necessary is based on the fact that it is recognized in South African Law that any victim of an unlawful attack upon his person, may resort to force to repel such an attack with any harm or damage inflicted upon the aggressor in the course of such repelling action not being unlawful. The Commission will however consider all the circumstances of the matter and then make a finding regarding the lawfulness of the said conduct of the warders.

Right at the outset of Mr Maake's testimony, it was apparent to the Commission that the inmate concerned, Mr Maake, resorted to some violence in the office of

the warders and that he was then assaulted afterwards. On his own version he stated that he became agitated by the conduct of the warders who were just ignoring him. Accordingly it is clear that what is in dispute is not whether Mr Maake had hurt one of the warders but what had happened to Mr Maake after he had hurt the warder, Mr Frost, and whether the warders who thereafter attacked him had acted lawfully.

From the understanding of the legal position in South Africa, the warders' conduct would only have been lawful and justifiable if they had acted in self-defence given the specific circumstances. In determining, however, whether the implicated warders' conduct was lawful, it is necessary to look at what constitutes this specific defence, referred to as private defence in South African Law. It will also be necessary to examine what the Rules and Regulations of the Department stipulate as to what can be considered as necessary force in circumstances where a warder is "attacked".

Criminal Law scholars have stated that private defence involves a choice between two evils, and that in exercising that choice, the lesser evil, must be preferred.¹⁹ The evils are in the first place, the harm threatened by an attack upon the interest of a citizen and secondly, the harm done to some legal interest of the attacker in the course of repelling the attack. The doctrine of the lesser evil implies that a defender should not inflict greater harm than is threatened by an attack.²⁰

Equally of importance in considering this doctrine is the fact that an attack must have commenced or be imminent and that the repelling action should have occurred at the time of the attack and not subsequently as a retaliation. Clearly if a

¹⁹ See J Burchell and J Milton *Principles of Criminal Law* (Juta) Second Edition 1997 @ 134.

²⁰ Interestingly when the history of this defence is considered it shows that private defence is the civilized remnant of an ancient system of self help for a wrong done. In permitting such self help, the Romans formulated the principle "moderatio inculpatae tutelae" (moderation in self defence) which European jurists later relied upon to construct a more or less coherent doctrine of private defence.

person attacks after he or she has been attacked, they become the aggressor and can no longer be considered as defending themselves against an attack.

In considering the facts and evaluating the evidence of the present case, it is important to bear in mind what the elements of a private defence are. It is accepted that for this defence to succeed, a person needs to show that the private defence was necessary in the circumstances in which he or she found themselves and if necessary was repelled by means appropriate to the danger which confronted him. In other words, to put it more simply and coherently, the retaliation act should be proportionate to the danger and harm posed by the aggressor.

In considering the actions of the warders and whether it was justified, the Commission will determine and examine objectively the nature of the attack and the nature of the “defence” and whether the action of the warders falls within the principles of the law that governs self-defence.²¹ If measures are taken after an attack has ceased, the action becomes retaliatory rather than defensive and becomes unjustified.²²

2. EVIDENCE LED

The following evidence was heard:

2.1 Marius Anker

Mr Anker is a member employed by the Department as a Correctional Officer Grade One. At the time of the hearing he was working at the laundry section and

²¹ It is generally accepted in our law that an attack must never be completed in order to evoke the defence of private defence.

²² See *R v Hayes* 1904 TS 383 and *R v Kantolo* 1912 EDL @ 154.

on weekends worked at the sections in the prison. Mr Anker gave testimony as a warder who had been implicated in an assault on an inmate and came forward to give his version to the Commission in the hope that his co-operation and truthfulness would finally get him the same indemnity that any witness would receive in terms of Section 204 of the Criminal Procedure Act No 51 of 1977.

It was the testimony of Mr Anker that the incident that implicated the four warders took place on the 24th August 2003, when the members, Mr Frost, Mr Lourens, Mr van Wyk and Mr Anker were sitting in an office at Pretoria Central Prison. Mr Anker stated that at the specific time, he looked up from the newspaper he was reading and saw that Mr Frost was covering his face with his hands and that he had blood on his hands. At about the same time, he heard from Mr van Wyk that the prisoner had hit Mr Frost. Mr Anker's version was that he never saw what had happened but that he knew that earlier on the same day the prisoner, Mr Maake had come to the office and asked something. Mr Anker thought that the prisoner was directing the question to Mr Frost. They did not take notice of the prisoner but chased him out of the office. So when Mr van Wyk told him about a prisoner hitting Mr Frost, he knew that it was one and the same prisoner, even though he did not witness the assault.

Mr van Wyk was the first person to run out of the office and it was Mr Anker's version that they then all decided to go after the prisoner. Mr van Wyk grabbed the prisoner first and then held him against the wall, whilst striking him with his knee. At the stage, Mr Anker was approximately two (2) metres away from the scene of the assault. Mr van Wyk then pulled the prisoner into the office whereafter the door was closed and they all participated in the assault of the prisoner. The main reason for closing the door was to make sure that no one witnessed the assault on the prisoner. Mr Anker was asked whether it was possible that the door was closed in order to make sure that the prisoner would not escape.

He convincingly, responded that it is a known practice that when they want to sort out a prisoner they do it behind closed doors.

It is clear that at the time when Mr Maake was assaulted he was already under control and that no further force was necessary in the circumstances. Mr Anker however admitted that despite this, he and Mr Lourens continued hitting the prisoner in the stomach and eventually the prisoner reached the point during the assault where he was just lying helplessly on the ground. According to Mr Anker, Mr Frost then hit the prisoner with his fist on the head. Numerous blows were aimed at the prisoner and the assault went on for approximately two (2) to three (3) minutes. The warders also repeatedly kicked Mr Maake whilst they were wearing boots, which had the potential of causing serious injury. In fact, Mr Anker went further in his testimony and acknowledged that at the time of the assault, it was him who asked for the belt to be given to him and who suggested that they should hit the prisoner with his own belt. However, this belt was not given to him and they assaulted the prisoners with their bare hands.

Shortly after the assault came to an end, Mr Lebesse came into the office and instructed the warder accompanying him, Mr Mashigo to take the prisoner to hospital. Mr Lebesse then asked all of them in the office what had happened to the prisoner to which they all said that the prisoner had an epileptic fit and that is why the prisoner was laying on the ground. One of them also said that the prisoner had attacked Mr Frost. After Mr Lebesse and Mr Mashigo had entered the office and referred the prisoner to the hospital, Mr Frost took the belt and went off to lay charges against the prisoner, Mr Maake. Mr Anker's confirmed that he had received a subpoena to appear in court as a witness for Mr Frost.

Mr Anker admitted that, in the circumstances described, they, as members, were required to remove the weapon that was used by the prisoner, in this case the belt

and that there was really no need for them to chase the prisoner in order retrieve the belt as the prisoner had thrown the belt into the office when he ran out of the office. What was required of them was to charge the prisoner departmentally in terms of the regulations and to record the kind of force that was used and to note the circumstances of what had happened. They did not make a note of this case. He acknowledged that all in all, considering the events, it was never necessary for them to assault the prisoner.²³

During cross-examination by Mr Theron acting on behalf of Mr Frost, Mr Anker admitted that he had made a statement not only to the Jali Commission but also in respect of the internal investigation done by the Department. He further admitted that he had lied in his statement to the Department by saying that he had not participated in the assault on the prisoner. He admitted that he deviated from that statement but explained that his conscience was bothering him and that he had decided to tell the truth to the Commission.

Much of the cross-examination focused on establishing the fact that members of the Department were not trained in dealing with psychopaths and other mentally ill prisoners. Mr Anker was questioned repeatedly as to whether members had received any training regarding the behaviour and thought processes of psychopaths and whether such training might have altered the conduct of the implicated members. Mr Anker stood firm by his earlier evidence and stated that in the nature of his work the lack of such training in how to deal with psychologically disturbed people was not an insurmountable problem because he had the ability and the training to determine whether a situation was potentially

²³ This view of Mr Anker is in accordance with the Department's policy as contained in the Departmental Orders, Series B, xvii (2.1) that provides as follows:

"A correctional official may not use force against a prisoner except when it is in:

- self-defence
- the defence of another correctional official, another prisoner or any other person
- the prevention of an escape from custody by a prisoner
- the protection of property, and in achieving the objectives of safe custody."

dangerous. The Commission will return in the analysis section of this report to consider whether it would not be in the interests of the Department to ensure that warders are trained in dealing with different behaviour patterns of mentally challenged prisoners. This is however not important in the discussion of the fact at hand whether the assault on the prisoner, Mr Maake, was justified.

In answer to the question when force would be permissible to be used by members in the prison, Mr Anker answered that they are entitled to use force in situations where a member's life or that of their colleagues, other prisoners or the property of the State is endangered. Mr Anker said that he regretted what had happened and that he knew that what he had done was wrong.

2.2 Mariam Tsatsi

Dr Tsatsi is a medical practitioner with eleven (11) years experience practicing at Atteridgeville. She stated that she has a contract with the Department of Correctional Services to consult and examine ill patients on a two (2) hour session per day and is, at present, based at the Pretoria Local Prison Hospital for such two (2) hours. The prisoner, Mr Maake, who was assaulted, was seen by her as well by the Chief Professional Nurse Mr Mabena on the 25th August 2003.

Dr Tsatsi described Mr Maake as a soft spoken person whom she had known for a long time since he had previously also attempted to commit suicide. She pointed out that in all the time that she had been working at the Pretoria Prison, she had never seen him being aggressive. She found him to be coherent in expressing his thoughts but was aware that he complained for some time that he wanted to be

placed in a single cell, something the officials did not want to consent to because Mr Maake required supervision.

Dr Tsatsi testified that when she examined Mr Maake, he was fully conscious and not psychotic. She found that he was angry and non co-operative and she observed the following injuries:

- a swollen right hand;
- a periorbital hematoma around the right eye;
- a right temporal bruise,
- bruise on the right aspect of the neck,
- scratch marks on the left chest and bruises on the shins bilaterally.

She noted these findings on the G337 form, more commonly known as the Medical Report on a prisoner.

Her opinion was that the injuries, sustained by Mr Maake were still fresh then and consistent with an assault. She added that Mr Maake had been treated by the Psychiatrist, Dr Rangaka and she was aware that Mr Maake was on an anti psychotic drug namely Lebonex which is a Schedule 5 drug. The drug was prescribed by Dr. Rangaka.

Regarding her finding that Mr Maake was angry at the time of the examination, she explained that she had inferred this as Mr Maake “constantly wanted to be left alone”.

Much of the cross-examination of Dr Tsatsi related to Mr Maake’s psychological condition and not her findings as a professional doctor even though Dr Tsatsi had

made it clear that she is not a trained psychiatrist and hence could not express an opinion as to the psychological condition of Mr Maake.

Her evidence relating to the injuries that the prisoner had suffered was never challenged and accordingly the Commission is satisfied to accept such evidence as conclusive proof of the injuries suffered.

2.3 Alpheus Oupa Mabena

Mr Mabena's evidence did not take the matter much further. He stated that he is the Chief Professional Nurse stationed at the Pretoria Local Prison Hospital and that he was telephonically informed that Mr Maake was being sent to his hospital and that Mr Maake had been assaulted by members. He never saw the assault and could not comment on it. He could, however, confirm that the prisoner Mr Maake had been on the drug Lebonex which is an anti psychotic drug and that Mr Maake had been treated by the Psychiatrist, Dr Rangaka before. Once again a lot of time was spent on cross examining Mr Mabena on the psychological state of Mr Maake and his psychological condition when Mr Mabena was clearly not in a position to express an expert opinion on this issue.

The Commission had great difficulty understanding this approach in cross examination. The psychological state of Mr Maake is not important regarding the outcome of this matter since it is not Mr Maake who is charged with assault. It is therefore not important for this Commission to determine whether Mr Maake at the time of the assault was *compes mentis* nor to determine whether he had the required criminal capacity at the time of the incident. If the Commission had to

decide on the transgression committed by Mr Maake then the focus would have been on his mental capacity at the time of committing the so called offence. Given

the circumstances, Mr Maake became the victim and not the transgressor of an assault.

2.4 Sydney Lebesé

Mr Sydney Lebesé is employed by the Department as the Internal Security Supervisor at Medium C Section, Pretoria Central Prison. He has seventeen (17) years experience in the Department and the perpetrators of the assault, Mr Frost, Mr Van Wyk and Mr Lourens are all well known to him.

His evidence was that he was on duty on the 25th August 2003 at Medium C and around about 9.30 that morning a prisoner namely Mr Desmond Mortin approached him and requested him to immediately go to Section E as members were assaulting a prisoner. He asked Mr Mashego to accompany him to the office of the members and when they arrived at the Section they found the office door closed. He pushed the door of the office open and found the prisoner lying helplessly on the floor with the four implicated members in the office with the prisoner. According to Mr Lebesé the prisoner was lying on his side and did not make any noise. None of the four members were attending to the injuries sustained by the prisoner.

His evidence was that it is the policy of the Department that if a prisoner is injured then his safety lies with the members of the Department and there is a duty and obligation on them to take the prisoner for medical treatment.²⁴ He had been

²⁴ Also see Departmental Orders, Series B, xvii (2.4) that provides:
“If force was used the prisoner(s) concerned must immediately be medically examined and receive the necessary/prescribed treatment”;
and (2.5) provides that:
“The Head of Prison must be notified immediately when any type of force is used. A dated and signed written report, prepared by the correctional official who applied force, must be completed not later than the end of that shift and shall include the following information:
• number of prisoners involved;

informed by Mr Lourens that one of the members had been assaulted by the prisoner with a belt and he could see that there was some blood on the face of Mr Frost.

The prisoner Edward Maake is also known to him and he is well aware of the fact that Mr Maake has been persistent in requesting to be given a single cell but because of his earlier suicide attempt, this request could not be consented to. Later on the same day Mr Frost came to him and requested him to go off duty so that he could go lay a charge of assault at the police station. Mr Frost also said him that the prisoner had first assaulted him.

2.5 Edward Maake

The Commission has also heard the evidence of the victim Mr Edward Maake, who confirmed that he was assaulted on the 25th August 2003 and that he sustained certain injuries. His version was that he had complained in the morning to Mr Frost that he wanted to be moved to a single cell because he struggled to live in a communal cell. His request was ignored and he then lost his temper. As to what

directly happened after he lost his temper and what he exactly did to Mr Frost is not very clear but it is accepted that Mr Maake in all likelihood must have injured Mr Frost by hitting him in the face with a belt which was then later confiscated. Thereafter Maake had hastily left the office, and was pursued by the members who dragged him back to the office and assaulted him.

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- an account of the events leading to the use of force;
 - an accurate and precise description of the incident and reasons for applying force;
 - a description of the restraining devices, if any, and the manner in which they were used;
 - a description of the injuries suffered, if any, and the treatment given and/or received;
 - a list of all participants and witnesses to the incident;
 - number of officials involved.”

It is not necessary to determine exactly who did what to Mr Maake as it is clear from Mr Maake's own evidence that all the members present were assaulting and kicking him until he felt pain over his whole body. From the injuries already documented in this report, it is clear that Mr Maake was assaulted over his whole body.

2.6 Lulama David Halam

Mr Halam is an advocate and the Commission investigator tasked with the investigation of this assault on Mr Maake. His evidence was that on the 25th August 2003 when he visited the prison he received a report of a prisoner who was assaulted over the weekend. After obtaining statements from the prisoner and other witnesses, Mr Halam also tried his best to obtain statements from those implicated. On requesting Mr Frost to submit a statement to him, Mr Frost told him that he would give him the same statement that he submitted to the internal investigators of the Department. This statement was then obtained and handed in and marked as Exhibit Y.

Mr Van Wyk and Mr Lourens followed the conduct of Mr Frost and also handed Mr Halam the statements that they had made originally to the internal investigators, which statements were handed in and marked as Exhibit Z and Exhibit AA, respectively. The evidence of Mr Halam was hardly challenged and it is clear that he in his investigations relied on his previous experience as a Captain in the South African Police and as a Prosecutor with the Department of Justice.

2.7 Messrs Frost, Van Wyk and Lourens

The versions of the three (3) warders who were implicated in this matter corresponded with each other to such an extent that Commission does not find it necessary to deal with each of these explanations separately.

The statements tendered by Messrs Frost, Van Wyk and Lorens confirm what is not in dispute, namely that Mr Frost was hit once in his face with a belt by the prisoner Mr Edward Maake. What happened after the assault is of far more importance in deciding this matter. The members claim that when they pursued the fleeing Mr Maake and dragged him back to the office, all they were doing was exercising the necessary force to calm the prisoner down and to avoid the prisoner injuring himself or any of the officials. The explanation they tendered on being confronted by the arriving Mr Lebesé was that they were all trying to restrain or keep Mr Maake on the ground.

The evidence supports the view that when Mr Maake was assaulted, he was not causing any threat to Mr Frost nor to any of the other officials. He was no longer in possession of the belt or any other weapon. Accordingly there was no reason for them to fear that he would either injure himself or any of the other officials. He was clearly no longer posing any danger to them.

Whilst it is acknowledged that warders are at all times entitled to use the necessary force to defend themselves or the property of the Department or to protect any of the other prisoners, the circumstances of this case clearly indicate that no such threat was posed to them and that they clearly acted unlawfully under the circumstances.²⁵

²⁵ See Departmental Orders, Series B, xvii (2.7) that provides:

“Minimum force is that application of force which would, in every factual situation, be regarded as justified in a court as being the only essential or necessary force. The force must be the only reasonable means to protect a threatened interest and should not be more damaging than what is necessary to obviate the threat/attack;”

and (2.6) provides that:

Although Mr Lourens tried to exonerate himself by saying that he did not assault the prisoner, his version was not tendered under oath and thus could never be challenged. Furthermore, it was also contrary to the evidence given by Mr Anker who implicated Mr Lourens in the assault.

All the warders implicated namely, Mr Frost, Mr Van Wyk and Mr Lourens, had the opportunity to come forward and to explain to the Commission why it was necessary for them to use the force applied and why the Commission should not consider the force applied by them as being excessive. None of them were prepared to come forward to give an explanation under oath and to submit themselves to cross-examination by the Evidence Leader of the Commission.

As for Mr Frost it is necessary to add that he was represented by Advocate Theron during the proceedings and that at the end of Mr Halam's testimony, Mr Theron withdrew as the legal representative of Mr Frost since no Legal Aid was granted to Mr Frost by either the Department or the Legal Aid Board. Mr Theron wanted to make a submission to this Commission that the Commission should instruct or order the Department to grant Mr Frost legal representation however after due consideration a ruling was made by the Chairman of the Commission that no such order would be made. Mr Frost then elected not to attend the proceedings nor tendered any evidence before the Commission, after his rights had been duly explained to him. Similarly the other warders elected not to testify before the Commission.

3. ANALYSIS

“Whenever force is used only a minimum degree of force must be used and the force must be appropriate to the objective.”

Throughout this report it has been accepted that the prisoner, Mr Edward Maake, struck the warder, Mr Frost, with a belt in the face causing the member to bleed. It appears that the assault was confined to a single blow with the belt whereafter the prisoner then ran out of the office.

The evidence that mainly implicated the warders, Messrs Frost, Lourens and van Wyk, is that of Mr Anker. It is accepted that Mr Anker's evidence should be evaluated with caution and carefully considered since Mr Anker for all legal purposes, is also a co-accused. Although Mr Anker participated in the assault, he was nevertheless prepared to come forward and testify and face the challenge of being cross-examined. It is noted that he without hesitation admitted a previous contradicting statement that he had given to the internal investigator of the Department. The question is how much weight should be attached to such statement and whether his evidence should be accepted as truthful in light of the statement. The Commission is satisfied, having considered his explanation and the case law that spells out the legal position regarding earlier untruthful evidence that his testimony can be accepted as reliable and credible.²⁶ Very little, if any, criticism that can be leveled at the evidence given by Mr Anker. He did not try to exonerate himself nor did he attempt to play down the role that he had in the assault of the prisoner, Mr Maake. He even testified that he went as far to request the belt to assault the prisoner but that the belt was not given to him. The

²⁶ See *S v Mtsweni* 1985 (1) SA 590 (A) where it was held that; "Untruthful evidence or a false statement does not always justify the most extreme conclusion. The weight to be attached thereto must be related to the circumstances of each case. In considering false testimony by an accused, the following matters should, inter alia, be taken into account: (a) the nature, extent and materiality of the lies and whether they necessarily point to a realisation of guilt; (b) the accused's age, level of development and cultural and social background and standing insofar as they might provide an explanation for his lies; (c) possible reasons why people might turn to lying, e.g, because, in a given case, a lie might sound more acceptable than the truth; (d) the tendency which might arise in some people to deny the truth out of fear of being held to be involved in a crime, or because they fear that an admission of their involvement in an incident or crime, however trivial the involvement, would lead to the danger of an inference of participation and guilt out of proportion to the truth." And *R v Mlambo* 1957 (4) SA 727 (A) at 738B – D; and *Goodrich v Goodrich* 1946 AD 390 at 396.

acknowledgement of his own participation is indicative of the honesty that he displayed in the witness stand.

It is therefore the opinion of the Commission that Mr Anker was frank and honest in his evidence and that he should be afforded the same indemnity as any other witness in a criminal matter that had given testimony in terms of section 204 of the Criminal Procedure Act No 51 of 1977.

Turning to the question of the force to be exercised in any given circumstances, it is established in the Department that necessary force can be defined as the amount of force necessary to establish and maintain control over the subject, neutralizing a threat or resistance. Furthermore, the use of force is permitted when it is necessary and considering the rules and regulations in the Department, it appears that it would be necessary in:

- an attempt to defend yourself against harm;
- in the defence of any other person;
- in preventing a prisoner from escaping and
- in protecting the property of the State.

When all of above is considered, it is evident that none of these circumstances were present or played any role at the time when the warders assaulted Mr Maake. He was not posing any danger to anyone or anything. He was not even armed.

What is disturbing in this matter is the evidence of Mr Lebes, who stated that the prisoner, Mr Maake, had been seriously injured and yet none of the warders offered to take Mr Maake for any medical treatment or to assist him with his injuries. The conduct of these warders is unacceptable and not in accordance with the rules and regulations of the Department. It is reprehensible that members who

are entrusted with the safety of a prisoner can ultimately injure the prisoner and thereafter display total disregard for the injuries suffered by the individual. Even though much was made of the fact that there was a likelihood that the prisoner concerned was a mentally challenged person and therefore needed to be treated differently from other prisoners, the Commission is not convinced that an attack on such a person should be treated any differently to that of a so-called psychologically normal person.

The issue to be decided in this matter is basically very simple and that is whether there was really a threat that necessitated the warders to protect themselves or whether the prisoner posed any danger. Whether the prisoner was mentally challenged or not, is truly irrelevant for the purposes of this enquiry. This, however, should not be construed to mean that the Department could not benefit from introducing some basic training programmes for warders to sensitize them about the behaviour patterns of people with psychological problems. It is envisaged that warders would be better equipped if they received such training and that prisoners with some psychological disturbances might also benefit if these warders are sensitive to how they conduct themselves. The aforesaid should not be interpreted as meaning that such training is a prerequisite for warders to be able to determine what will constitute the necessary force to bring the prisoner under control. Determining how much force is required or necessary is a completely separate enquiry, which depends on the given circumstances of each case.

4. FINDINGS

It is found that Messrs Frost, Van Wyk, and Lourens did not act in self defence and that if they did, they exceeded the limits of self defence and that all three (3) of them should be charged with a criminal charge of assault as well as being charged internally with assault.

5. RECOMMENDATIONS

It is recommended that:

- 5.1 Messrs L Frost, A L van Wyk and G P Lourens should be suspended immediately;
- 5.2 Messrs L Frost, A L van Wyk and G P Lourens be criminally charged with assault and that all three (3) of them be charged internally with transgressing Clause 5.7 (Column A) of the Disciplinary Code i.e. assault while on duty;
- 5.3 Mr Anker be used as a witness against the three members. Should he not co-operate then he too should be charged criminally and also internally.

DATED AT DURBAN ON THIS DAY OF 2004.

JUDGE T S B JALI
CHAIRMAN

ADV. T A SISHI
COMMISSIONER

ADV. E J S STEYN
COMMISSIONER