

CHAPTER 20

THE IMPLEMENTATION OF THE COMMISSION'S INTERIM REPORTS

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CHAPTER 20

IMPLEMENTATION OF THE COMMISSION'S INTERIM REPORTS

1. INTRODUCTION

This report deals with the implementation of the Commission's interim reports. It is, at this stage, appropriate to set out the Commission's observations as to the manner in which the Department has dealt with the Commission's interim reports. To a large extent, the manner in which the previous reports of investigations into the Department were dealt with by the Department¹ is no different from the manner in which some of the interim reports have been dealt with. For purposes of clarity, this aspect will be dealt with before the Commission considers the rest of its findings with regard to this investigation.

The Commission submitted eleven (11) interim reports to the Department of Correctional Services. The Commission has been informed that the Department has endeavoured to implement the recommendations made in these reports. The same information has been conveyed to the Parliament of the Republic of South Africa and the citizens of this country through the media.²

However, on closer scrutiny, it is clear that not all the recommendations have been implemented, and indeed the most crucial recommendations have been ignored. This has led to the low success rate of the disciplinary inquiries against certain members.

¹ For more details, see the Chapter dealing with Previous Investigations into the Department, where recommendations were not implemented.

² See the *Business Day* dated 4 October 2004, in which it was reported that the Commissioner indicated that most of the Commission's recommendations have been implemented.

The eleven (11) interim reports recommended that one hundred and seven (107) people be charged with various transgressions the Commission had identified. These were divided, amongst the Management Areas and reports as follows:

Number of Recommended Charges per Prison

First Interim Report	Durban-Westville	6
Second Interim Report	Durban-Westville	8
Third Interim Report	Durban-Westville	4
Fourth Interim Report	Pietermaritzburg	14
Fifth Interim Report	Bloemfontein	33
Sixth Interim Report	St Albans	1
Seventh Interim Report	Pollsmoor	1
Eighth Interim Report	Leeuwkop	19
Ninth Interim Report	Johannesburg	10
Tenth Interim Report	Pretoria	5
Eleventh Interim Report	Pretoria	6
Total		107

The majority of the people were to be charged both in terms of the Disciplinary Code and criminally, as they had committed certain criminal offences. Only one person was solely to be charged criminally, because he had resigned from the Department.³

The Commission requested that the Department furnish a report on the progress that has been made regarding the Commission's interim reports. In response, the Department reported that disciplinary inquiries had delivered the following results:

³ That is the former Provincial Commissioner Mr Nxumalo – See the Tenth Interim Report.

TABLE : Disciplinary Outcomes

DETAILS	TOTAL
Dismissed	26
Re-instated	7
Warnings	3
Final Written Warnings	14
Part Heard/Pending	3
Awaiting Arbitration Date/Disciplinary Hearing	5
Referred to SIU/DSO Investigation	8
Still to be investigated	6
On review	3
Members resigned	8
Cases not proceeded with	11
Matter still under discussion /Time frame problem	5
Passed away	1
Non co-operation from witness	3
Criminally prosecuted, found not guilty	3
Restructuring transfer	1
TOTAL	107

Some of the implicated members passed away and one resigned. The outcome of the various inquiries is in the report from the Chief Deputy Commissioner: Central Services, Ms J.A. Schreiner, dated 31 August 2005, which was submitted to the Commission.⁴

We will now deal with our comments regarding each of the reports, which were submitted to the Department.

⁴ See Head Office Exhibit 'H'.

2. FIRST INTERIM REPORT

The re-instatement of the members, despite the clear evidence against them, was due to the unforeseen circumstance that the main witness emigrated, as is apparent from the annexed report.

Nevertheless, the Commission has the following observations to make on the manner in which the disciplinary inquiries were conducted.

In the First Interim Report the Commission recommended that a Special Task Team should be appointed to deal with the disciplinary inquiries. It was further recommended that such a Special Task Team should consist of independent people who are experienced. The experience referred to was in respect of labour relations and/or labour law. That is the reason why the independent Labour Arbitration Organisations were suggested, in the said report. However, the reports, which have been received by the Commission, state that contrary to these recommendations the very first hearings were chaired by a person who was not familiar with either labour relations or disciplinary procedures in labour law. As a result, a number of technical mistakes were made, which may have led to the eventual acquittal of offenders.

The Department also disregarded the recommendations that disciplinary inquiries should be attended to by experienced, independent people. This led to unsuccessful prosecutions in circumstances where there was cogent evidence of transgressions having been committed.

3. SECOND INTERIM REPORT

3.1. Medical Aid Fraud

As is clear from the Commission's Second Interim Report, during the course of the Commission's investigations into the Durban-Westville Management

Area, evidence was presented by members of the Department and by the medical aid company that medical aid fraud was rampant in the Department. After following up leads and interviewing numerous witnesses the Commission's investigators were able to confirm that a large number of members in various prisons in KwaZulu-Natal were defrauding the medical aid company, Medcor, of millions of rands.

The sheer number of leads received by the Commission made it clear that this would be a massive investigation far beyond the limited resources of the Commission or even the Department itself.

One of the recommendations in this interim report was that the matter should be referred to the Scorpions⁵ and the Asset Forfeiture Unit. The Commission held a meeting with the Director of Public Prosecutions of KwaZulu-Natal (who previously headed the Scorpions in KwaZulu-Natal) and alerted her of the widespread medical aid fraud in the Department. The Scorpions then took over all investigations and eventually a Special Task Team was put in place at national level to co-ordinate all medical aid investigations. Members of this task team met with the Commission in Cape Town and provided a full briefing of the plan of action for the operation.

The Department head office also took steps to broaden its efforts to stamp out medical aid fraud by appointing forensic auditors KPMG. Furthermore, as the problem affected several government departments, the Commission has been reliably informed that the offices of the Auditor-General became involved.

Since the Commission's initial referral of the matter to the Scorpions, they, together with the Asset Forfeiture Unit, have moved against the main parties implicated and Mr Moonsamy Soobramoney and Mr Maliga Pillay have been charged with 75 383 counts of fraud. Assets worth R31 million were apparently also seized, which included houses in Umhlanga, La Lucia and

⁵ The Directorate of Special Operations within the National Prosecution Authority.

Zimbali, motor vehicles and bank accounts. Forensic auditors KPMG carried out an audit of the 75 383 claims made by the two (2), who are also alleged to have defrauded other medical aid schemes in the same way.⁶ The prosecution authorities have added charges of racketeering to those of fraud already laid against Mr Soobramoney and Mr Pillay.⁷

The Scorpions have also taken action against members of the Department. According to reports, about seven hundred (700) warders face action for participating in these medical aid scams.⁸ These warders are apparently scattered across KwaZulu-Natal and to ensure that the security of the prisons was not compromised, they were arrested in small groups at different times. The first group of thirty (30) warders have appeared in court and been charged with fraud. KMPG have compiled files on the thirty (30) members arrested.⁹

The Special Investigations Unit has also become involved and according to the Department there were savings in medical aid claims of R492.8 million in two financial years (R122.8 million in 2002/03 and R370 million in 2003/04) due to a sharp decline in claims made after fraudsters were caught.¹⁰

The outcome of the various investigations into medical aid fraud, which were referred to the Scorpions and/or the SIU by the Commission, will become apparent at a later stage.

The response of the various government agencies in this regard is commended by the Commission.

⁶ See Tania Broughton: “R31 million assets seized in swoop on doctor”, *The Mercury*, Thursday, 24 March 2005.

⁷ See Latoya Newman, “KZN doctor accused of fraud faces charges of racketeering”, *The Mercury*, 4 July 2005.

⁸ See Latoya Newman “Scorpions to sting 700 KZN warders for fraud”, *The Mercury*, 9 December 2004.

⁹ See Nathi Olifant, “Warders arrest prison warders for graft”, *Weekend Witness*, 12 December 2004.

¹⁰ “Minister Balfour vows to intensify the anti-fraud and corruption fight in Correctional Services”, dated 2 March 2005 – see www.gov.za, accessed 3 March 2005.

In the said interim report the Commission had also recommended the prosecution of Mr I.S. Zulu. The Commission would like to comment on the disciplinary hearings relating to Mr I.S. Zulu as follows:

3.2. Mr I.S. Zulu's Disciplinary Inquiry

The disciplinary inquiry emanating from the First and Second Interim Reports against Mr Zulu was held at the Durban-Westville Management Area on or about 23-25 October 2002. The disciplinary inquiry was chaired by a senior official employed by the Eastern Cape Provincial government.

The reports the Commission received show that, notwithstanding the seniority of the chairperson, he lacked the necessary experience and skills in chairing disciplinary inquiries and committed a number of procedural irregularities, which would have vitiated the proceedings in any event.

During May 2003, the matter was taken on appeal. The appeal was chaired by a former magistrate, currently employed as a Chief Director in the Department of Justice and Constitutional Development. At this stage, obviously, the aforesaid irregularities and other substantive mistakes could not be rectified. Mr Zulu was then bound to be re-instated, which eventually happened. It was in anticipation of such problems that the Commission recommended in its First Interim Report that properly qualified and experienced people be appointed as a Special Task Team to deal with all disciplinary inquiries emanating from its recommendations.

Whilst disciplinary inquiries might, to the lay person, seem simple, their procedures and the rules of the law of evidence are very complicated, even for experts in the field. It is clear that there was a problem in the presentation of evidence and in the cross-examination of witnesses, which would have vitiated the finding.

Furthermore, labour law is a specialised area of the law, practised by specialist lawyers, with its own specialist tribunal and court, in which non-labour law practitioners hardly appear and do not preside as Commissioners or Judges, as the case might be. Unless a person has experience in labour law, it is fairly difficult to appreciate some of the finer points and nuances relating to Labour Law. It was these finer points, nuances and issues which led to the Commission recommending to the Department that serious consideration be given to appointing people who are experienced in labour law. They need not be experienced lawyers, although even experienced lawyers, unless they have practised labour law, still encounter problems because labour law is not only about labour related issues but also about “Law and Equity”. The constitutional rights enshrined in our Bill of Rights lead to an even greater complexity of the labour matters.

3.3. Mr Zulu’s Appeal

The difficulty or uniqueness of labour law became apparent in the manner in which the fairly experienced magistrate dealt with the appeal. In reading his findings, it is clear that he was using criminal law concepts in dealing with labour law. He was looking for “proof beyond reasonable doubt”, when the standard of proof should be on a “balance of probabilities”. The probabilities based on proven facts were overwhelming. There was a failure on the part of the chairperson to appreciate the nature of the misconduct and sometimes the provisions of the General Amendment Act No. 45 of 1988 regarding hearsay evidence. He also misdirected himself regarding the evidence that was led.

The failure of the Department to follow the recommendations regarding disciplinary hearings resulted in a very senior employee, who had been dismissed for corruption, having to be re-instated due to several irregularities during his disciplinary hearing.

The same thing happened in the other matters referred to in the Second Interim Report, and people who were implicated in it were also found not guilty and re-instated despite overwhelming evidence implicating them.

The same recommendation to form a Special Task Team was repeated in the Third and Fifth Interim Reports, and was reiterated by the Chairperson of the Commission when he was addressing the Correctional Services Portfolio Committee in Parliament.¹¹ The Department's officials did not act as recommended by the Commission.

It is clear that whatever successes the Commission might have achieved in the investigations have been undermined by the Department officials disregarding this crucial recommendation by the Commission, and because people or organisations who have the relevant experience were ignored.¹²

Accordingly, it cannot be ignored that the Department's own failure to comply with the Commission's recommendations has led to a low conviction rate in the disciplinary inquiries.

4. THIRD INTERIM REPORT

The hearings with regard to this report have been finalised and members who were identified in it were predominantly given final written warnings. In the circumstances, the Commission does not have any comments on these hearings as it does not have any evidence to indicate how they were conducted.

¹¹ In response to the Portfolio Committee presentation by the Chairman on 20 August 2002, the then Minister also gave an undertaking that the disciplinary inquiries emanating from the Commission would be dealt with by independent people from outside the Department as recommended by the Commission.

¹² See the Chapter dealing with Disciplinary Inquiries, which deals in detail with the problem encountered by the Commission with regard to disciplinary inquiries in the Department.

5. FOURTH INTERIM REPORT

The hearings with regard to this report have been finalised and members who were identified in it were predominantly dismissed and some arbitration hearings are still pending. Most of these matters have been referred to the South African Police Service for investigation and criminal prosecution.

6. FIFTH INTERIM REPORT (GROOTVLEI REPORT)

It also appears that most of the hearings have been finalised in this matter. However, there was no report as to what has happened with regard to the various criminal charges. In addition, the Special Task Team, which had been sent by the Commissioner of the South African Police Service, also undertook to investigate the criminal charges against the various members who had been implicated. There is no report on this either.

The one person who has not been dealt with as recommended by the Commission in this report, is the former Provincial Commissioner of the Free State, Mr W. Damons. This is a matter of concern because he attempted to defeat the ends of justice, which is a very serious offence.¹³

In Chapter six (on page 85) of the Fifth Interim Report, the Commission seeks to deal with the issue of outside interference by Departmental officials in the Commission's work. The recommendations of the Commission in this regard are clearly set out in the interim report, which is an Appendix to this Final Report.

Subsequent to the submission of this report, the office of the Commissioner prepared a memorandum, which states:

¹³ See the Fifth Interim Report – pages 28 and 123.

“3. DISCUSSION

The Commissioner respected the Presidential authorising of the Jali Commission to deal with the video, and as such did not take action immediately after he saw the video. However, the public showing of the video on national TV altered the dynamics and set up volatility in the prison of Grootvlei and the Provincial Management that required in the Commissioner’s estimation exercise of his responsibility for the management of the Department. He crafted terms of reference to ensure that the Task Team was not focus on the situation in the prison management, to stabilise the situation in the prison, to complement the investigation of the Jali Commission.

- Since the Task Team was intended to ensure that the Department fulfilled its responsibility to stabilise the prison management the Task Team could not and should not have consisted of non-departmental members*
- The terms of reference specifically indicate that the Task Team should complement the work of the Commission, and that the focus should be on the “circumstances that made it possible and led to the production of the video”. The Task Team was sent to Grootvlei in relation to the Management responsibility to stabilise the prison and to address prison management, and not to investigate the allegations made in the video.*
- The Commissioner’s concern in relation to the making of the video relates to the importance for evidentiary purposes of involving the appropriate investigative and law enforcement agencies of the country in such an operation. The Department of Correctional Services does not have a legal mandate to conduct secret surveillance investigations, and where such methods are required, co-operates with the appropriate state institutions.*

- *The Department remains fully committed to the terms of reference of the Jali Commission, and has no and did not have any intention of establishing a team to work with the Jali Commission. The Department remains committed to ensure that DCS members provide full co-operation to the Jali Commission, and accepts that all staff, even those required to provide such support to the Commission, may themselves be subject to investigation by the Commission if their actions have warranted such investigation.*
- *The Commission Report indicates that there is a misunderstanding as to the nature of the Task Team. The Task Team was a temporary task team sent to intervene to stabilise a situation and to make managerial recommendations to the Commission. It is a manifestation of the management tool that is utilised in DCS in relation to “crisis” situations that develop in the operational arena of the Department, and similar Task Teams with different compositions have been utilised in relation to the mass escape in Bizana prison, the burning of a cell in Rustenburg prison, etc.*
- *Personnel from outside the Department have chaired the disciplinary hearings that have emanated from the Grootvlei Interim Report as well as from other reports from the Jali Commission. In this respect the recommendation of the Jali Commission about the importance of the independence of the disciplinary hearings has been meticulously acted on.*

CONCLUSION:

The Jali Commission recommendation that ‘The sending of a Task Team to a prison whilst the Commission is busy with investigations at such prison should be avoided in future. If there is a need to do so, every attempt should be made to ensure that interference with the work of the Commission is avoided’, is noted. It is hoped that the above

response to the Interim Report will assist in establishing clarity with the Jali Commission that no interference was intended, and that the purpose of any Task Team sent to a prison in which the Jali Commission may be busy would only be to address the management dimension of the situation and not to investigate any allegations.

CDC FUNCTIONAL SERVICES.”¹⁴

The Commission has considered the response of the Department. It is clear that the Department has not fully understood the Commission’s concerns as set out in the interim report. The Department seeks to address issues that have not been raised by the Commission and thus the Commission regards them as not being relevant for purposes of dealing with the issue of outside interference.

The question of what role the Task Team had to perform at Grootvlei and its terms of reference was clearly defined by Mr Mohoje in his testimony. In his own words, he indicated that this was the Task Team that had been recommended by the Commission in its First Interim Report and was intended to work with the Commission in dealing with the various disciplinary measures. This is clearly incorrect.

According to paragraph 2.2.1 of the Task Team Report to the Commissioner dated 31 July 2002, the mandate given to the Task Team on 19 June 2002 was as follows:

“2.2.1 The mandate given to the Task Team by yourself (Commissioner) was as follows:

- *Set up/establish the disciplinary process against the officials implicated in the video. (Including suspension).*

¹⁴ See Head Office Exhibit “N”.

- *Investigate circumstances that made it possible and led to the production of the video.*
- *Ensure that criminal charges (members and prisoners) are referred to the SAPS.*
- *Establish the need to transfer the four (4) prisoners from Grootvlei for their own safety.*
- *Ensure that the Management of the prison is stabilised and that the Prison is operated according to departmental policies.*
- *Ensure that the Task Team work in close cooperation with the Jali Commission and complement their work.”*

The Department’s response cannot undo the evidence, which has already been led, as to the reason for the establishment and dispatching of the Task Team to Grootvlei and the documentary evidence¹⁵ before the Commission.

The Commission does not intend dealing with this any further other than to say the facts speak for themselves. The Commission hopes this will bring this matter to finality. In the light of the above, the Commission reiterates its views as expressed in the Fifth Interim Report regarding interference.

6.1 Whistle-Blowers : Mr T. Setlai

The Department’s approach to the entire Grootvlei video incident demonstrated vindictiveness against whistle-blowers, although the Department would still like the Commission to believe that its action was justified. This was demonstrated by a memorandum that was sent to the Commission by the Commissioner which is referred to above.¹⁶ It has always been the Department’s position that those who made the video would have to be punished. In particular, there was a concerted effort throughout to victimise

¹⁵ In particular, the Task Team’s Terms of Reference as quoted above.

¹⁶ See Head Office Exhibit ‘N’.

Mr Setlai, the then Head of Prison at Grootvlei at the time of the video hearings at the Bloemfontein Management Area.

The proven facts showed that allegations in various newspaper articles about Mr Setlai being victimised were not false. The manner in which Mr Setlai was subsequently treated corroborates the views of the Commission, the Commission investigators, the Commission evidence leader and the general public that Mr Setlai was being specifically targeted by the Department.

These views are in stark contrast to the the statements made by or on behalf of the Department, which are:

“ANOTHER PERSPECTIVE ON THE GROOTVLEI PRISON MEDIA DEBATE – Department of Correctional Services, 9 July 2002:

Some of the many insinuations, allegations and concerns publicly expressed are: the ‘victimisation’ of Mr Setlai, cover-ups, intimidation of potential whistle-blowers, and the protection of the corrupt lot within the correctional services Department.

As a Department we do understand in principle the importance of these concerns: we acknowledge the need to protect whistle-blowers, to expose and uproot corruption and to employ whatever means at our disposal to meet these objectives.

In so doing, however, we have real responsibilities that we simply cannot jettison. There is the constitution and there are imperatives of the prison management policy, which guide us in terms of what we can and cannot do.”¹⁷

When the Commission was sitting at Bloemfontein, the members of the Special Task Team, which was sent by the Commissioner to Bloemfontein,

¹⁷ See the media statement by the Department dated 9 July 2002. (Head Office Exhibit ‘W’).

made every effort to deny that their mission was to punish or victimise Mr Setlai. However, less than six (6) months after the Commission had left Bloemfontein, Mr Setlai was charged with a number of charges, which did not survive judicial scrutiny in a court of law.

It could be argued that the action taken against Mr Setlai was an independent action by the Special Investigation Unit (SIU). However, all the evidence points to the Department being the driving force behind the action because Mr Setlai dared, together with the prisoners, to expose corruption within the Department. The actions taken against him included transfer, demotion, disciplinary actions and eventually criminal charges.¹⁸

The Special Investigation Unit took a number of affidavits from various witnesses, which were subsequently repudiated by those who made them because they alleged that they had been either “unduly influenced” or “threatened” to make the statements. Obviously, evidence obtained in this manner would not be admissible in a court of law.

The question that has to be asked is why the Special Investigation Unit took such a keen interest in the matter of Mr Setlai?

The Special Investigation Unit is tasked to investigate corruption in the Department, as well as the entire Public Service. The Unit is aware of the fact that for it to succeed it needs whistle-blowers and cannot afford to victimise them. The Commission believes that it is very likely that the SIU acted on instructions rather than on its own initiative. The only other role player that remains is the Department, which suffered embarrassment when Mr Setlai emerged as a whistle-blower of corruption. This leaves one with the view that there was a concerted effort by the Department officials to victimise the whistle-blower, contrary to all the provisions of the law that seek to protect

¹⁸ See “Call for more support for whistle-blowers,” *Business Day*, 20 October 2005, wherein T. Devine, a legal director, says “a whistle-blower” might find himself being forced to choose between being loyal to his co-workers, who might lose their jobs because of the disclosure, and being loyal to the law”.

whistle-blowers.¹⁹ In section one of the Protected Disclosures Act, a protected disclosure by an employee is defined and Mr Setlai's actions fall within the ambit of the definition.

It is this Commission's view that the actions by the Department against Mr Setlai did a great deal of damage to the image of the Department as an institution that seeks to uphold the Government's vision to fight against corruption.²⁰

These actions also impacted negatively on the work of the Commission because after the Setlai incident, other whistle-blowers were no longer willing to take the risk to come forward to expose corruption lest they be victimised too.²¹

¹⁹ See section 3 of the Protected Disclosures Act No. 26 of 2000, which provides as follows:

“3. Employee making protected disclosure not to be subjected to occupational detriment. – No employee may be subjected to any *occupational detriment* by his or her *employer* on account, or partly on account, of having made a *protected disclosure*.

²⁰ The effect of the Department's actions in this regard can also be illustrated by the manner in which civil society has perceived the approach the Department took towards Mr Setlai. According to the *Business Day*, 20 October 2005, reporting on the conference, organised by the “Open Democracy Advice Centre”, it reported as follows:

“A number of people who exposed corruption in the workplace have found themselves at risk of losing their jobs, facing charges of insubordination or being isolated.

These include former Grootvlei prison head Tatolo Setlai, who exposed corruption at the prison by allowing prisoners to film warders engaging in illicit activities.

After the exposure, Setlai was charged with unrelated offences by prison authorities and spent two years on suspension.

The need for protecting whistle-blowers was important because reprisals by employers would not end, said Tom Devine, legal director of US whistle-blower protection organization Government Accountability Project.”

²¹ See the Fifth Interim Report for more detailed findings regarding the Bloemfontein Management Area and the views of the Commission.

It was also clear to members of this Commission that at all times when the Department was conducting its campaign against Mr Setlai, every attempt was made to make it look like it was the Commission that was victimising him. The Commission has always maintained that Mr Setlai showed courage and did good work by exposing corruption and rendering assistance to the Commission against so many odds.

The allegations of victimisation can be corroborated by the various statements numerous people filed.

The role of the SIU investigators was also, rightly or wrongly, a subject of controversy. There were also allegations of irregularities by some of the witnesses against the investigators, who had come to obtain statements from them in preparation for the prosecution of Mr Setlai.²²

For example, Mr Jen-Chih Huang, in his founding affidavit, in paragraph 46, alleged that:

“The question of my release on parole is being used as leverage in an attempt to force me to testify against Mr SETLAI.”

²² See affidavit filed by Marthinus Hermanus van Rooyen in the matter of *Jen-Chih Huang (Applicant) v Provincial Commissioner for Correctional Services (Respondent)*, Orange Free State Provincial Division, Case No. 992/03. Paragraphs 25-27 of the abovementioned affidavit of Mr M. H. van Rooyen, which was deposed in Afrikaans, can be translated as follows:

- “25. On the 16th January 2003, I was requested by Messrs Herman Espach and Peet Nell, members of the SIU, attached to the Jali Commission, and who were tasked with investigating the matter of Mr Setlai, as well as his arrest, regarding the possibility that I would testify against Mr Setlai. I was told that his parole would be more easily processed if he would be prepared to testify against Mr Setlai.
26. The applicant declined to make a statement since he had no knowledge of anything to testify about against Mr Setlai.
27. I am convinced that the Department of Correctional Services had granted the parole of the applicant and the date was set for it, but because of the problems between Mr Damons and Mr Setlai, whose revelations gave impetus to the Jali Commission, they (the Department) wanted to victimise him because he didn't want to testify against Mr Setlai.”

It is clear from the Jen-Chih Huang affidavit, (paragraphs 42-46) that he alleges that there was a degree of duress and undue influence on him to testify against Mr Setlai. This was denied. However, the outcome of the hearing against Mr Setlai, leaves one with more questions.

Not only was Mr Setlai hauled before a criminal court by the investigators, he was also charged internally by the Department. There were nineteen (19) charges brought against Mr Setlai in the internal disciplinary inquiry and some related to the video incident or matters that had been aired directly or indirectly before the Commission in Bloemfontein.²³ Mr Setlai was charged contrary to the promise by Mr Damons, the then Provincial Commissioner of the Free State, that he would neither be charged nor victimised as a whistleblower.

The charges contained in Appendix 'G' to this report were clearly an attempt by members of the Department to get rid of Mr Setlai. Scrutiny of the internal charges shows that they are all charges that could have led to his dismissal. Mr Setlai ended up being found guilty on two (2) minor offences, which resulted in written warnings.²⁴ There was no conviction on the serious corruption, sabotage, gross negligence (or serious maladministration) and bribery charges.

This then goes back to the comments, which the Commission had raised in its interim report, that there was a concerted effort to interfere with the Commission's investigations.²⁵ The attempt by the Department to dispute this

²³ See Appendix 'G' hereto. In particular, charges 12, 13 and 14. Charge 15 may also be related to the video matter. However, further particulars are needed.

²⁴ "Mr Setlai was charged for misconduct on several charges and he pleaded guilty on 2 charges, i.e.

1. DCS disciplinary code paragraph A 2.1 – Negligence in the execution of his duties during the period December 2001 to January 2003, at Grootvlei by allowing prisoner Mr McKenzie to utilise the official telephone contrary to departmental policies.
2. DCS Disciplinary Code paragraph A 5.10 – In that he breached internal security arrangements during the period 2001-2003 at Grootvlei in that he allowed prisoner Mr Robert Wong to receive visits without custodial supervision." (See Head Office Exhibit "L").

²⁵ See the Commission's Fifth Interim Report.

in its memorandum is not convincing. This attitude was not confined to Mr Setlai.

Other Commission witnesses have also alleged victimisation by the Department.²⁶

The Commission took very strong exception to this attitude which was displayed towards its work. If the Department felt that the Commission was not performing its mandate in accordance with the terms of reference, it could simply have requested that the mandate of the Commission be terminated by the State President. It should not have attempted to interfere with the work of the Commission or to try to undermine the Commission's work and to bring the Commission into disrepute by victimising those who assisted it in its task.

The Department's approach to Mr Setlai is totally different from that which they adopted towards the former Provincial Commissioner of the Free State, Mr Damons.

²⁶ Mr Baxter, the Area Manager of Middeldrift, testified before the Commission at Port Elizabeth. After he testified, a number of charges were preferred against him. Such charges were serious charges, which could have led to his dismissal. The Commission is not aware of the circumstances surrounding the said charges or the veracity of the allegations against him. Mr Baxter has also complained about the manner in which the Department dealt with his promotion. Mr Baxter has, however, reported to the Commission that he was being victimised by the Department, because he testified before the Commission. The Commission does not have the full facts regarding the transgressions or the disciplinary inquiry or the aforesaid promotions. In the premises, the Commission would strongly recommend that this matter should be investigated by an independent person or the Public Service Commission to ensure that the question of whether the Department's disciplinary process was being abused to victimise whoever had testified before the Commission does not arise again in future with other investigations or Commissions of Inquiry.

Mr Damons, according to the evidence before the Commission, sought to destroy evidence of corruption, which the whistle-blowers had obtained. This evidence was brought to the attention of the Department. Even though he had committed a serious offence, he was merely redeployed and “placed at the post of DC: Facilities and Security in terms of the restructuring of the Department”²⁷.

The Commission hopes that its comments will be taken seriously within the Department. The role played by the various officials should be investigated and those who were responsible for the wrongdoing should be dealt with accordingly.

7. SIXTH INTERIM REPORT

The Sixth Interim Report dealt with the charges against the former Provincial Commissioner of the Eastern Cape, Mr R.E. Mataka. The report was submitted during December 2002.

The Department’s Disciplinary Code is clear with regard to the fact that all disciplinary inquiries are to be finalised within three (3) months after concluding the investigation. In the Commission’s view, this investigation was finalised by the Commission, at the latest, when the report was submitted during December 2002. Accordingly, the disciplinary inquiry should have been held during or before the end of March 2003. However, notwithstanding the fact that the Department is aware of such provisions of the Disciplinary Code, nothing was done to initiate the disciplinary inquiry until intervention by the Commission during April 2003.

The only conclusion the Commission could arrive at was that there was a lack of willingness on the part of the Department to discipline Mr Mataka.

²⁷ See the Report by the Chief Deputy Commissioner: Central Services dated 31 August 2005. Head Office Exhibit ‘H’.

Even when he was being disciplined, he was afforded a lot of latitude, including being given an opportunity to lead evidence in an appeal and also to be legally represented.²⁸ As a result, the entire disciplinary process was only finalised on or about 30 September 2004.

Eighteen (18) months elapsed between the report being submitted to the Department and him being dismissed. During this time, he continued to earn his full salary although the State could have been saved a substantial sum of money had there been a clear commitment from the Department to discipline him. Instead, the Department, for reasons unknown, decided to conduct a further investigation into this matter. Furthermore, the Department collected evidence from Mr Mataka in which he was trying to exculpate himself from having committed these crimes. This was notwithstanding the fact that he ignored the Commission's subpoena to appear before it, choosing instead to travel out of the Port Elizabeth Magisterial District. This was dealt with in detail in the Commission's report and the Department was well aware of the details.

In the Commission's view, the Department was trying to give him a second chance when no other employee had been given such an opportunity. The impression that was given to the Commission was that every attempt was being made to avoid the disciplinary inquiry. Moreover, every attempt was made to give him preferential treatment so that in the end he would not be disciplined and dismissed from the Department. Obviously, any delay of more than three (3) months after the report was submitted in December 2002, would have given him a defence, namely, that the matter had lapsed.²⁹

This view is confirmed by a press release,³⁰ which sought to indicate that people should not expect that he would be dismissed after the Commission hearings and that everybody should wait for the report before anything could

²⁸ See the report by Mr Paxton in this regard.

²⁹ See the Chapter on Disciplinary Inquiries for an analysis of the time frame clause in the Department's Disciplinary Code.

³⁰ See press statement by Mr Luzuko Jacobs dated 25 October 2002.

be done because Commission reports can, in their view, be either useful or immaterial.

In a press release the Department's Mr Luzuko Jacobs³¹ stated:

...“Our concern notwithstanding, as a department, we have a responsibility to respect the protocols of an investigation of this nature. This is crucial, taking into account that outcomes sometimes cannot be accurately predicted. Evidence led in any investigation can either be useful or immaterial to the nature of the final decision in the adjudication of matters. That is why it might be crucial to resist any temptation to prejudge matters.

When the Commission makes its recommendations formally to the Department, these will be acted upon. So far this approach has worked well. In line with the recommendations of the Commission, suspensions were effected and disciplinary hearings against our members have commenced in KwaZulu-Natal and will start next week in the Free State.

Our commitment is to do all in our power to create Zero Space for corruption in our department. This we are going to do. Our reaction to instances of corruption has no regard for rank and applies equally to all members. Seniority is not an issue, corrupt tendencies are our target. It is important, however, to do things right and to do things properly.”
(Own emphasis).

Notwithstanding this assurance, the disciplinary inquiry only took place more than four (4) months after the report had been submitted and this only happened after the Commission approached the Office of the President to inquire about developments. Thus the above quoted statements about equality of employees were not adhered to.

³¹ See Head Office Exhibit '0'.

The urgency, which the Department showed in respect of the Grootvlei investigations, was no longer necessary in this matter. Even though the charges were as serious as the Grootvlei charges, if not more serious. There is a view amongst junior members that the Department is only keen to discipline the foot soldiers and not the senior officials.

It is this approach to discipline that concerns the Commission about the Department's commitment to root out corrupt officials from its ranks. Whilst certain people within the Department might be committed, it is clear that there are still certain officials who will try to frustrate whatever is being done to discipline certain individuals, in particular those who happen to be powerful within the union movement or the Department.

The Provincial Commissioner's general behaviour and attitude was inconsistent with certain aspects of the law, Public Service Regulations, Public Service Code of Conduct and Treasury Instructions. He was not a good example to the other employees. Accordingly, the senior officials within the Department should have disciplined him speedily and make an example of him. A speedy disciplinary inquiry would have served as a strong message to the personnel corps that dishonesty and fraudulent conduct will not be tolerated by the Department.

The recommendations that are made later in this report with regard to disciplinary inquiries should be seen in the context of these observations.

8. SEVENTH INTERIM REPORT

The matter has been dealt with and finalised so the Commission has no comments to make with regard to the disciplinary inquiry as the Commission has not received any evidence in that regard.

9. EIGHTH INTERIM REPORT

The Eighth, Ninth, Tenth and Eleventh Interim Reports were submitted to the Department at the same time, during February 2004. As at the date of writing, namely September 2005, it is clear from the report, which the Commission received from the Department, that the Department had not attended to the recommendations contained in these reports timeously, if at all. The Commission will deal with these reports individually.

With regard to the Eighth Interim Report, the Department has advised the Commission that it is investigating these matters further. The report had three (3) chapters, which dealt with three (3) different transgressions by various members. Chapter One dealt with "Irregular Contact visits". Chapter Two dealt with "Illicit Relationships". Chapter Three dealt with "Hospital Malpractices".

The Commission is of the view that very little has been done since the report was submitted for the following reasons:

9.1 Chapter One

This chapter deals with irregular contact visits, which were expressly authorised by members of the Department at the Leeuwkop Management Area. These members granted special privileges to prisoners incarcerated in the Maximum Security Prison (Block C). The said prisoners were not entitled to the said privileges. The special privileges afforded to these prisoners included, amongst others, the opportunity to have contact visits with their wives and/or girlfriends, whilst these prisoners did not belong to the 'A' group of prisoners. In some of these contact visits, they were given an opportunity to have sexual intercourse with their aforesaid partners.

The Commission recommended that Messrs Sithole, Maseko Matikinca and Rakgotho should be charged in terms of the Internal Disciplinary Procedure.

Furthermore, that Messrs Sithole and Matikinca also to be charged in terms of the Correctional Services Act 111 of 1998. Mr Rakgotho was also to be charged criminally in terms of the Corruption Act 94 of 1992.

The Department's response has been as follows:

EIGHTH INTERIM REPORT : LEEUWKOP

NO.	OFFICIAL	TRANSGRESSION	SANCTION	COMMENT
1	Mr Sithole	Smuggling	---	Witness unco-operative. Testified <i>in camera</i> at Commission
2	Mr Maseko	Unsatisfactory work	Warning	
3	Mr Matikinca	Corruption	---	Witness unco-operative. Testified <i>in camera</i> at Commission
4	Mr Rakgotho	Bribery		

Firstly, dealing with Mr Sithole, the Commission fails to understand the relevance of the fact that the witness testified *in camera* at the Commission. The witness who testified *in camera* only testified in the absence of members of the public. The people who were implicated were present at all times. One witness who testified *in camera* was Mr Mputhi's wife or girlfriend. There were other witnesses who testified regarding these contact visits who were prisoners at Leeuwkop Prison, namely, Messrs Binca, Mills and Mputhi. Mrs Mills (Senior) also testified about the fact that she unlawfully brought a radio into prison and she had to pay a warder Fifty Rand (R50,00) to do so.

The evidence of transgressions in regard to the aforesaid chapter is overwhelming. The testifying *in camera* has nothing to do with the evidence, which is before the Department and the people who transgressed the departmental rules should have been accordingly disciplined.

Secondly, the Department does not say what it did about the criminal recommendations. It is clear that to date no criminal charges have been laid.

The evidence of bribery against Mr Rakgotho is clear and cogent. There is documentary evidence to corroborate Mr Mputhi's evidence insofar as the payment of a Three Thousand Rand (R3000,00) bribe is concerned. The Department does not give an explanation as to why Mr Rakgotho has not been prosecuted in this regard, both criminally and in terms of the internal disciplinary code.

9.2 Chapter Two

This chapter deals with the illicit relationships between a warder and a prisoner incarcerated at Leeuwkop. In this matter the warder purchased a motor vehicle from a prisoner, notwithstanding the clear provisions of the Correctional Services Act, which stipulates that warders should not have any pecuniary relations with prisoners. The provisions of the Act are also contained in the Departmental regulations. The Commission's recommendations were as follows:

- (a) Mr Shongwe should be suspended immediately from his position in the Institutional Committee to another position so that he will not have any contact with prisoners;
- (b) Mr Shongwe should be charged for contravening provisions of section 118 (2) (b) of the Correctional Services Act 111 of 1998; and
- (c) Mr Shongwe should be charged internally in terms of clause 4.7 (Column A) of the Disciplinary Code for having dealings with a prisoner or a relative of a prisoner.

The Department's report insofar as Mr Shongwe is concerned stipulates that:

EIGHTH INTERIM REPORT : LEEUWKOP

NO.	OFFICIAL	TRANSGRESSION	SANCTION	COMMENT
1	Mr Shongwe	Section 118 Act 111/1998	Final written warning	

It is clear that the Department ignored the recommendations of the Commission. The Department in its own report indicated that Mr Shongwe was supposed to be charged in terms of the Correctional Services Act. However, he was only given a written warning in an internal disciplinary inquiry. The Department does not say what it did with regard to the criminal charges against Mr Shongwe, who committed a criminal offence in terms of the Act. It is clear that all criminal transgressions are being ignored.

This was a serious offence, especially because Mr Shongwe, as a member of the Institutional Committee, is also in charge of prisoner's discipline. He, in fact, prosecutes in their tribunal.

9.3 Chapter Three

This chapter deals with hospital malpractices at the Leeuwkop Management Area. Sentenced prisoners, who were totally untrained or unsupervised, were made to perform medical duties, which are reserved for qualified nurses and medical doctors. The said malpractice is not only in contravention of the Correctional Services Act and Regulations, but also in contravention of the Health Professions Act No 56 of 1974, which reserves the aforesaid duties for qualified medical personnel. This matter was reported and a number of charges were recommended against Sister Molobi. There were also recommendations that proceedings be instituted against Messrs Nyambi,

Shongwe and Bokweni, for allowing a prisoner, Mr Masopha to perform nursing functions on a Mr Dinokwe.

The Department has stated that it is still investigating cases against Messrs Nyambi and Bokweni.

Firstly, there is no mention as to why the Department is not proceeding against Mr Shongwe. The Commission recommended that he should be charged as well.

Secondly, the Commission fails to understand what is being investigated because there was overwhelming evidence against them. The Commission had finished its own investigation and it was clear that there was strong evidence that supports the contravention of various provisions.

Thirdly, the witnesses are mostly prisoners serving long sentences. It is not clear why all these matters need to be investigated as the statements, Exhibits, and the transcripts are readily available. It is the Commission's view that this is yet again a reaction to its request for a progress report on the disciplinary inquiries, when very little had been done.

The Commission also recommended that proceedings should be instituted against Messrs Kekane, Phiyega, Mduzulwane and Kotze. The aforesaid were to be charged for allowing the prisoner, Mr Masopha to treat them as patients for various ailments in contravention of the B-Orders of the Department. This was also in contravention of the Departmental Rules and Regulations.

The Department's response in this regard is that the matters are still being investigated. The Commission fails to understand what is still being investigated after more than a year when the evidence was all before the Department and the witness, Mr Masopha had testified and was always willing to testify in this regard.

The Commission also recommended that proceedings should be instituted against Sister Biyela and Messrs. Gama, Dikotsi, Buthelezi, Biyela, as well as Mrs Mhlongo and Sister Britz. The aforesaid officials are no longer in the employ of Correctional Services. As the Department will no longer be able to discipline the aforesaid nurses, it was recommended that the Department should report these members to the South African Nursing Council, so that proceedings could be instituted by them, wherever the nurses might be.

According to the South African Nursing Council, these matters were reported to them on 11 May 2004. A letter was received from Mr K.G. Mapotse, Professional Practice Section for Registrar and Chief Executive Officer, South African Nursing Council, dated 15 October 2005, (received by fax on 15 September 2005),³² which states:

“The Jali commission top secret report was forwarded to the Council on 11 May 2004 and went to Preliminary Investigation Committee in June 2004 which resolved to seek further information in the form of duty rosters, medical file and proper identification of personnel from the department of Correctional Services Legal Division in Pretoria.

The Department’s legal services indicated to the Council that it will take some time to gather all the documents required because they are housed in different division in the Department and finally they managed to provide us with all required documents by July 2005 and the matter is scheduled to be discussed on 27 to 28 September 2005, for final deliberation by Preliminary Investigation Committee and your office will be notified about their decision.”

It is evident that the Department did comply with the recommendation in respect of these nurses, who were no longer employed by the Department and also in respect of Sister Molobi.

³² See Head Office Exhibit ‘H(1)’.

If one takes into account the cumulative effect of everything, which has been done since the aforesaid reports were submitted, it is clear that the Department has done very little to discipline these members. People who have committed criminal offences are still in the Department and are being protected by senior departmental officials who do not pursue the charges. In the end, they will raise the defence that the proceedings have lapsed in terms of Clause 7.4 of the Disciplinary Code.

The investigations referred to are merely going to delay matters and are similar to the delays, which are referred to in the section dealing with the Sixth Interim Report.

10. NINTH INTERIM REPORT

The comments received from the Department about the Ninth Interim Report once again indicated the problems with disciplinary inquiries. They are not confined to the hearings of people but also to the investigations. The Commission had collected evidence regarding the assaults and presented it to the Department for it to prosecute the implicated members. However, the comments, which the Commission received from the Department, were that there was lack of evidence against all the people who were implicated. Furthermore, the complainant was also not co-operative.

It needs to be stated that the Commission not only recommended that those warders who assaulted the prisoner be charged, but that the warders who were blatantly negligent in guarding the prisoner at the hospital also be charged. (Evidence was submitted to the Commission that the prisoner received a bolt cutter and private clothing from a friend whilst he was being guarded by a certain warder). Given the Department's commitment to safe custody of prisoners, the Commission is surprised that no disciplinary action was taken against the warder involved.

The Commission has to report that it not only dealt with a matter of assault in its Ninth Interim Report. It also dealt with a matter of smuggling in scheduled medicines; another matter wherein a warder, in a fraudulent manner, received monies from prisoners and their relatives on thirteen (13) occasions, arranged unauthorised visits for a fee, smuggled goods into the prison and asked a prisoner for money for assisting her with an appeal. The fourth chapter of the said report deals with the corruption in granting privileges (illegal granting of visits by various members).

The evidence in all these matters not only consists of complaints from witnesses but is corroborated by documentary and real evidence.

The Commission is therefore surprised by the Department's standard response of "a lack of evidence". Any legally qualified person would know that the burden of proof in disciplinary matters is not beyond a reasonable doubt, but on a balance of probabilities. The evidence against the warders was cogent, truthful and most certainly would pass the civil burden of proof with ease. Even the comment of the Department in the case of assault, shows that the recommendations of the Commission in its Ninth Interim Report were considered irrelevant. The Commission recommended that the record of the proceedings implicating the warders be sent to the Gauteng Director of Public Prosecutions for consideration of instituting criminal charges against them. The complainant could at all times be subpoenaed in terms of section 205 of the Criminal Procedure Act, should he not be spontaneous in laying a charge.

In not pursuing what was recommended in the assault matter, the Department shows a lack of commitment to take action against members who assault a prisoner and disregard his basic right to be detained in a humane manner.³³

³³ See chapter on Treatment of Prisoners for more details.

11. TENTH INTERIM REPORT

The comment, which has been given by the Department with regard to the five (5) people who were to be charged according to this report, is as follows:

*“Recommendations were made as to who should be disciplined and who should be exonerated in order to testify against the other implicated members. Matter still under discussion. Time frame is also a particular problem”.*³⁴

Clearly, this is a confirmation of the observation, which was made by the Commission earlier on, that nothing was done about these matters until there was a query from the Commission. The investigation was concluded at the time that the Commission filed its report in February 2003. Those officials who were supposed to prosecute the implicated members should have been aware of the fact that unless they started the prosecutions within three (3) months of the report being filed there would be problems with the time frames.

This issue has been highlighted to the Department by the Commission on a number of occasions. Once again, this is evidence of disciplinary inquiries not being handled properly by the Department and of people who should be prosecuted being left untouched.

This matter relates to another former Provincial Commissioner, who has since resigned. The recommendation that was made was that he should be charged criminally for his actions. From the report received from the Department, it is clear that nothing has been done. The fact that he resigned does not pose a problem to the Department laying criminal charges if there was a transgression. At the time of submitting the report he had already resigned and the report brought to the attention of the Department the fact that the only

³⁴ See Head Office Exhibit ‘H’.

action, which the Department could take against him, was to lay criminal charges.³⁵

Accordingly, there has been a degree of negligence on the part of the Department officials who are supposed to handle these matters.

In the circumstances, the Commission strongly recommends that the Department conduct a thorough investigation as to what progress was made with regard to these reports. Those who were negligent in doing their work with regard to the Eighth to the Eleventh Interim Reports should be charged with negligence.

12. ELEVENTH INTERIM REPORT

The matter has been dealt with and finalised so the Commission has no comments to make on the disciplinary inquiry as the Commission has not received any evidence in that regard.

13. CONCLUDING REMARKS

Evidently the Department is having difficulty in complying with the recommendations emanating from the various investigations. It is this state of affairs that needs to be attended to by senior officials as a matter of urgency, as it reinforces the perception that members of the Department disregard any form of authority.

Furthermore, it confirms the view, which the Commission has come across in the prisons, that the members of the Department of Correctional Services believe that no outsider can tell them how to run the prisons if that particular

³⁵ See paragraph 4 of the Tenth Interim Report at page 42.

person has never worked in a prison. This attitude of the members in the Department is definitely self-defeating.

This is not a new phenomenon. The Department's resistance to the opinions of outsiders is well documented. See for example the dissertation of Chris Gifford, "Out of Step", University of Leicester, February 1997, page 35:

"While the Minister blew cold about the Transformation Forum, the Department's response was not much more than luke-warm. In general, the 'interference' of the Forum was resented. While on the one hand the Department wanted the legitimacy that the representative Forum gave it, particularly with reference to its dubious past, on the other its centralized leadership was not accustomed to referring ideas to, or negotiating with 'outsiders'. As a result, the Department to a large extent kept the key decisions to itself". (Own emphasis.)

Also see the evidence of Mr Knoesen³⁶ before the Commission who explained that help was offered to the Department to address fears of homophobia free of charge but that the Department was not keen to accept such offers.

This is a sad state of affairs because it is this very attitude that discourages any input from people who might be experts in other areas, which would be of assistance to the Department. The Department cannot operate in isolation. It is not an island but an integral part of the South African society. The manner in which it conducts its affairs has a bearing on the lives of all South Africans, who expect the Department to consult and interact with experts and relevant stakeholders to ensure that correctional facilities in our country are competently run so that they compare with the best in the world.

³⁶ Mr Knoesen, Chairperson of the Gay and Lesbian Equality Project, testified before the Commission in Pretoria. See proceedings of Louis Karp (a.k.a. Louisa Karp) referred to in the Chapter on Sexual Violence in this report.