IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE DIVISION, CAPE TOWN)

Case number: 24227/16

In the matter between:

SONKE GENDER JUSTICE NPC **Applicant**

and

PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA **First Respondent**

MINISTER OF JUSTICE AND

CORRECTIONAL SERVICES **Second Respondent**

NATIONAL COMMISSIONER OF

CORRECTIONAL SERVICES **Third Respondent**

INSPECTING JUDGE FOR

CORRECTIONAL SERVICES **Fourth Respondent**

MINISTER OF FINANCE **Fifth Respondent**

MINISTER OF PUBLIC SERVICE AND

ADMINISTRATION **Sixth Respondent**

Date: 5 September 2019

JUDGMENT

BOQWANA, J

Introduction

[1] The applicant, a non-governmental organisation which plays an active role in prison related work in South Africa's correctional centres, including research, engagements with correctional officials, inmates and the Judicial Inspectorate of Correctional Services ("JICS"/"the Inspectorate"), has brought an application challenging the constitutionality of Chapters IX and X of the Correctional Services Act 111of 1998 ("the Act"), which deal with the establishment of JICS, its structure and its functionality, and the Independent Correctional Centre Visitors ("ICCV") respectively. In its papers, the applicant characterises the attack on the respective Chapters of the Act as a "broad challenge", where a declaratory order is sought that these two Chapters are, in their entirety, invalid.

[2] In the alternative, the applicant seeks an order declaring that sections 85 (2), 90 (1), 88A (1) (b), 88A (2), 88A (4), and 91 of the Act are inconsistent with the Constitution[1] and accordingly invalid. This is described as a narrow challenge.

[3] During oral argument, the applicant's counsel was constrained to abandon the attack on Chapter X in reply, as it became clear, after submissions made by the second and third respondents' counsel, that no constitutional inconsistency could be identified from each of the sections contained in that Chapter upon their careful examination. Accordingly, there seems to be no escaping the fact that an analysis of the text of each of the remaining impugned sections contained in Chapter IX, as

[1] Constitution of the Republic of South Africa, 1996 (Act 108 of 1996).

against the infringed constitutional requirements, is required. This effectively leads us to the narrow challenge, as there is no point in analysing the text in sections, even in that Chapter, that are not being challenged as unconstitutional.

[4] In summary, the applicant's case is that the State is obliged, under section 7 (2) of the Constitution, to create a prison inspectorate with sufficient independence to enable it to function effectively. It alleges that JICS, as the primary institution tasked with "monitoring and overseeing" South Africa's correctional system, as presently constituted, lacks the necessary structural and operational independence.

[5] The initial challenge by the applicant also focused on the mandate of the JICS, as described in the Act, as being too limited, in that the Inspectorate lacked legal powers required for it to discharge its functions effectively and maintain its credibility. Indeed, a good portion of the applicant's founding affidavit is devoted to this allegation. This attack, too, is no longer being pursued; rightly so, as this Court would impermissibly interfere with a scope chosen by the legislature, in which JICS has to operate as outlined in the section of the Act dealing with its object, if it were to do what the applicant had initially sought it to do in its broad challenge. The issue now seems to be pointed to the question whether the impugned sections, appearing in Chapter IX, are inconsistent with the Constitution and therefore should be struck for their invalidity.

[6] The application had been opposed by the Minister of Justice and Correctional Services ("the Minister") and the National Commissioner of Correctional Services ("the National Commissioner"), who are second and third respondents respectively, throughout. Surprisingly, very little had come from the President by way of comprehensive opposing papers before the hearing of the matter; however, brief submissions were made in opposition to the application during oral argument, where the President made common cause with second and third respondents. The Inspecting Judge abides by the decision of the Court, but has, together with the previous acting Chief Executive Officer of JICS, as well as the current Chief Executive Officer ("the CEO"), filed explanatory affidavits. Brief submissions were made in Court on behalf of the Inspecting Judge. I was

advised by the State Attorney that the sixth respondent abides by the decision of the Court. The fifth respondent did not appear to take part in these proceedings at all.

[7] My attention was drawn to a further supplementary affidavit deposed to by Mr Vickash Misser, the current CEO of JICS, apprising me of the ongoing discussions between JICS and the Ministry of Correctional Services, relating to a consideration of a Business Case for the possible restructuring of JICS aimed at achieving efficiency within the institution, pursuant to a previous postponement by the parties to allow for this process. From the discussions in Court I gathered from the respondents' perspective that these discussions ought to be given space to continue. The applicant, however, was of the view that that process had been ongoing for a long time and was moving at a snails' pace. According to it the matter had been postponed previously to afford the respondents time to come up with a Business Case, which they had failed to do. The applicant therefore pressed for the matter to be heard and adjudicated upon.

The Formation of JICS

[8] JICS was formally established with effect from 1 June 1998.[2] The purpose of the current Act, when it was introduced, was to reform legislation governing correctional services, including establishing an Inspectorate, aimed at ensuring a correctional system that is regulated in a manner giving effect to the Bill of Rights. So there was a switch from an old system to a new constitutional order, which would "*embrace the principles of accountability, responsiveness and open governance within a human rights framework*".[3]

[9] The vision of JICS, in the most recent 2017/2018 Annual Report, is outlined as "[*t*]*o uphold the human dignity of inmates through independent, proactive, and responsive oversight*" and its mission is "[*to*] *impartially inspect, investigate, report and make recommendations on the conditions of correctional centres and*

[2] *Annual Report 2014/2015, Republic of South Africa, Judicial Inspectorate for Correctional Services: Treatment of inmates and conditions in Correctional Centres,* at page 16

[3] Id fn 2. Also see: *A Review of Judicial Inspectorate of Prisons of South Africa, Civil Society Prison Reform Initiative Research Paper Series* No 7, May 2004 by Saras Jagwanth

treatment of inmates in order to ensure the protection of the human rights of inmates."[4]

JICS' Statutory Framework

[10] JICS as an institution is created by the Act as an independent office under the control of the Inspecting Judge.[5] Its object "*is to facilitate the inspection of correctional centres in order that the Inspecting Judge may report on the treatment of inmates in correctional centres and on conditions in correctional centres*."[6]

[11] The Inspecting Judge is appointed from the ranks of either judges in active service, who continue to hold the position as such during the period of active service or until he or she requests to be released to resume judicial duties, or amongst retired judges. He or she continues to receive the salary, allowances, benefits and privileges attached to the office of a judge. Should the Inspecting Judge be a judge retired from service in terms of section 3 of the Judges' Remuneration and Conditions of Employment Act 88 of 1989, which has since been repealed by the Judges' Remuneration and Conditions of Employment Act 47 of 2001 ("the 2001 JRCE Act"), any period of service as Inspecting Judge shall be reckoned as service performed in terms of section 7 (1) of the 2001 JRCE Act and the provisions of subsections (2) and (5) thereof shall apply (these being the equivalents of subsections (3) and (6) of the 1989 JRCE Act). If the Inspecting Judge is retired from active service in terms of what used to be sections 3 (1) (b) or (d) of the 1989 JRCE Act, the remuneration applicable to him or her shall be determined by the Minister of Justice or agreed with the prospective appointee. Since the 1989 JRCE Act has been repealed by the 2001 JRCE Act, the content of sections 3 (1) (b) and (d) of the old Act, is reflected in sections 3 (1) (c), and 3 (2) (b) and (d) of the 2001 JRCE Act."[7] The current incumbent in the office is the

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[4] *JICS Annual Report* 2017/2018, at page 18, http://pmg-assets.s3-website-eu-west-1.amazonaws.com/JICS_Annual_Report_1718_Final.pdf

[5] Section 85 (1) of the Act

[6] Section 85 (2) of the Act

[7] Sections 86 and 88 of the Act read as follows:

"***86 Inspecting Judge***

(1) The President must appoint the Inspecting Judge who must be-

retired Constitutional Court Justice Van der Westhuizen ("the Inspecting Judge"). These sections are not quibbled with by the applicant.

[12] The Act was amended in 2008 to insert section 88A, which introduced the office of a CEO. In terms of section 88A (1) the Inspecting Judge must identify a suitably qualified and experienced person as a CEO who *"(a) is responsible for all administrative, financial and clerical functions of the Judicial Inspectorate"* and *"(b) is accountable to the National Commissioner for all the monies received by the Judicial Inspectorate"* and *"(c) is under control and authority of the Inspecting Judge"*.

[13] Section 88A (2) provides that "[*t*]*he person contemplated in subsection (1) must be appointed by the National Commissioner"*. In terms of section 88A (3) the appointment and other conditions of service, including the salary and allowances of the CEO, are regulated by the Public Service Act, 103 of 1994 ("the Public Service Act"). Section 88A (4) stipulates that "[*a*]*ny matters relating to misconduct and incapacity of the Chief Executive Officer must be referred to the National Commissioner by the Inspecting Judge."* The sections underlined are listed under those impugned by the applicant.

[14] Section 89 deals with the appointment of staff and assistants. This section requires the CEO to appoint staff as may be necessary to enable the Inspectorate to perform its functions in terms of the Act; the staff component must be established

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(a) a judge of the High Court who is in active service as defined in section 1 (1) of the Judges' Remuneration and Conditions of Employment Act, 1989 (Act 88 of 1989); or

(b) a judge who has been discharged from active service in terms of section 3 of the said Act.

(2) An Inspecting Judge in active service must be seconded from the Supreme Court of Appeal or the High Court and holds office as such during the period of active service or until the Inspecting Judge requests to be released to resume judicial duties.

(3) The Inspecting Judge continues to receive the salary, allowances, benefits and privileges attached to the office of a judge."

"88 Conditions of service of retired judges

(1) *Should the Inspecting Judge or an Assistant be a judge retired from active service in terms of section 3 (1) (a) of the Judges' Remuneration and Conditions of Employment Act, 1989 (Act 88 of 1989), any period of service as Inspecting Judge or an Assistant shall be reckoned as service performed in terms of section 7 (1) of the said Act and the provisions of subsections (3) and (6) thereof shall apply to such appointment.*

(2) Should the appointee be a judge retired from active service in terms of section 3 (1) (b), (c) or (d) of the said Act, the remuneration payable to such appointee shall be determined by the Minister of Justice or agreed with the prospective appointee."

in accordance with the Public Service Act; and the conditions of service, including salaries and allowances of such staff, are to be regulated in terms of the Public Service Act. The CEO must appoint one or more persons with legal, medical, penological, or other, expertise as assistants, and when required by the Inspecting Judge, such must assist the Inspecting Judge with any specialised aspect of inspection or investigation. Such persons must be appointed for a fixed period, or until the completion of a specific task. Their remuneration is determined in accordance with the Public Service Act and they must perform such functions as authorised and directed by the Inspecting Judge.

[15] The Inspecting Judge must appoint, from within this complement, inspectors and such other staff, including a secretary, as required. Such employees are deemed, for administrative purposes, to be correctional officials seconded to the Judicial Inspectorate, but are under the control and authority of the Inspecting Judge. The Inspecting Judge has the same powers and duties as the National Commissioner for the purposes of administrative management and control of employees under his or her authority, and may delegate any such power, and assign any such duty, to an employee of a post level of Deputy-Director or higher. The conditions of service of such employees are regulated by the Act, but the salaries and allowances of such employees are regulated by the Public Service Act. There is no specific quarrel with these provisions.

[16] Section 90 deals with the powers, functions and duties of the Inspecting Judge. In terms of this section the Inspecting Judge inspects, or arranges for the inspection of, correctional centres, in order to report on the treatment of inmates, and on conditions at the centres, and any corrupt or dishonest practices at such centres. He may only receive and deal with complaints submitted by the National Council, the Minister, the Commissioner, a Visitors' Committee and, in cases of urgency, an Independent Prison Visitor and may also, of his or her own volition, deal with any complaint. Importantly, the Inspecting Judge must submit a report on each inspection to the Minister, and he or she must also submit an annual report to the President and the Minister. The report must be tabled in Parliament by the

Minister. For the purpose of conducting an investigation, the Inspecting Judge may make any enquiry and hold hearings. At a hearing, the provisions of the Commissions Act, 1947 (Act 8 of 1947), apply as if the Inspecting Judge and the secretary of the Inspectorate were the chairperson and secretary of a Commission, respectively. The Inspecting Judge may delegate any of his or her functions to inspectors, except where a hearing is to be conducted by the Inspecting Judge. He or she may make such rules, not inconsistent with the Act, as are considered necessary or expedient for the efficient functioning of the Inspectorate. The Inspecting Judge must perform any other function ascribed to him or her in the Act.

[17] One of the strongly contested provisions which forms the basis, amongst others, of the applicant's complaint, is section 91, which provides that the Department of Correctional Services ("the Department") is responsible for all expenses of the Inspectorate.

[18] Chapter X, which consists of sections 92 to 94, deals with ICCVs, who are appointed at every correctional centre. They are tasked with visiting correctional centres, and receiving, recording and discussing complaints with Heads of Correctional Centres, or their subordinates. The Heads of Correctional Centres must assist the ICCVs in the performance of their duties. The ICCVs must submit quarterly reports to the Inspecting Judge on, for example, the duration of visits, the number and nature of complaints dealt with and the number and nature of the complaints referred to the Visitors' Committee. A Visitors' Committee is a Committee consisting of ICCVs that may be established by the Inspecting Judge for a particular area. Its functions are to (a) consider unresolved complaints with a view to their resolution, (b) submit to the Inspecting Judge those complaints which the Committee cannot resolve, (c) organise a schedule of visits, (d) extend and promote the community's interest and involvement in correctional matters, and (e) submit minutes of meetings to the Inspecting Judge.

Issue

[19] Central to the applicant's case is that, because of the current structure of the Act, JICS is in material respects beholden, or susceptible to being beholden, to the Department. It cites section 91, which provides that "*the Department is responsible for all expenses of the Judicial Inspectorate*" as an example of such intrusion by the Department. According to it, this is undesirable, as it may cause JICS' staff not to act solely to protect inmates' rights, but to serve or protect the "interests" of the very Department that JICS ought to monitor and oversee, and that the staff would therefore not be in a position where they would be able to perform their functions without fear, favour or prejudice. Furthermore, it stifles JICS' ability to deliver on its mandate effectively, as it depends on the Department for its budget, staffing needs and other relevant expenses. Also, the fact that the National Commissioner appoints the CEO, and handles disciplinary issues in relation to the CEO, referred to him by the Inspecting Judge as provided for in the Act, takes away the independence of JICS as a body separate from the Department.[8] It raises three forms of independence, namely, financial independence, operational independence and perceived independence as forms that JICS ought to be clothed with.

[20] As indicated previously, the applicant premises its constitutional challenge on section 7 (2) of the Constitution, which it alleges obliges the State to create a prison inspectorate that is sufficiently independent to enable it to function effectively – in line with the Constitution and its international obligations. The applicants rely, in the main, on the judgment in *Glenister*[9] for this proposition.

[21] According to the second and third respondents this argument is incorrect, because, firstly, the Court's findings in *Glenister* were premised upon the provisions of the South African Police Service Act, No 68 of 1995 ("SAPS Act"), which regulates the establishment of the Directorate of Priority Crime Investigation ("the DPCI"), which was newly created at the time, replacing the

[8] Sections 88A (2) and 88A (4) of the Act.
[9] *Glenister v President of the Republic of South Africa and Others* 2011 (3) SA 347 (CC)

Directorate of Special Operations ("the DSO"). The respective respondents argue that the findings in *Glenister* were directed at the lack of job security which the DPCI members were affected by, which, according to them, is in sharp contrast to the position of JICS, in particular, the job security of the Inspecting Judge, the CEO and the rest of JICS' staff. Secondly, that the applicant's contentions are based on conjecture rather than factual evidence. Thirdly, the second and third respondents further contend, it is incorrect to suggest that JICS is dependent on the Department for its funding. JICS sources its finances from National Treasury via the Department's branch finance, and the Department may not tamper with or utilise these funds. JICS's dependence on the Department for administrative support cannot be regarded as inimical to its independence. In any event, a process of reviewing JICS' organisational structure is currently underway.

Discussion

[22] The importance of JICS in the correctional services sphere cannot be understated. It serves a crucial function, focusing on facilitating inspection and reporting on the vulnerable (the inmates), how they are treated and the conditions they are held in. Referring to inmates, who have offended society, as the vulnerable, sounds like an oxymoron. The vulnerability lies in the fact that they, for the most part, are at the mercy of others as to their living conditions and treatment or survival, once incarcerated. Whilst they have given up their right to liberty, other rights, including the right to human dignity, are still protected by the Constitution. It is therefore imperative to have a body, independent from that which enforces correctional measures or incarceration, to "watch over" or report on the correctional enforcer's conducting of services, so as to give effect to the Bill of Rights. Working in collaboration with the Department to achieve the constitutional goals, in my view, should not in itself be seen to fetter the independence of JICS. The question to be asked is whether the statute restrains that independence.

[23] In *Glenister* the Court observed that creating a separate corruption-fighting unit within the SAPS was not in itself unconstitutional, and thus the DPCI legislation could not be invalidated on that ground alone. Since the applicant, in this case, sources its argument in the Constitution, questions that need to be asked, as in *Glenister*, are (a) whether the Constitution imposes an obligation on the State to establish and maintain an independent body of the kind proposed by the applicant; and (b) if so, whether JICS, which the Act has established, meets the requirements of independence. In *Glenister*, in answer to these questions, the Court found that the Constitution itself imposed the obligation on the State for an anti-corruption unit to be established, that the requirement of independence had not been met, and consequently the impugned legislation did not pass constitutional muster. I propose to follow the same approach in asking these questions.

Is there a constitutional obligation to establish and maintain an independent inspectorate?

[24] The Constitution does not expressly state that an independent inspectorate must be established; neither does it specify what characteristics such a body would encompass, if established. Indeed, it differs from Chapter 9 institutions, and even the Independent Police Investigative Directorate ("the IPID"), in this respect. As articulated by the Inspecting Judge in his affidavit, it is more akin to the IPID than the Chapter 9 institutions, though, the IPID is established in terms of section 206 (6) of the Constitution.

[25] The legislature's aim, in establishing a constitutionally compliant correctional system, is evident in the prelude, preamble and the objects of the Act. The Act was clearly geared at changing the system that existed prior to the new constitutional era. Its objects include giving effect to the Bill of Rights. It says so, in so many words, in its Preamble. The Act also states, amongst its functions, that it is there to provide for "*the custody of all offenders under conditions of human dignity*" and it introduces the Judicial Inspectorate under the same outlook. The change in the system, to bring it in line with the values of the Constitution, chief

amongst those being human dignity, is also apparent from the language in the general note of the Act, which is more humane in expression than previously. For instance words like "*prison*", "*sentenced prisoner*", "*imprisonment*" and "*prisoner*" are substituted with "*correctional centres*", "*sentenced offender*", "*incarcerated*" and "*offender*" respectively.[10] This speaks to the general tone of the Act, which aligns itself with treating all human beings with respect and dignity, regardless of who they are and their background.

[26] The purpose of the correctional system is described in section 2 of the Act, as being "*to contribute to maintaining and protecting a just, peaceful and safe society*" by not only *"enforcing sentences of the courts"*, but *"detaining all inmates in safe custody whilst ensuring their human dignity; and promoting the social responsibility and human development of all sentenced offenders."* Section 10 of the Constitution, *"[e]veryone has inherent dignity and the right to have their dignity respected and protected"*, underlies the correctional system. The ethos of human dignity as a constitutional value, appears to be engrained in the philosophy of the Act. To ensure that the constitutional values are maintained, JICS plays a crucial role, amongst other institutions created by the Act, with its objects being to facilitate the inspection of correctional centres in order that the Inspecting Judge may report on the treatment of inmates in correctional centres and on conditions in correctional centres.

[27] The applicant contends that the State's obligation to create an inspectorate that is lawfully, appropriately and genuinely independent is implicit in the Constitution, when viewed in light of the Republic's international obligations. The status of international agreements, as derived from section 231 of the Constitution, has been dealt with in a number of cases, notably *Glenister*[11], on which the applicant relies. I propose not to repeat it, save to state, firstly, that section 231 of the Constitution appropriates the negotiating and signing of all international

[10]Section 1 of the Act.
[11] Id fn 9 at para 88

agreements to the national executive.[12] Such an international agreement only binds the Republic once it has been approved by resolution of Parliament,[13] except if it is an international agreement of a technical, administrative or executive nature or that does not require ratification or accession, in which case such an agreement binds the Republic without a need for approval by Parliament.[14] Even if an international agreement has been approved by Parliament, it does not automatically become law in the Republic unless it is enacted into law by national legislation (i.e. domesticated).[15] A self-executing provision of an international agreement that has been approved by Parliament is law in the Republic, provided it is not inconsistent with the Constitution or an Act of Parliament.

[28] The approval of an international agreement in terms of section 231 (2), by Parliament, tells the world that South Africa undertakes to comply with international agreements as between it and other member states at an international level.[16] The use of the word "binds" in section 231 (2) connotes a legal obligation that South Africa has in the international sphere. Thus, although an international agreement may not have been domesticated, it binds South Africa at an international level.

[29] The Court in *Glenister* emphasised the importance of section 39 (1) (b) of the Constitution, which requires the Courts, when interpreting the Bill of Rights, to consider international law: "[*t*]*hat the Republic is bound under international law to create an anti-corruption unit with appropriate independence is of the foremost interpretive significance in determining whether the State has fulfilled its duty to respect, protect, promote, and fulfil the rights in the Bill of Rights, as s 7 (2) requires*."[17] Furthermore, in terms of section 233 of the Constitution, when interpreting any legislation, every Court must prefer any reasonable interpretation

[12] Section 231 (1)
[13] Section 231 (2)
[14] Section 231 (3)
[15] Section 231 (4)
[16] Id fn 9 at paras 91 and 182
[17] Id fn 9 at para 194

of the legislation that is consistent with international law, over any alternative interpretation that is inconsistent with international law.

[30] It also observed that taking international law into account, whether section 7(2) of the Constitution imposed international obligations on the State to establish an anti-corruption unit was not *"to manufacture or create constitutional obligations. It is to respect the careful way in which the Constitution itself creates concordance and unity between the Republic's external obligations under international law, and their domestic legal impact.*"[18]

[31] The applicant submits that, although the Constitution does not explicitly refer to the establishment of a prison inspectorate, it enshrines and protects a number of human rights that are particularly relevant to the vulnerable in the correctional services, namely the inmates. The most notable of the rights being section 10 (right to dignity), section 11 (right to life), section 12 (right to freedom and security of the person) and section 35 (2) (rights of detained persons). It contends that section 7 (2) imposes a duty on the State to *"respect, protect, promote and fulfil the rights in the Bill of Rights"* and this may extend, so it argues, to the creation of independent bodies, such as JICS.

[32] It refers to a number of international agreements, the most relevant being the Optional Protocol to the Convention against Torture ("OPCAT"). The OPCAT was signed by South Africa in 2006. It has been indicated as such in the founding papers; I was subsequently informed by way of a supplementary affidavit by the applicant, which appears not to be objected to by the respondents, that OPCAT was, according to the record of proceedings in the National Assembly, approved on 19 March 2019.[19] It appears from a statement issued by the South African Human Rights Commission on 17 July 2019 that both houses of Parliament have approved the ratification of the OPCAT.[20] It also appears from the speech made by the Deputy Minister of Justice and Constitutional Development on 19 July 2019, at the

[18] Id fn 9 para 201
[19] Unrevised Hansard, National Assembly, Tuesday, 19 March 2019
[20] https://www.sahrc.org.za/index.php/sahrc-media/news-2/item/2009-media-statement-launch-of-the-national-torture-preventive-mechanism-npm

"*Launch of South Africa's National Torture Preventive Mechanism of the Optional Protocol to the Convention against Torture (OPCAT)*" that the National Council of Provinces ("NCOP") approved the ratification of OPCAT on 28 March 2019.[21] The instrument of accession was deposited with the Secretary General of the United Nations in June 2019, as required by article 27, meaning it would be in force on the 30th day after the date of deposit in terms of article 28. I have been made to understand that OPCAT would have come into force on 20 July 2019 in South Africa.[22] This has been confirmed by a further supplementary affidavit filed on behalf of the applicant, dated 29 August 2019, in respect of which no opposition was received.

[33] The relevant provisions of OPCAT that the applicant draws attention to, are:

> Article 1, which states the objective of the Protocol as being "*to establish a system of regular visits undertaken by independent international and national bodies to places where people are deprived of their liberty, in order to prevent torture and other cruel, inhuman or degrading treatment or punishment*." (Underlined for emphasis.)
>
> In terms of Article 3
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> "*Each State Party shall set up, designate or maintain at the domestic level one or several visiting bodies for the prevention of torture and other cruel, inhuman or degrading treatment or punishment (hereinafter referred to as the national preventive mechanism).*" (Underlined for emphasis.)
>
> Article 17 states
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> *"Each State Party shall maintain, designate or establish, at the latest one year after the entry into force of the present Protocol or of its ratification or accession, one or several independent national preventive mechanisms for the prevention of torture at the domestic level. Mechanisms established by decentralized units may be designated*

[21] Held at the Castle of Good Hope Cape Town:http://www.justice.gov.za/m_speeches/2019/20190719-NPM-OPCAT-Launch_dm.html .
[22] Id fn 21

as national preventive mechanisms for the purposes of the present Protocol if they are in conformity with its provisions." (Underlined for emphasis)

Articles 18 (1), 18 (3) and 18 (4) state

"(1) The States Parties shall guarantee the functional independence of the national preventive mechanisms as well as the independence of their personnel.

....

(3) The States Parties undertake to make available the necessary resources for the functioning of the national preventive mechanisms.

(4) When establishing national preventive mechanisms, States Parties shall give due consideration to the Principles relating to the status of national institutions for the promotion and protection of human rights." (Underlined for emphasis)

[34] The principles referred to in Article 18 (4) are the United Nations Principles relating to the Status of National Institutions ("the Paris Principles").[23] The Paris Principles relate to the status and functioning of national institutions for the protection and promotion of human rights. Article 2 of the Paris Principles, under the heading "Composition and guarantees of independence and pluralism", provides:

"The national institution shall have an infrastructure which is suited to the smooth conduct of its activities, in particular adequate funding. The purpose of this funding should be to enable it to have its own staff and premises, in order to be independent of the Government and not be subject to financial control which might affect its independence."

[35] From the reading of the above articles of the OPCAT, it appears that what is envisaged by OPCAT is the establishment of a national preventive mechanism ("NPM"). It should be noted that according to article 17, the OPCAT obliges each State Party to maintain, designate or establish an NPM at the latest one year after the entry into force of the OPCAT, or ratification or accession.

[23] Adopted by General Assembly resolution 48/134 of 20 December 1993

[36] Whether JICS can be viewed as the NPM in South Africa is an arguable point, as the mandate of an NPM in OPCAT appears to be far wider than that of JICS. It appears that after approval by Parliament, the country is looking at, in fact, establishing the NPM. It is acknowledged in the speech of the Deputy Minister, referred to above, that it has to be taken into account, in the establishment of the NPM, that South Africa currently has a number of institutions with an oversight mandate over places of detention, including JICS, IPID and other relevant organisations and Inspectorates. "*A significant consideration in setting up our NPM was the fact that South Africa already has a number of institutions which have an oversight mandate over places of detention and as such these institutions already carry out many of the functions required by the NPM in terms of their respective mandates.*"[24] An email from the State Attorney, acting for the fourth respondent, dated 01 August 2019, attached to the applicant's supplementary affidavit dated 29 August 2019, fortifies this statement as follows: "… *our further instructions are to advise that the Inspecting (sic) is a member of the National Preventative Mechanism (NPM is created in terms of OPCAT), which is coordinated by the SAHRC.*"

[37] Although JICS may not be an NPM *per se* or *by itself,* as spoken of in the OPCAT, it contains features of what is envisaged by the OPCAT, and its mandate ultimately contributes to the attainment of the aims of the OPCAT, at least at the reporting level by the Inspecting Judge, as well as the work done by the ICCVs. Certainly its independence is crucial to the fulfilling of its mandate. The question is whether the international instruments spoken of describe the kind of independence required.

[38] Article 18 does refer to a guarantee of functional independence of the NPM, as well as the independence of its personnel, and that States Parties shall make available the necessary resources for the funding of the NPM. The Paris

[24] Id fn 20: "*The South African government has designated the South African Human Rights Commission (SAHRC) to perform a coordinating and functional role in the NPM together with other oversight bodies such as the Judicial Inspectorate for Correctional Services (JICS) and the Independent Police Investigative Directorate (IPID) subject to legislative review relating to their independence*". See also media statement at fn 21.

Principles, which according to Article 18 (4) of OPCAT must be given due consideration, are quite clear that the national institution must be given funding suited for its activities and which is adequate. Further, *"*[*t*]*he purpose of this funding should be to enable it to have its own staff and premises, in order to be independent of the Government and not be subject to financial control which might affect its independence."* (Underlined for emphasis.)

[39] I need not go through the plethora of international instruments that the applicant refers to, which, *inter alia*, provide that persons or authorities who conduct visits to places of detention should be separate from those in charge of the administration of those facilities.[25] JICS in its 2017/2018 Annual Report also does

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[25] For instance, *The United Nations Body of Principles for the Protection of all Persons Under Any Form of Detention or Imprisonment*, adopted by the General Assembly under resolution number 43/173 on 9 December 1988, states as follows in article 29:

"*In order to supervise the strict observance of relevant laws and regulations, places of detention shall be visited regularly by qualified and experienced persons appointed by, and responsible to, a competent authority distinct from the authority directly in charge of the administration of the place of detention or imprisonment*." (Underlined for emphasis)

The applicant also refers to Articles 17, 40, 41, 42 and 43 of The Robben Island Guidelines for the prohibition and Prevention of Torture in Africa adopted on 23 October 2002 by the African Commission on Human and People's Rights which provide that Member States shall:

"17. Ensure the establishment of readily accessible and fully independent mechanisms to which all persons can bring their allegations of torture and ill-treatment.

40. Establish and support effective and accessible complaint mechanisms which are independent from detention and enforcement authorities and which are empowered to receive, investigate and take appropriate action on allegations of torture, cruel, inhuman or degrading treatment or punishment.

41. Establish, support and strengthen independent national institutions such as human rights commissions, ombudspersons and commissions of parliamentarians, with the mandate to conduct visits to all places of detention and to generally address the issue of the prevention of torture, cruel, inhuman and degrading treatment or punishment, guided by the UN Paris Principles Relating to the Status and Functioning of National Institutions for the Protection and Promotion of Human Rights.

42. Encourage and facilitate visits by NGOs to places of detention.

43. Support the adoption of an Optional Protocol to the UNCAT to create an international visiting mechanism with the mandate to visit all places where people are deprived of their liberty by a State party."

See also *The United Nations Standard Minimum Rules for the Treatment of Prisoners (the Mandela Rules)* and the *United Nations ("UN") Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment ("CAT").* Although some of these may not have the binding effect as contemplated in section 231(2) of the Constitution, they still play a role in terms of section 39 (1) (b) of the Constitution.

refer to a list of international instruments relevant "*in the South African correctional and remand setting*"[26]. The OPCAT, read with the Paris Principles, on its own does demonstrate obligations on South Africa to create a national institution(s) with the necessary independence. So too do other noted international instruments.

[40] My reading of *Glenister* is that the Court firmly established the South African domestic impact of international law.[27] It held that: (a) when South Africa ratifies an international instrument and complies with section 231 of the Constitution, that instrument essentially has some kind of constitutional import; and (b) section 7 (2) which enjoins the State to, inter alia, protect the rights in the Bill of Rights, has to be read to embrace international law. In the same way this Court is confronted with international obligations that the country has committed itself to, which, following *Glenister*, the State has to abide by. The Court in *Glenister* found that the constitutional obligation on the State to establish an anti-corruption unit (in that case) that had the necessary independence was clear and unequivocal. It held that the Constitution imposed this requirement through section 7 (2) which required the state to respect, protect, promote and fulfil the rights in the Bill of Rights. This provision imposes a positive obligation on the State in certain instances "*to provide appropriate protection to everyone through laws and structures designed to afford such protection. Implicit in section 7 (2) is the requirement that the steps the State takes to respect, protect, promote and fulfil constitutional rights must be reasonable and effective*."[28] The State**,** inclusive of the Executive and Parliament, when preparing, initiating and enacting legislation, had to give effect to the duties imposed on it by section 7 (2).

[41] What positive measures the State chose in order to fulfil this duty was not for the Court to prescribe, as long as such measures were reasonable. What

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[26] Id fn 4 at page 19

[27] Id fn 9 at paras 189 - 202

[28] Id fn 9 at para 189. Also incorporating a quote from *Carmichele v Minister of Safety and Security and Another (Centre for Applied Legal Studies Intervening)* 2001 (4) SA 938 (CC) at para 44, with approval. See also *Women's Legal Centre Trust v President of the Republic of South Africa and Others* 2018 (6) SA 598 (WCC) on the general application of section 7 (2) in relation to the interpretation of international law.

reasonable measures were required to be taken, was a question in part answered by taking into account international law.

[42] Taking *Glenister's* reasoning into account, creating an Inspectorate that is not sufficiently independent could not be seen as reasonable. If the Inspectorate lacks sufficient independence that would not be in keeping with South Africa's international obligations as provided in OPCAT, read with the Paris Principles and other relevant international instruments. The State would not have fulfilled its duty as implied in section 7 (2), which is to take reasonable and positive steps in creating an appropriately independent Inspectorate. The structure chosen by the State in the creation of the inspectorate must withstand constitutional scrutiny. The applicant has listed a number of rights which pertain to inmates, which I have already listed. Any failure on the part of the State to create an adequately independent Inspectorate, may well be an infringement of those rights. It goes without saying that if JICS is not adequately independent, that would affect the fulfilment of its inspecting and reporting role on the treatment of inmates in correctional centres and their conditions. This ultimately impacts on the protection, promotion or fulfilment of the Bill of Rights as it pertains to the inmates.

[43] With these considerations as background, it seems to me that the basis of applicant's case, sourced from section 7 (2), has merit and is well supported by the reasoning in *Glenister*. Therefore, although the Constitution does not specify the creation of an inspectorate with the necessary independence, it seems to me, given the scheme of the Constitution, read with the international obligations South Africa has committed itself to, and the objects of the Act, the most reasonable and effective interpretation of section 7 (2) is that it does impose an obligation for the creation of an adequately independent institution, as part of its duties to provide reasonable and effective mechanisms to promote human rights, as undertaken in OPCAT, for instance. The issue however does not end there; the next question is whether JICS has the operational and structural features of independence.

Does JICS have the operational and structural features of independence?

[44] It is perhaps fitting to start with an understanding endorsed in both *Glenister* and *Helen Suzman*[29] that the Constitution does not envisage absolute independence; such may not be attainable having regard to the South African context.[30] What is envisioned is adequate independence, which should be demonstrated by the structure of the institution and its operation.[31] In *Helen Suzman*, the Court said *"*[*t*]*he correct approach ... is ... to examine each of the impugned provisions and determine whether they militate for or against a corruption-fighting agency which, though not absolutely independent, should nevertheless be adequately independent in terms of both its structure and operations*."[32] Those that do not meet the constitutional obligations must be declared invalid individually and set aside.[33] The position as to how a statute should be interpreted needs no repetition, save to mention that it must be given its grammatical meaning (except where it would lead to absurdity), be properly contextualised, interpreted purposively and be construed consistently with the Constitution.[34] It is perhaps important to mention at this point that the mere mention of independence in section 85 (1), does not mean that the provisions of the Act meet the necessary standard of independence.

[45] Starting with section 85 (2): this section deals with the object of the Inspectorate. The challenge based on the scope of JICS as being limited is no longer being pursued; I therefore need not go any further with the attack on this provision, as it would have been unsound, in any event. The same applies to section 90 (1), which deals with the powers and duties of the Inspecting Judge.

[46] Sections 88A (1) (b) and 88A (2) are still being challenged. In terms of section 88A (1) (a) of the Act, the Inspecting Judge must identify a suitably qualified and experienced person as a CEO who is responsible for all

[29] *Helen Suzman Foundation v President* of the Republic of South Africa and Others 2015 (2) SA 1 (CC)
[30] Id fn 29 at para 9
[31] Id fn 29 at para 10
[32] Id fn 29 at para 10
[33] Id fn 29 at para 10
[34] *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 (4) SA 593 (SCA) at para 18; *Cool Ideas 1186 CC v Hubbard and Another* 2014 (4) SA 474 (CC) at para 28.

administrative, financial and clerical functions of the Judicial Inspectorate. That person is accountable to the National Commissioner for all the monies received by the Inspectorate (section 88A (1) (b)). I come back to this later. The CEO is under the control and authority of the Inspecting Judge (section 88A (1) (c)). However, the CEO must be appointed by the National Commissioner (section 88A (2)).

[47] The power to identify the CEO, and to consider his or her qualifications and experience, lies with the Inspecting Judge. The National Commissioner is obliged to appoint the person so identified. No discretion is afforded to the National Commissioner in this regard. There is no scope for him or her to interfere with the choice of the Inspecting Judge, all he or she is required to do is to formally effect the appointment of a CEO. If in practise the National Commissioner does more than effecting the appointment administratively, that is not a problem of statutory content but of implementation. If he in fact questions the selection made by the Inspecting Judge, or refuses to give effect to the obligation to appoint the person so identified, he or she would be acting outside his or her powers. There is accordingly no issue with the text in section 88A (2), in my view.

[48] Section 88A (4) requires any matters relating to misconduct or incapacity of the CEO to be referred, by the Inspecting Judge, to the National Commissioner. What independence actually means is not a concept easily definable; it is an exercise that requires a careful examination of a wide range of factors. It has been held that *"*[*a*]*mongst these are the method of appointment, method of reporting, disciplinary proceedings and method of removal of the executive director from office, and security of tenure."*[35] (Underlined for emphasis.)

[49] According to the respondents, it makes sense that the Inspecting Judge is disqualified from deciding on these matters, as he may potentially be a witness or a complainant against the CEO. While that might be so, it does not mean that another mechanism more independent of the Department could not be put in place (statutorily). The provision does not say what the National Commissioner ought to

[35] *McBride v Minister of Police and Others (Helen Suzman Foundation as Amicus Curiae)* 2016 (2) SACR 585 (CC) at para 31

do after the referral by an Inspecting Judge. It does not, for instance, say he may discipline or remove the CEO after a process has been followed. It seems to me his powers are open as to what process to follow after the referral of those matters to him or her. A decision is, however, taken by him or her as to what follows after the referral.

[50] I tend to agree with the applicant that the CEO is meant to be independent of the Department, which is the body administratively in charge of the correctional centres and under the control of the National Commissioner. It was held in *McBride*[36] that to subject the executive director of the IPID to the same regime as public servants, who are government employees, is to undermine his independence. That is not consonant to the Constitution. The powers of the Minister of Police in *McBride* to remove the executive director of IPID were found to be antithetical to the intrinsic independence of IPID, as entrenched by the Constitution and equivalent to political management of IPID by the Minister. This, according to the Court in *McBride,* could result in political influence and manipulation where power could be usurped under the guise of political accountability[37].

[51] It may be argued in this case that the National Commissioner does not *per se* initiate disciplinary matters, those are referred to him or her by the Inspecting Judge. Whilst that is so, the process of referral from the Inspectorate, which is an office that is meant to be independent, to the National Commissioner, may, in my view, undermine the independent role that the CEO has to play, not only in the actual sense but perceptually. It is necessary to its credibility, and for public confidence, that JICS be not only independent, but that it is also seen to be independent, to undertake this important role, without interference, actual or perceived. The issue of public confidence was dealt with in *McBride*[38], *Glenister*[39]

[36] Id fn 35 at para 30
[37] Id fn 35 at para 38
[38] Id fn 35 at para 41.
[39] Id fn 9 at para 207

and *Helen Suzman*[40] respectively. In *Helen Suzman,* the Court, referring to a passage in *Glenister,* held:

> *"This court has indicated that the appearance or perception of independence plays an important role in evaluating whether independence in fact exists…By applying this criterion we do not mean to impose on Parliament the obligation to create an agency with a measure of independence appropriate for the judiciary. We say merely that public confidence in mechanisms that are designed to secure independence is indispensable. Whether a reasonably informed and reasonable member of the public will have confidence in an entity's autonomy-protecting features is important to determining whether it has the requisite degree of independence."* (Underlined for emphasis.)

[52] Even if in practise the National Commissioner has not tended to use his powers to discipline, upon referral by the Inspecting Judge, or has not yet been called upon to do so, or has or would appoint independent "persons" to run the process, it is not the actual use of that power that should be judged - although that may strengthen the applicant's case of reality being reflective of the shortcomings of the statute - but the potential effect it has on the independence of JICS. The issue is what may potentially arise owing to the lopsided structural framework imposed by section 88A (4).

[53] Therefore, the role played by the National Commissioner may have been intended to be administrative or practical in nature on disciplinary matters, as suggested by the respondents; the wording of the Act, however, shifts the role away from the office of the Inspecting Judge, not to a neutral body, organ or person, but to the very body on whose conduct the Inspectorate is intended to report. I do not think it is the role of the Court to prescribe where disciplinary matters involving the CEO could be referred to. A mechanism ensuring that the independence of JICS is preserved could be put in place. I therefore find section 88A (4) to fall short of the standard of independence required, and that it does not pass constitutional muster. It should accordingly be declared invalid.

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[40] Id fn 29 at para 31

[54] The last disputed provisions are sections 88A (1) (b) and 91. In terms of 88A (1) (b) the CEO is accountable to the National Commissioner for all the monies received by the Inspectorate. Section 91 provides that the Department is responsible for all expenses of the Inspectorate. This seems to be the section to which most of the applicant's argument is devoted.

[55] Management and accountability of finances in government are regulated by the Public Finance Management Act 1 of 1999 ("the PFMA"). The PFMA requires each government department or constitutional institution to have an accounting officer and for State monies to be properly managed and accounted for. The accounting officer is usually the head of department or the chief executive officer of the constitutional institution. Constitutional institutions are listed in schedule 1 of the PFMA (section 36 of the PFMA). The accounting officers' responsibilities are prescribed in the PFMA.[41] Treasury may in exceptional circumstances approve persons other than those mentioned to be accounting officers. The executive authority accounts to Parliament. That is the position in South Africa generally.

[56] It is useful to look at how the administration and functioning of other bodies or mechanisms designed to be "independent" is financed. In this case I consider the DPCI and IPID as examples. The DPCI is located within the SAPS. Unlike the IPID it is not established by a constitutional provision, but in terms of the SAPS Act.[42] It has, *inter alia*, a National Head, and its functioning is overseen by Parliament.[43] The DPCI's finances and financial accountability are dealt with by section 17H. In terms of this section:

> "
>
> *(1) The expenses incurred in connection with-*
>
> *(a) the exercise of the powers, the carrying out of the duties and the performance of the functions of the Directorate; and*

[41] Sections 38 to 42
[42] Section 17C (1) of the SAPS Act
[43] Sections 17C (1A) (a) and 17K

(b) the remuneration and other conditions of service of members of the Directorate,

shall be defrayed from monies appropriated by Parliament for this purpose to the departmental vote in terms of the Public Finance Management Act, 1999 (Act No.1 of 1999).

(2) In order to give effect to subsection (5), the National Head of the Directorate shall prepare and provide the National Commissioner with the necessary estimate of revenue and expenditure of the Directorate for incorporation on the estimate and expenditure of the Service.

(3) Whenever the National Commissioner and the National Head of the Directorate are unable to agree on estimate of revenue and expenditure of the Directorate, the Minister shall mediate between the parties.

(4) The National Commissioner, as the accounting officer of the Service [the SAPS], *shall, subject to the Public Finance Management Act, 1999 (Act No.1 of 1999), and subsection (2)-*

(a) be charged with the responsibility of accounting for State monies received or paid out for or on account of the Directorate;

(b) involve the National Head of the Directorate in all consultations relating to the estimate of revenue and expenditure of the Directorate including any consultations with the National Treasury relating to the revenue and expenditure of the Directorate;

(c) cause the necessary accounting and other records to be kept; and

(d) ensure that the annual report on the performance of the Directorate is included as a distinct programme in the annual report of the Service.

(5) Monies appropriated by Parliament for the purpose envisaged in subsection (1)-

(a) shall be regarded as specifically and exclusively appropriated for that purpose; and

(b) may only be utilised for that purpose.

> *(6)* *The National Head of the Directorate shall have control over the monies appropriated by Parliament envisaged in subsection (1) in respect of the expenses of the Directorate."* (Underlined for emphasis.)

[57] In addition, in terms of section 17DB of the SAPS Act, the National Director determines the number and grading of posts, in consultation with the relevant Ministers, and appoints the staff of the Directorate. Funding is provided by Parliament by means of Departmental vote in terms of the PFMA. What can be observed in the DPCI scenario, is that while the National Commissioner must account for all funds received / paid by the Directorate, the National Head of the Directorate has control over monies appropriated by Parliament (section 17H). Parliament oversees the Directorate, and any committees created in terms of the chapter (section 17K). In terms of section 17K(2) " [*t*]*he National Commissioner shall include in the annual report to Parliament in terms of section 40 (d) of the Public Finance Management Act, 1999 (Act No.1 of 1999), a report in respect of the performance of the Directorate compiled by the National Head of the Directorate as a separate programme*." The National Head of the Directorate also makes a presentation to Parliament on the Directorate's budget.

[58] An interesting phenomenon is the complaints mechanism established by section 17L of the SAPS Act. It is headed by a retired judge who investigates complaints relating to the DPCI. The judge reports annually to Parliament on the performance of his or her function. In terms of subsection 12 *"*[*t*]*he Minister shall ensure that the retired judge has sufficient personnel and resources to fulfil his or her functions."* Subsection 13 provides that "[*a*]*n annual operational budget shall be prepared by the Secretary in consultation with the retired judge and provided for under the budget for the Secretariat for the specific and exclusive use of the official duties of the retired judge and may not be used for any other purpose*."

[59] The IPID is financed with money appropriated from Parliament (Section (3) of the Independent Police Investigative Directorate Act No. 1 of 2011 ("the IPID Act")). In terms of section 7(1) of the IPID Act, the Executive Director is also the accounting officer. Finances are dealt with in sections 31 and 32 of the IPID Act.

The Executive Director is subject to the PFMA and is charged with the responsibility of accounting for money received or paid out for, or on account of, the office of the Directorate, causes the necessary accounting and other related records to be kept and is in this respect accountable to the Minister of Police. The Executive Director must prepare and submit an annual report to the Minister. The Minister tables the report and financial statements in Parliament. It seems as if IPID gets its funding from Parliament, and reports to Parliament, via the Minister of Police.

[60] This is not to suggest a form or structure that JICS must take but to highlight some examples of how the independence in some important institutions has sought to be preserved. It seems to be possible for these institutions to have control of monies appropriated to them, in their case by Parliament, but yet have the National Commissioner as the accounting officer, in the case of DPCI. The Executive Director in case of IPID is its accounting officer. Further, in the DPCI situation it appears that the National Head is involved in budgeting, and has control over monies appropriated by Parliament in respect of the expenses of the Directorate.

[61] Statutorily the CEO of JICS accounts to the National Commissioner for monies received by the Inspectorate. Notionally there may be nothing wrong with that, taking into account that the National Commissioner is the accounting officer for the Department. This provision however should also be read in the context of the provision which makes the Department responsible for all the expenses of the Inspectorate and not in isolation. If the financial structure needs consideration as to whether it provides the adequate independence, it seems to be proper that both provisions are looked at.

[62] At the factual level, the supplementary affidavit by the current CEO, Mr Misser, who has been employed in that position since 1 September 2017, illustrates the difficulties presented by the Department being responsible for JICS' finances. There is no reason not to accept the experiences as accounted by the actual incumbent in the JICS' CEO position. He reveals that "*JICS has continued to experience difficulty in concluding or agreeing on how administrative and*

financial support must be rendered from the Department of Correctional Services (DCS) represented by the 3rd respondent to JICS in order to enhance JICS autonomy". Although, he points out that once an agreement, if any, has been reached with the Department to address administrative, financial and other operational matters, issues raised by the applicant that depend on whether such an agreement is reached, could in the end become moot. That process does not detract from the existing structural problems triggered or aggravated by the impugned provisions. The parties agreed that the Court is bound to make a finding in relation to the provisions based on the case presented before it.

[63] Mr Misser makes a remarkable statement in his affidavit: "*Insofar as averred by Smalberger* [the then Acting National Commissioner who deposed to an answering affidavit on behalf of the second and third respondents], *that JICS, as presently constituted and mandated, possesses the necessary structural and operational independence and legal powers to discharge its functions, I disagree. In my experience there are numerous and significant instances within the administrative, financial and clerical functions of the CEO in section 88A(1)(a) of the Correctional Services Act 111 of 1998 (CSA) that have adversely and materially affected JICS' efficiency and effectiveness. I list them hereunder: …"*

[64] He goes on to state that funding of posts is entirely dependent on the Department. This is so even though section 89 (1) of the Act empowers the CEO to appoint staff. It seems to me that that power is constrained by the applicability of section 91, which makes the Department responsible for all of JICS' expenses.

[65] Some of the difficulties faced by JICS may be more operational than structural, such as access to the Persal[44] functions, the basic accounting system, and computer technology owing its dependence on the Department. Some of these, however, are in some way intertwined with the issue of JICS' financial dependence on the Department. Because it has no say on its budget, its staffing

[44] "'Persal' means the personnel and salaries management system used by the national and provincial government."
https://docplayer.net/15090541-Persal-means-the-personnel-and-salaries-management-system-used-by-the-national-and-provincial-government.html

requirements, activities and functioning are hamstrung. This does not mean JICS cannot be supported by the Department, a point made in *Helen Suzman*[45]. There the Court said:

> "… *The International trend is that the executive prepares the budget and Parliament approves it. But the executive should not have an unfettered discretion over the level of funding for an anticorruption unit. This is the position in South Africa. Good reason would have to be shown for suggesting that acting in line with this international good practise poses a threat to the functional independence of the DPCI*."

[66] Mr Misser, however, gives examples of JICS' complete dependence on the Department, which are not purely administrative and clerical, but affect the effective functioning of the Inspectorate. He confirms that the Department controls JICS' budgetary allocation. The Department, without any notice, unilaterally reduced JICS' approved 2018/2019 budget allocation by 22%, in terms of the Medium Term Expenditure Network. The amount of control the Department has over JICS' budget, renders it unable to function effectively and efficiently, as it is placed in a situation where it has to compete with the Department on priorities.

[67] At first blush one may attribute these difficulties to administrative inefficiencies, which could be sorted simply by the Department and JICS clarifying their roles amongst each other. It seems to me, however, that the problems are as a result of the structure of JICS dealing with its finances, which does not provide JICS with the necessary autonomy. It makes no sense that the head of the institution, the Inspecting Judge or the CEO has no say, let alone a final say, on the level of the Inspectorate's funding or involvement in the budgetary process. This does not mean that he should not consult with the National Commissioner with regard thereto or vice versa.

[68] It is possible, although it is not for me to prescribe, that if JICS were to have its funding appropriated by Parliament, for instance, that it could still have control or involvement over its funding and have the National Commissioner as its

[45] Id fn 29 at para 41

accounting officer for the purposes of the PFMA, as an example. As was held in *Helen Suzman* supra, there is nothing wrong with accounting to the Executive on financial and budgetary matters. It seems to me that the fundamental issue is the lack of control that JICS has over its budget.

[69] Mr Misser points out in his supplementary affidavit that by September 2017 there was agreement amongst the respondents that JICS needed to be "more independent". His position is supported notably by JICS' 2015/2016 annual report, which stated:

> *"The inspectorate had very little influence and opportunity to determine its own financial and human resourcing needs, as the budget of the JICS is administered via DCS. Budget inputs provided by the Inspectorate to the DCS are finalised and concluded with National Treasury with limited consultation from the Inspectorate. The implication on this model is that funding allocated by the DCS may be reprioritised to other units within DCS, thus disadvantaging the operations of the JICS."*

[70] It is also reported that the Inspecting Judge had to use his own money to attend a business related trip overseas, with the hope that he would be reimbursed, and that that was never forthcoming. In fact, this expense was disapproved and it remains unresolved. This is not to say funds should be used without any accountability, but this is an example of the power that the Department has over JICS, which, as the Inspecting Judge points out in his affidavit, may severely hamper its work and independence. I do not want to get involved in the nitty – gritty and minute detail of how the office of JICS is administratively hampered. I am also not suggesting that the Inspecting Judge should get involved in administration matters, but am advocating for an adequately independent structure that would enable JICS to play its role, as mandated by the Act, effectively.

[71] It is also not for me to get involved in a comparative exercise between how much JICS is funded compared to other independent national institutions, as the applicant may appear to invite this Court to. That is not the enquiry before me. I am satisfied that, on the whole, there are sufficient grounds to indicate that the

impugned provisions (to the extent indicated in this judgment) are inconsistent with the Constitution and should therefore be declared invalid, as they do not provide the JICS with adequate independence.

Conclusion and Remedy

[72] In sum, the broad attack impugning Chapters IX and X is not sustained. The applicant in any event conceded that Chapter X, and certain provisions of Chapter IX, cannot be faulted as being inconsistent with the Constitution. This left the Court to deal with the remaining impugned provisions. In the first instance the Court found that there is a positive duty on the State, sourced from section 7 (2) of the Constitution, taking, inter alia, the international agreements into account, to ensure the functional independence of JICS, operationally, financially and also perceptually. The statement that the office of the Inspectorate is independent, contained in section 85 (1), does not necessarily, by itself, mean all provisions that follow provide adequate independence as is required of a body like JICS.

[73] I do take into account that the Inspecting Judge, by virtue of being a Judge, is presumed independent, and I have no doubt about his independence. The challenge is not directed at the office of the Inspecting Judge, but at JICS as an institution and whether statutorily it has adequate independence allowing it to fulfil its role. I have found that whilst most provisions cannot be faulted, at least three do fall beneath the standard of the independence required of it, constitutionally, to function as such so as to give effect to the rights enshrined in Bill of Rights regarding the inmates and, in particular, the right to human dignity, which is the foundation of the Act.

[74] Therefore, section 88A (1) (b), read with section 91, dealing with the funding of JICS being under the control of the Department, and section 88A (4), which refers matters relating to misconduct or incapacity of the CEO to the National Commissioner by the Inspecting Judge, are in my view inconsistent with the Constitution.

[75] The Court in *Glenister* highlighted the detrimental effects of corruption on our constitutional democracy, that it undermined the Bill of Rights, and how the entire scheme of the Constitution, whilst not expressly stating that a corruption-fighting unit must be established, called for the State to set up solid and effective mechanisms to that end and that this was discernible in section 7 (2) of the Constitution.[46] The importance of ensuring the attainment of a humane, honest, ethical and incorruptible correctional system through oversight and other important mechanisms is as central to the Constitution as anti-corruption endeavours are, in my view.

[76] In terms of section 172 (1) of the Constitution, the Court must declare any law or conduct that is inconsistent with the Constitution invalid to the extent of its inconsistency, and may make any order that is just and equitable, including an order suspending the declaration of invalidity, for any period or on any conditions, to allow the competent authority to correct the defect. An order of constitutional invalidity has no force unless it is confirmed by the Constitutional Court.[47]

[77] The applicant seeks an order suspending the declaration of invalidity for 18 months, to allow for the legislature to craft the necessary replacement legislation. The respondents submitted that it would be just and equitable for the Court to allow the process regarding the development of the Business Case to take its course, rather than immediately giving an order directing Parliament to correct the defect. Whilst I am aware of the discussions that are taking place, not only regarding the possible restructuring of JICS, but also the possible revamping of the oversight role(s) played by different institutions in correctional services, and possible developments brought about by the accession to OPCAT, I do think, without prescribing to Parliament in what shape or form the defects should be cured, that Parliament should be directed to do so. How it does that, is a matter for it to consider.

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[46] Id fn 9 at paras 175-177

[47] Section 172 (2) (a) Constitution of the Republic of South Africa, Act 108 of 1996.

[78] It is also just to give the process time and to suspend the orders of invalidity in order to give Parliament 24 months in which to cure the defect. It seems just that costs be paid by the second and third respondents to the applicant.

[79] For these reasons, the following order is made:

1. The application is upheld to the extent indicated in this judgment.
2. It is declared that sections 88A (1) (b), 88A (4) and 91 of the Correctional Services Act 111 of 1998 are inconsistent with the Constitution and invalid to the extent that they fail to provide an adequate level of independence to the Judicial Inspectorate for Correctional Services.
3. In terms of section 172 (1) (b) of the Constitution, the declaration of invalidity in paragraph 2 is suspended for a period of 24 months from the date of this judgment in order to afford Parliament the opportunity to remedy the defect.
4. The orders in paragraphs 2 and 3 above are referred, in terms of section 15 (1) (a) of the Superior Courts Act, No. 10 of 2013, to the Constitutional Court for confirmation.
5. The second and third respondents are ordered to pay the costs of the applicant, including costs of two counsel.

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N P BOQWANA

Judge of the High Court

APPEARANCES

For the applicant:	Adv. N Bawa SC with Adv. D Simonsz
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For the first respondent:	Adv. Choudree with Adv. Mdladla
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Instructed by:	State Attorney
For the fourth respondent:	Adv. K Pillay SC
Instructed by:	State Attorney