overall value of his evidence. I accept that he may well have been fairly stringent in his requirements on some occasions, because he clearly expected a very high standard of performance and became extremely frustrated by the circumstances under which he had to perform his work at the prison. At no stage, however, did I get the impression that Dr Craven was anything less than open and frank with the Court, or that he was being deliberately unfair or biased against the defendant. The high standards of performance which he set for himself and others may nowadays appear to be somewhat old fashioned and may be irritating to persons who tend to have a more relaxed attitude, but such fact does not detract from the honesty, veracity or reliability of his evidence. His evidence is accordingly accepted.

[190.] Mr Muller was also a good witness. Albeit that he is still in conflict with the DCS, he testified in a calm and balanced manner and there was no indication that he was partisan. He did not volunteer to support the plaintiff's case, he came to Court to testify under a witness subpoena. His evidence in regard to the critical nursing shortage and the impact which this had on the health system at the prison, was borne out by the letters which he had written at the time. There was no indication that he was biased against the defendant, or that he was deliberately painting a bleaker picture than was necessary. I am satisfied that he gave an honest account of the situation at the prison and that his evidence is both credible and reliable. His evidence is accordingly also accepted.

[191.] There is no reason to doubt the veracity or credibility of the evidence given by Ms Caldwell. Her evidence, however, did not substantially contribute to the determination of the issues herein.

[192.] Mr Gertse was a poor witness. He obviously had much to lose if he gave evidence which did not favour the defendant's case and it was obvious that he tried to put the DCS in the best possible light. If his evidence were to be believed, the defendant had a health system in place which functioned perfectly, despite the fact that the prison was not only extremely over crowded, but also suffered from a critical shortage of nurses. Moreover, despite the massive overcrowding, he would have the Court believe that all TB patients who were in the infectious stage of the disease, were isolated. In addition, he was obviously prepared to draw conclusions favourable to the defendant's case even though he had no personal knowledge of events. His evidence relating to the completion of the plaintiff's TB hospital card offers a prime example of this fact.

[193.] Mr Gertse also frequently contradicted himself. Some of these contradictions have already been alluded to herein above. The record will reveal many more. Moreover, it was patently obvious that he tailored his evidence to suit the case. His evidence, referred to above, relating to the completion of the plaintiff's TB hospital card, the TB blitz which had allegedly been conducted and the taking of sputum samples on consecutive days, clearly demonstrates his penchant for modifying the truth.

[194.] On the whole, Mr Gertse was clearly not an unbiased witness and his evidence is tainted by many defects. I am not satisfied that he was truthful, nor am I satisfied that his evidence was reliable. In so far as his evidence is contradicted by the witnesses who testified for the plaintiff, his evidence is accordingly rejected.

[195.] Prof Van Helden suffered the misfortune of having been briefed by Mr Gertse. In the result, many of the facts which underpinned his opinions are suspect, incorrect and unreliable. So, for example, Prof Van Helden was told that persons who were diagnosed as having active TB were all isolated so that the risk to other inmates was reduced, that the DOTS system was consistently followed and that the plaintiff had been kept in a single cell and had not been exposed to infection by other prisoners. On the basis of such information, all of which was factually incorrect, Prof Van Helden concluded that the care of TB patients in prison was better than in the outside world. The evidence of the plaintiff as well as that of Dr Theron and Dr Craven is clear that due to overcrowding by no means all TB cases were isolated. Indeed, the plaintiff himself was not isolated.

[196.] Prof Van Helden also appeared to fall into the trap of losing his objectivity. So, for example, he used statistical evidence which was obtained in lower socio-economic areas such as Ravensmead and Masiphumelele to justify his opinion that the plaintiff, who came from a middle class environment, had probably been infected with TB prior to coming into the prison, in

circumstances where he himself had admitted that those statistics would not be applicable in middle and higher socio-economic areas. Indeed, Prof Van Helden went so far as to say that the plaintiff's chances of having been infected with TB prior to entering prison were 'exceptionally high'.

[197.] There is no doubt that Prof Van Helden is an expert is his field, but he is not a medical doctor and has had no experience in the diagnosis and treatment of TB. His experience relates to research. On the whole, Prof Van Helden's evidence was tainted with bias and misinformation. As a consequence, his evidence is, in my view, in many instances unreliable and inaccurate.

[198.] Both Dr Theron and Dr Craven have had much experience in the diagnosis and treatment of TB during the years that they have practised medicine and their expertise in this regard is beyond question. By virtue of their expertise and the fact that they were directly involved in the health system at the prison, they were in a unique position to provide an insight into the circumstances at the prison which impacted upon the management of TB during the plaintiff's incarceration. Whenever the evidence of Prof Van Helden is in conflict with that of Drs Theron and Craven, I unhesitatingly accept the latter versions.

The Legal Position

[199.] In order to establish a claim in delict, a plaintiff has to prove that the

defendant negligently committed an act which was unlawful and that the act so complained of was causally related to the harm which ensued.

[200.] In the instant case, it was not disputed that the acts of omission which had been alleged by the plaintiff in his particulars of claim, if established, would constitute acts for the purposes of liability in delict. The defendant has, however, taken issue with the plaintiff in regard to the elements of unlawfulness, fault and causation.

[201.] Negligent omissions are unlawful only if these occur in circumstances that the law regards as sufficient to give rise to a legal duty to avoid negligently causing harm (Minister of Safety and Security v Van Duivenboden 2002 (6) SA 431 (SCA) at 441E-F). As was stated in Minister of Polisie v Ewels 1975 (3) SA 590 (A) at 597A-B, negligent omissions will only be regarded as constituting unlawful conduct if the circumstances of the case are such that the omission not only evokes moral indignation, but the 'legal convictions of the community' require that it be regarded as unlawful. The enquiry is a broad one in which all of the relevant circumstances must be taken into account (Minister of Safety and Security v Van Duivenboden, supra, at 442B-E para [13] and cases there cited).

[202.] As the Constitutional Court has pointed out in Carmichele v Minister of Safety and Security 2001 (4) SA 938 (CC) at 961F the Constitution, which is the supreme law, embodies an objective, normative value system which

pervades all areas of the law. Moreover, section 39(2) of the Constitution expressly provides that '(W)hen interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights.' In applying the test laid down in the case of Ewels referred to above, a court must accordingly have regard to the fact that the 'legal convictions of the community' must now be informed and guided by the norms and values which have been enshrined in the Bill of Rights, because norms or values which are inconsistent with the Constitution, have no validity (Minister of Safety and Security v Van Duivenboden, supra, at 444E-H, para [17]).

[203.] As Nugent JA pointed out in Van Duivenboden's case[1] the general reluctance to impose liability for omissions, which is underpinned by the concept that individuals are free to 'mind their own business', may have been strengthened by the Bill of Rights in so far as individuals are concerned. Public officials, however, appear to find themselves in a less advantageous position.

> 'The protection that is afforded by the Bill of Rights to equality and to personal freedom and to privacy might now bolster that inhibition against imposing legal duties on private citizens. However, those barriers are less formidable where the conduct of a public authority or a public functionary is in issue, for it is usually the very business of a public authority or functionary to serve the interests of others and its duty to do so will differentiate it from others who similarly fail to act to avert harm. The imposition of legal duties on public authorities and functionaries is inhibited instead by the perceived utility of permitting them the freedom to provide public services without the chilling effect of the threat of litigation if they happen to act negligently and the spectre of limitless liability. That last consideration ought not to be unduly exaggerated, however,

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1 AR 445B-F, PARA [19]

bearing in mind that the requirements for establishing negligence and a legally causative link provide considerable practical scope for harnessing liability within acceptable bounds.'

[204.] The Constitution itself recognises that the State has a duty to act in order to promote and to protect the rights which are the subject of the Bill of Rights. Section 7(2) of the Constitution, read with section 2 thereof, expressly provides that the State 'must respect, protect, promote and fulfil the rights in the Bill of Rights' and that the obligations imposed by the Constitution 'must be fulfilled'. Section 8(1) of the Constitution provides that the 'Bill of Rights applies to all law, and binds the legislature, the executive, the judiciary and all organs of state'.

[205.] In determining whether or not there is a legal duty to act on the part of a public official, the relevant factors must now accordingly be weighed in the context of the spirit, purport and objects of the Bill of Rights which recognises a Constitutional State founded on dignity, equality and freedom, in which the government has positive duties to promote and uphold such values. Given the provisions of the Constitution which have been referred to in the immediately preceding paragraph, the Constitutional Court has found that there is a duty imposed on the State and all of its organs not to perform any act that infringes the Bill of Rights. Indeed, in some circumstances the State and its organs would be obliged to provide appropriate protection to everyone through laws and structures which have been designed to afford protection against infringement of the rights

contained in the Bill of Rights (see Carmichele v Minister of Safety and Security, supra, at 957B-D and F).

[206.] Section 41(1)© of the Constitution, moreover, provides that '(A)ll spheres of government and all organs of state ... must ... provide effective, transparent, accountable and coherent government for the Republic as a whole' . As was pointed out by the Supreme Court of Appeal in Olitzki Property Holdings v State Tender Board and Another 2001 (3) SA 1247 (SCA) at 1263E:

> '(T)he principle of public accountability is central to our new constitutional culture, and there can be no doubt that the accord of civil remedies securing its observance will often play a central part in realising our constitutional vision of open, uncorrupt and responsive government.'

[207.] The principle of accountability, however, does not necessarily translate into a civil remedy in the form of an action for damages. Other appropriate remedies, whether judicial or non-judicial, might be available[2]. As was said by Nugent JA in Van Duivenboden [3],

> 'However, where the State's failure occurs in circumstances that offer no effective remedy other than an action for damages the norm of accountability will, ... ordinarily demand the recognition of a legal duty unless there are other considerations affecting the public interest that outweigh that norm. For as pointed out by Ackermann J in Fose v Minister of Safety and Security ...
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> > without effective remedies for breach ... the values underlying and the right entrenched in the Constitution cannot properly be upheld or enhanced. Particularly in a country where so few have the means to enforce their rights through the

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[2] Minister of Safety and Security v Van Duivenboden, supra, at 446G-H

[3] At 447B-E

> courts, it is essential that on those occasions when the legal process does establish that an infringement of an entrenched right has occurred, it be effectively vindicated. The courts have a particular responsibility in this regard and are obliged to 'forge new tools' and shape innovate remedies, if needs be, to achieve that goal.'

[208.] In determining whether or not the breach of a statutory duty is to be regarded as unlawful so that it would give rise to a private law claim for damages, Cameron JA stated the position as follows in the Olitzki Property Holdings case[4]:

> 'Where the legal duty the plaintiff invokes derives from breach of a statutory provision, the jurisprudence of this Court has developed a supple test. The focal question remains one of statutory interpretation, since the statute may on a proper construction by implication itself confer a right of action, or alternatively provide the basis for inferring that a legal duty exists at common law. The process in either case requires a consideration of the statute as a whole, its objects and provisions, the circumstances in which it was enacted, and the kind of mischief it was designed to prevent. But where a common-law duty is at issue, the answer now depends less on the application of formulaic approaches to statutory construction than on a broad assessment by the court whether it is "just and reasonable" that a civil claim for damages should be accorded. The conduct is wrongful, not because of the breach of the statutory duty per se, but because it is reasonable in the circumstances to compensate the plaintiff for the infringement of his legal right. The determination of reasonableness here in turn depends on whether affording the plaintiff a remedy is congruent with the court's appreciation of the sense of justice of the community. This appreciation must unavoidably include the application of broad considerations of public policy determined also in the light of the Constitution and the impact upon them that the grant or refusal of the remedy the plaintiff seeks will entail.' (Footnotes omitted)

[209.] Cameron JA added that, in instances where the court has to determine whether or not a delictual claim arises from the breach of a statutory provision, the fact that the provision is embodied in the Constitution may, depending on the nature of the provision, attract a duty more readily than if it had been in an ordinary statute.[5]

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[4] At 125B-F para [12]

[5] At 125BE-F, para [14]

[210.] Even if the law recognises the existence of a legal duty to act and even if such duty has been breached, with the result that the conduct complained of is unlawful, the element of fault must still be satisfied before liability will attach to the defendant. In order for fault or culpability to attach to an omission, the test referred to in Kruger v Coetzee [6] is applied, which means that liability arises if a reasonable person in the position of the defendant would have foreseen that his conduct would reasonably possibly cause harm to another and would have taken reasonable steps to avert it, but the defendant failed to do so (Minister of Safety and Security v Van Duivenboden, supra, at 441G-442). The test is an objective one which does not depend on the subjective intent or mind set of the defendant, but rather on the particular circumstances of each case.

[211.] Last but not least, there must be a causal connection between the unlawful and negligent conduct complained of, and the harm which is alleged to have ensued. The element of causation involves two distinct enquiries. Firstly, in regard to the issue of factual causation, it must be determined whether or not the postulated cause can be identified as the sine qua non of the loss in question. This has become known as the 'but-for' test. In applying such a test, one makes a hypothetical enquiry as to what would probably have happened, but for the wrongful act of the defendant. If the plaintiff's loss would still have ensued absent the defendant's conduct, factual causation

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[6] 1966(2) SA 428 (A) at 430E-F

is lacking and that is the end of the matter. Secondly, if factual causation has been established, it must be determined whether the wrongful act is linked sufficiently closely to the loss concerned for liability to ensue. If the damage is too remote, no liability will accrue.[7]

Issues to be Decided

[212.] In order to determine whether or not the defendant is liable to the plaintiff in the instant case, it appears to me that the following underlying issues need to be decided:

(1) Whether or not the prevailing conditions in the maximum security prison at Pollsmoor, during the period November 1999 to June 2003, were such that the spread of TB was facilitated thereby; If the answer to this issue is in the affirmative,

(2) Whether it is more probable than not, that the plaintiff's illness with TB was occasioned by, or resulted from, the prevailing conditions in the maximum security prison at Pollsmoor during his incarceration. If so,

(3) Whether a reasonable person, in the position of the defendant, would

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7 mCubed International (Pty) Ltd & Another v Singer & Others 2009 (4) SA 471 (SCA) at 479F-J and cases there cited

have foreseen that the prevailing conditions in the maximum security prison would reasonably possibly spread TB amongst the inmates in the said prison and cause inmates, such as the plaintiff, who had not previously been ill with TB, to succumb to the disease. If so,

(4) Whether or not a reasonable person in the position of the defendant would have taken steps to guard against the spreading of TB as aforesaid? If the latter question is answered affirmatively,

(5) Whether or not the defendant took reasonable steps to guard against the spread of TB in the maximum security prison to inmates, such as the plaintiff, who had not been ill with TB and, if not

(6) whether or not the defendant's failure to take such steps was unlawful, thereby giving rise to a private law claim for damages.

Did the prevailing conditions in the maximum security prison facilitate the spread of TB?

[213.] When the plaintiff first came into the maximum security prison at Pollsmoor in November 1999, TB was already prevalent in the prison. The evidence of Dr Theron is clear in this regard. Indeed, throughout the time of the plaintiff's incarceration, TB remained a problem in the prison. This much is clear from the evidence of both Dr Theron and Dr Craven.

[214.] Dr Theron and Dr Craven were agreed that control over TB in the prison environment was dependant upon the effective screening of incoming prisoners, the isolation of infectious patients and the proper administration of the necessary medication over the prescribed period of time. All of these measures were heavily dependant upon a sufficient number of suitably qualified nursing staff being available. The provision of adequate nutrition and ventilation also played an important role.

[215.] As has been referred to above, clause 4.1(a) of Chapter 3 of the standing orders provided that all persons admitted to prison, should been seen on admission by a registered nurse for, inter alia, medical problems, whether acute or chronic. Such provision is reiterated in clause 4.4(a) which stated that '(A)ll admissions must be screened by a registered nurse on admission using the screening form.' Clause 6.1 of the said standing orders stated that '(F)ollowing screening at the reception, all admissions must be taken to the prison health facility by the unit manager or reception manager within 24 hours, for a medical examination by the registered nurse or medical officer/practitioner as prescribed.' Clause 6.2 provided that at prisons where there are primary health care clinics at the housing units, the medical examination may be performed at such clinics. The intention of the standing orders appears to me to be clear and unambiguous. Every incoming prisoner must be screened by a registered nurse on admission and every such prisoner must be medically examined within 24 hours of admission. The reasons why such a strict obligation was imposed are, in

my view, self-evident. Firstly, prisoners who were ill or injured had to receive medical attention. Secondly, prisoners who posed, or could reasonably pose, a health risk to others had to be identified in order that the necessary steps might be taken to prevent other inmates from becoming ill. Indeed, clauses 14 and 15 of the said Chapter of the standing orders contained, inter alia, the following provisions in regard to communicable and contagious diseases:

> 14.6.1 Whenever there is a suspicion that a prisoner ... could be suffering from a communicable, or contagious disease. The case must immediately be brought to the attention of the Supervisor: Nursing and the attending medical officer/ practitioner.
>
> 14.6.3 If the registered nurse or attending medical officer/ practitioner deems it necessary to isolate/segregate the prisoner ... suspected to be suffering from a communicable, or contagious disease, the recommendations or prescriptions must always be adhered to.
>
> 15.1 All prisoners with communicable conditions must be isolated in strict accordance with the medical officer's/ practitioner's and registered nurse's orders issued in each case.
>
> 15.3 Each prison must have written orders on infection control which must be monitored and reviewed annually.'

[216.] Mr Gertse initially testified that incoming prisoners were screened by the nurse who was on night duty. He subsequently changed his evidence in this regard and said that the night nurse conducted a pre-screening and that incoming prisoners who volunteered that they had medical problems were screened at the hospital the following day. The plaintiff's evidence was that on admission to the prison one of the inmates, Trevor Blignault, would ask persons who were ill to come forward. Mr Muller testified that there was only one nurse on duty at Pollsmoor after 16h00 and that nurse

was responsible for all 5 of the prisons. The screening of prisoners who came from the courts in the afternoons could accordingly not be performed by the night nurse and did not form part of the duties which such nurse was expected to perform. Mr Muller knew this to have been the case, because he was in charge of nursing services at Pollsmoor and prepared the duty roster. Dr Craven's working hours did not extend to the afternoon and there was accordingly no doctor on duty at the time when prisoners were brought back from the courts. It is accordingly clear from the evidence which has been accepted, that during the period of the plaintiff's incarceration, prisoners were not screened by a registered nurse or medical practitioner, whether for TB or any other disease, upon their arrival at the prison.

[217.] Mr Muller testified that the nurses ensured that incoming prisoners were screened on the morning after their admission and that those with medical complaints were then referred to the doctor. Under cross-examination Mr Gertse stated that the screening forms, such as Exhibits O and P, containing the details of the incoming prisoners were printed out on completion of the admission process. The nurse would then fill out the medical details on such form the following day when incoming prisoners were screened. As is evident from the aforesaid Exhibits, the forms contain only the most basic information in regard to prisoners' health status - their body mass and whether or not they had any medical complaints. It appears that the nurses who conducted the screening process did not physically examine any of the

incoming prisoners. They merely noted whether a prisoner provided a positive or negative answer to the question as to whether he had any medical complaints. Only those prisoners who stated that they had medical complaints were referred to the doctor for examination.

[218.] In the context of the aforesaid screening process, it is important to bear in mind Dr Craven's testimony that persons from the lower economic classes who smoked and lived in crowded conditions, frequently coughed and did not regard a cough as pathological. They only went to the doctor when additional symptoms manifested. The aforesaid evidence is clearly based on Dr Craven's experience and accords with the probabilities. It is accordingly unlikely that incoming prisoners who were already ill with TB, but who had not yet experienced marked symptoms other than coughing, would have volunteered that they were ill. Had these prisoners been properly screened, a simple chest examination would have revealed that there was an underlying pathology and they could have been separated out from the general prison population. The evidence of Drs Craven and Theron are clear in this respect. As a result of the manner in which the nurses implemented the screening process, which amounted to no more than asking whether or not an incoming prisoner had any medical complaints, the vast majority of such prisoners were accordingly not medically screened, inasmuch as no physical examination was conducted unless a prisoner was referred to the attending doctor.

[219.] The aforesaid screening process, such as it was, appears to have constituted the only screening that was conducted. Drs Theron and Craven testified that mass screening of prisoners had been conducted in the past when the old, military style of management was in place, but not during the time of the plaintiff's incarceration when the more relaxed management style had been adopted. Dr Theron, however, testified that it would have been possible for a doctor to conduct the screening of all of the inmates from time to time on a cell by cell basis, although such screening had not taken place.

[220.] Instead of screening prisoners for infectious diseases, such as TB, from time to time after their admission, the authorities at the maximum security prison relied on a self-reporting system in terms whereof prisoners had to make it known if they were ill or required medical attention. With regard to TB in particular, the authorities, according to Mr Gertse, maintained a 'suspect register'. If an inmate was suspected of having TB, whether because he reported it or whether a nurse was of the opinion that a prisoner might be suffering from TB, a sputum test would be conducted and the inmate's name would be recorded in the such register. Although Mr Muller testified that all test results ought to have been referred to the doctor for further attention, Mr Gertse's evidence was that only the cases which yielded positive results would be referred to the doctor. If test results were negative for TB, the nurse would merely counsel the inmate and, if necessary, treat the cough. It is by no means clear that the suspect

register was used during the period prior to the plaintiff becoming ill. Mr Gertse's evidence was extremely unreliable, for the reasons already adverted to. Mr Muller could not recall whether the suspect register was used during 2002 and 2003. Neither Dr Craven nor Dr Theron had knowledge of such a register during their period of employment at Pollsmoor and the plaintiff also did not know of its existence. Dr Craven only had knowledge of a suspect register which had been maintained after he had left the prison. Even if a suspect register had been maintained, however, it is by no means clear what purpose it was intended to serve. There is no evidence that persons whose names had been entered into the register and whose sputum tests produced negative results were followed up on any regular basis or at all. In the absence of appropriate monitoring of prisoners who were suspected of having TB, but who tested negative, the keeping of such a register appears to have been a wholly useless exercise.

[221.] The prison authorities' failure to screen incoming prisoners adequately appears to me to have constituted a contravention of clause 4 of Chapter 3 of the standing orders. Such failure obviously permitted persons who were ill with an infectious disease, such as TB, to mingle with other prisoners, at the very least while they were held in the overnight cell. If they did not volunteer that they were ill with TB, or that they were suffering from symptoms which were indicative of TB, upon their arrival at the maximum security prison, they would remain in the general prison population until such time as they did request medical assistance, or until

such time as they were so ill that one of the warders or nurses noticed it and caused them to be medically examined. In the mean time, those who were ill with TB would be expelling TB bacteria into their overcrowded cells every time they sneezed, coughed or spat.

[222.] It is also clear on the evidence of Dr Theron and Dr Craven that various further factors played a role in the transmission of TB in the maximum security prison - overcrowding, a lack of free flowing air, lack of isolation facilities, inadequate application of the DOTS system in the administration of the necessary TB medication and a severe shortage of nurses.

[223.] The evidence of Drs Theron and Craven in regard to overcrowding was confirmed by Mr Muller and by the official correspondence at the time. Although the approved accommodation at the maximum security prison was 1619 inmates, the lock-up total on occasion was as much as 3052, which constituted 189% occupation (Exhibit A p 58). Single cells regularly housed 3 inmates and communal cells were filled with double and sometimes triple bunks. Given that TB bacteria are air borne, these circumstances must clearly have facilitated the transmission of the disease. Indeed, the evidence of Drs Craven and Theron, as well as of Prof Van Helden, was to the effect that TB spreads more easily in crowded conditions, especially in a closed environment. (In the light of such evidence, Prof Van Helden's refusal to acknowledge the necessity of isolation in the prison environment, was particularly unconvincing.)

[224.] In addition to the overcrowding, the evidence was clear that there was a lack of free flowing air in the cells of the maximum security prison. Dr Theron described the atmosphere in communal cells as one of dinginess and squalor. The air was thick with smoke from cigarettes and 'hondjies'. The cells had windows along one of the cell walls with a doorway on the opposite side. Once lock down had occurred at approximately 16h00, there was no cross-ventilation at all until the next morning at approximately 07h00 when the steel door to the cell would be opened. Dr Craven confirmed that during such time prisoners would be coughing, sneezing and spitting over each other. Prisoners were confined to their cells for 23 hours a day - unless they went to court - and were only let out for exercise for an hour.

[225.] It is also clear from the evidence that isolation of infective TB patients was not routinely practised. Dr Craven and Mr Muller testified that isolation of infectious TB patients was not practically possible, due to the overcrowding of the maximum security prison and the concomitant lack of suitable accommodation. Moreover, although so-called isolation cells were available in the hospital section of the maximum security prison, Dr Theron testified that these in fact did not provide isolation in the true sense. The evidence was that the solid metal doors to such cells were seldom closed, because the prisoners detained in such cells would then be cut off from contact with others and would have inadequate ventilation. Mr Gertse would have the Court believe that all prisoners who were infective were isolated, whether

in the hospital section or in some of the single cells in the sections which had been reserved for this purpose. His evidence in this regard was, however, contradicted by Mr Muller and Dr Craven, does not accord with the probabilities if regard is had to the measure of overcrowding and does not fit in with the plaintiff's treatment.

[226.] The plaintiff was not isolated at any stage after he had been diagnosed as suffering from TB. During the period of approximately 4½ years while he was awaiting trial, the plaintiff was detained in the E-section of the maximum security prison at Pollsmoor, save for a few months when he was held in the Medium B prison. Albeit that he spent some time in communal cells, he was incarcerated in a single cell for most of the time. He was, however, always in contact with other prisoners. He shared his single cell with two other inmates. On the approximately 70 occasions when he went to court, he was confined with other inmates in a holding cell at Pollsmoor, in the truck that conveyed him to court and in the court cells. On occasions when he was hospitalised in the prison, he was in a communal ward. When prisoners were let out for exercise, they congregated in the passage before being let out in the exercise yard. Indeed, even when the plaintiff was diagnosed as suffering from TB, he was not isolated from other prisoners, but returned to his cell.

[227.] It is clear from the plaintiff's evidence as well as that of Mr Gertse that the DOTS system of treatment was not adhered to in the maximum security

prison. As was explained by Dr Craven, the DOTS system is particularly important in the treatment of TB, because patients are frequently not inclined to take their medication on account of the side effects. Patients are also frequently poorly motivated to continue taking their medication once they feel better. Unless the entire period of treatment is completed, however, the patient may develop MDR-TB or even XTR-TB. Dr Theron held the same view. Indeed, Dr Theron testified that the fact that there were cases of both MDR-TB and XTR-TB in the maximum security prison was indicative of the fact that patients had not completed the entire course of medication. The evidence of the plaintiff and of Mr Gertse established that patients were not always seen to take their medication. The plaintiff testified that he was sometimes given as much as a week's medication in advance. Mr Gertse's evidence established not only that the patient treatment cards were sometimes filled out in advance of medication being taken, or subsequent thereto, but that such cards might be marked off by a person who had no direct knowledge of the administration of the medication.

[228.] There was a substantial nursing shortage at all of the prisons which form part of the Pollsmoor prison complex. The maximum security prison, in particular, had approximately 50% of the nurses which were required. The letters written by Mr Muller in this regard provide graphic detail of such fact. Dr Theron testified as to such shortage, as did Dr Craven. As a direct result of the fact that the number of available nurses was insufficient, clinics were

not held in the sections on a daily basis and patients had difficulty in obtaining their TB medication. Dr Craven testified that it was logistically impossible for the nurses to do what was required of them. The shortage of nurses was exacerbated by a shortage of warders and as a result, inmates who were ill and who required medical attention sometimes could not get to see the doctor. Dr Theron testified that inmates had sometimes been ill with TB for months before being brought to the doctor.

[229.] Given the nature of the disease and the manner in which it is transmitted, each of the factors adverted to above, on its own, was capable of facilitating the spread of TB in the maximum security prison. When these are regarded cumulatively, as they must, because none of these factors operated in isolation, the conclusion is inescapable that the spread of TB was indeed facilitated by the prevailing conditions in the said prison.

Is it more probable than not that the plaintiff's illness with TB was occasioned by, or resulted from, the prevailing conditions in the maximum security prison?

[230.] The plaintiff was 53 years old when he was first admitted to the maximum security prison. His evidence that he had not ever been ill with TB prior to such admission, was not challenged. Upon his admission, he was fit and well, save for some heart and prostate problems and he appeared to be well nourished. Dr Craven regarded him as obese and ordered that he receive

half rations. Although the plaintiff smoked, a factor which would make him more susceptible to TB, his evidence that he was fit and well and had always looked after his physical health, was also uncontested. Even when he was in prison, he kept an eye on his health by requesting regular sputum tests.

[231.] When the plaintiff is measured against the typical TB patient profile which Dr Theron referred to, the latter was of the opinion that the plaintiff had not been a typical candidate for the development of TB. Per contra, the plaintiff appeared to have been robust and well nourished. There was no evidence that he displayed any of the clinical signs and symptoms which were, in Dr Theron's experience as a clinician, indicative of TB or of susceptibility thereto.

[232.] The plaintiff became ill with TB after spending some 3 years in the maximum security prison. Given the plaintiff's medical history, coupled with the prevailing conditions in the maximum security prison, Dr Theron concluded that the prison situation caused him to become vulnerable to TB, because his immune system had broken down as a result of the stressful environment. Dr Craven testified that the plaintiff would have inhaled far more of the TB bacteria in prison than he would have in the outside world and that the increased dose of bacteria would, in turn, have increased the plaintiff's chances of becoming ill with the disease. Dr Craven also came to the conclusion that the plaintiff became ill with TB as a result of his

imprisonment.

[233.] Prof Van Helden took issue with the views of Dr Craven and Dr Theron, but his evidence in this regard was wholly unreliable. Not only did he attempt to apply inappropriate statistics to the plaintiff's case, but his opinion that the plaintiff had in all likelihood been infected with TB prior to being admitted to the prison, did not take into account the fact that the plaintiff had been incarcerated for a period of approximately 3 years before he succumbed to the disease.

[234.] During the course of the trial, much time was spent on the re-activation of TB as opposed to re-infection. It appears to me that such debate between Drs Theron and Craven on the one hand and Prof Van Helden on the other, is of academic importance only. Fact of the matter is that the plaintiff had been tested for TB when he was a child and lived in Edenvale. He had never been ill with TB throughout his entire life. He did not fit the patient profile for persons who would be vulnerable to TB. He came into a prison which had an unacceptably high incidence of TB and 3 years later he was diagnosed with the disease. When regard is had to these factors and to the manner in which the disease is spread, the conclusion is, in my view, inescapable that but for his incarceration in the maximum security prison, the plaintiff would probably not have become ill with TB.

[235.] The fact that the plaintiff had been aware that TB was prevalent in the

prison where he was detained and that he smoked, does not take the matter any further. The plaintiff was unaware as to the identity of the inmates were who were ill with TB, because the majority of the inmates smoked and coughed. However, even if he had known the identity of the prisoners who were ill with TB, he could not necessarily have avoided them. Although he spent most of his time in a single cell, which he shared with 2 other inmates, he was incarcerated in communal cells for some time during his incarceration and, in particular, when he had to attend court on 70 separate occasions. He also came into contact with other prisoners when they congregated in the passage leading to the court yard where they exercised. Just as smoke drifted down the corridor during the day, a fact which was not disputed, Dr Craven expected the TB bacteria to come drifting down the corridor. The fact that the plaintiff smoked might have caused him to be more susceptible to TB, but even if he had not smoked, he could not have avoided coming into contact with smoke.

[236.] On the totality of the evidence, I am accordingly satisfied that it is more probable than not that the plaintiff contracted TB as a result of his incarceration in the maximum security prison at Pollsmoor.

[237.] Once the plaintiff had been diagnosed as suffering from TB, he was promptly treated by means of the required prescription drugs. He completed the full course of treatment and was cured of TB. In these circumstances, the allegations made in paragraphs 15.2 and 15.3 of the

plaintiff's Particulars of Claim, to the effect that the responsible authorities failed to provide the plaintiff with adequate medical treatment, are without foundation.

Would a reasonable person, in the position of the defendant, have foreseen that the prevailing conditions in the maximum security prison would reasonably possibly spread TB amongst the inmates and cause inmates, such as the plaintiff, to succumb to the disease?

[238.] As has been alluded to above, TB is a formidable infectious disease which is easily spread. It is also a notifiable or communicable disease which must be reported to the Medical Officer of Health, because of the danger which it poses to society. It is, moreover, a disease which is difficult to treat, because patients are frequently not compliant once the symptoms have lessened. Incomplete treatment may result in infectious patients with chronic TB and in the development of resistant strains of TB such as MDR-TB and XTR-TB which are more difficult to treat.

[239.] It is well acknowledged that TB, because it is an airborne disease, spreads more easily in confined environments which are not exposed to adequate sunlight and ventilation. The cells which housed prisoners at the maximum security prison are not properly ventilated for a great part of the day and there is inadequate sunlight. Notably, cross-ventilation is absent after lock down and the free flow of air and light in the communal cells are further

restricted by blankets and the like which are put up to provide privacy, thereby causing such cells to be dark and dingy. Prisoners are confined to such cells for 23 hours per day in severely overcrowded conditions. Whereas the TB guidelines do not stipulate that persons in the outside world who are ill with the disease must be isolated from their families, Dr Theron and Dr Craven were agreed that isolation was extremely important in the closed prison environment. Their evidence in this regard is logical and, in my view, any person with a modicum of common sense would appreciate that in the prison context, or for example in an army camp, or any other place where people are confined in close quarters, TB patients have to be separated out lest they spread the disease.

[240.] Given the prevalence of TB in the maximum security prison, it appears to me that any reasonable person in the position of the defendant would also have realised and appreciated that the measure of overcrowding would facilitate the spread of the disease, especially in circumstances where there was inadequate screening of incoming prisoners, inadequate treatment of those who were ill with TB and inadequate numbers of nursing staff, in addition to overcrowding and the lack of isolation facilities. Once again, it is a matter of logic and common sense, having regard to the nature of the disease and the manner in which it is transmitted.

[241.] The evidence of Drs Theron and Craven established that the greater the pool of bacteria, the greater the chances are of becoming infected with the

disease. Persons who had previously had TB were also, according to Prof Van Helden, more susceptible to a recurrence. Even persons who had not previously been ill, but whose immune system had become compromised, were at risk for developing the disease. A reasonable person in the defendant's position, who was responsible for the health and welfare of prisoners, would no doubt have ensured that he/she had been informed of the risk factors and would accordingly have appreciated these facts. Defendant's attention had been drawn to the problems posed by overcrowding, nursing shortages and the spread of TB, as is evidenced by the letters written by Mr Muller and the alarms raised by Dr Theron and Dr Craven which culminated in the approach to the parliamentary portfolio committee.

[242.] In the result, I am satisfied that a reasonable person in the position of the defendant would have foreseen that the prevailing conditions in the maximum security prison at Pollsmoor would reasonably possibly spread TB amongst inmates and cause inmates, such as the plaintiff, who had not previously been ill with TB, to succumb to the disease.

Would a reasonable person, in the position of the defendant, have taken steps to guard against the spread of TB?

[243.] Given the serious nature of the disease, the ease with which it is transmitted and the risk which the disease posed to the health of the

general prison population, warders and nurses included, a reasonable person in the position of the defendant would, in my view, have taken steps to guard against the spread of the disease, if it was at all feasible to do so. It has to be determined, however, what steps could reasonably have been taken.

[244.] It is readily evident that the lack of proper ventilation and sunlight in the cells of the maximum security prison was due to the manner in which the building had been designed and constructed. Incarceration under such circumstances is clearly undesirable and may constitute a breach of the plaintiff's right in terms of clause 12 of the Constitution not to be treated or punished in a cruel, inhuman or degrading way. There is no doubt that the lack of proper ventilation and sunlight in the prison cells materially contributed to the spread of TB in the prison. The plaintiff, however, proffered no evidence that such design flaw is practically capable of remediation and it is not the task of this Court to speculate on measures that could or could not have been instituted to remedy such defect.

[245.] Overcrowding of the prison was clearly a major problem and certainly contributed to the spread of TB in the prison. It is, however, by no means clear what steps could have been taken to alleviate the situation. Reference was made to the fact that some prisoners were let out on early parole in order to reduce the number of inmates and that other prisons, such as Goodwood, did not suffer from overcrowding, but the maximum security

prison remained overcrowded. Whilst it is true that the defendant did not offer any reasonable explanation as to why the overcrowding was permitted to continue, other than for Mr Gertse's evidence that the courts sent prisoners there and that the authorities at Pollsmoor had no choice in the matter, the plaintiff failed to tender any evidence as to reasonable steps that could have been taken to reduce the overcrowding. Once again, the Court is not entitled to speculate about the steps that could or could not reasonably have been taken to do so.

[246.] The evidence tendered by Dr Theron does, however, establish that the spread of TB can be curtailed by introducing some relatively simple, cost effective, measures as had been demonstrated during his experience at the low cost, community hospital, ran by Dr Barker in Kwazulu Natal during the period 1971 to 1973. What is required, is early identification of persons who are deteriorating and who may accordingly become vulnerable to TB, early diagnosis of the disease, effective treatment and proper nutrition.

[247.] It appears to me that in the context of the maximum security prison at Pollsmoor, the aforesaid measures would translate into the proper screening of incoming prisoners, inclusive of a physical chest examination; separating out those who had, or were suspected of having TB, or who were obviously under nourished and vulnerable to TB; the provision of adequate nutrition to those who were undernourished and otherwise vulnerable to TB; regular and effective screening of the prisoner population, inclusive of examinations

by means of X-Rays and/or physical chest examinations by means of a stethoscope, to identify possible TB infection; isolation of infectious inmates and effective implementation of the DOTS system over the prescribed period of time.

[248.] The measures referred to in the immediately preceding paragraph, other than isolation, are all obviously dependant on sufficient numbers of nursing staff and doctors to perform the various tasks. The shortage of nursing staff had been a major problem at Pollsmoor in general and, at the maximum security prison in particular, for a considerable period of time. The correspondence by Mr Muller and Mr Engelbrecht which form part of Exhibit A referred expressly to the under staffing of the health care service in the prison and the effect thereof on the standard of care. The report by Ms Magoro, the Director Health and Physical Care dated March 2001 (Exhibit A p 53 et seq) similarly drew attention to these matters. However, as is apparent from subsequent correspondence, posts remained vacant. By facsimile dated 21 January 2002 forwarded to the Commissioner of Correctional Services, the Area Manager, Mr Engelbrecht, drew attention to the fact that 10 posts for professional nurses were vacant and that a memorandum regarding the appointment of additional nurses which had been sent in October 2001, had not been answered (Exhibit A, p 29 -30). Facsimiles sent by Mr Muller to the aforesaid Commissioner on 28 November 2001 and 16 January 2002, drew attention to the fact that vacant posts for registered nurses had been advertised in August 2001,

interviews had been conducted from 29 October to 2 November 2001, but appointments had not been made (Exhibit A p 32 - 34).

[249.] According to the evidence given at the trial of the matter, staff shortages remained a problem throughout the time of the plaintiff's incarceration. In my view, a reasonable person in the defendant's position would have realised that adequate staffing was the key to the prevention and control of TB and would have taken steps to ameliorate the staff shortage as a matter of some urgency.

[250.] The overcrowding of the maximum security prison obviously made it difficult, if not impossible, to isolate all of the persons who were in the infectious stage of TB in the prison hospital. The evidence of Dr Theron and Dr Craven made it clear that isolation was an important element in the prevention of the spread of TB in a closed environment, such as the prison and logic dictates that infectious prisoners ought to have been separated from the general prison population if the spread of TB was to be curtailed.

[251.] Whilst the evidence has established that some so-called isolation facilities were available in the hospital section, it was apparent from Dr Theron's evidence that the design of the so-called isolation cells was such that isolation was not capable of practical implementation. There is no evidence that such problem was capable of remediation, given the physical constraints of the prison building. Mr Gertse, however, testified that some

of the single cells in the sections were also used as isolation facilities. If it is accepted that some of the single cells were set apart for isolation purposes, it tends to indicate that with a measure of re-organisation, more cells could have been used for such purpose. However, no evidence as to whether or not it would have been feasible to do so, was presented.

[252.] In conclusion, a reasonable person in the defendant's position would, in my view, have taken steps to guard against the spread of TB in the maximum security prison, because it is such a formidable disease which is easily spread. More particularly, a reasonable person would have ensured that sufficient numbers of nursing staff were employed to perform the various tasks involved in the control and prevention of TB in the said prison.

Did the defendant take reasonable steps to guard against the spread of TB?

[253.] On the evidence before the Court, one could not reasonably have expected the defendant to re-design the prison, or to remedy the design defects. The evidence tendered is also insufficient to determine whether or not the defendant could reasonably have gained control over the overcrowding.

[254.] The failure to isolate infectious TB patients may well have breached the defendant's obligations in terms of clause 15 of Chapter 3 of the standing orders which provides that prisoners with communicable conditions must be

isolated. Given the constraints imposed by inadequate accommodation and overcrowding I am, however, not satisfied that it has been established that it would have been reasonably possible to provide isolation for all of the infectious prisoners.

[255.] The evidence has, however, established that if sufficient members of nursing staff had been available, proper and effective screening could have been conducted, which was one of the key elements in gaining control over the spread of TB in the prison. In addition, nurses would have been able to conduct clinics in the various sections on a daily basis, which means that it would have been possible to identify potential TB patients more expeditiously and to implement the DOTS system effectively. In short, the evidence has established that sufficient numbers of nursing staff were essential in combatting and controlling TB in the prison. Put differently, the serious shortage of trained nursing staff was one of the main factors which resulted in the loss of control over TB in the maximum security prison.

[256.] The defendant, obviously had the power and authority to appoint additional staff, but failed to do so. The reasons why vacant positions were not filled, are obviously within the exclusive knowledge of the defendant, but the defendant tendered no evidence to show that it was impossible, inappropriate, or unreasonable, to fill vacant posts on the nursing staff establishment, or that there were alternative means of curtailing the spread

of TB in the maximum security prison. The high water mark of the defendant's case was that a self-reporting system was in place in the prison, that it was up to inmates to report if they were ill and that sputum tests were conducted for prisoners who requested these.

[257.] The authorities' reliance upon a self-reporting system, in terms whereof prisoners had to come forward if they were ill, appears to me to have been ill-advised, inappropriate and wholly insufficient in the fight against TB in the prison environment for, inter alia, the following reasons:

[257.1] According to the evidence, most of the inmates smoked, cells were filled with smoke and drifted down the corridor and most of the inmates coughed. Mere coughing was accordingly unlikely to precipitate any action on the part of an affected inmate. Indeed, Dr Craven's evidence was that people who usually cough do not regard a cough as pathological and only go to the doctor once additional symptoms have manifested. Such evidence also accords with common sense and with the probabilities. In instances where people have become ill with TB, they accordingly cough up bacteria until such time as they have manifested additional symptoms which make them realise that they are ill. In the closed prison environment which is characterised by poor ventilation and a lack of sunlight, this means that the bacteria remain active for some

time. Moreover, with each person who has become ill with TB, but has not been diagnosed, the pool of TB bacteria increases. Fellow inmates who are not ill with TB are, however, exposed to the TB bacteria which may be present in a cell for 23 hours each day;

[257.2] According to the evidence, prison gangs had their own 'doctors' or 'inyangi', who exercised control over inmates and who dictated when inmates could see the prison doctor. Inmates who were ill with TB could accordingly be prevented from seeking timeous medical assistance, thereby increasing the pool of bacteria in the prison environment;

[257.3] the number of nurses employed at the maximum security prison were wholly insufficient to cater for the needs of inmates. As Mr Muller testified, it was accordingly not possible for a nurse to visit each of the sections on a daily basis so as to attend to inmates' complaints. It was also practically difficult for inmates to get to the hospital to see the doctor, as was testified to by Dr Theron and the plaintiff. The number of warders was insufficient and there were many gates and check points to traverse. Dr Theron testified that there had been several cases in the maximum security prison where prisoners with active TB had been incarcerated for 3 or 4 months without having been referred to the hospital, because of

difficulties with access;

[257.4] There was insufficient monitoring of suspected TB cases. Nurses did not get to see inmates in the sections on a daily basis, due to the staff shortage. Although Mr Gertse tended to suggest that the 'suspect register' was already being used at the time of the plaintiff's incarceration, it is by no means clear that this was the case. Mr Gertse's evidence was tainted by unreliability on account of his bias in favour of defendant's case and the fact that he did not appear to have much respect for the truth. However, even if one were to accept that the register was being maintained, Mr Gertse testified that in instances where sputum tests produced negative results, such results were not brought to the attention of the doctor. Sputum tests do not always produce positive results in instances where a patient is already ill with TB. This was illustrated in the plaintiff's own case. If prisoners whose sputum tests produced negative results were referred to the doctor, the latter would, at least, have been able to perform a proper chest examination in order to determine whether there was evidence of any underlying pathology which required further investigation and/or treatment. Given the failures in the system alluded to above there was, however, no proper follow-up of suspected TB cases.

[258.] In light of the circumstances adverted to above, the crisp answer to the question as to whether the defendant took reasonable steps to guard against the spread of TB, or to curb its spread in the maximum security prison, is no. There is no evidence that the defendant, or members of the DCS took any steps whatsoever to guard against the spread of TB in the maximum security prison. It follows that the defendant's omission(s) referred to above, constituted negligence.

Allegations of Negligence Found to Have been Proved

[259.] On the totality of the evidence, at appears to me that the Plaintiff has proved the following elements of his claim on preponderance of probabilities:

[259.1] That it was common for inmates, including the plaintiff, to be congregated in close proximity to one another and to be housed in mass cells;

[259.2] That a considerable proportion of prisoners were ill with TB and were infectious, but that they were not isolated from the general prison population;

[259.3] That it was reasonable to expect that persons who were in the

infectious stage of the disease, would expel TB bacteria by coughing, sneezing or spitting and that such bacteria would infect fellow inmates who were in close proximity to them;

[259.4] That it was reasonable to expect that some of the inmates who were infected with TB bacteria as aforesaid, would themselves become ill with the disease;

[259.5] That the plaintiff was infected with TB bacteria during his imprisonment and became ill with the disease;

[259.6] That the responsible authorities could have prevented, or curtailed, the spread of TB in the maximum security prison by providing sufficient numbers of adequately trained nursing staff to properly screen incoming prisoners for TB, to screen inmates regularly for TB, to effectively counsel those inmates who had been in close contact with freshly diagnosed TB patients and to apply the DOTS system effectively;

[259.7] That the responsible authorities failed to prevent or curtail the spread of TB as aforesaid and failed to provide adequate numbers of nursing staff to perform the aforesaid tasks;

Was the defendant's failure to take reasonable steps as aforesaid unlawful?

[260.] As appears from the extract of the Plaintiff's Particulars of Claim which has been referred to in paragraph [6] above, the plaintiff has alleged that the conduct of the responsible authorities was unlawful in that the plaintiff's rights at common law, under the Correctional Services Act 1959 and under the Constitution, were violated.

[261.] If it is found that an omission is culpable, because a reasonable person in the position of the defendant would not only have foreseen the harm, but would also have acted to avert it, that is not the end of the matter. Negligent conduct consisting of an omission is only visited with liability in circumstances that the law regards as sufficient to give rise to a legal duty to avoid negligently causing harm. Whether or not such a legal duty is to be imposed, must be determined by the courts upon a consideration of public and legal policy which is consistent with constitutional norms[8].

[262.] As was pointed out in Van Duivenboden [9] the reluctance to impose liability for omissions is often founded on the concept that individuals are free to mind their own business and the protection which is afforded by the Bill of Rights to equality, personal freedom and privacy may further militate

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[8] Minister of Safety and Security v Van Duivenboden, supra, paras [12] - [17] at 441E-444G. See also Mcintosh v Premier Kwa Zulu Natal [2008] 4 All SA 72 (SCA) at 77d-f

[9] Supra, paras [19] - [20] at 445B-446E

against imposing legal duties on private citizens. Different considerations, however, apply in instances where the conduct of a public authority or functionary is in issue. Public functionaries are, after all, usually charged with serving the interests of the community so that their failure to act cannot be dealt with on the same footing as an omission on the part of private individuals. In the interests of effective government, public functionaries must be afforded the freedom to arrange their affairs and to provide public services without the constant threat of litigation if they were to act negligently. The position of public functionaries is, however, different from that of private individuals in a most important respect. The Constitution expressly imposes certain obligations upon the State. So, for example, section 7 of the Constitution requires the State to protect, promote and to fulfil the rights embodied in the Bill of Rights. Section 2 of the Constitution demands that the obligations imposed by the Constitution be fulfilled and section 41(1) expressly provides that all spheres of government and all organs of State within such spheres must provide government that is accountable, in addition to being effective, transparent and coherent.

[263.] The defendant is ultimately responsible for the safety, health and well-being of prisoners. In fulfilling that responsibility the defendant, in accordance with his obligations in terms of the 1958-Act and the Constitution, must clearly take such steps and do such things as may be necessary to ensure

that the right of a prisoner to treatment which is not inhuman or degrading, is preserved, as well as his right to dignity.

[264.] In the instant case, it appears to me that the plaintiff's rights as aforesaid have been violated. The evidence clearly shows that the plaintiff was detained in extremely overcrowded and poorly ventilated cells. Although the plaintiff received adequate medical treatment once he had been diagnosed with TB, the severe shortage of qualified nurses caused health services in the prison to break down. As a consequence, persons who were ill with TB were not routinely provided with adequate treatment and TB, inclusive of MDR-TB and XTR-TB became prevalent in the prison. In addition, the defendant and/or his officials at the maximum security prison failed to act in accordance with the provisions of section 23 of the 1959-Act and the standing orders, inasmuch prisoners with infectious diseases, such as TB, were not routinely separated from the remainder of the prison population, thereby facilitating the spread of the disease, given that the inmates found themselves in a closed, poorly ventilated environment. Instead of adopting measures to curtail the spread of TB in the maximum security prison, such as adequate screening, the authorities relied on a wholly inappropriate self-reporting system which permitted persons with TB to remain in the general prison population. The authorities had been warned in graphic terms that the situation at Pollsmoor, inclusive of the maximum security prison, was grave cause for concern and that conditions

at the prison were conducive to the risk of spreading TB, bur failed to address the problems in any meaningful manner.

[265.] The conditions under which the plaintiff was detained show considerable similarity with those in the case of Kalashnikov v Russia, an application decided by the European Court of Human Rights under the Convention for the Protection of Human Rights and Fundamental Freedoms. Kalashnikov had been detained in a pre-trial prison which was particularly overcrowded. His cell was so overcrowded that inmates had to take turns to sleep. There was an absence of adequate ventilation, but despite such situation prisoners smoked in the cell. He was allowed outside for exercise for 1 or 2 hours per day, but spent the rest of the time in the cell with limited space for himself and in a stuffy atmosphere. The cell was infested with pests and he contracted various skin diseases and fungal infections throughout his detention. On occasion he was detained with persons suffering from TB and syphilis.

[266.] Albeit that the European Court of Human Rights found that the Russian government had not had the direct or positive intention of humiliating or debasing the applicant, it found that the conditions of detention, in particular the severely overcrowded an insanitary environment and its detrimental effect on the applicant's health and well-being, combined with the length of his detention (from June 1995 to October 1999, i.e. a period

of approximately 4 years) amounted to degrading treatment.

[267.] The circumstances under which Kalashnikov was incarcerated, appear to have been somewhat worse than those which prevailed at the maximum security prison where the plaintiff had been detained. However, whereas there was evidence before the European Court that the Russian government were doing their best to improve conditions of detention in Russia, the defendant has not proffered any such evidence. Although Mr Jamie mentioned in argument that the defendant was subject to certain financial constraints, there was in fact no evidence to that effect.

[268.] Prison inmates live in an environment which is closed and which puts them at the mercy of defendant and his officials. It was the duty of the defendant and his officials, in terms of the 1958-Act and the Constitution, to provide prisoners with treatment which is neither inhumane nor degrading and to preserve prisoners' right to dignity. The failure of the defendant and his officials to do so is, in my view, not justifiable, whether in terms of section 36 of the Constitution or otherwise. These considerations must weigh heavily in favour of a finding that the defendant's conduct, and that of his officials, was unlawful. A further factor which must be borne in mind is that the plaintiff would have no means of redress if the defendant's conduct - and that of his officials - was held to be lawful. The result would be that the responsible authorities could ignore

their duties to prisoners with impunity. In my view, neither public nor legal policy, nor the provisions of the Constitution, could have intended such a wholly inequitable and unjustifiable result.

[269.] It follows that, in my view, the conduct of the defendant and his officials in omitting to take steps to guard against the spread of TB in the maximum security prison as aforesaid, was unlawful.

[270.] In the result, the following order is hereby made:

1. The defendant is declared to be liable to the plaintiff in delict pursuant to the plaintiff having become ill with TB whilst he was incarcerated in the maximum security prison at Pollsmoor;

2. The registrar is requested to set the matter down for hearing, in consultation with the Judge President, in order for the parties to lead evidence pertaining to the quantum of the plaintiff's damages in respect of his illness with TB as aforesaid and the sequelae thereof;

3. Defendant is to pay the plaintiff's costs of suit as between party and party.

A M DE SWARDT, A J