

**SOUTH AFRICAN LAW COMMISSION**

**DISCUSSION PAPER 100**

**PROJECT 73**

**SIMPLIFICATION OF CRIMINAL PROCEDURE  
(OUT-OF-COURT SETTLEMENTS IN CRIMINAL CASES)**

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## PREFACE

This discussion paper (which reflects information gathered up to the end of September 2001) was prepared to elicit responses and to serve as a basis for the Commission's deliberations, taking into account any responses received. The views, conclusions and recommendations in this paper are accordingly not to be regarded as the Commission's final views. The discussion paper is published in full so as to provide persons and bodies wishing to comment or to make suggestions for the reform of this particular branch of the law with sufficient background information to enable them to place focussed submissions before the Commission.

The Commission will assume that respondents agree to the Commission quoting from or referring to comments and attributing comments to respondents, unless representations are marked confidential. Respondents should be aware that the Commission may in any event be required to release information contained in representations under the Constitution of the Republic of South Africa, Act 108 of 1996.

Respondents are requested to submit written comments, representations or requests to the Commission by **31 December 2001** at the address appearing on the previous page. The researcher will endeavour to assist you with particular difficulties you may have. Comment already forwarded to the Commission should not be repeated; in such event respondents should merely indicate that they abide by their previous comment, if this is the position.

The researcher allocated to this project, who may be contacted for further information, is Mr W van Vuuren.

## INTRODUCTION

The South African Law Commission was established by the South African Law Commission Act, 1973 (Act 19 of 1973).

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The project leader responsible for this project is the Honourable Mr Justice LTC Harms. The Commission would like to express its appreciation to Professor Hans-Jörg Albrecht who did a background study on out-of-court settlements in Europe as well as to the German Agency for Technical Co-operation (GTZ) who provided financial and technical assistance by contracting Professor SS Terblanche who prepared this discussion paper.

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## **LIST OF CASES**

*NGJ Trading Stores v Guerreiro* 1974 (1) SA 51 (O)

*R v Jenkins* [1999] NSWCCA 111 (12 May 1999) par 216 ([www.austlii.edu.au](http://www.austlii.edu.au))

*S v Shange* 1083 (4) SA 46 (N)

## CHAPTER 1

### INTRODUCTORY REMARKS

1.1 During 1989 the then Minister of Justice requested the Commission to investigate the possibility of simplifying criminal procedure, with particular reference to a number of questions, two of which were:

(a) Whether the existing provisions relating to the procedure of pleading are unnecessarily cumbersome and/or whether they give rise to abuse; (and)

...

(h) Whether any other provisions relating to criminal procedure and the law of evidence should be amended in order to obviate unnecessary delays and abuse.

1.2 Owing to the extent of the investigation the Commission decided to publish several working papers dealing with different aspects of the investigation. In the first phase the Commission published a working paper which addressed appeal procedures and related matters. This part of the investigation was completed and a report submitted to the Minister during 1994. In the next phase the Commission published a working paper which addressed the reasons for delays in the completion of criminal trials, abuses of the process, specific provisions of the Criminal Procedure Act that cause delays, and problems relating to the administration of the process. That investigation focused on a possible simplification of the process aimed at the elimination of delays in the completion of criminal trials.

1.3 An interim report which, among other things, recommended the formal recognition of a process of plea negotiations in the Criminal Procedure Act, 51 of 1977, was finalised and submitted to the Minister on 16 January 1996. What subsequently occurred, especially as far as the interim report related to plea bargaining, is set out in the Commission's *Discussion Paper 94: Simplification of Criminal Procedure (Sentence Agreements)*. This discussion paper deals with sentence agreements as a part of plea bargaining.

1.4 Paragraph 5.15 of Discussion Paper 94 reads as follows:

The Commission proposes that the present study be limited to sentence agreements. Other plea agreements are sufficiently provided for in the CPA and do not require regulation. There is no evidence of abuse of these provisions. Out-of-court settlements of criminal cases – for example, as provided for in the amended section 6 – should be the subject of a separate investigation and proposal.

1.5 The current report is the result of this separate investigation into out-of-court settlements of criminal cases.

## CHAPTER 2

### OUT-OF-COURT SETTLEMENTS

#### BACKGROUND

2.1 The goal of this paper is to determine whether there is a need in South Africa to develop procedures that provide for the settling of criminal cases without having to go to court, and if so, the best way in which this can be achieved within the South African context.

2.2 Reference should be made at this stage of the international trend to have some criminal cases dealt with out of court. This trend is based mainly on two considerations, namely (1) to increase the cost-efficiency of the criminal justice process through simplified and streamlined procedures, and (2) to deal with mass crime outside of the traditional criminal process, so that the courts have more time to deal adequately with increasingly complex cases.

#### TERMINOLOGY

2.3 In this report an **out-of-court settlement** is an agreement between the prosecution and the defence in terms of which the accused undertakes to comply with conditions as agreed upon between the parties, in exchange for the prosecutor discontinuing the particular prosecution. Such conditional discontinuation of prosecution results in the diversion<sup>1</sup> of the matter from the trial process. Many other terms carrying roughly the same message have been used in various contexts. Examples include waiver of prosecution, deferred prosecution and dismissal of prosecution. Although these terms may have a specific meaning when used in a particular context (eg as part of the law of a particular country), generally they are very similar to out-of-court settlements, as referred to in this document. It is important, nevertheless, when doing comparative research, to keep the context and specific definition of any of these measures in mind.

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<sup>1</sup> Diversion has been defined as "...the referral of *prima facie* cases away from the criminal courts, with or without conditions" – South African Law Commission *Report: Juvenile Justice* (2000) 92. Clearly, an "out-of-court settlement" has to be conditional – the unconditional discontinuation of prosecution amounts to the simple withdrawal of the case, or stopping the prosecution. Both these procedures are currently in place, and are not the subject of this investigation – see par 10 below.

2.4 An out-of-court settlement needs to be distinguished from other pre-trial procedures and agreements. It is distinct from *sentence* and *plea agreements* in that these follow upon a decision by the prosecutor to institute a prosecution. The agreement may affect the offences for which the accused is finally charged, but it invariably results in the conviction and sentence of the offender. Therefore, such offender will have been put through the entire criminal process and will end up with a criminal record. An out-of-court settlement does not involve the entire criminal process, does not lead to a conviction and does not result in a criminal record.<sup>2</sup>

2.5 Traditionally, South African law follows a system of *discretionary prosecution*. It is within the discretion of the prosecutor to proceed with any prosecution, and on the charge that he or she deems appropriate. In terms of section 6 of the CPA, this discretion includes the power to withdraw a charge already instituted, or to stop a prosecution where the trial has already commenced.<sup>3</sup> No conditions are generally attached to such withdrawal of a case or stopping of a prosecution.<sup>4</sup>

## **CURRENT CRITERIA FOR DISCRETIONARY PROSECUTION**

2.6 Unconditional discontinuation of prosecution has been in place for many years. It does not require the Commission's present attention. However, it is necessary to consider the criteria currently used to determine whether such discontinuation would be appropriate.

2.7 The basic criteria for the decision to institute a prosecution is, firstly, that sufficient, admissible evidence should be available to "provide a reasonable prospect of a successful prosecution."<sup>5</sup> In the absence of a reasonable prospect of a conviction, a prosecution should not be pursued. The second is that a prosecution should normally follow if there is sufficient evidence for a conviction "...unless public interest demands otherwise."<sup>6</sup> It is clear that our law does not

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<sup>2</sup> Although it will be essential to keep record of such settlements – see par 74 below.

<sup>3</sup> Sec 6(1)(a) and (b). The latter needs the consent of the DPP or other person authorised thereto.

<sup>4</sup> Nothing currently prevents a prosecutor from withdrawing a case conditionally. Some prosecutors may occasionally undertake to withdraw a charge on the fulfilment of some condition by the accused. However, due to its isolated nature of such practices, it was not feasible to attempt to establish its exact extent.

<sup>5</sup> National Prosecuting Authority of South Africa *Prosecution Policy* (2000) 3.

<sup>6</sup> Op cit 5.

oblige a prosecutor to institute a prosecution whenever sufficient evidence is available.<sup>7</sup> A variety of factors should be considered in determining whether public interest dictates that a prosecution should follow or not. The relevance of these factors, and the weight to be attached to each of them, depends on the circumstances of each individual case and, therefore, on the discretion of the prosecutor. The factors that are involved<sup>8</sup> basically centre on the triad of factors involved in sentencing, namely the seriousness of the offence, the circumstances of the offender and the interests of society.<sup>9</sup> More detailed, these factors include the relationship between the accused and the victim, the economic impact of the offence, its impact on public order and morale, the attitude of the victim, the likely expense of the prosecution, the accused's previous convictions, the willingness of the accused to co-operate with the authorities in the investigation and prosecution of others, and whether the objectives of criminal justice would be served better by preferring a non-criminal alternative to a prosecution.

2.8 It is clear that the prosecutor's discretion to institute a prosecution is very wide. Although it has to be exercised with circumspection, the courts are unlikely to interfere with any decision taken by the prosecutor.<sup>10</sup>

## **THE POTENTIAL USEFULNESS OF OUT-OF-COURT SETTLEMENTS**

2.9 Out-of-court settlements provide a useful method of lessening the burden on our overcrowded criminal justice system. Its other advantages (and disadvantages) are dealt with in chapter 4 below. Much can also be learnt about the usefulness of these settlements by comparing similar procedures that exist in foreign law. However, out-of-court settlement and similar diversionary procedures are by no means foreign to South African law.

2.10 What follows below is a brief discussion of out-of-court settlements and similar diversionary procedures in South African legislation. However, it is not only in formal legal structures that such diversionary procedures are familiar to South African law. It is well known

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<sup>7</sup> SA Law Commission *Discussion Paper 94: Simplification of Criminal Procedure (Sentence Agreements)* (2000) 15, 19; Johann Kriegler *Hiemstra: Suid-Afrikaanse Strafproses* 5 ed (1993) 10-11.

<sup>8</sup> National Prosecuting Authority of South Africa *Prosecution Policy* (2000) 5.

<sup>9</sup> Cf SS Terblanche *The guide to sentencing in South Africa* (1999) 154.

<sup>10</sup> Kriegler op cit 10-11.

in the structures that drive processes of informal community dispute resolution and in indigenous African customary courts. These structures are noted for their restorative justice approach,<sup>11</sup> as well as their flexibility, accessibility, the speed with which they can resolve conflict and the inquisitorial process, rather than an adversarial one, that they follow.<sup>12</sup> They emphasise solving the problems created by the crime, and are intent on restoration and compensation.<sup>13</sup> Out-of-court settlements have the same aims.

## **OUT-OF-COURT SETTLEMENTS IN THE CRIMINAL PROCEDURE ACT**

2.11 Only one provision of the CPA can truly be termed an out-of-court settlement. Section 6(1)(c) provides the prosecutor with the authority to suspend a prosecution whilst placing the accused under correctional supervision. It does not lead to the conviction of the accused, and a successful completion of the correctional supervision ends the matter. Section 6(1)(c) was added to the CPA by the Correctional Services and Supervision Matters Amendment Act 122 of 1991. It has never come into operation, and is not expected to be put into operation either. It reads as follows:

### **6 Power to withdraw charge or stop prosecution**

(1) An attorney-general or any person conducting a prosecution at the instance of the State or any body or person conducting a prosecution under section 8, may—

...(c) at any time before judgment, whether or not an accused has already pleaded to a charge, reconsider the case and upon receipt of a written admission made by the accused in respect of the charge brought against him or a lesser charge, suspend the court proceedings and place such person, with his concurrence, under correctional supervision on such conditions and for such period as may be agreed upon: Provided that—

- (i) where a probation officer or a correctional official is readily available in the court's area of jurisdiction, the powers under this paragraph may only be exercised after a report of such a probation officer or correctional official has been submitted for consideration to the prosecutor concerned;
- (ii) the powers under this paragraph may only be exercised after consultation with the Commissioner and the police official charged with the investigation of the case and with due regard to the circumstances of the offence, the accused and the interests of the community;

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<sup>11</sup> South African Law Commission *Draft report on community dispute resolution structures* (2000) 5, 13 and 68-69.

<sup>12</sup> Op cit 41.

<sup>13</sup> Op cit 68-69.

- (iii) where a prosecution has been instituted under section 8, the suspension of the court proceedings shall be authorized beforehand by the attorney-general;
- (iv) the provisions of section 106(4) shall not be applicable where such an accused has already pleaded to the charge.

(2) If the court proceedings which have been suspended under subsection (1)(c) are proceeded with later—

(a) and the trial has already commenced, the plea which has already been recorded shall stand and the proceedings shall—

- (i) if the court is similarly constituted, be resumed from where they were suspended; or
- (ii) if the court is differently constituted, be proceeded with de novo;

(b) the written admission referred to in subsection (1)(c) may not be used against such an accused during the prosecution.

2.12 The utility of this provision is limited by several built-in factors. First it requires "a written admission" from the accused person. Apart from the uncertainty whether this admission should essentially amount to a confession to the alleged offence, there appears to be no good reason to require such admission for an out-of-court settlement. The modern approach is to require only that the settlement should take place with the consent of the accused.<sup>14</sup> Secondly, the provision contains inadequate information guiding the decision to suspend "the court proceedings".<sup>15</sup> Ideally, the legislature should provide prosecutors with more information regarding the factors on which their decisions should be based. Thirdly, the condition for suspension is limited to correctional supervision, without any apparent reason. The provision is further hampered by the fact that a report by a probation officer or a correctional official should generally be obtained, and that consultation with the Commissioner of Police and the investigating officer is required. The provision can also be criticised for its premise that the prosecution is *suspended*. The emphasis should rather be on the complete diversion of the matter from criminal proceedings. Section 6(1)(c) does not provide a good basis to work from, and it is proposed that it be repealed.

## **CURRENT EXAMPLES OF DIVERSION IN SOUTH AFRICAN LAW**

2.13 Section 57 provides for the payment of admission of guilt. The purpose of this provision

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<sup>14</sup> See Chapter 3 below.

<sup>15</sup> Although reference is made in par (iii) to "the circumstances of the offence, the accused and the interests of the community."

is "to avoid unnecessary court appearance, on a trivial charge, of an accused who is prepared to admit guilt by paying an admission of guilt fine in respect of the relevant charge."<sup>16</sup> It reads as follows:

## **57 Admission of guilt and payment of fine without appearance in court**

(1) Where –

(a) a summons is issued against an accused under section 54 (in this section referred to as the summons) and the public prosecutor or the clerk of the court concerned on reasonable grounds believes that a magistrate's court, on convicting the accused of the offence in question, will not impose a fine exceeding the amount<sup>17</sup> determined by the Minister from time to time by notice in the *Gazette*, and such public prosecutor or clerk of the court endorses the summons to the effect that the accused may admit his guilt in respect of the offence in question and that he may pay a fine stipulated on the summons in respect of such offence without appearing in court; or<sup>18</sup>

(b) a written notice under section 56 (in this section referred to as the written notice) is handed to the accused and the endorsement in terms of paragraph (c) of subsection (1) of that section purports to have been made by a peace officer,

the accused may, without appearing in court, admit his guilt in respect of the offence in question by paying the fine stipulated (in this section referred to as the admission of guilt fine) either to the clerk of the magistrate's court which has jurisdiction or at any police station within the area of jurisdiction of that court or, if the summons or written notice in question is endorsed to the effect that the fine may be paid at a specified local authority, at such local authority.

(2)(a) The summons or the written notice may stipulate that the admission of guilt fine shall be paid before a date specified in the summons or written notice, as the case may be.

(b) An admission of guilt fine may be accepted by the clerk of the court concerned notwithstanding that the date referred to in paragraph (a) or the date on which the accused should have appeared in court has expired.

- (3)(a) (i) Subject to the provisions of subparagraphs (ii) and (iii), an accused who intends to pay an admission of guilt fine in terms of subsection (1), shall surrender the summons or the written notice, as the case may be, at the time of the payment of the fine.
- (ii) If the summons or written notice, as the case may be, is lost or is not available and the copy thereof known as the control document –
- (aa) is not available at the place of payment referred to in subsection (1),

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<sup>16</sup> Du Toit et al *Commentary on the Criminal Procedure Act* (1997) 8-1. See also *S v Shange* 1983 (4) SA 46 (N) 49E.

<sup>17</sup> R1 500 - Government Notice R1410 (Government Gazette 19435) of 30 October 1998.

<sup>18</sup> Para (a) substituted by s 3 (a) of Act 109 of 1984 and by s 6 (a) of Act 5 of 1991.

the accused shall surrender a copy of the summons or written notice, as the case may be, at the time of the payment of the fine; or

(bb) is available at the place of payment referred to in subsection (1), the admission of guilt fine may be accepted without the surrender of a copy of the summons or written notice, as the case may be.

- (iii) If an accused in respect of whom a warrant has been endorsed in terms of section 55(2A) intends to pay the relevant admission of guilt fine, the clerk of the court may, after he has satisfied himself that the warrant is so endorsed, accept the admission of guilt fine without the surrender of the summons, written notice or copy thereof, as the case may be.<sup>19</sup>

(b) A copy referred to in paragraph (a)(ii) may be obtained by the accused at the magistrate's court, police station or local authority where the copy of the summons or written notice in question known as the control document is filed.

(c) Notwithstanding the provisions of subsection (1), an accused referred to in paragraph (a)(iii) may pay the admission of guilt fine in question to the clerk of the court where he appears in consequence of such warrant, and if the said clerk of the court is not the clerk of the magistrate's court referred to in subsection (1), he shall transfer such admission of guilt fine to the latter clerk of the magistrate's court.<sup>20</sup>

(4) No provision of this section shall be construed as preventing a public prosecutor attached to the court concerned from reducing an admission of guilt fine on good cause shown.

(5)(a) An admission of guilt fine stipulated in respect of a summons or a written notice shall be in accordance with a determination which the magistrate of the district or area in question may from time to time make in respect of any offence or, if the magistrate has not made such a determination, in accordance with an amount determined in respect of any particular summons or any particular written notice by either a public prosecutor attached to the court of such magistrate or a police official of or above the rank of non-commissioned officer attached to a police station within the magisterial district or area in question or, in the absence of such a police official at any such police station, by the senior police official then in charge at such police station.

(b) An admission of guilt fine determined under paragraph (a) shall not exceed the maximum of the fine prescribed in respect of the offence in question or the amount<sup>21</sup> determined by the Minister from time to time by notice in the *Gazette*, whichever is the lesser.<sup>22</sup>

(6) An admission of guilt fine paid at a police station or a local authority in terms of subsection (1) and the summons or, as the case may be, the written notice surrendered under subsection (3), shall, as soon as is expedient, be forwarded to the clerk of the

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<sup>19</sup> Para (a) substituted by s 2 (a) of Act 26 of 1987.

<sup>20</sup> Para (c) substituted by s 2 (b) of Act 26 of 1987. Sub-s (3) substituted by s 6 of Act 33 of 1986.

<sup>21</sup> R1 500 - Government Notice R1410 (Government Gazette 19435) of 30 October 1998.

<sup>22</sup> Para (b) substituted by s 3 (b) of Act 109 of 1984 and by s 6 (b) of Act 5 of 1991.

magistrate's court which has jurisdiction, and such clerk of the court shall thereafter, as soon as is expedient, enter the essential particulars of such summons or, as the case may be, such written notice and of any summons or written notice surrendered to the clerk of the court under subsection (3), in the criminal record book for admissions of guilt, whereupon the accused concerned shall, subject to the provisions of subsection (7), be deemed to have been convicted and sentenced by the court in respect of the offence in question.

(7) The judicial officer presiding at the court in question shall examine the documents and if it appears to him that a conviction or sentence under subsection (6) is not in accordance with justice or that any such sentence, except as provided in subsection (4), is not in accordance with a determination made by the magistrate under subsection (5) or, where the determination under that subsection has not been made by the magistrate, that the sentence is not adequate, such judicial officer may set aside the conviction and sentence and direct that the accused be prosecuted in the ordinary course, whereupon the accused may be summoned to answer such charge as the public prosecutor may deem fit to prefer: Provided that where the admission of guilt fine which has been paid exceeds the amount determined by the magistrate under subsection (5), the said judicial officer may, in lieu of setting aside the conviction and sentence in question, direct that the amount by which the said admission of guilt fine exceeds the said determination be refunded to the accused concerned.

2.14 The fine-system of admission of guilt has been in place for many years, and appears to be functioning well. However, it is generally accepted that accused persons frequently select this option in order to avoid having to contest a petty charge, rather than because they consider themselves guilty of an offence.<sup>23</sup> The public also does not regard it as a previous conviction. Under these circumstances it appears to be manifestly unfair to equate the payment of an admission of guilt fine to a previous conviction, especially when the accused person has not appeared in court, and may also not have intended to admit the commission of an offence through payment of the money. A system of out-of-court settlements will exacerbate this paradox if an admission of guilt fine continues to amount to a previous conviction, whereas a true out-of-court settlement, which will often involve more serious crimes, will not.

2.15 Once the above is accepted, the question is whether payment of an admission of guilt fine should not rather be approached as an out-of-court settlement. This approach will be consistent with other diversionary measures contained in the CPA. Also, if payment of an "admission of guilt fine" is not taken as a conviction and sentence, there is no need for a judicial officer to be involved in the finalisation of the matter, and an administrative process will be sufficient.

2.16 Section 341 of the CPA, which should be read with section 57, probably exists only

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<sup>23</sup>

Cf *NGJ Trading Stores v Guerreiro* 1974 (1) SA 51 (O) 53H.

because of the financial relationship between the State and local authorities.<sup>24</sup> Section 341 deals exclusively with municipal offences and certain motor vehicle offences.<sup>25</sup> It reads as follows:

### **341 Compounding of certain minor offences**

(1) If a person receives from any peace officer a notification in writing alleging that such person has committed, at a place and upon a date and at a time or during a period specified in the notification, any offence likewise specified, of any class mentioned in Schedule 3, and setting forth the amount of the fine which a court trying such person for such offence would probably impose upon him, such person may within thirty days after the receipt of the notification deliver or transmit the notification, together with a sum of money equal to the said amount, to the magistrate of the district or area wherein the offence is alleged to have been committed, and thereupon such person shall not be prosecuted for having committed such offence.

(2) (a) Where a notification referred to in subsection (1) is issued by a peace officer in the service of a local authority in respect of an offence committed within the area of jurisdiction of such local authority, any person receiving the notification may deliver or transmit it together with a sum of money equal to the amount specified therein to such local authority.<sup>26</sup>

(b) Any sum of money paid to a local authority as provided in paragraph (a) shall be deemed to be a fine imposed in respect of the offence in question.<sup>27</sup>

(c) Not later than seven days after receipt of any sum of money as provided in paragraph (a), the local authority concerned shall forward to the magistrate of the district or area wherein the offence is alleged to have been committed a copy of the notification relating to the payment in question.

(d) If the magistrate finds that the amount specified in the notification exceeds the amount determined in terms of subsection (5) in respect of the offence in question, he shall notify the local authority of the amount whereby the amount specified in the notification exceeds the amount so determined and the local authority concerned shall immediately refund the amount of such excess to the person concerned.

(e) For the purpose of this subsection 'local authority' means any institution or body contemplated in section 84(1)(f) of the Provincial Government Act, 1961 (Act 32 of 1961), and includes-

- (i) a regional services council established under section 3 of the Regional Services Councils Act, 1985 (Act 109 of 1985);
- (ii) any institution or body established under the Rural Areas Act, (House of Representatives), 1987 (Act 9 of 1987);<sup>28</sup>
- (iii) a local authority as defined in section 1 of the Black Local Authorities Act, 1982 (Act 102 of 1982);
- (iv) a local government body contemplated in section 30(2)(a) of the Black

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<sup>24</sup> Kriegler *Hiemstra: Suid-Afrikaanse strafproses* 5 ed (1993) 889.

<sup>25</sup> These offences are specifically mentioned in Sch 3 to the CPA.

<sup>26</sup> Para (a) substituted by s 9 of Act 64 of 1982.

<sup>27</sup> Para (b) substituted by s 9 of Act 64 of 1982.

<sup>28</sup> Sub-para (ii) amended by s 4 of Act 18 of 1996.

- Administration Act, 1927 (Act 38 of 1927); and  
(v) any committee referred to in section 17(1) of the Promotion of Local Government Affairs Act, 1983 (Act 91 of 1983).<sup>29</sup>

(3) Any money paid to a magistrate in terms of subsection (1) shall be dealt with as if it had been paid as a fine for the offence in question.

(4) The Minister may from time to time by notice in the *Gazette* add any offence to the offences mentioned in Schedule 3, or remove therefrom any offence mentioned therein.

(5) The amount to be specified in any notification issued under this section as the amount of the fine which a court would probably impose in respect of any offence, shall be determined from time to time for any particular area by the magistrate of the district or area in which such area is situated, and may differ from the admission of guilt fine determined under section 57(5)(a) for the offence in question.

2.17 This provision should be kept in mind when any amendments to section 57 are proposed by the Commission.

2.18 Section 57A was added to the CPA in 1996.<sup>30</sup> In essence section 57A extends the provisions of section 57, which apply only when a person has been presented with a summons or written notice to appear in court and to arrested persons who have appeared in court already,<sup>31</sup> regardless whether they are in custody, or have been released subsequent to the arrest. However, the main practical difference between the two sections is that section 57 is aimed at mass offences, such a traffic offences, whereas section 57A is aimed at isolated individual cases. It reads as follows:

#### **57A Admission of guilt and payment of fine after appearing in court**

(1) If an accused who is alleged to have committed an offence has appeared in court and is –

- (a) in custody awaiting trial on that charge and not on another more serious charge;
- (b) released on bail under section 59 or 60; or
- (c) released on warning under section 72,

the public prosecutor may, before the accused has entered a plea and if he or she on reasonable grounds believes that a magistrate's court, on convicting such accused of that

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<sup>29</sup> Para (e) substituted by s 25 of Act 33 of 1986 and by s 16 of Act 26 of 1987.

<sup>30</sup> It was inserted by s 1 of Act 86 of 1996.

<sup>31</sup> SA Law Commission *Discussion Paper 94: Simplification of Criminal Procedure (Sentence Agreements)* (2000) 16.

offence, will not impose a fine exceeding the amount<sup>32</sup> determined by the Minister from time to time by notice in the *Gazette*, hand to the accused a written notice, or cause such notice to be delivered to the accused by a peace officer, containing an endorsement in terms of section 57 that the accused may admit his or her guilt in respect of the offence in question and that he or she may pay a stipulated fine in respect thereof without appearing in court again.

(2) Such notice shall contain—

(a) the case number;

(b) a certificate under the hand of the prosecutor or peace officer affirming that he or she handed or delivered, as the case may be, the original of such notice to the accused and that he or she explained to the accused the import thereof; and

(c) the particulars and instructions contemplated in paragraphs (a) and (b) of section 56(1).

(3) The public prosecutor shall endorse the charge-sheet to the effect that a notice contemplated in this section has been issued and he or she or the peace officer, as the case may be, shall forthwith forward a duplicate original of the notice to the clerk of the court which has jurisdiction.

(4) The provisions of sections 55, 56(2) and (4) and 57(2) to (7), inclusive, shall apply *mutatis mutandis* to the relevant written notice handed or delivered to an accused under subsection (1) as if, in respect of section 57, such notice were the written notice contemplated in that section and as if the fine stipulated in such written notice were also the admission of guilt fine contemplated in that section.

2.19 The following aspects of this provision should be reconsidered: (1) whether an admission of guilt should be required, (2) whether court appearance should be essential, (3) whether the result should be deemed a conviction and sentence and (4) whether this provision should not be replaced by a true out-of-court settlement involving payment of an amount of money to the state.

2.20 The Commission's arguments with respect to aspects (1) and (3) above are dealt with elsewhere.<sup>33</sup> As to (2), the question is why the legislature has specified that the alleged offender has to appear in court before it can find application. There appears to be no reason in principle why an arrested person cannot be granted the option to pay an "admission of guilt fine" even before the first court appearance, should such payment be an appropriate course of action. These issues have to be considered when the Commission makes its recommendations at the end of this document.

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<sup>32</sup> R1 500 - Government Notice R1410 (Government Gazette 19435) of 30 October 1998.

<sup>33</sup> See pars 2.12 and 2.14.

2.21 Two further provisions of the CPA provide for the trial to be stopped, and the proceedings to be diverted from the criminal process. These are contained in sections 254 and 255. Section 254 deals with the stopping of a trial in the case of an offender under the age of eighteen years, if that child appears to be in need of care,<sup>34</sup> and bringing the child before a children's court. Since the Commission has fully dealt with juvenile justice elsewhere, it will not be elaborated upon here.

2.22 Section 255(1) of the CPA reads as follows:

**255 Court may order enquiry under Prevention and Treatment of Drug Dependency Act, 1992**

(1)(a) If in any court during the trial of a person who is charged with an offence other than an offence referred to in section 18, it appears to the judge or judicial officer presiding at the trial that such person is probably a person as is described in section 21(1) of the Prevention and Treatment of Drug Dependency Act, 1992 (in this section referred to as the said Act), the judge or judicial officer may, with the consent of the prosecutor given after consultation with a social worker as defined in section 1 of the said Act, stop the trial and order that an enquiry be held in terms of section 22 of the said Act in respect of the person concerned by a magistrate as defined in section 1 of the said Act and indicated in the order.<sup>35</sup>

(b) The prosecutor shall not give his consent in terms of paragraph (a) if the person concerned is a person in respect of whom the imposition of punishment of imprisonment would be compulsory if he were convicted at such trial.

2.23 Although this provision describes a procedure which is conducted by the presiding judge or magistrate, it has some elements in common with out-of-court settlements, and may be of some guidance to the current enquiry. Some of the guidance relate to (1) the crimes for which this avenue is open, (2) the stage of the proceedings during which the trial can still be stopped, and (3) consent by the prosecutor.

## **Competition**

2.24 Diversion is also known from competition law. The Competition Act 89 of 1998 creates a special procedure for dealing with competition law matters. It creates a Competition Tribunal,<sup>36</sup> which has as one of its functions to

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<sup>34</sup> In terms of s 14(4) of the Child Care Act 74 of 1983.

<sup>35</sup> Section 255(1)(a) has been amended by s 32 of Act 105 of 1997.

<sup>36</sup> Section 26.

...adjudicate in relation to any conduct prohibited in terms of Chapter 2 or 3, by determining whether prohibited conduct has occurred, and if so, impose a remedy provided for in Chapter 6.

The prohibited conduct mainly relates to commercial practices preventing or lessening competition in the market.

2.25 The remedy provided for in Chapter 6 is a consent order. It comes closest to an out-of-court-settlement in criminal matters and is provided for in section 63, which reads as follows:

- (1) If a complaint of a *prohibited practice* has been investigated by the Competition Commission, and the Commission and the *respondent* agree on the terms of an appropriate order, the Competition Tribunal, without hearing any evidence, may confirm that *agreement* as a consent order in terms of section 60.<sup>37</sup>
- (2) With the consent of a complainant, a consent order confirmed in terms of subsection (1) may include an award of damages to that complainant.
- (3) A consent order does not preclude a complainant applying for –
  - (a) a declaration in terms of section 60(1)(a)(v) or (vi);<sup>38</sup> or
  - (b) an award of civil damages in terms of section 65, unless the consent order includes an award of damages to the complainant.<sup>39</sup>

2.26 In terms of section 73(1) a person who fails to comply with an order of the Competition Tribunal commits an offence, punishable by up to R500 000 or 10 years' imprisonment, or both.<sup>40</sup> This penalty clause is an indication that such offence can, in appropriate circumstances, be very serious. At the same time, section 64(1) provides that any order by the Competition Tribunal "may be served, executed and enforced as if it were an order of the High Court". Non-compliance with a consent order can therefore have both criminal and civil law consequences.

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<sup>37</sup> Section 60(2) simply provides that the Competition Tribunal may confirm a consent agreement in terms of section 63 as an order of the Tribunal.

<sup>38</sup> (v): to declare conduct of a firm to be a prohibited practice; (vi): to declare the whole or any part of an agreement to be void.

<sup>39</sup> Italics occur in the legislation, and are cross-referenced in the definitions in section 1.

<sup>40</sup> Section 74(1)(a).

## CHAPTER 3

### OUT-OF-COURT SETTLEMENTS IN FOREIGN LAW

#### COUNCIL OF EUROPE RECOMMENDATION

3.1 On 17 September 1987 the Committee of Ministers to member states of the Council of Europe accepted a document<sup>41</sup> which is pertinent to the present discussion. It is hard to assess its actual impact on the law of European countries. On the face of it the document was not widely implemented. Yet, many countries have since introduced some legislation relating to speedier criminal procedures, discretionary prosecution, et cetera.

3.2 Recommendation No R(87)18 recommends that member states introduce the principle of “discretionary prosecution” and make use of several measures when dealing with minor and mass offences. The main consideration is to accelerate and simplify the working of the criminal justice system, while taking due consideration of articles 5 and 6 (the right to speedy trial) of the European Convention on Human Rights, as well as the increase in the number of criminal cases and the fact that delays in dealing with crimes bring criminal law into disrepute and affect the proper administration of justice.

3.3 The principle of discretionary prosecution is dealt with in the following terms:

1. The principle of discretionary prosecution should be introduced or its application extended wherever historical development and the constitution of member states allows; otherwise, measures having the same purpose should be devised.
2. The power to waive or to discontinue proceedings for discretionary reasons should be founded in the law.
3. The decision to waive prosecution, under this principle, only takes place if the prosecuting authority has adequate evidence of guilt.
4. This principle should be exercised on some general basis, such as the public interest.
5. The competent authority, in exercising this power, should be guided in conformity with its domestic law, notably by the principle of equality of all citizens before the law and the individualisation of criminal justice, and especially by:
  - the seriousness, nature, circumstances and consequences of the offence;
  - the personality of the alleged offender;
  - the likely sentence of a court;

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<sup>41</sup> Council of Europe *The simplification of criminal justice (Recommendation R(87)18)* (1988) Strasbourg.

- the effects of conviction on the alleged offender, and
  - the position of the victim.
6. The waiving or discontinuation of proceedings may be pure and simple, accompanied by a warning or admonition, or subject to compliance by the suspect with certain conditions, such as rules of conduct, the payment of moneys, compensation of the victim or probation.
  7. The alleged offender's consent should be obtained wherever conditional waiving or conditional discontinuation of proceedings is envisaged. In the absence of such consent, the prosecuting authority should be obliged to proceed against the alleged offender unless it decides upon a different reason to drop the charges. Failure to challenge the measure decided upon or compliance with a condition required within the meaning of paragraph 6 may be considered as amounting to consent. Rules should be prescribed to ensure that informed consent is given freely and not subject to constraint.
  8. In general, the waving or discontinuation of proceedings may be temporary, pending expiry of the statutory period for prosecution, or final.
  9. In the case of conditional discontinuation, discontinuation should be final once a person has fulfilled his or her obligations. The decision should not be treated as equivalent to conviction and follow the normal rules regarding, *inter alia*, inclusion in the criminal record unless the alleged offender has admitted his or her guilt.
  10. Whenever possible, a decision to waive or discontinue proceedings should be notified to the complainant.
  11. The victim should be able to seek reparation for the injury done to him by the offence in a civil or criminal court.
  12. The notification of the suspect should not be necessary if the decision takes the form of a simple decision not to prosecute.<sup>42</sup>

3.4 The next proposal deals with summary procedures for offences which are inherently minor. In essence, this is already applied in South Africa by way of admissions of guilt. Nevertheless, a few of the recommendation's detailed points bear repeating: (1) no physical coercive order should be ordered; (2) the procedure should be subject to express or tacit acceptance; (3) acceptance of or compliance with such a proposal should preclude any prosecution in respect of the same facts; and (4) the procedure should not infringe the right of the suspect to have his case brought before a judicial authority.<sup>43</sup>

3.5 What are termed out-of-court settlements are then dealt with.<sup>44</sup> This is done in the following terms:

- (1) In the light of their constitutional requirements, member states should review their legislation with regard to out-of-court settlements in order to allow an authority

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<sup>42</sup> Op cit 8-9.

<sup>43</sup> Op cit 10-11.

<sup>44</sup> Op cit 11.

competent in criminal matters and other authorities, intervening at this stage, to promote the possibility of out-of-court settlements, in particular for minor offences on the basis of the following principles:

- (2) The law should prescribe the conditions which the authorities may propose to the alleged offender, more particularly: (i) the payment of a sum of money to the state or to an institution of public or charitable nature; (ii) the restitution of goods or advantages obtained by the commission of the offence; (iii) that appropriate compensation be granted to the victims of the offence either in advance of the settlement or as a part of it.
- (3) The competence of the authorities concerned to make such a proposal and the categories of offences should be determined by law. The authorities should be able, for the benefit of the alleged offender, to revise its proposal after having taken note of possible objections made by the alleged offender.
- (4) The authorities should specify the circumstances in which they have recourse to out-of-court settlements and should draw up guidelines and tables of amounts payable for out-of-court settlements in order to ensure, as far as possible, the principle of equality before the law. With this aim, it is useful to publish the circumstances, guidelines and tables of amounts payable.
- (5) The alleged offender who does not wish to accept the proposal for an out-of-court settlement should always be entirely free to ignore or refuse the offer.
- (6) The acceptance of the out-of-court settlement by the alleged offender and his fulfilling of the conditions makes the renunciation of the right to prosecute definitive.
- (7) The authorities should publish an annual report on how they have exercised their powers of out-of-court settlement, without disclosing the identity of the alleged offenders.

3.6 The main difference between discretionary prosecution and out-of-court settlements as they are dealt with in this document appears to be the fact that out-of-court settlements are advanced in the case of "an authority competent in criminal matters and other authorities, intervening at this stage". The distinction is not important for South African purposes, as South African law does not provide for a comparable authority.

3.7 The considerations that are mentioned in the Recommendation, which are often based in the protection of human rights, should be heeded in any out-of-court settlement procedure that may be advanced or discussed for South Africa.

## **OUT-OF-COURT SETTLEMENTS IN EUROPE**

3.8 Professor Hans-Jörg Albrecht of the Max Planck Institute for Foreign International Criminal Law in Freiburg, Germany drew up a report for the Commission on current developments regarding out-of-court settlements in Europe. This report will be published in the Commission's research series.

3.9 Generally, the motivation for out-of-court settlements has already been mentioned in this document.<sup>45</sup> Professor Albrecht's study also deals with this motivation in some detail. The following bears repeating: the main aim is the simplification and acceleration of the criminal process without undermining the rule of law and basic standards of fair and just criminal process. Cost-efficiency is a major consideration. Criminal cases must be finalised within a reasonable time. Restitution and restorative justice plays an important role, especially in the interests of crime victims. At the same time stigmatisation of the offender is reduced. Mass crime and the increased complexity of criminal cases is a further consideration.

3.10 In this document the most important features of Dr Albrecht's report will be summarised briefly.

### **Germany**

3.11 It is important, when considering the German position, to keep in mind that, according to the German understanding of the principle of legality, every criminal complaint has to be investigated and, if sufficient evidence is found to exist, prosecuted. Therefore, German law does not accept discretionary prosecution. Nevertheless, the power of prosecutors to settle cases out of court has been constantly expanded in recent years.

3.12 In terms of §153 of the German Procedural Code a prosecutor may unconditionally dismiss a case "if the guilt of the suspect is marginal". This means that both the degree of intent or negligence that should be satisfied, and the damage or injury caused, should be marginal. Dismissal is, in general, based on the discretion of the prosecutor. In the case of more serious offences, despite compliance with the above-mentioned criteria, the decision has to be affirmed by the court.

3.13 In terms of §153a of the German Procedural Code a prosecutor may dismiss a "case of minor guilt" if the offender complied with conditions set by the prosecutor.<sup>46</sup> The payment of an amount of money (*Geldbuße*), which is different from a fine as the latter is confined to criminal convictions, is by far the commonest such condition, although compensation, community service

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<sup>45</sup> See par 7 p 3 above.

<sup>46</sup> See also JMT Labuschagne "Konsensuele strafregepleging: Opmerkinge oor die spanningsveld tussen regsstaatlikheid en doelmatigheid" (1995) 8 SACJ 158 at 185.

and maintenance orders are imposed in a small number of cases.

3.14 Criticism against the increasing discretion by the prosecutors is that it grants the victim no input, that strong pressure may be exercised on the suspect to accept the conditions of a conditional dismissal (simply because an objection would lead to a trial in court), that these provisions could be used to avoid acquittals because of insufficient evidence, that there is considerable disparity within the system and that influential offenders may find it easier to bargain their way out of the criminal justice system by offering to pay the *Geldbuße* in exchange for having the charges dropped. There is also claimed to be insufficient control over prosecutors decisions.

### **Denmark**

3.15 The prosecutor may dismiss a case “if costs, expected length of proceedings or workload required by processing a case would be unproportional compared to the significance of the case and the expected outcome.” This option was introduced mainly for economic crimes.

3.16 The prosecutor may waive prosecution at own discretion if (1) only a fine is prescribed as punishment; (2) the accused is a juvenile and confesses to the crime; (3) the expected costs of the trial would be disproportionate; (4) the law authorises waiving; or (5) rules of the executive permit waiving.

3.17 Provision is also made for a summary fine, similar to the South African admission of guilt. In this case the accused can pay the fine immediately, or consent to the fine but negotiate to pay in instalments.

### **England and Wales**

3.18 In simple cases “and in cases where the suspect had confessed to the offence police have the power to caution the offender and to dismiss the case after a formal caution had been issued.”<sup>47</sup> However, neither the police nor the prosecuting services have the power to impose fines or any other conditions in exchange for waiving prosecution.

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<sup>47</sup> This cautioning has been given a statutory basis in the Crime and Disorder Act, 1998.

## **France**

3.19 For certain traffic offences fixed amounts of (administrative) fines are imposed by the police. In case of other “contraventions” the accused has the right to appeal to the prosecutor who can decide to dismiss the case unconditionally, or to take the matter to court.

3.20 The “composition pénale” was introduced in 1999. It is quite similar to the procedure introduced under §153a of the German Procedural Code. It can be imposed for offences for which not more than three years’ imprisonment can be imposed, has to be consented to by the judge, and is dependent on full compensation of the victim. Such dismissal of prosecution can also be made dependent on payment of a transaction fine, withdrawal of driver’s licence, community service or confiscation of proceeds or instruments of crime.

## **Belgium**

3.21 The first option open to a Belgian prosecutor is simple, unconditional non-prosecution.<sup>48</sup> This is limited to petty offences, and the decision has to be made in accordance with the general guidelines from the ministry of justice. Such decisions have to be justified in writing.

3.22 Conditional non-prosecution is also possible. The suspect has to agree to such conditions, which are usually closely related to probation.

3.23 The report also makes mention of the procedure provided for in §216 of the Belgium Procedural Code. This appears to be a typical out-of-court settlement, to which a wide variety of conditions can be attached, including the “proposal” of a fine, which is available for all offences punishable by fine or imprisonment of up to 5 years’. Only 1,2% of all prosecutorial decisions in 1995 fell into this category.

## **Italy**

3.24 Italian criminal procedure does not allow the prosecutor any discretionary dismissal of criminal cases. A couple of abbreviated procedures are provided for, but a judge is always involved, and the outcome of the case is determined only by the judge.

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<sup>48</sup> It amounts to 54% of all prosecutor decisions (1999).

## **The Netherlands**

3.25 Dutch criminal procedure allows the prosecutor not to open a criminal trial, based on reasons of public interest. Some of the considerations that may prompt such a decision include the existence of other agencies to deal with the offence, that the offence is petty or occurred a long time ago, or that there are factors peculiar to the offender or in the relationship between the offender and the victim which would make punishment superfluous (eg the victim participated in the crime).

3.26 Decisions not to prosecute can take one of two forms: (1) informal decisions, or (2) formal decisions with “notification of the judge”.

3.27 §74 of the Dutch Criminal Code permits the prosecutor to dismiss a case in exchange for compliance with some condition (*transactie*).<sup>49</sup> The requirements are the following: (1) only criminal offences not carrying a sentence of more than six years’ imprisonment; (2) the suspect has to consent to the transaction, and (3) the guidelines by the Dutch ministry of justice have to be complied with. Four conditions can be attached to a *transactie*: (1) payment of a sum of money,<sup>50</sup> (2) payment of an amount equivalent to the value of items which can be forfeited, (3) consent to confiscation, or (4) compensation and restitution.

## **Portugal**

3.28 For petty offences a summary procedure is provided. Although no trial takes place, it is restricted to a small range of offences. It is not sufficiently close to an out-of-court settlement to warrant further consideration.

## **Spain**

3.29 No out-of-court settlement procedure is provided for.

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<sup>49</sup> See also JMT Labuschagne “Konsensuele strafregspiegeling: Opmerkinge oor die spanningsveld tussen regsstaatlikheid en doelmatigheid” (1995) 8 SACJ 158 at 184.

<sup>50</sup> The most common disposition (25% of cases).

## **Austria**

3.30 §42 of the Austrian Criminal Code provides that a particular act will under certain circumstances not be regarded as a crime. If these circumstances are present, the prosecutor has to dismiss the case unconditionally. The circumstances are the following: (1) the offence is not punishable with more than three years' imprisonment, (2) punishment is not required for the deterrence of the offender, and (3) the offence has only resulted in minor loss or damage and the offender has compensated the victim or has made a serious attempt to effect compensation. Although dismissal has to be unconditional, the latter condition gives the prosecutors ample opportunity to require compensation before the unconditional dismissal is allowed.

3.31 Conditional dismissal has been provided for since 1 January 2000. The following conditions can be imposed: (1) a fine, (2) community service, (3) probation, or (4) victim-offender mediation. A move is afoot to make a combination of these conditions possible. The requirements for conditional dismissal are the following: (1) the offence is not punishable with more than 5 years' imprisonment, (2) the suspect has consented, (3) there is sufficient evidence that the accused committed the offence and no difficulty in proving it, and (4) the blameworthiness of the offender is minor.

## **Switzerland**

3.32 A penal order exists, which cannot be equated to an out-of-court settlement.

## **Poland**

3.33 The Polish Code of Criminal Procedure does not really provide for any process related to an out-of-court settlement. It does provide for abbreviated procedures in the case of less serious offences, but these procedures generally culminate in a conviction and sentence. The prosecutor may only decide not to institute prosecution of petty offences where the danger to society is insignificant.

## OUT-OF-COURT SETTLEMENTS IN AUSTRALIA AND UNITED STATES OF AMERICA

### Australia

3.34 True out-of-court settlements appear to be a foreign concept in Australia. A speech by the Commonwealth DPP on 18 April 1996,<sup>51</sup> dealing with the initial decision to prosecute, mentions two fundamental considerations in the decision to prosecute. The first is that there must be sufficient evidence, and the second that a prosecution must be required in the public interest. The latter consideration has some place in the question whether an out-of-court settlement might be appropriate.

3.35 Some Australian states have a separate trial system for certain drug offenders. These offenders are diverted from the normal criminal justice system, and channelled into a drug courts system. The Drug Court Act 1998 of New South Wales provides an example. In terms of its provisions the court<sup>52</sup> before which a person is charged has the duty to determine whether the accused is an "eligible person".<sup>53</sup> If the accused is an "eligible person", and is willing to be referred to the Drug Court, the court has to do so.<sup>54</sup> The Drug Court acts as an ordinary court, in the sense that it convicts and sentences the accused,<sup>55</sup> but must suspend the sentence within 14 days of its imposition, allowing the offender to participate in a program instituted under the Act.<sup>56</sup> At the termination of this program, the imposed sentence has to be reconsidered.<sup>57</sup>

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<sup>51</sup> See [www.law.gov.au/cdpp/speeches/SPEECHPR.HTM](http://www.law.gov.au/cdpp/speeches/SPEECHPR.HTM)

<sup>52</sup> The courts to which the Act is applicable is prescribed by regulation – s 6(1).

<sup>53</sup> Among others, an "eligible person" is someone likely to be sentenced to unsuspended imprisonment, has pleaded guilty or intends to do so and appears to be dependent on the use of prohibited drugs – s 5(1).

<sup>54</sup> Section 6(2).

<sup>55</sup> Section 7(2).

<sup>56</sup> Section 7(3).

<sup>57</sup> Section 12(1). The rationale of the Drug Court is the following, according to *R v Jenkins* [1999] NSWCCA 111 (12 May 1999) par 216 ([www.austlii.edu.au](http://www.austlii.edu.au)): "The acceptance of the link between drug dependency and many forms of criminal activity has recently led the State of New South Wales to create a Drug Court, with a special regime for dealing with certain categories of offenders, although not those charged with offences 'involving violent conduct'."

## United States of America

3.36 Dealing with diversion in general, Professor Candace McCoy writes as follows:

Most often, a prosecutor will demand that the accused admit guilt and agree to participate in a 'diversion program,' often involving drug or alcohol treatment. In return, the prosecutor will not make formal charges or will drop the charges already made. The result is that the offender will have no criminal record and the prosecutor will have assured a measure of social control and, optimistically, rehabilitation. A thoughtful prosecutor has thus worked to prevent a juvenile or petty criminal from being stigmatized with a criminal conviction – an important consideration for juveniles whose lives may change for the worse by being labelled 'delinquent'. A pretrial diversion program may involve restitution to the victim, voluntary public service, or other conditions. If a person accomplishes the requirements of such a program, formal charges – if made – are dismissed, leaving no criminal record. But if the person does not fulfill the program requirements, the prosecutor may then pursue the original charges.

The point is that the prosecutor has complete power to decide who will receive the benefits of diversion, the conditions necessary to avoid criminal charges, and whether to restart prosecution due to noncompliance. As a matter of policy, the prosecutor has determined who might be capable of rehabilitation or, indeed, whether a person is guilty of the crime or not. And the prosecutor has arguably 'widened the net' of state control over lives of people accused of crime, because defendants assigned to diversion programs probably would not have received such extensive conditions of compliance if they had proceeded through regular adjudication into court and been sentenced by a judge. This is simply one example of the great discretionary power the prosecutor can wield over the lives of a great number of people – and all before their cases ever get near a courtroom.<sup>58</sup>

3.37 It must be accepted that diversion is not held in the same high regard everywhere or under all circumstances.<sup>59</sup> It may be a solution in the case of juvenile justice, but it has the potential of adding to the criminal justice system cases which would not have been accepted in the absence of diversion. In other words, it may have a "net-widening effect", which could complicate rather than simplify the criminal procedure. The net-widening effect results in more cases coming through the criminal justice system, placing a greater burden on the prosecuting staff or other officials that may be specifically appointed for this purpose, often without really reducing the number of cases going to court.<sup>60</sup>

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<sup>58</sup> In "Prosecution" in Michael Tonry (ed) *The Handbook of Crime and Punishment* (1998) Oxford University Press 460.

<sup>59</sup> See, eg, Paul C Friday, Katherine R Malzahn-Bass, Donna K Harrington "Referral and selection criteria in deferred prosecution" (1981) 21 *British Journal of Criminology* 166-172.

<sup>60</sup> Cf Friday et al (n 46) at 172.

3.38 A fairly common practice in the USA is that of deferred prosecution,<sup>61</sup> where prosecution is suspended on compliance by the defendant with some condition or conditions. This practice is closely related to out-of-court settlements. It is fairly generally accepted to have been initiated in the 1930s in Brooklyn, as a result of the efforts of Conrad Printzlien.<sup>62</sup> Its purpose is

the diversion of selected defendants from the regular criminal justice system, after arrest and arraignment. It is recommended where, in the prosecutor's initial impressions, it appears that the defendant is not a significant threat to the community and is likely to benefit from the procedure.<sup>63</sup>

At first, deferred prosecution was informally implemented, without statutory authority, but in June 1964 the Department of Justice issued a memorandum that formalised the institutional use of deferred prosecution.<sup>64</sup>

3.39 Some of the useful points that have been highlighted in studies on deferred prosecution include the following:

- (1) One should not underestimate the risk of the abuse of power by prosecutors. Although the accused is supposed to comply with the conditions of the deferred prosecution voluntarily, it remains the threat of conviction that is used to encourage such compliance. One of the safeguards against abuse is the availability of a legal advisor.<sup>65</sup>
- (2) The ideal duration of supervision under deferred prosecution has been shown to be from 6 to 23 months.<sup>66</sup>

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<sup>61</sup> Carol J. DeFrances, Steven K. Smith, Louise van der Does: U.S. Department of Justice, Office of Justice Programs, Bureau of Justice Statistics *Prosecutors in State Courts, 1994* (October 1996) NCJ-151656 (see [www.ojp.usdoj.gov/bjs/pub/ascii/pisc94.txt](http://www.ojp.usdoj.gov/bjs/pub/ascii/pisc94.txt)): 59% of prosecutors used deferred prosecution for felony prosecution.

<sup>62</sup> James M Dean "Deferred prosecution and due process in the Southern District of New York" (1975) *Federal probation* 39(3) 23.

<sup>63</sup> Dean op cit (n 49) 24.

<sup>64</sup> Stephen J Rackmill "Printzlien's legacy, the 'Brooklyn Plan'" (1996) *Federal probation* 60(2) 8 at 10.

<sup>65</sup> Dean op cit (n 49) 24.

<sup>66</sup> Rackmill op cit (n 51) 13.

## **SUMMARY**

3.40 It is clear from the comparative research that a very wide range of out-of-court settlements is provided for in different countries, for crimes of widely different severity, with a wide range of conditions. Owing to this wide variety, often determined by the legal traditions and practices of the specific jurisdiction, it serves no purpose to attempt a summary of the comparative research. As far as useful ideas can be gathered from this research, it will be done in the next chapter, in dealing with the different considerations that should be kept in mind when constructing a South African proposal.

## CHAPTER 4

### THE NEED FOR OUT-OF-COURT SETTLEMENTS IN SOUTH AFRICA

#### Advantages of out-of-court settlements

4.1 The advantages of out-of-court settlements are the following:

- (1) Most importantly, they will contribute to saving precious court time and costs, since the case can be finalised without going to court,<sup>67</sup> and without the time-consuming task of settling factual disputes.
- (2) The saving in time means that more cases can be dealt with more rapidly, something that should improve the people's perception of the administration of justice.
- (3) The accused person has certainty regarding the outcome of the case, provided the conditions of the agreement are complied with.<sup>68</sup>
- (4) The accused person does not end up with a record of previous convictions, a factor which often prompts people to dispute a criminal charge.
- (5) If all parties involved approach the matter with open minds there are ample opportunities for restorative justice as an outcome of an out-of-court settlement. However, expectations in this respect should be tempered by the experience in jurisdictions employing out-of-court settlements, namely that such conditions are rarely used.
- (6) Victims can be protected from publicity, and from having to be subjected to cross-examination, and yet benefit from compensation or restitution by the accused.<sup>69</sup>

#### Disadvantages

4.2 The main disadvantages of out-of-court settlements are the following:

- (1) The possibility exists that the public may view private settlements with suspicion,

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<sup>67</sup> See also SA Law Commission *Discussion Paper 94: Simplification of Criminal Procedure (Sentence Agreements)* (2000) 26 [par 4.3].

<sup>68</sup> See also *Sentence Agreements* 25 [par 4.2].

<sup>69</sup> See also *Sentence Agreements* 33 [par 5.12].

something that may impact negatively on the image of the administration of justice. However, it is unrealistic to expect each dispute and crime to be settled in open court. The criminal justice system simply does not have that capacity. Also, secrecy can sometimes be preferable, for example in the interests of the victim of a crime.<sup>70</sup>

- (2) Some may argue that the lack of judicial control over out-of-court settlements is another disadvantage.<sup>71</sup> The response to this objection is as in the previous point.
- (3) There are various ways in which lawyers and public prosecutors can improperly influence an accused person to make the required admission or to consent to the conditions of the out-of court settlements. This will not be something peculiar to out-of-court settlements. Nevertheless, the concern has to be addressed in the proposed legislation.<sup>72</sup>
- (4) The decision to enter into out-of-court settlements and the nature of the conditions can be based on irrelevant factors, such as the personality of the prosecutor and legal representative, which could lead to the unequal treatment of accused persons. However, the exercise of a discretion by the prosecutor is an integral part of the criminal justice system as it currently stands. If applied correctly, out-of-court settlements could become an instrument furthering the effective administration of justice.

### **Further consideration**

4.3 There is currently a tremendous backlog of criminal cases in the courts. The reasons for this backlog have already been noted in other reports. There can be little doubt that a system of out-of-court settlements, properly devised and implemented, may help to alleviate this backlog simply because a case can reach a satisfactory conclusion with a minimum expenditure of time and effort.

### **Conclusion**

4.4 In view of the foregoing the Commission is of the opinion that there is a very definite need for out-of-court settlements in criminal cases in South Africa.

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<sup>70</sup> See also *Sentence Agreements 27* [par 4.5 and 4.6].

<sup>71</sup> See also *Sentence Agreements 27* [par 4.7 and 4.8].

<sup>72</sup> See also *Sentence Agreements 28* [par 4.9 and 4.10].

## **CHAPTER 5**

### **FACTORS TO CONSIDER IN DEVISING A FORMAL SYSTEM OF OUT-OF-COURT SETTLEMENTS**

#### **A real saving in time and cost**

5.1 The system of out-of-court settlements must be a cost-effective option: it must not complicate criminal procedure and must effectively reduce the number of cases going to court.

5.2 It is also essential that the proposed system does not cause a net-widening effect, so that where out-of-court settlements are utilised for cases that are so petty that they would not, under the current system, end up in the criminal court anyway. If this happens the criminal justice system will have to deal with more cases rather than fewer and will become even more expensive. Therefore, the cases that are made subject to out-of-court settlements must be those that, without such a possibility, would undoubtedly have gone to court otherwise. Prosecutors should not be in a position to substitute a current decision not to prosecute, but to withdraw the case ("discretionary prosecution"), with an out-of-court settlement.

#### **The integrity of the criminal justice system**

5.3 The Commission is aware of the present pressures under which the criminal justice system is labouring. These include mistrust in the officials administering the system. The proposed system should not open up new avenues for dishonesty, fraud or corruption. Furthermore, the new system should not further the public perception that serious crime goes unpunished, as this may encourage self-help and may support the idea that the system exists mainly for the benefit of criminals. The Commission is also aware of the fact that the traditional African way of restitution and restoration is often not supported by urbanised people.

5.4 Any newly devised system of out-of-court settlements has to account for these considerations, and needs to contain certain counter-measures. On the other hand a balance has to be struck with the need to deal with offences of a less serious nature speedily and without the unnecessary consumption of scarce resources.

## **Proof of the offence**

5.5 Out-of-court settlements should only be entered into if the prosecutor has sufficient evidence to warrant the prosecution of the accused. A settlement should not be permitted if the prosecutor knows that the accused is innocent or knows that a material element of the case against the accused can never be proved.

## **Equal protection**

5.6 It is important that the proposed legislation should contain guidelines for the exercise of the discretion to utilise an out-of-court settlement in any given case. Not only will such guidelines be of assistance to prosecutors, but they will be essential in order to ensure the equal treatment of all offenders. One guideline found in a number of local and foreign sources is that of public interest. Public interest should always be the overriding consideration in any decision taken by the prosecutor. However, public interest is also the standard used to determine whether a prosecution should be dispensed with altogether, and by itself may be insufficient as a guideline in the case of out-of-court settlements.

5.7 Reference to the triad of factors involved in the determination of an appropriate sentence, namely the offence, the offender and the interests of society, is also found in a number of jurisdictions. To these considerations can be added the effect of a conviction on the accused.

5.8 Beyond public interest, one standard that could be used is that of the sentence that the particular offence would probably attract in the view of the prosecutor. Since the conditions of an out-of-court settlement will not include the option of imprisonment, it could be determined that an out-of-court settlement would only be permitted if the court would probably not impose imprisonment as its primary sentence, or would probably not impose a term of more than one year's imprisonment (as an indication that the crime is not too serious for an out-of-court settlement). By requiring the prosecutor to consider the court's probable sentence, matters such as the seriousness of the offence, the personal factors of the accused and the interests of society in general will have to be taken into account.

5.9 The obvious objection to this standard is that it is too imprecise, and that the prosecutor may totally over- or underestimate the sentence that the court will impose. While this is true, the Commission is of the view that it is better than any other available standard and much better than

an open discretion.

### **Limits to the offences**

5.10 It is clear that the offences that should qualify the accused person for an out-of-court settlement would generally be restricted to offences at the lower end of the scale of severity. The question is whether the legislation should specifically limit such offences or whether this decision should be left to the discretion of the prosecutor. Ideally some guidance should be given in the legislation. In foreign jurisdictions it is customary to limit the offences by the maximum term of imprisonment that can be imposed, generally ranging from one year to six years' imprisonment. Such a course of action in South Africa is complicated by the fact that our criminal law is not codified. It would only be possible in the case of statutory offences.

5.11 In view of the fact that the South African criminal law is not codified and that the penalty clause in many statutory offences is no real indication of the seriousness of the offence,<sup>73</sup> the Commission is of the view that the limiting factor should be the probable sentence should the case go to court.<sup>74</sup> This approach would have the advantage that the **nature** of the offence would determine whether it qualifies for an out-of-court settlement, rather than its name. No further details regarding the limitation of specific offences are, therefore, required.

### **Consent**

5.12 There is no room in our law for an out-of-court settlement to be forced on an accused person or for improper influencing of the accused to accept the settlement or its conditions. Current examples in the Criminal Procedure Act require of the accused person to admit the offence. Such requirement makes sense, since these examples generally result in a previous conviction for the accused. However, it is one of the characteristics of a true diversionary system that it does not result in a criminal record. In fact, most of the advantages of out-of-court settlements<sup>75</sup> would be lost if the settlement were to amount to a previous conviction. Therefore,

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<sup>73</sup> A common example is the possession of a small amount of dagga (cannabis) – the penalty clause provides for a maximum sentence of any fine, or 15 years' imprisonment, or both (s 17(d) read with 13(d) and 4(b) of Act 140 of 1992). The typical sentence is but a fraction of these maxima.

<sup>74</sup> As discussed in para 5.6.

<sup>75</sup> See par 3.40 above.

the Commission is of the opinion that an admission should not be required for purposes of an out-of-court settlement, but that the accused should consent only to the terms of the out-of-court settlement before it can be implemented. The accused persons should be able to enter into a settlement with more freedom if consent is the only requirement. Generally, consent is also the requirement in foreign law.

### **Suitability of the accused person**

5.13 Not every offender is a suitable candidate for an out-of-court settlement. The criteria used in the USA for determining the suitability of the accused in the case of deferred prosecution<sup>76</sup> are, in the view of the Commission, useful. According to these criteria, deferred prosecution can be appropriate if it appears, in the prosecutor's initial impressions, that the accused is not a significant threat to the community and is likely to benefit from an out-of-court settlement. An accused person with previous convictions may, for that reason alone, not be a suitable candidate.

5.14 A database of accused persons who have entered into out-of-court settlements must be established. A prosecutor must be able to determine from an independent source whether the accused is subject to a current out-of-court settlement, has successfully completed a previous settlement, or has failed to comply with the conditions of such a settlement. This information is vital for a proper exercise of the prosecutor's discretion.

### **Settlement**

5.15 The settlement should be in writing, and be binding on both parties as soon as they have signed the agreement. Ordinary contractual rules ought to apply.<sup>77</sup>

5.16 In the discussion paper on sentence agreements the Commission recommended that the sentence agreement contains a preamble setting out which rights have been explained to the accused before the agreement was concluded.<sup>78</sup> The question is whether any preamble is needed in the case of an out-of-court settlement and if so, what it should contain.

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<sup>76</sup> See par 3.36, page 26 above.

<sup>77</sup> See also *Sentence agreements* 29.

<sup>78</sup> Op cit 35.

5.17 In view of the other proposals in this document, the accused's right to remain silent is not affected by an out-of-court settlement, since no admission is required. A preamble should also be unnecessary, due to the content that can be expected of a standard out-of-court settlement.

5.18 The legislation should make it clear that the successful compliance with the terms of the settlement will indemnify the accused against prosecution on the same charge, based on the same fact.

### **The role of victims**

5.19 Another question is whether victims of crime should be given any input in the decision to enter into an out-of-court settlement? If they should, a further question is the extent of this input and whether a victim should be able to veto the prosecutor's decision to enter into an out-of-court settlement.

5.20 It may also be necessary to define the "victim" of the crime. In the *Report on Sentencing: Project 82 (2000)* 90 the Commission took a fairly generous view in defining victims and their rights. Section 47 of the proposed draft legislation reads as follows:

- (1) The prosecution must, when adducing evidence or addressing the court on sentence, consider the interests of a victim of the offence and the impact of the crime on the victim and, where practicable, furnish the court with particulars of -
  - (a) damage to or the loss or destruction of property, including money;
  - (b) physical, psychological or other injury; or
  - (c) loss of income or support.
- (2) A victim impact statement may be made by a victim who, as a result of an offence, suffered damage, injury or loss as referred to in subsection (1), or by a person nominated by such victim.

Accordingly, one could describe a victim as a person who suffered damage to (or loss of) property, injury (whether physical, psychological or otherwise) or loss of income or support as a result of the offence. This would generally be a question of fact.

5.21 It is expected that since the settlement procedure will often be victim-driven, victims should be given considerable input in the decision whether to enter into such a settlement. The Commission is of the view that the victim or victims should get the opportunity to make representations to the prosecutor on whether an out-of-court settlement would be fair in the

circumstances, to make suggestions with respect to restorative justice conditions and to provide proof of damages suffered as a result of the offence. The prosecutor will have to take such representations into account in reaching his or her decision, but should not necessarily be bound by them. The victim, who is emotionally involved in the matter, should not be in a position to veto the decision to enter into an out-of-court settlement.

5.22 In order to enable the victim to make these representations, the victim should be notified of the intended out-of-court settlement whenever possible.

5.23 It should not be possible for a victim to institute a private prosecution against a person who has entered into an out-of-court settlement with the prosecutor. However, as an interested party the victim should be able to take the matter on review if the settlement is unreasonable, or was made in bad faith.<sup>79</sup>

### **The role of the legal representative**

5.24 A further question is whether the legal representative should be given any specific role to play, whether this role should be spelled out or whether general principles should apply in this respect.

5.25 In its recommendations on plea bargaining the Canadian Law Reform Commission recommended that, if the accused is legally represented, the prosecutor must negotiate with the legal representative. The Commission is of the view that such requirement makes sense also in an out-of-court settlement scheme. Beyond this function, which should be contained in legislation, the ordinary principles with respect to legal representation should apply.

### **Any role to the judicial officer**

5.26 It must be determined whether the judicial officer should have any role in out-of-court settlements, such as confirming the settlement, as is currently the case with respect to admissions of guilt.

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<sup>79</sup> Cf, on review in general, E Du Toit et al *Commentary on the Criminal Procedure Act* (1997) 30-1 – 30-2.

5.27 In light of the Commission's view that the settlement should not amount to a previous conviction and that the accused should only consent to the settlement, the Commission is of the opinion that a judicial officer should not play any role with respect to out-of-court settlements in general.

### **Consultation with other interested parties**

5.28 Current legislation often requires the prosecutor to consult with various other parties, such as a probation officer or the investigating officer. The question is whether an out-of-court settlement should also be preceded by such consultation. The Commission is of the view that such consultation should not be a formal requirement for an out-of-court settlement. This should not prevent the prosecutor or the defence from obtaining a probation officer's report. Furthermore, if the investigating officer is of the opinion that an out-of-court settlement should not be entered into in a specific case, the initiative to prevent this should come from the police services, rather than requiring the prosecutor to consult in each and every instance.<sup>80</sup> On the other hand, however, the prosecutor should not be allowed to enter into a settlement without sufficient information about the offence and its surrounding circumstances. Information emanating from the defence alone cannot amount to "sufficient information".

### **Conditions to be attached**

5.29 Out-of-court settlements have to be subject to certain conditions. The nature of these conditions has to be considered.

5.30 Rather than creating a completely new set of conditions for out-of-court settlements, the Commission is of the view that the conditions that are available in the case of the suspension of sentence<sup>81</sup> should be used as point of departure in the case of out-of-court settlements. Several considerations favour such an approach:

- (1) the conditions are well known;
- (2) the conditions are essentially those that are proposed for inclusion in any scheme for

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<sup>80</sup> This is in contrast to the recommendation in *Sentence agreements* 36 (s 111A(b)(i)), due to the specific nature of out-of-court settlements.

<sup>81</sup> See section 297(1) of the Criminal Procedure Act.

conditional discontinuation of prosecution;

- (3) some jurisprudence has already developed with respect to most of these conditions;
- (4) some infrastructure for the implementations of most of these conditions already exists.

5.31 However, some adaptation of the conditions available in the case of suspended sentences will be necessary:

- (1) The duration of suspension of these conditions (five years) is too long, and has to be reduced in the case of out-of-court settlements. The reason is that such a settlement will generally only take place in the case of crimes of lesser seriousness, and that finality needs to be reached within a shorter time. In view of the finding that six to 23 months has been considered the ideal duration for supervision,<sup>82</sup> the Commission recommends a maximum period of two years.
- (2) A shorter maximum period is required for the duration of the more severe condition, namely community service. In this instance the Commission recommends a maximum duration of one year.
- (3) It needs to be determined whether correctional supervision should be retained in the case of out-of-court settlements. The Commission is of the view that too many complications could potentially result from the house arrest component of correctional supervision, especially because it limits the freedom of movement of the accused.
- (4) Payment of a fine is widely used as condition for out-of-court settlements in foreign law. It is also available to prosecutors in South Africa in terms of section 57A of the CPA. The Commission proposes to replace section 57A with a provision allowing for an amount of money to be paid to the State, as condition of an out-of-court settlement. Ideally, this payment should not be referred to as a fine, in order to distinguish it from an ordinary court sentence. The extent of such amount should be limited and this can be done in the manner that the admission of guilt fine of section 57A is currently limited. Payment need not be limited to payment to the State, and should also be extended to carefully circumscribed state agencies, such as the NDA.
- (5) It is probably unwise to retain the open-ended "any other matter"<sup>83</sup> as a condition in

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<sup>82</sup> See par 3.39 above.

<sup>83</sup> Section 297(1)(a)(i)(hh).

the case of out-of-court settlements. It is too wide, and is also of doubtful use in the case of sentencing.<sup>84</sup>

- (6) It also has to be determined whether some kind of warning or reprimand should be included within the available conditions. The Commission is of the view that such a condition is not one to which any settlement can be subjected. Also, if such a "condition" were appropriate, the need for the case to go to settlement has to be questioned. Rather, the decision should then simply be not to prosecute at all.
- (7) Another condition that should be considered for present purposes, pertains to a committal to community dispute resolution structures. The *Draft report on community dispute resolution structures*<sup>85</sup> states that the following benefits are evident from an incorporation of "elements of popular justice" into the formal state structures:

- (1) It will make the state system more accessible and user-friendly for the majority.
- (2) It will make the state system come closer to popular expectations of restorative and compensatory justice.
- (3) It will reduce prison congestion because it would favour non-custodial sentences.
- (4) It will speed up trials, especially if combined with better case-flow management.
- (5) It will strengthen the influence of local communities in making them willing partners for supervision of community service orders and rehabilitation projects.
- (6) It will reduce recidivism because community informal social control systems would dove-tail with the state's methods and processes to form a seamless re-enforcement of the same values and similar processes.

Although that report is at a draft stage, and no fixed recommendations have been made so far, the draft legislation in the current report should make provision for referral to community dispute resolution structures by the prosecutor. All the advantages mentioned above can then potentially attach to out-of-court settlements as well.

## Procedure

5.32 It has to be determined up to which stage the criminal proceedings could be stopped and replaced by an out-of-court settlement. The Commission is of the view that it should be possible at any time after a charge sheet has been served upon the accused. The existence of a charge sheet appears to be a minimum requirement, since the accused needs to be informed as to the details of the charge in respect of which he or she will be concluding the settlement. The cut-off

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<sup>84</sup> Cf Johann Krieglner *Hiemstra: Suid-Afrikaanse Strafproses* 5 ed (1993) 739.

<sup>85</sup> *Project 94* (2000) 85.

point towards the other end of the criminal proceedings is more complicated. Possibilities include (1) before plea,<sup>86</sup> (2) after plea but before adducing any evidence, (3) before the end of the state case, (4) after the state case but before adducing any defence evidence, or (5) any time before judgment. Arguments in favour of an earlier cut-off point include that it will optimise the time and cost saving advantages of out-of-court settlements, and will prevent the accused from first testing the strength of the state's case before deciding to settle. Arguments in favour of a later cut-off point include that the rush to finalise cases often results in a lack of attention to the accused's individual needs and to premature pleading to the charges, and that any saving in the time spent in court, no matter how small, should be appreciated as worthwhile. The Commission is of the view that the best solution is to allow the proceedings to be stopped at any time before any evidence has been presented in court, even after plea.

5.33 The legislation should make provision that the out-of-court settlement has to be approved by a senior control prosecutor.

5.34 The legislation should also make provision for the settlement to fall away if the conditions are not complied with. The accused should receive some credit for partial fulfilment of the conditions. The possibility having the agreement amended should also be attended to.

### **The possibility of appeal or review**

5.35 It has to be considered whether any appeal from the decision of the prosecutor should be provided for. The Commission is of the view that such a procedure is unnecessary. An accused person who considers the settlement unreasonable has the option not to comply with the conditions, in which case the matter will probably run its normal course, leading to the reinstating of the prosecution against that accused. Review of any decision by the prosecutor is also available. The Commission is of the view that the general principles of review are sufficient, and that specific provision is not needed.<sup>87</sup>

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<sup>86</sup> This is the proposal in the case of sentence agreements – *Sentence agreements* 36 (s 111A(1)(a)).

<sup>87</sup> Section 1(b)(ff) of the Promotion of Administrative Justice Act, 3 of 2000, excludes the decision to institute or continue a prosecution from administrative review. The Law Commission, in its report on Administrative Justice, August 2000, on page 17, intended to allow review of decisions not to prosecute (see *The Promotion of Administrative Justice Act Handbook* by Iain Curry & Jonathan Klaaren, 2001 at 67). Since the Act is

## **Mass offences**

5.36 The current provisions of sections 57 and 341 of the CPA should be largely retained in order to provide a measure for dealing with mass crime. In line with the discussion of section 57 above,<sup>88</sup> however, certain amendments are proposed, including the provision of a new name in place of the current "admission of guilt fine".

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silent on decisions not to prosecute or not to continue a prosecution, the section can also be interpreted to excluded such decisions from administrative review.

<sup>88</sup> See par 2.15

## CHAPTER 6

### IMPLEMENTATION OF A SYSTEM OF OUT-OF-COURT SETTLEMENTS

#### Pilot project

6.1 The Commission is of the view that any system of out-of-court settlements should initially be implemented in a pilot scheme where it will, on a trial basis, be available to certain courts only.<sup>89</sup>

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<sup>89</sup> A similar recommendation is included in the discussion paper *Sentence agreements* 33 (par 5.9).

## CHAPTER 7

### RECOMMENDATION

7.1 The Commission recommends that the Criminal Procedure Act, Act 51 of 1977, be amended to provide for out-of-court settlements in criminal matters. The following amendments are submitted for comment:

- (a) The amendment of section 6, by the substitution for paragraph (c) of the following paragraph:

**6 Power to withdraw charge, [or] stop or conditionally discontinue prosecution**

“(c) if it is determined that the withdrawal or stopping of prosecution, as provided for in subsection (a) or (b) would be inappropriate, nevertheless conditionally discontinue prosecution of the accused, by entering into an out-of-court settlement, as provided for in section 104A of the Act.”

- (b) The substitution for section 57 of the following section:

**57 Payment of amount of money without appearance in court**

(1) Where –

- (a) a summons is issued against an accused under section 54 (in this section referred to as the summons) and the public prosecutor or the clerk of the court concerned on reasonable grounds believes that a magistrate's court, on convicting the accused of the offence in question, will not impose a fine exceeding the amount determined by the Minister from time to time by notice in the *Gazette*, and such public prosecutor or clerk of the court endorses the summons to the effect that the accused may **[admit his guilt in respect of the offence in question and that he may]** pay **[a fine]** an amount stipulated on the summons in respect of such offence without appearing in court; or
- (b) a written notice under section 56 (in this section referred to as the written notice) is handed to the accused and the endorsement in terms of paragraph (c) of subsection (1) of that section purports to have been made by a peace officer,

the accused may, without appearing in court, **[admit his guilt in respect of the**

**offence in question by paying the fine] pay the amount stipulated [(in this section referred to as the admission of guilt fine)]** either to the clerk of the magistrate's court which has jurisdiction or at any police station within the area of jurisdiction of that court or, if the summons or written notice in question is endorsed to the effect that the **[fine] amount** may be paid at a specified local authority, at such local authority.

- (2) (a) The summons or the written notice may stipulate that the **[admission of guilt fine] amount** shall be paid before a date specified in the summons or written notice, as the case may be.
- (b) **[An admission of guilt fine] Payment of the amount stipulated** may be accepted by the clerk of the court concerned notwithstanding that the date referred to in paragraph (a) or the date on which the accused should have appeared in court has expired.
- (3) (a) (i) Subject to the provisions of subparagraphs (ii) and (iii), an accused who intends to pay an **[admission of guilt fine] amount** in terms of subsection (1), shall surrender the summons or the written notice, as the case may be, at the time of the payment **[of the fine]**.
- (ii) If the summons or written notice, as the case may be, is lost or is not available and the copy thereof known as the control document –
- (aa) is not available at the place of payment referred to in subsection (1), the accused shall surrender a copy of the summons or written notice, as the case may be, at the time of the payment **[of the fine]**; or
- (bb) is available at the place of payment referred to in subsection (1), the **[admission of guilt fine] amount** may be accepted without the surrender of a copy of the summons or written notice, as the case may be.
- (iii) If an accused in respect of whom a warrant has been endorsed in terms of section 55(2A) intends to pay the relevant **[admission of guilt fine] amount**, the clerk of the court may, after he or she has satisfied himself or herself that the warrant is so endorsed, accept the **[admission of guilt fine] amount** without the surrender of the summons, written notice or copy thereof, as the case may be.
- (b) A copy referred to in paragraph (a)(ii) may be obtained by the accused at the magistrate's court, police station or local authority where the copy of the summons or written notice in question known as the control document is filed.
- (c) Notwithstanding the provisions of subsection (1), an accused referred to in paragraph (a)(iii) may pay the **[admission of guilt**

fine] amount in question to the clerk of the court where he appears in consequence of such warrant, and if the said clerk of the court is not the clerk of the magistrate's court referred to in subsection (1), he shall transfer such **[admission of guilt fine] amount** to the latter clerk of the magistrate's court.

- (1) No provision of this section shall be construed as preventing a public prosecutor attached to the court concerned from reducing **[an admission of guilt fine] the stipulated amount** on good cause shown.
- (2) (a) **[An admission of guilt fine] The amount** stipulated in respect of a summons or a written notice shall be in accordance with a determination which the magistrate of the district or area in question may from time to time make in respect of any offence or, if the magistrate has not made such a determination, in accordance with an amount determined in respect of any particular summons or any particular written notice by either a public prosecutor attached to the court of such magistrate or a police official of or above the rank of non-commissioned officer attached to a police station within the magisterial district or area in question or, in the absence of such a police official at any such police station, by the senior police official then in charge at such police station.  
  
(b) **[An admission of guilt fine] The amount** determined under paragraph (a) shall not exceed the maximum of the fine prescribed in respect of the offence in question or the amount determined by the Minister from time to time by notice in the *Gazette*, whichever is the lesser.
- (6) **[An admission of guilt fine] The amount** paid at a police station or a local authority in terms of subsection (1) and the summons or, as the case may be, the written notice surrendered under subsection (3), shall, as soon as is expedient, be forwarded to the clerk of the magistrate's court which has jurisdiction, and such clerk of the court shall thereafter, as soon as is expedient, enter the essential particulars of such summons or, as the case may be, such written notice and of any summons or written notice surrendered to the clerk of the court under subsection (3), in the **[criminal record book for admissions of guilt] relevant register**, whereupon the **[accused concerned] the matter** shall, subject to the provisions of subsection (7), be **[deemed to have been convicted and sentenced by the court in respect of the offence in question] considered as finalised and the amount so paid shall be dealt with as if it were a fine.**
- (7) **[The judicial officer presiding at] An officer appointed or designated by the magistrate of** the court in question shall examine the documents and if it appears **[to him that a conviction or sentence under subsection (6) is not in accordance with justice or]** that any such **[sentence] amount**, except as provided in subsection (4), is not in accordance with a determination made by the magistrate under subsection (5) or, where the determination under that subsection has not been made by the magistrate,

that the **[sentence] amount** is not adequate, such **[judicial]** officer may **[set aside the conviction and sentence and direct that the accused be prosecuted in the ordinary course]** return the amount paid, whereupon the accused may be summoned to answer such charge as the public prosecutor may deem fit to prefer: Provided that where the **[admission of guilt fine] amount** which has been paid exceeds the amount determined by the magistrate under subsection (5), the said **[judicial]** officer may, in lieu of **[setting aside the conviction and sentence]** returning the amount in question, direct that the amount by which the said **[admission of guilt fine] amount** exceeds the said determination be refunded to the accused concerned.”

- (c) The deletion of section 57A.
- (d) The insertion of the following section:

**“104A Out-of-court settlements**

- (1) If the prosecutor is satisfied, at any time before any substantial evidence has been adduced against the accused and considering all the facts at his or her disposal that -
  - (a) it is in the public interest to do so; and
  - (b) a court would, in the case of a conviction, impose a sentence other than imprisonment, or imprisonment for a period not exceeding one year,

he or she may enter into an out-of-court settlement with the accused, in terms of which the prosecution undertakes to discontinue prosecution on condition that the accused complies with the conditions as agreed upon in the settlement.
- (2) In considering whether it will be in the public interest to enter into an out-of-court settlement, the prosecution shall have regard to –
  - (a) whether the accused poses a significant threat to the community and is likely to benefit from the settlement;
  - (b) the effect of a conviction on the accused;
  - (c) whether, in the case of an accused with two or more previous convictions for the same or similar offences or an accused who have entered into a settlement as provided for in this section on two or more occasions for the same or similar offences, there are substantial and compelling circumstances meriting the settlement;  
and
  - (d) the interests of the victim of the crime.
- (3) A settlement contemplated in subsection (1) can only be entered into –

- (a) once a charge sheet, setting out the offence or offences for which the accused is being charged, has been served on the accused;
  - (b) if the prosecution is satisfied that there is sufficient evidence to warrant the prosecution of the accused; and
  - (c) through the accused's legal representative, if the accused is legally represented.
- (4)
- (a) The prosecution must, in exercising its discretion in terms of this provision, if circumstances permit, obtain the views of the investigating officer and the victim of the offence, and must consider such views, before entering into a settlement with the accused.
  - (b) If the victim is not available to make representations, the prosecution must notify him or her of the intention to enter into an out-of-court settlement and such notification must give the victim a reasonable time to respond with representations, whether orally or in writing, whether in person or otherwise.
  - (c) For the purposes of this subsection, a "victim" is any person who, as a result of the accused's offence, suffered damage to or loss of property, or injury, whether physical, psychological or otherwise, or loss of income or support.
- (5) An out-of-court settlement is, for a period as agreed upon between the parties, but not more than two years, subject to one or more of the following conditions, as expressly stipulated in the settlement:
- (a) Compensation;
  - (b) the rendering to the person aggrieved of some specific benefit or service in lieu of compensation for damage or pecuniary loss;
  - (c) the performance without remuneration and outside the prison of some service for the benefit of the community under the supervision or control of an organization or institution which, or person who, in the opinion of the court, promotes the interests of the community (in this section referred to as community service);
  - (d) payment of an amount of money of not more than the amount prescribed from time to time by the Minister in the *Gazette*, to the State or a state agency as directed by the prosecution;
  - (e) submission to instruction or treatment;
  - (f) submission to supervision or control (including control over the earnings or other income of the person concerned) of a probation officer as defined in the Probation Services Act, 1991 (Act No 116 of 1991);
  - (g) the compulsory attendance or residence at some specified centre for a specified purpose;
  - (h) referral to community dispute resolution structures that have been put into place in terms of an Act of Parliament.
- Notwithstanding the above, a condition in terms of paragraph (c) shall be limited to a maximum period of one year.
- (6)
- (a) If the conditions to a settlement under this section requires the accused to perform community service, to undergo instruction or

- treatment or to attend or reside at a specified centre for a specified purpose, the prosecutor shall cause a notice to be served on the accused, directing him or her to report on a date and time specified in the notice or (if prevented from doing so by circumstances beyond his or her control) as soon as practicable thereafter, to the person specified in that notice, whether within or outside the area of jurisdiction of the court, in order to perform that community service, to undergo that instruction or treatment or to attend that centre or reside thereat, as the case may be.
- (b) A copy of the said notice shall serve as authority to the person mentioned therein to have that community service performed by the person concerned or to provide that instruction or treatment to the person concerned or to allow the person concerned to attend that centre or to reside thereat.
- (c) Any person who, when he or she reports to perform community service, to undergo instruction or treatment or to attend or reside at a specified centre for a specified purpose, is under the influence of intoxicating liquor or drugs or the like shall be guilty of an offence and liable on conviction to a fine or imprisonment for a period not exceeding three months.
- (7) The terms of the out-of-court settlement –
- (a) must be in writing, and must be signed by the prosecutor and the accused;
- (b) has to be approved by the Director of Public Prosecutions having jurisdiction or an official authorised thereto by him or her;
- (c) may be amended on good cause shown, with consent from both parties: Provided that any amendment must also comply with paragraph (b).
- (8) If the accused fails to comply with any of the conditions of the out-of-court settlement and the prosecutor is satisfied that such failure was beyond the accused's control, or for any other good and sufficient reason, the prosecutor may, having due regard to the extent to which the conditions of the prior settlement has been complied with, enter into a further out-of-court settlement.
- (9) If the accused fails to comply with any of the conditions of the out-of-court settlement under circumstances other than those referred to in subsection (8), the criminal proceedings against the accused on that charge can be resumed from where they were when the out-of-court settlement was entered into: Provided that sections 118 and 275 of the Act applies with the necessary changes: Provided further that, should the accused be convicted, the court imposing sentence shall take into consideration the extent to which the conditions of the out-of-court settlement have been complied with.
- (10) Once the accused has complied with the conditions of the out-of-court settlement, the charge is considered finalised and no prosecution resulting from the same offence may be instituted.
- (11) (a) The provisions of section 106(4) shall not apply where the

accused has already pleaded to a charge, except if the trial is resumed as provided for in subsection (9).

(b) A private prosecution as provided for in section 7 of the Act shall not be allowed during the course of an out-of-court settlement, or after its successful implementation.”

(d) The amendment of section 297A by the substitution for subsections (1) and (5) of the following subsections:

**“297A Liability for patrimonial loss arising from performance of community service**

(1) If patrimonial loss may be recovered from an accused on the ground of a delict committed by him or her in the performance of community service in terms of sections 104A or 297, that loss may, subject to subsection (3), be recovered from the State.

(5) If any person as a result of the performance of community service in terms of sections 104A or 297 has suffered patrimonial loss which cannot be recovered from the State in terms of subsection (1), the **[Director-General: Justice] Minister** may, with the concurrence of the Treasury, as an act of grace pay such amount as he or she may deem reasonable to that person.”

(e) The amendment of section 341 by:

(i) the substitution for paragraph (b) of subsection (2) of the following paragraph:

“(b) Any sum of money paid to a local authority as provided in paragraph (a) shall, for administrative purposes only, be deemed to be a fine imposed in respect of the offence in question.”

(ii) the substitution for subsection (3) of the following subsection:

“(3) Any money paid to a magistrate in terms of subsection (1) shall, for administrative purposes only, be dealt with as if it had been paid as a fine for the offence in question.”

(iii) the substitution for subsection (5) of the following subsection:

“(5) The amount to be specified in any notification issued under this section as the amount of the fine which a court would probably impose in respect of any offence, shall be determined from time to time for any particular area by the magistrate of the district or area in which such area is situated, and may differ from the **[admission of guilt fine] amount** determined under section

57(5)(a) for the offence in question.”

REPUBLIC OF SOUTH AFRICA

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# **CRIMINAL PROCEDURE AMENDMENT BILL**

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*(As introduced)*

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(MINISTER FOR JUSTICE AND CONSTITUTIONAL DEVELOPMENT)

**[B -2000]**

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REPUBLIEK VAN SUID-AFRIKA

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# **STRAFPROSESWYSIGINGS- WETSONTWERP**

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*(Soos ingedien)*

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(MINISTER VAN JUSTISIE EN STAATKUNDIGE ONTWIKKELING)

[W –2000]

**GENERAL EXPLANATORY NOTE:**

[ ] Words in bold type in square brackets indicate omissions from existing enactments.

\_\_\_\_\_ Words underlined with a solid line indicate insertions in existing enactments.

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## **BILL**

**To amend the Criminal Procedure Act, 1977, so as to amend the provisions related to the payment of admissions of guilt, to provide for out of court settlements; and to provide for matters connected therewith.**

**BE IT ENACTED** by the Parliament of the Republic of South Africa, as follows:—

**The Criminal Procedure Act, 51 of 1977, hereinafter referred to as the principal Act, is hereby amended by -**

(1) **The amendment of section 6 of the principal Act, by the substitution for paragraph (c) of the following paragraph:**

**6 Power to withdraw charge, [or] stop or conditionally discontinue prosecution**

“(c) if it is determined that the withdrawal or stopping of prosecution, as provided for in subsection (a) or (b) would be inappropriate, nevertheless conditionally discontinue prosecution of the accused, by entering into an out-of-court settlement, as provided for in section 104A of the Act.”

(2) **The substitution for section 57 of the following section:**

## 57 Payment of amount of money without appearance in court

(1) Where –

- (a) a summons is issued against an accused under section 54 (in this section referred to as the summons) and the public prosecutor or the clerk of the court concerned on reasonable grounds believes that a magistrate's court, on convicting the accused of the offence in question, will not impose a fine exceeding the amount determined by the Minister from time to time by notice in the *Gazette*, and such public prosecutor or clerk of the court endorses the summons to the effect that the accused may **[admit his guilt in respect of the offence in question and that he may]** pay **[a fine]** an amount stipulated on the summons in respect of such offence without appearing in court; or
- (b) a written notice under section 56 (in this section referred to as the written notice) is handed to the accused and the endorsement in terms of paragraph (c) of subsection (1) of that section purports to have been made by a peace officer,

the accused may, without appearing in court, **[admit his guilt in respect of the offence in question by paying the fine]** pay the amount stipulated **[(in this section referred to as the admission of guilt fine)]** either to the clerk of the magistrate's court which has jurisdiction or at any police station within the area of jurisdiction of that court or, if the summons or written notice in question is endorsed to the effect that the **[fine]** amount may be paid at a specified local authority, at such local authority.

- (2) (a) The summons or the written notice may stipulate that the **[admission of guilt fine]** amount shall be paid before a date specified in the summons or written notice, as the case may be.
  - (b) **[An admission of guilt fine]** Payment of the amount stipulated may be accepted by the clerk of the court concerned notwithstanding that the date referred to in paragraph (a) or the date on which the accused should have appeared in court has expired.
- (3) (a) (i) Subject to the provisions of subparagraphs (ii) and (iii), an accused who intends to pay an **[admission of guilt fine amount]** in terms of subsection (1), shall surrender the summons or the written notice, as the case may be, at the time of the payment **[of the fine]**.
  - (ii) If the summons or written notice, as the case may be, is lost or is not available and the copy thereof known as the control document –
    - (aa) is not available at the place of payment referred to in subsection (1), the accused shall surrender a copy of the summons or written notice, as the

- case may be, at the time of the payment **[of the fine]**; or
- (bb) is available at the place of payment referred to in subsection (1), the **[admission of guilt fine] amount** may be accepted without the surrender of a copy of the summons or written notice, as the case may be.
  - (iii) If an accused in respect of whom a warrant has been endorsed in terms of section 55(2A) intends to pay the relevant **[admission of guilt fine] amount**, the clerk of the court may, after he or she has satisfied himself or herself that the warrant is so endorsed, accept the **[admission of guilt fine] amount** without the surrender of the summons, written notice or copy thereof, as the case may be.
- (b) A copy referred to in paragraph (a)(ii) may be obtained by the accused at the magistrate's court, police station or local authority where the copy of the summons or written notice in question known as the control document is filed.
  - (c) Notwithstanding the provisions of subsection (1), an accused referred to in paragraph (a)(iii) may pay the **[admission of guilt fine] amount** in question to the clerk of the court where he appears in consequence of such warrant, and if the said clerk of the court is not the clerk of the magistrate's court referred to in subsection (1), he shall transfer such **[admission of guilt fine] amount** to the latter clerk of the magistrate's court.
- (3) No provision of this section shall be construed as preventing a public prosecutor attached to the court concerned from reducing **[an admission of guilt fine] the stipulated amount** on good cause shown.
  - (4)
    - (a) **[An admission of guilt fine] The amount** stipulated in respect of a summons or a written notice shall be in accordance with a determination which the magistrate of the district or area in question may from time to time make in respect of any offence or, if the magistrate has not made such a determination, in accordance with an amount determined in respect of any particular summons or any particular written notice by either a public prosecutor attached to the court of such magistrate or a police official of or above the rank of non-commissioned officer attached to a police station within the magisterial district or area in question or, in the absence of such a police official at any such police station, by the senior police official then in charge at such police station.
    - (b) **[An admission of guilt fine] The amount** determined under paragraph (a) shall not exceed the maximum of the fine prescribed in respect of the offence in question or the amount determined by the Minister from time to time by notice in the *Gazette*, whichever is the lesser.

- (6) **[An admission of guilt fine]** The amount paid at a police station or a local authority in terms of subsection (1) and the summons or, as the case may be, the written notice surrendered under subsection (3), shall, as soon as is expedient, be forwarded to the clerk of the magistrate's court which has jurisdiction, and such clerk of the court shall thereafter, as soon as is expedient, enter the essential particulars of such summons or, as the case may be, such written notice and of any summons or written notice surrendered to the clerk of the court under subsection (3), in the **[criminal record book for admissions of guilt]** relevant register, whereupon the **[accused concerned]** the matter shall, subject to the provisions of subsection (7), be **[deemed to have been convicted and sentenced by the court in respect of the offence in question]** considered as finalised and the amount so paid shall be dealt with as if it were a fine.
- (7) **[The judicial officer presiding at]** An officer appointed or designated by the magistrate of the court in question shall examine the documents and if it appears **[to him that a conviction or sentence under subsection (6) is not in accordance with justice or]** that any such **[sentence]** amount, except as provided in subsection (4), is not in accordance with a determination made by the magistrate under subsection (5) or, where the determination under that subsection has not been made by the magistrate, that the **[sentence]** amount is not adequate, such **[judicial]** officer may **[set aside the conviction and sentence and direct that the accused be prosecuted in the ordinary course]** return the amount paid, whereupon the accused may be summoned to answer such charge as the public prosecutor may deem fit to prefer: Provided that where the **[admission of guilt fine]** amount which has been paid exceeds the amount determined by the magistrate under subsection (5), the said **[judicial]** officer may, in lieu of **[setting aside the conviction and sentence]** returning the amount in question, direct that the amount by which the said **[admission of guilt fine]** amount exceeds the said determination be refunded to the accused concerned."

(3) **The deletion of section 57A of the principal Act.**

(4) **The insertion of the following section in the principal Act:**

**"104A Out-of-court settlements**

- (1) If the prosecutor is satisfied, at any time before any substantial evidence has been adduced against the accused and considering all the facts at his or her disposal that -
- (a) it is in the public interest to do so; and  
(b) a court would, in the case of a conviction, impose a sentence other than imprisonment, or imprisonment for a period not exceeding one year,

he or she may enter into an out-of-court settlement with the accused, in

terms of which the prosecution undertakes to discontinue prosecution on condition that the accused complies with the conditions as agreed upon in the settlement.

(2) In considering whether it will be in the public interest to enter into an out-of-court settlement, the prosecution shall have regard to –

- (a) whether the accused poses a significant threat to the community and is likely to benefit from the settlement;
- (b) the effect of a conviction on the accused;
- (c) whether, in the case of an accused with two or more previous convictions for the same or similar offences or an accused who have entered into a settlement as provided for in this section on two or more occasions for the same or similar offences, there are substantial and compelling circumstances meriting the settlement; and
- (d) the interests of the victim of the crime.

(3) A settlement contemplated in subsection (1) can only be entered into –

- (a) once a charge sheet, setting out the offence or offences for which the accused is being charged, has been served on the accused;
- (b) if the prosecution is satisfied that there is sufficient evidence to warrant the prosecution of the accused; and
- (c) through the accused's legal representative, if the accused is legally represented.

(4) (a) The prosecution must, in exercising its discretion in terms of this provision, if circumstances permit, obtain the views of the investigating officer and the victim of the offence, and must consider such views, before entering into a settlement with the accused.

(b) If the victim is not available to make representations, the prosecution must notify him or her of the intention to enter into an out-of-court settlement and such notification must give the victim a reasonable time to respond with representations, whether orally or in writing, whether in person or otherwise.

(c) For the purposes of this subsection, a "victim" is any person who, as a result of the accused's offence, suffered damage to or loss of property, or injury, whether physical, psychological or otherwise, or loss of income or support.

(5) An out-of-court settlement is, for a period as agreed upon between the parties, but not more than two years, subject to one or more of the following conditions, as expressly stipulated in the settlement:

- (a) Compensation;
- (b) the rendering to the person aggrieved of some specific benefit or service in lieu of compensation for damage or pecuniary loss;
- (c) the performance without remuneration and outside the prison of some service for the benefit of the community under the supervision or control of an organization or institution which, or

- person who, in the opinion of the court, promotes the interests of the community (in this section referred to as community service):
- (d) payment of an amount of money of not more than the amount prescribed from time to time by the Minister in the *Gazette*, to the State or a state agency as directed by the prosecution;
  - (e) submission to instruction or treatment;
  - (f) submission to supervision or control (including control over the earnings or other income of the person concerned) of a probation officer as defined in the Probation Services Act, 1991 (Act No 116 of 1991);
  - (g) the compulsory attendance or residence at some specified centre for a specified purpose;
  - (h) referral to community dispute resolution structures that have been put into place in terms of an Act of Parliament.

Notwithstanding the above, a condition in terms of paragraph (c) shall be limited to a maximum period of one year.

- (6)
  - (a) If the conditions to a settlement under this section requires the accused to perform community service, to undergo instruction or treatment or to attend or reside at a specified centre for a specified purpose, the prosecutor shall cause a notice to be served on the accused, directing him or her to report on a date and time specified in the notice or (if prevented from doing so by circumstances beyond his or her control) as soon as practicable thereafter, to the person specified in that notice, whether within or outside the area of jurisdiction of the court, in order to perform that community service, to undergo that instruction or treatment or to attend that centre or reside thereat, as the case may be.
  - (b) A copy of the said notice shall serve as authority to the person mentioned therein to have that community service performed by the person concerned or to provide that instruction or treatment to the person concerned or to allow the person concerned to attend that centre or to reside thereat.
  - (c) Any person who, when he or she reports to perform community service, to undergo instruction or treatment or to attend or reside at a specified centre for a specified purpose, is under the influence of intoxicating liquor or drugs or the like shall be guilty of an offence and liable on conviction to a fine or imprisonment for a period not exceeding three months.
- (7) The terms of the out-of-court settlement –
  - (a) must be in writing, and must be signed by the prosecutor and the accused;
  - (b) has to be approved by the Director of Public Prosecutions having jurisdiction or an official authorised thereto by him or her;
  - (c) may be amended on good cause shown, with consent from both parties: Provided that any amendment must also comply with paragraph (b).
- (8) If the accused fails to comply with any of the conditions of the out-of-court

settlement and the prosecutor is satisfied that such failure was beyond the accused's control, or for any other good and sufficient reason, the prosecutor may, having due regard to the extent to which the conditions of the prior settlement has been complied with, enter into a further out-of-court settlement.

- (9) If the accused fails to comply with any of the conditions of the out-of-court settlement under circumstances other than those referred to in subsection (8), the criminal proceedings against the accused on that charge can be resumed from where they were when the out-of-court settlement was entered into: Provided that sections 118 and 275 of the Act applies with the necessary changes: Provided further that, should the accused be convicted, the court imposing sentence shall take into consideration the extent to which the conditions of the out-of-court settlement have been complied with.
- (10) Once the accused has complied with the conditions of the out-of-court settlement, the charge is considered finalised and no prosecution resulting from the same offence may be instituted.
- (11) (a) The provisions of section 106(4) shall not apply where the accused has already pleaded to a charge, except if the trial is resumed as provided for in subsection (9).
- (b) A private prosecution as provided for in section 7 of the Act shall not be allowed during the course of an out-of-court settlement, or after its successful implementation.”

- (4) **The amendment of section 297A of the principal Act by the substitution for subsections (1) and (5) of the following subsections:**

**“297A Liability for patrimonial loss arising from performance of community service**

- (1) If patrimonial loss may be recovered from an accused on the ground of a delict committed by him or her in the performance of community service in terms of sections 104A or 297, that loss may, subject to subsection (3), be recovered from the State.
- (5) If any person as a result of the performance of community service in terms of sections 104A or 297 has suffered patrimonial loss which cannot be recovered from the State in terms of subsection (1), the **[Director-General: Justice] Minister** may, with the concurrence of the Treasury, as an act of grace pay such amount as he or she may deem reasonable to that person.”

- (5) **The amendment of section 341 of the principal Act by:**

**(i) the substitution for paragraph (b) of subsection (2) of the following paragraph:**

“(b) Any sum of money paid to a local authority as provided in paragraph (a) shall, for administrative purposes only, be deemed to be a fine imposed in respect of the offence in question.”

**(ii) the substitution for subsection (3) of the following subsection:**

“(3) Any money paid to a magistrate in terms of subsection (1) shall, for administrative purposes only, be dealt with as if it had been paid as a fine for the offence in question.”

**(iii) the substitution for subsection (5) of the following subsection:**

“(5) The amount to be specified in any notification issued under this section as the amount of the fine which a court would probably impose in respect of any offence, shall be determined from time to time for any particular area by the magistrate of the district or area in which such area is situated, and may differ from the **[admission of guilt fine]** amount determined under section 57(5)(a) for the offence in question.”