

MEDIA STATEMENT BY THE SOUTH AFRICAN LAW COMMISSION CONCERNING ITS INVESTIGATION INTO THE SIMPLIFICATION OF CRIMINAL PROCEDURE: OUT OF COURT SETTLEMENTS (PROJECT 73): REPORT

The South African Law Commission has completed a report on out of court settlements. The report considers 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.

The international trend to have some criminal cases dealt with out of court is based mainly on two considerations: to increase the cost-efficiency of the criminal justice process through simplified and streamlined procedures, and 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.

An out of court settlement is defined as 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 of the matter from the trial process. 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.

The Commission concludes that the formal recognition of a procedure to settle criminal cases out of court will have particular advantages for the criminal justice process in South Africa. Such a process will, among other things -

- contribute to saving precious court time and costs, since cases can be finalised without going to court, and without the time-consuming task of settling factual disputes;
- improve the public's perception of the administration of justice;
- give the accused person certainty regarding the outcome of the case, provided the conditions of the agreement are complied with;
- give the accused person the opportunity not to end up with a record of previous convictions, a factor which often prompts people to dispute a criminal charge;
- provide ample opportunities for the application of restorative justice initiatives as an outcome of an out-of-court settlement; and
- protect victims from publicity, and from having to be subjected to cross-examination, while giving them the benefit from compensation or restitution by the accused.

It is recommended that the legislation provide for the following principles:

- The prosecutor may, before evidence has been adduced against the accused and considering all the facts at his or her disposal, enter into an out of court settlement with the accused if he or she is satisfied that it is in the public interest to do so and that the court would upon conviction impose a sentence other than imprisonment or imprisonment for a period not exceeding one year. In considering whether it will be in the public interest to enter into an out of court settlement, the prosecution must inter alia have regard to -
 - o whether the accused poses a significant threat to the community and is likely to benefit from the settlement;
 - o the effect of a conviction on the accused;
 - o whether, in the case of an accused with two or more previous convictions for the same or similar offences or an accused who has entered into a settlement on two or more occasions for the same or similar offences, there are substantial and compelling circumstances meriting the settlement; and
 - o the interests of the victim of the crime.

- In terms of the settlement the prosecution may undertake to discontinue the prosecution on condition that the accused complies with the conditions as agreed upon in the settlement.

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

- In exercising its discretion the prosecution must, if circumstances permit, obtain the views of the victim of the offence, and must consider such views, before entering into a settlement with the accused.

- 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:
 - o Compensation.
 - o The rendering to the person aggrieved of some specific benefit or service in lieu of compensation for damage or pecuniary loss.
 - o The performance without remuneration of some service for the benefit of the community under the supervision or control of an organization or institution which, or person who, promotes the interests of the community.
 - o 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.
 - o Submission to instruction or treatment.
 - o Submission to supervision or control of a probation officer.
 - o The compulsory attendance or residence at some specified centre for a specified purpose.
 - o Referral to community dispute resolution structures that have been put into place in terms of an Act of

Parliament.

- The terms of the out of court settlement must be in writing and must be signed by the prosecutor and the accused. In order to address the risks of fraud and abuse it is proposed that the settlement has to be approved by the Director of Public Prosecutions having jurisdiction. It is also proposed that a settlement should be subject to review and that the settlement may be amended on good cause shown.
- 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, 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.
- If the accused fails to comply with any of the conditions of the out of court settlement the criminal proceedings against the accused on that charge can be resumed from the point when the out of court settlement was entered into.
- 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.

The report will be made available on the Internet at the following site: <http://www.law.wits.ac.za/salc/salc.html>

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