Case management and court-annexed alternative dispute resolution

The Hoexter Commission: new rule 37A

Judge David Ipp

Comments by Judge David Ipp* of the Supreme Court of Western Australia, addressed to Peter Hodes SC, chairman of the GCB of South Africa

DEAR Peter

1 This letter is written in response to your request for some comments on what is required, in principle, to enable the Cape Provincial Division to introduce a pilot case management scheme, having regard to the new rule 37A and paragraphs 10.1 and 10.2 of the report of the Hoexter Commission.

2 There should be a clear understanding of what case management is, and what it is designed to achieve. In simple terms, case management is a system by which control over the litigation passes from the parties to the judiciary. The judiciary exercises that control to promote the just determination of litigation, to dispose efficiently of the business of the court, to maximise the efficient use of available judicial and administrative resources, and to facilitate the timely disposal of business at a cost affordable by the parties. In achieving these goals, case management aims to eliminate unnecessary delays in litigation. Unnecessary delay is regarded as any lapse of time beyond that reasonably required for interlocutory activities essential to the fair and just determination of the issues bona fide in contention between the parties and the preparation of the case for trial.

3 There are certain fundamental principles which are common to every effective case management system. If the pilot project is to work, it will have to be based on these principles. They are:

(a) (i) The overriding power of the judiciary to control the pace of litigation should be embodied with clarity in the Rules.

(ii) This power should encompass not only the power to make orders against the wishes of the parties, but to override time limits otherwise contained in the Rules. The managing judge should be free to make whatever order he or she considers to be appropriate for the circumstances of any particular case.

(iii) This does not mean that there should not be the "basic model" referred to in paragraph 10.1.6 of the Hoexter Commission. It does mean, however, that whatever the "milestones" might be, the ultimate decision lies with the managing judge.

(b) There has to be recognition that failure to comply with case management rules, orders, directions or milestones will carry with it appropriate sanctions. These sanctions will usually involve costs orders, sometimes indemnity costs orders (orders which indemnify the innocent party against all costs incurred of whatsoever nature) and sometimes orders that the lawyers (including counsel) pay costs personally. At times such a failure will result in a loss of rights. An example of the latter is the refusal of amendments when to grant them will lead to an adjournment. These consequences, too, should be embodied with clarity in the Rules.

(c) At best, one judge should assume responsibility for the pilot project (perhaps assisted by a very small team of judges). This is necessary to ensure adequate managerial control and consistency of approach, and to prevent forum shopping. Particular characteristics are required of the judge in question. It has to be accepted that, at least initially, that judge will have to do work additional and different to that previously performed by him or her. He or she should be experienced in all kinds of trial work, including heavy commercial matters, and be able to make decisions quickly and articulate them with clarity. The judge should be committed to the task; it is not usually one that can be described as pleasant. It will involve educating the profession in an entirely different method of practice. This is a culture change that usually attracts vociferous opposition, particularly from many at the senior end of the profession, who will object to having to adapt to the changes required, and will voice their complaints under the guise of moral outrage. Some members of the judiciary, too, will find the new role of judges quite undesirable. These problems cannot be dealt with if case management control is diffused by having a number of judges with different styles, capabilities and views dealing with cases on a daily basis.

(d) (i) I understand that, at present, resources are inadequate to apply case management, even at the pilot stage, to cases from their commencement. Careful thought therefore has to be given to precisely when the cases >

* See also Judge Ipp's article "Case management" in 1997 May *Consultus* 35.

will fall under judicial control.

(ii) Entry for trial (i e the stage at which one or other of the parties considers that the case is ready for a trial date, and applies to the court registry for a date) is often fixed on for this purpose. If entry for trial is regarded as the case management trigger, every effort should be made to provide a trial date as soon as possible to the parties, and certainly no later than six months after entry. The fundamental aim of case management is to get the matter to trial as quickly as possible, and this (apart from the resources of the court) depends on the parties' readiness. If they are ready when the case is entered for trial (and, within reason, they should be) they cannot maintain readiness for longer than six months. Facts change, the availability of witnesses alters, as does the availability of counsel.

(iii) In a system where cases are managed as from entry for trial, that entry should be regarded as a privilege, to be granted only when the parties are ready for trial. That is because once the case falls under the control of the managing judge, every effort will be made to provide a trial date within six months. This will not work if, after entry, the parties are still carrying out preparatory work.

(iv) To ensure parties are ready at the stage of entry, the party entering the matter should certify that all necessary parties have been joined, pleadings are closed and no amendments will be sought, discovery is complete, an advice on evidence has been obtained, if expert evidence is to be led there has been an exchange of experts' reports, and the party entering is ready to serve witness summaries (the exchange of witness summaries, and not witness statements, has been proposed by the Hoexter Commission).

(v) Once the matter has been entered for trial, the other parties will be deemed to be ready for trial if they do not apply within a specified time for the entry to be countermanded.

(e) (i) Once the matter is entered it will come before the managing judge for all interlocutory applications. The object is to reduce these in number and significance. This can be done by requiring written arguments to be filed the previous day, the judge reading the papers overnight, forming a provisional view, and calling only on the party he or she is against. On this basis an interlocutory application will seldom last more than 15 minutes (and should not).

(ii) All applications for amendment and adjournment prior to trial should come before the managing judge. They should rarely be granted. Any inaccuracy in a certificate of readiness for trial, or failure to countermand entry when appropriate, should be visited by severe sanctions. It is through this process that the culture change is effected. Interlocutory applications, in general, should be discouraged. The lawyers should be encouraged to cooperate. There are various techniques that can be utilised in this respect.

(iii) Shortly after the matter is entered for trial the managing judge should allocate a trial date (as I have mentioned, hopefully not more than six months after entry) and hold a directions hearing.

(f) At the directions hearing, the managing judge should also assess the length of the trial, ensure (within reason) that the parties have played "open cards" (that being cardinal to case management), ensure that the parties are ready, inquire into the issues to attempt to ensure that litigation will not ensue on unnecessary issues, consider whether issues should be split, make orders about anything that remains to be done (in particular, the exchange of witness summaries) and, if thought appropriate, refer the matter to mediation.

(g) Mediation is a powerful tool in any case managed system. While many cases will settle in any event, the object of court-appointed mediation is to ensure that settlement takes place earlier than would otherwise be the case. This frees up judges and other court resources. In virtually all jurisdictions utilising court-appointed mediation, it has been found that this facility has a profound effect on reducing the number of cases coming to trial.

(h) Once a case comes under the control of the managing judge it should never be adjourned sine die. It would be helpful (if not essential) for the court to be able to keep track of cases (and compliance with milestones and orders) through an appropriate computer system. I endorse, with respect, everything that the Hoexter Commission has said in this respect.

4 There are a myriad of other aspects of case management that might be considered. However, you have asked me to mention only the most basic aspects, and this I have attempted to do.

Yours sincerely

David Ipp

Diary/Dagboek

International Society for the Reform of Criminal Law

The Society will hold its 12th international conference at the Shelbourne Conference Centre, St Michael, Barbados, from 9-12 August 1998.

The theme of the conference is "Drugs, criminal justice and social policy: new alternatives for an old problem".

Contact: Elize van den Heever, General Council of the Bar of SA
Tel: (011) 336-3976