Case management

BY **JUSTICE HCJ FLEMMING**, FORMER DEPUTY JUDGE PRESIDENT OF THE THEN TRANSVAAL PROVINCIAL DIVISION

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It was fairly recently stated that we may get case management in High Court trials. I could not obtain detail but logically that must be something 'more' than the current rule 37. So I tender my evidence 'on commission'. I may not be around if inputs are invited.

'R37' is my shorthand for a system with judicial involvement only (a) at the instance of a party or (b) when there is pertinent other reason to think that it may bring benefits. The reasons may be ad hoc (eg handling the case after the death of the presiding judge) or generalised (e.g. views of the running of MVA cases). 'Case management' is my shorthand for more routine court involvement and/or greater participation in procedural aspects.

Insight into past experiences is required to fairly understand my views.

THE DRIFTING PRACTICE EXPERIENCE

When I arrived in Johannesburg, I observed that the court was lending itself in several matters per week to amending title conditions. A judgment removing the fear that an objector will have to pay (or incur) costs of 'showing cause', was greeted by groans - similarly a judgment critical of insolvency matters being postponed ten times in ten weeks. In 23 February 1983 I had to adjourn motion court six times because there was no counsel in court. I required counsel to explain themselves. That was to the chagrin of the chairman of the Bar Council who responded curiously. The fact that counsel turned op whenever it suited them in the course of the motion court week often meant that the registrar's roll closed for week 2 before the matter was postponed in week 1 for hearing in week 2. Apart form the pattern that some attorneys were using weekly postponements to milk fees, the outcome was numbers of missing files in week 2 and the creating of duplicate files that in the long run caused delay and confusion. The 'prohibition' on one-week postponements was concurred in by all judges and all points of consultation. Yet attorneys persisted and counsel kept on trying. On raising the 'prohibition', counsel's argument normally was 'some of your lordship's brethren' do grant one-week postponements. That the enquiries about the names of the brethren produced only the name judge C or so does not detract from the fact of underlying resistance to good order and to fairness.

Such examples of even the sensible and desirable readily-suffering non-compliance or resistance, also demonstrate that it is regularly administration by the court and not official changes of laws that make the difference. (Examples will follow that show how readily laws and rules were ignored.) It is administration that helped that a judge did not have to read 266 default judgments matters (plus the missing files) only to sit until beyond noon doing only postponements. A changed format of the Anton Piller order prevented the guaranteed full-blown opposed matter within days of the granting of the order. Avoiding the rule nisi also reduced work, time and cost as did the using of the positive potential of interlocutory applications. (Over 15 years I had no application about restraint of competition that was not solved at first appearance.)

THE AMENDMENT-OF-COURT-RULES-EXPERIENCE

I had the privilege of being a member of the Rules Board for some time until the new government dumped non-favourite sons. Concededly with pride but presently for a different reason, I mention that I guided through and formulated amended rules 5-6A with 45 (computerisation); 6-12-c (to promote the Hiemstra Commission's attempt in the early sixties to abolish the rule nisi); rules 23-1 and 30; rule 31 (registrars' default judgments); and rule 37. That involvement, plus being by nature a confessed disciple of continuously reconsidering how we did things, caused me to closely watch the outcome of rule changes. The pattern was clear: each of those changes was met by approval during the process of consulting but then with neglect and opposition in practice. I expand on one. Practitioners did not use rule 33-4 but in fact opposed its use. Much unpopularity was bred by the court insisting on separation of issues and even ordering separation at roll call. The reasons for opposition probably varied. A grown-up does not like to be told how to do his or her work; some thought that a party has a 'right' to a unitary trial; another long wait for a trial date is odious. At least in some cases there probably was the realised or sensed financial factor that a unitary trial produces more fees. Whatever the precise reasons, resistance to change and to loss of income can be expected to operate on any basis of court 'interference' in pre-trial stages. That can last for decades. It can destroy the usefulness of the system.

THE RSA HISTORY OF THE R37 AND OF CASE MANAGEMENT

When I was appointed to the Rules Board, the idea of replacing the 1966 rule 37 was moribund because Judges President opposed change. I got agreement within the Board that we should give it a go but would have to 'sell' the idea. For that reason I wrote an article in 1991 (54) *THRHR* 759 and attorney Billy van der Merwe obtained funding for a workshop.

I wrote for overseas information. That

meant getting hard copy. (In the period Sir Tim was only putting together what is now named 'internet'.) Precedents were then not all that many. They were mostly relatively new.

At the workshop the first speaker from the floor was the Transvaal JP who argued strongly that no change was needed or proper. The response was a gallery of Capetonians who argued intensely not only for change but for going further than the proposed rule. They wanted and got the experimental rule 37A which in substance created case management.

While Cape Town practised case management, Johannesburg partly applied rule 37. I used the word 'partly' because the JP himself called the roll every second week (and sometimes more) and he did not apply the rule. That made for a rather unpleasant task (for everyone) to honour the court rule 40% of the time. The practitioners' atmosphere of grudge was intensified because the JP did his best to undermine applying the rule. He inter alia instituted a procedure whereby counsel or attorney could phone Pretoria and ask him or the Pretoria DJP to condone any non-compliance with rule 37. At roll call I would then be faced with a completed 'condonation'. It is only in the last year or so before his retirement that I was allowed a free hand and could apply rule 37 consistently. In the circumstances it is this period only, running into the period of the next JP, that the Johannesburg experience with rule 37 should be assessed.

Then came case management in Johannesburg in a 'commercial court'. I was not party to considering it or planning it and the select judges administered it with its own filing system and a dedicated registrar. I was given the task to adapt all other planning to free a select judge to do commercial court work on whatever date he chose. The commercial court fizzled out in the hands of devotees.

A last bit of history is appropriate. I think it was a DG of Justice who was impressed by what he heard at a conference about the benefits of case management. The speaker was the judge who administered the system in a large American court. That judge was brought to South Africa to advise about introducing the system here. Our time from summons to hearing was then about 5 months. Speaking about expedition at the end of his visit he said: 'We cannot equal what you have.'

In considering alleged benefits of case management, we can therefore compare four systems running concurrently: case management in Cape Town; the 'commercial court'; rule 37 as applied in Johannesburg; and Pretoria. (In the sense that Johannesburg accommodated every request for a judge-presided conference and that directives were then sometimes created, there was an element similar to case management that Pretoria did not use.)

DO EXPERIENCES THEN MAKE A CASE FOR 'NO CHANGE'?

No. We need changes. Some may indeed involve additional judicial involvement. Had it not been for my exit at the Rules Board, I would have pushed inter alia for drastic change in the summary judgment procedure. Our system of pleadings has substantially failed. My doubt about mini-trials has weakened. A litigant should be able to ask a rule 37-8 conference without knowledge of his attorney. We need change in the 'training' of judges, including those involved in administration. At present each judge has to go through his own experience curve (or he does not) and we have no succession planning.

Because outside parties do affect court effectiveness and injustice it must also be conceded that at places case management is sorely necessary. It is imperative in the police force in respect of the investigation stage. It may help at the RAF. Maybe with State employees who handle demands for payment? Do not assume that it is raised only in regard to lawyers and senior officials whose lack of attention force plaintiffs to sue. Without a control system, the present situation will continue that a plaintiff who gives no gift of appreciation believes he waits longer for his order; and some files are 'found'.(Concededly there is the matter of staff appointment on a suitability basis. I suggested to the registrar that each filer be responsible for a specific section so that the employee who is not up to it can be assisted or transferred. In an era where 'managing' meant doing what employees permit, the staff outvoted the registrar. I would be surprised if there is now appointment-attention to literacy, numeracy, short term memory or psychometric testing. Also under case management a 2009 case filed in the 2008 group is liable not to be found when wanted - or at all.)

OBSERVATIONS

My comments refer to trends and patterns remembering that the argument can be confused by specifics like the overwhelming of a court by incompetence at the MVA (RAF) Fund..

A Expected expedition

1.1 The court's function in civil cases is to decide that which the parties place before it for decision. It is not the court's role to ensure that parties do come to the court.

1.2 It is not the court's business to see to it that the parties hurry up. It is the court's business to be ready to dispose of the matter when the parties are ready

2 The court rules give remedies for a party to respond to slowness by his or her opposite number. The State Attorney has the tools to hurry up the plaintiff. Secondly, parties may have good reason why the case does not develop faster, e.g. it can suit both parties when the plaintiff loses heart to have the matter peter out without the expense of court participation. There are other valid reasons. Before the original computer programme was replaced by the State's program that crashed in about 2005, it carried *Mandela v Mandela* from about 1997. It is probably still part-heard. If you do not want the president's case to be pushed along in a pipeline, why do it to others?

3 Time limits imposed by judges' orders are not inherently better than those of court rules but non-compliance is not pliable by parties.* Expect many applications for judicial amendment of directives or for condonation: looking for funding; case not fully investigated; considering settlement; counsel not yet available; attorney ill; change of attorneys.

4.1 In jurisdictions where there were no preceding measures, it would have been the experience that case management causes expediting. We do not start with a blank slate. We have rule 37. The question is not whether case management has (in some jurisdictions) proved beneficial but whether in RSA it will fare better than a properly applied rule 37– or even when not properly applied when you bear in mind that getting matters heard is greatly beyond the terrain where involvement or not of a puisne judge can make a difference.

4.2.a Comparing systems. One accepts that the Cape rule 37A caused expedition but there is no way to measure whether R37 would have fared worse. We do know that the commercial court was very markedly slower than the concurrent R37 system. There is also the evidence of the visiting American judge.

4.2.b Comparing the administration of systems. We also know that no changed system is required to get expedition.

* In some systems of case management the court sets time limits and duties. They tend to become standardised so that the duties about pleadings, discovery and so forth only suffer a change or source.

What is necessary is proper administration. Once rule 37 was consistently applied (with other matters of administration that also showed up in civil appeals and in applications) the time for summons to trial in Johannesburg was in less than 2 years reduced from 25 months to 3 (add the July of December vacations) at which point attorneys objected to 'short notice'. And there was more capacity: In one case a request for urgency was received on a Friday and granted on Monday. Judge van Oosten heard it in Vereeniging that same week. In the same period Pretoria increased its backlogs. Now, under a new Pretoria DJP wonders have been achieved – under an unchanged system. Arrears were not a problem of systems, but of administration and attitudes.

B Settlements: More and earlier

The ideal is good. A senior departmental officer said that case management is planned because the State has to pay so much in legal costs and that that expense can be decreased by case management.

The first question is how much earlier can settlement talk be brought to its commencement by a changed system? Firstly a party can before or immediately after summons raise settlement - with or without a statement that raising it is standard practice and not a sign of weakness. No new system is needed. Secondly, at present, once pleadings are closed the defendant can convene the pre-trial conference if the plaintiff fails to do so and it is compulsory then to discuss settlement. Note the early operation in rules 37-1 and -2. If that conference is unsatisfactory (and for other reasons) the State's attorney can at any time request a Rule 37 conference before a judge. No need to change the system.

A second major question is what FACTS justify a belief that a higher settlement ratio will result? [Why not an experimental rule to test the academic assertions?]

A serious answer will attend at lest to the following constants:

1.1.a As indicated in the *THRHR* article cited above and by experience in Johannesburg, the personal make-up of the presiding judge made a difference. [A 100% settlement outcome is probably not a recommendation but proof of undue pressure.]. Have we sufficient judges who have experience plus suitability?

1.1.b The attitude and enthusiasm of the head of the court makes a difference. Witness Johannesburg, Pretoria (and Cape Town and others?)

2.2.a The willingness of parties is crucial. In the initial heat of litigation or if it is a matter of principle or emotion, settlement is more difficult. Their interest in settlement is not created by the attendance of a non-invited judge.

2.2.b I have observed a higher success rate when the parties attend than if the attorney has to 'take instructions' or does settlement talks by letter. By the time that I retired the obligation under rule 37 for the litigants to be present was hardly enforced.

3 The third personality factor is that of the attorney. The attorney for the third party plaintiff will be as unwilling under case management to settle before the trial stage as he or she is under rule 37. I have had an attorney protesting in so many words that the pre-trial conference is a blatant interference with his livelihood. Case management that terminates prospective fees may have as rebellious a response as the introduction of requiring rule 37 conferences.

4 There are practical realities:

4.1 Deciding about case management is not an area for academic thinking. The attorney who gets instructions to issue summons does not then hold a full consultation or investigate all evidence. Similarly the defendant's attorney. A system that hopes for settlement before both legal advisors have acquainted themselves with the strength of the client's case, may be disappointed. The alternative is to have early full consultations. That introduces a cost factor for all that may counterbalance the expected savings in fees for some. Attorneys will not protest.

4.2 Case management will introduce additional 'bureaucracy' for an attorney running a case. That* and detailed instructions and time limits will chaff. There is reason to think that the 'irritation' factor was important in the failure of the two RSA case management experiences.

4.3 I have it from respected Cape opinion that Cape judges decided against seeking extension of the experimental Cape rule 37A. With the retirement of Judge President Friedman possibly an additional factor, the heart of Cape attorneys was no longer in the procedure and it was approached as a formality that has to be complied with and, for some, as merely an opportunity to earn fees. You only need one experience of interrupting your work for a conference at which nothing material is achieved for you to sit in the congested traffic and realise that you have ceased being a conferencing supporter.

5 Case management will require staff and equipment. In Johannesburg, one stage of empirical investigation pointed to 35 000 matters commenced in a year of which less than 800 (I can no longer recall exactly) came before a trial judge. Some of the 800 would have gained nothing from any type of pre-trial procedure. It does not make adequate sense to have judicial involvement in hundreds of matters where attorneys have it in their hands to get to the outcome without a judge, simply because in a minority of the cases it *may* make a difference. What makes sense is that courts assist every attorney who has any problem with holding a positive conference (or has any other handling problem)with a requested pre-trial conference before a judge. The current rule 37 permits that. It compels settlement talk.

6 The judge or other official does not know where to 'push' unless he or she is aware of some of the available evidence. To inform him or her will require time. That implies cost in many directions. Without information, the judge is essentially a lame duck but even with partial information the experienced judge knows that the improbable is sometimes the truth.

7 If either party attends through a person who is not fully au fait or does not have full authority, settlement talks are worse than a premature baby.

8 In a case management system the file must be available when the matter is to be attended to. How will staff who cannot handle their present tasks, cope with additional handlings?

CONCLUSION

I am an enthusiast for judicial involvement whenever there is pertinent prospect of gaining something. On the basis of experience and probability, that enthusiasm does not support management by judges or officials.

It is ironic that the new magistrate's court rules are retrogressive in abolishing a scope for case management at a time when that scope could have been used to get a factual basis test the expectations of those who now wish for case management.

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*Some systems tie a case to a particular judge. That may be workable in a large city. Where the judge also does other (or defined) types of work or out-of town work it creates delays and administrative complications. It also did not work in the 'commercial court.'