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Plea-bargaining in South Africa: The need for a formalised trial run*

1. Introduction

> This matter involves an aspect of our criminal procedure which has to date received little attention by way of judicial scrutiny and/or comment. I am referring to the process which is known to the robust as 'plea bargaining' and to the more faint-hearted as 'plea negotiation'.[1]

A handsome alternative to lengthy and costly criminal trials, plea bargaining offers a number of advantages to any overburdened court system. It may be succinctly described as a procedure in which the accused exchanges a plea of guilty for a concession by the court or the prosecution.[2] These concessions may include the retraction of certain charges, the acceptance of a plea of guilty to a lesser charge or the withholding of a request for a specific unfavourable sentence.[3]

This contribution focuses on the South African experience and a few tentative suggestions for a trial exercise on formalised plea bargaining.[4]

2. Accepting a plea of guilty

The procedure for the conviction of an accused without a trial where the plea is one of guilty, has been described as the *sina qua non* for the efficient administration of justice.[5]

Chapter 17 of the *Criminal Procedure Act* 51 of 1977 governs the plea of guilty at a summary trial. More specifically, section 112 of the Act allows a presiding judge, regional magistrate or magistrate to convict an accused of the offence in respect of which he/she has pleaded guilty on, on that plea,

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1 *North Western Dense Concrete CC v Director of Public Prosecutions, Western Cape* 2000 2 SA 78:80.

2 Joubert 1996:299.

3 Watney 1996:316.

4 See also the advice of Isakow and Smith 1985:138 that should the South African courts be faced with plea bargaining on an extended scale, it would be necessary to develop positive guidelines that would provide a controlled legal environment for the negotiation of pleas.

5 Barton 1981:212.

Ms S du Toit, Brink Cohen Le Roux & Roodt Inc, PO Box 2404, Houghton, 2041, and Research Fellow, Centre for Business Law, University of the Free State.
Dr E Snyman, Senior Lecturer, Centre for Business Law, University of the Free State, PO Box 339, Bloemfontein, 9300.

provided that the prosecutor accepts that plea and that the presiding officer is of the opinion that the offence does not merit imprisonment or any other form of detention without the option of a fine or a fine in excess of R1500.00.[6] The presiding officer is then able to impose any competent sentence.

Should the presiding officer be of the opinion that the offence merits imprisonment or another form of detention without the option of a fine, or a fine in excess of R1500.00, he/she must question the accused with reference to the alleged facts in order to ascertain whether the accused does indeed admit the allegations in the charge to which he/she has pleaded guilty. If the presiding officer is satisfied that the accused is guilty of the offence to which he/she has pleaded guilty, then he/she may convict the accused and impose any competent sentence. Such questioning may also be conducted at the request of the prosecutor.[7]

It is also possible to substitute the questioning explained above through the submission of a written statement, which must be handed into court. In such a written statement the accused sets out the facts which are admitted and pleaded guilty on. The court may then convict on the strength of the document, as opposed to the questioning. The submission of such a written statement does, however, not preclude the court from putting any questions to the accused.[8]

While this section governs the acceptance of a plea of guilty with the co-operation of the prosecutor, it does not prevent the prosecutor from presenting evidence, nor does it preclude the court hearing evidence on any of the charges, for the purposes of determining an appropriate sentence.[9]

It is, in addition, only possible for the prosecutor to accept a plea of guilty on a lesser charge if that charge is also an competent verdict on the original charge.[10]

For the legal representative of the accused, these provisions make it possible to dispose of a matter without having any facts of the matter disclosed to the court. In addition, even where facts must be disclosed, the section 112(2) statement can be utilised to determine the version of the facts the presiding officer will regard as correct.[11]

3. North Western Dense Concrete CC and Another v Director of Public Prosecutions, Western Cape

The judgment delivered in the case of *North Western Dense Concrete CC and Another v Director of Public Prosecutions, Western Cape*[12] confirmed

6 Government notice R1410 (Government Gazette 19435) of 30 October 1998.
7 *Criminal Procedure Act* 51/1977 section 112(1)(b).
8 *Criminal Procedure Act* 51/1977 section 112(2).
9 *Criminal Procedure Act* 51/1977 section 112(3).
10 Labuschagne 1995:176.
11 Allan 1987:51.
12 2000 2 SA 78.

that plea bargaining is an entrenched, accepted and acceptable means of achieving a settlement of the lis between the State and the accused in South African law.

3.1 The practice of plea-bargaining

In the practice of plea bargaining, the legal representative of the accused, armed with the instructions of his/her client, enters into a process of negotiation with the prosecutor. In the current constitutional dispensation, both have knowledge of the facts set out in the police docket and both have a grasp of their respective likelihoods of success, should the bargaining process not be successful.

The representative of the accused attempts to either plead guilty to a lesser offence or to plead guilty to the main charge on a different basis, both with the aim of ultimately influencing the sentence. The prosecutor, with the danger of acquittal in the back of his/her mind, attempts to secure a plea of guilty on a charge on the imperative that the moral blameworthiness of the accused's actions has to be answered by the appropriateness of a possible sentence.[13]

This means that an agreement may be reached, not only on the charge, but also on the facts placed before the court.[14]

Far from condemning the practice, the court approved plea bargaining in the following unequivocal terms:

> Such and exchange of thoughts is only to be encouraged in the interests of justice … Indeed, I am of the view that the system of criminal justice ion South Africa would probably break down if the procedure of plea bargaining were not to be followed because it had become the subject of judicial disapproval.

Until a plea is formally tendered and duly entered, the prosecutor remains *dominus litis* and the court cannot prevent a prosecutor from accepting a plea.[15] The court is also bound to impose a sentence on the basis of the agreed facts.[16]

It has, in fact been held that the court is not entitled to take any additional facts into consideration once an accused has pleaded guilty and submitted a plea explanation in terms of section 112(1)(b).[17]

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13 *North Western Dense Concrete CC v Director of Public Prosecutions, Western Cape* 2000 2 SA 78:82.

14 *North Western Dense Concrete CC v Director of Public Prosecutions, Western Cape* 2000 2 SA 78:83.

15 *North Western Dense Concrete CC v Director of Public Prosecutions, Western Cape* 2000 2 SA 78:86; Joubert 1995: 298; Allan 1987: 48.

16 *North Western Dense Concrete CC v Director of Public Prosecutions, Western Cape* 2000 2 SA 78:86.

17 *S v Moorcroft* 1994 1 SACR 317.

3.2 Enforcing a plea agreement

The question of plea bargaining and the consequences thereof is undoubtedly *res nova* in our law.

The courts are traditionally loathe to interfere with the decision-making of the Director of Public Prosecution[18] and the plea agreement is exactly that — a binding and enforceable agreement, the terms of which the court will order any of the parties to the plea bargain to comply with.[19]

The court will only intervene if justice dictates that it does so,[20] and in determining whether such intervention is called for, the court will take constitutional rights and values into account.[21]

On a proper reading of section 112 and 113, the court held:-

> That the *lis* is restricted by the acceptance of the plea appears from sections 112 and 133. The proceedings under the former are restricted to the offence 'to which he has pleaded guilty' and the latter must be read within that frame.[22]

It thus becomes evident that the Director of Public Prosecution and the discretion vested in prosecutors merit closer attention.

4. The Director of Public Prosecution

The prosecutor stands in a special relationship to the court. It is expected that he/she be unscrupulously fair in all dealings with the accused. In addition, the *Constitution* [23] enjoins all organs and functionaries of state to give effect to such rights as the right to administrative action that is fair and reasonable[24] and demands that they respect the rights conferred in the *Bill of Rights*.[25]

Against the backdrop of this constitutional imperative the Director of Public Prosecution is also afforded independence from the executive. The National Director lays down prosecuting policy.

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18 *North Western Dense Concrete CC v Director of Public Prosecutions, Western Cape* 2000 2 SA 78:90.
19 *North Western Dense Concrete CC v Director of Public Prosecutions, Western Cape* 2000 2 SA 78:92.
20 *North Western Dense Concrete CC v Director of Public Prosecutions, Western Cape* 2000 2 SA 78:91.
21 *North Western Dense Concrete CC v Director of Public Prosecutions, Western Cape* 2000 2 SA 78:92.
22 *S v Ngubane* 1985 3 SA 677 A:683.
23 *Constitution of the Republic of South Africa* 108/1996.
24 *Constitution of the Republic of South Africa* 108/1996 section 33.
25 *North Western Dense Concrete CC v Director of Public Prosecutions, Western Cape* 2000 2 SA 78:92.

Section 21 of the *National Prosecuting Authority Act* empowers the National Director to determine prosecution policy and issue policy directives in the following manner:-

> The National Director shall, in accordance with section 179 (5) (a) and (b) and any other relevant section of the Constitution-
>
> (a) with the concurrence of the Minister and after consulting the Directors, determine prosecution policy; and
>
> (b) issue policy directives,
>
> which must be observed in the prosecution process, and shall exercise such powers and perform such functions in respect of the prosecution policy, as determined in this Act or any other law.

Such a policy has been formulated and distributed to all the offices of the Director of Public Prosecution for implementation, and the aim of the policy is to set out the way in which the prosecuting authority and individual prosecutors should exercise their discretion.[26]

The prosecutor has the discretion to enter into negotiations with the defense prior to the commencement of the formal proceedings in court.[27] Some authors have expressed their concern for the unfettered discretion with which prosecutors are vested as to whether a person suspected of criminal conduct should be prosecuted or not, and if prosecuted, on what charges and before which court.[28] The prosecution policy, however, makes provision for the acceptance of a plea of guilty in scant terms:-

> an offer by the defense of a plea of guilty on fewer charges or on a lesser charge may be acceptable, provided that:-
>
> · The charges to be proceeded with readily reflect the seriousness and extent of the criminal conduct of an accused;
>
> · The plea to be accepted is compatible with the evidential strength of the prosecution case;
>
> · Those charges provide an adequate basis for a suitable sentence, taking into account all the circumstances of the case; and
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> · Where appropriate, the views of the complainant and the police as well as the interests of justice, including the need to avoid a protracted trial, have been taken into account.[29]

26 Prosecution Policy: A1.
27 Watney 1996:315-316.
28 Richings 1977:143.
29 Prosecution Policy: A.9.

To these measures may well be added those proposed by the South African Law Commission:-

a) that justice be done to the accused;

b) that the public trust in the legal system should be maintained; and

c) that no infringement should be made on the protection afforded to the accused by the current system.[30]

All of these measures have the result that the prosecutor is still afforded a significant amount of discretion relating to the acceptance of pleas:-

> … the legislator elected not to interfere with that discretion, leaving the necessary avenues open for citizens aggrieved by perceived misapplication of that discretion to obtain redress.[31]

5. Safeguarding the process

In order to most effectively employ the process of plea-bargaining within the criminal justice system to realise all its benefits, it is submitted that the process must be duly recognised and formalised.[32]

One attempt at such formalisation has been made by the South African Law Commission[33] which proposed the insertion of a section 106A to specifically govern the procedure of plea bargaining into the *Criminal Procedure Act* of 1977[34] in the following wording:-

> 106A Plea Discussions and Plea Agreements
>
> (1) The prosecutor and the accused or his legal representative may hold discussions with a view to reaching an agreement acceptable to both parties in respect of plea proceedings and the disposal of the case.
>
> (2) Any agreement reached between the parties shall be reduced to writing and shall state fully the terms of the agreement and any admissions made and shall be signed by the prosecutor, the accused, the legal representative and the interpreter, as the case may be.
>
> (3) The contents of such an agreement shall be proved by the mere production thereof by both parties: provided that in the case of an

30 South African Law Commission Interim Report Project 73: *Simplification of Criminal Procedure* 1995.
31 *North Western Dense Concrete CC v Director of Public Prosecutions, Western Cape* 2000 2 SA 78:90.
32 Kriegler 1993:259.
33 South African Law Commission Interim Report Project 73: *Simplification of Criminal Procedure* 1995.
34 *Criminal Procedure Act* 51/1977.

> agreement concluded with an accused who is not legally represented the court shall satisfy itself that the accused fully understands the contents thereof and entered into the agreement voluntarily and without improper influence.
>
> (4) The judicial officer before whom criminal proceedings are pending shall not participate in the discussions contemplated in subsection (1): Provided that he may, before an agreement is reached, be approached by the parties in open court or in chambers regarding the contents of such discussions and he may inform the parties in general terms of the possible advantages of the discussions, possible sentencing options or the acceptability of a proposed agreement.[35]
>
> (5) The judicial officer shall, before the accused is required to plead in open court or, if he has already pleaded, before judgment is given, be informed that plea discussions are to be conducted or that the parties have reached a plea agreement as contemplated in subsection (1).
>
> (6) If after discussions the parties concluded a plea agreement and the court has been informed as contemplated in subsection (3), the court shall enter such fact upon the record and order that the contents of the agreement be disclosed in open court. Provided that if the court is for any reason of the opinion that the accused cannot be convicted of the offence with which he is charged or of the offence in respect of which an agreement was reached and to which he pleaded guilty or that the agreement is in conflict with the provisions of section 25 of the Constitution of the Republic of South Africa or with justice, the court shall record a plea of not guilty in respect of such a charge and order that the trial shall proceed.
>
> (7) No evidence of a plea agreement or of admissions contained therein or of statements relating to such agreement shall be admissible as proof of guilt in subsequent criminal proceedings.

Though this recommendation cannot be supported as a whole, it does contain a number of elements which are of primary importance in the development of guidelines on plea-bargaining.

5.1 Involuntary pleas of guilty

One of the biggest dangers inherent to the plea bargaining system is that an innocent accused may be coerced into pleading guilty.[36]

35 It should be noted that, in the United Kingdom, it has been held that a judge should never indicate the sentence which he/she is minded to impose; Isakow and Smith 1985:137.

36 Joubert 1995:298; Labuschagne 1995:178; Barton 1981:214; Lutchmia v S 1979 3 SA 699 T; *Chetty v Cronje* 1979 1 SA 294 O.

There are two failsafes for such an eventuality:-

a) the power of the court to question an accused prior to accepting a pleas of guilty and the authority to correct such a plea;[37] and

b) the fact that a lack of consensus generated by that coercion will render the plea-bargain as a contract void.

In addition to these two safeguards, the following guidelines for the Director of Public Prosecution have been suggested:-

a) the client must be allowed ample opportunity to discuss the proceedings with his/her attorney;[38]

b) care must be taken that no false expectations are created and that it is made clear to the accused that no guarantees can be given as to the ultimate sentence;[39]

c) a prosecutor should take additional care when negotiating a plea with an unrepresented accused and such practice should, in fact, be discouraged;[40]

d) it may be desirable to designate only a limited number of prosecutors who may conduct plea negotiations,[41] or develop a system whereby plea negotiations are conducted under the auspices of a senior within the office of the Director of Public Prosecution;[42]

e) the plea agreement should be reduced to writing[43] and should be presented in an open court where the court will have the opportunity to question the accused as to the contents and his/her voluntary agreement to it;[44]

It has also been proven in other jurisdictions that the courts are influenced by a plea of guilty when considering sentence.[45] In fact, some South African authors, on good authority, list a plea of guilty as tangible evidence of remorse which would be taken into account in sentencing as a mitigating factor.[46] This question, however, remains open.[47]

37 Trichardt and Krull 1987:440; Isakow and Smit 1985:138.
38 Allan 1987:56 adapted to be a guideline for the prosecutor and not for the legal representative of the accused.
39 Allan 1987:56; Isakow and Smit 1985:137 advise that, should the accused be placed under the impression that a plea of guilty will lead to one sentence and a plea of not guilty to another, heavier one, negatively influences the voluntary nature of the accused's plea.
40 Watney 1996:318.
41 Watney 1996:319.
42 Trichardt and Krull 1987:444.
43 It is not only necessary to safeguard the interests of the accused, but also essential as a record for appeal grounds should the agreement not be honoured; Clarke 1999:165.
44 Watney 1996:320.
45 Joubert 1995:300.
46 Allan 1987:51; Isakow and Smit 1985:137.
47 Trichardt and Krull 1987:442.

5.2 Can justice be bought?

Plea bargaining has also, in other jurisdictions, vested the public with the impression that justice can be bought by those who afford it.[48] In fact, the German courts have ruled that an agreement clothed as a judgment amounts to trading in justice and have prohibited it as such.[49]

Consequently, care should be taken to avoid the creation of an impression that justice can be bought.

> It is axiomatic that justice must not only be done, but must manifestly be seen to be done. Therefor courts must always ensure that nothing occurs which may create the impression that there is any impropriety, let alone any corruption or a somewhat underhand method of administering justice, in connection with the conduct of any judicial proceeding.[50]

It may well be advisable to develop a number of guidelines as to instances in which the imposition of sentences other than imprisonment is unacceptable. Factors that may be taken into consideration in the development of such guidelines include the number of prior convictions and the type of crime committed.[51]

It may also be desirable to lay down detailed guidelines as to whether or not the prosecutor may agree to support any specific sentence, if suggested, or may merely leave sentence in the discretion of the court, without putting any further relevant information before the court.[52]

The following complementary guidelines in this regard have been suggested:-

a) that the charges agreed upon bear a reasonable relationship to the nature of the criminal conduct of the accused; and

b) that those charges provide the basis for a sentence appropriate to the circumstances; and

c) that there is sufficient evidence to support those charges.[53]

It has also been argued that the de-mystification of the plea-bargaining process and the removal of all elements of secrecy from it, are prerequisites to rendering plea negotiations an acceptable component of the criminal justice system which will contribute to public confidence in the practice.[54]

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48 Joubert 1995:301.
49 Labuschagne 1995:176.
50 Trichardt and Krull 1987:443.
51 See for instance the so-called “Three strikes and you’re out” law promulgated in California.
52 Watney 1996:319.
53 Trichardt and Krull 1987:444.
54 Watney 1996:320.

5.3 Throwing the book

One of the primary criticisms levied against plea-bargaining is that, in anticipation of the plea-bargaining process, prosecutors charge the accused with multiple and more serious offences than merited by the facts.[55]

It has been suggested that the Director of Public Prosecution develop guidelines on exactly which aspects may be negotiated in the process of plea bargaining, for instance, whether or not the prosecution may waive the right to prosecute the accused on further charges of a similar nature which may stem from the same police investigation at a later stage.[56]

The existing rules relating to the formulation of charges should also be strictly maintained.

5.4 Maintaining high police morale

The police frequently experience a lowering of morale due to the fact that plea-bargaining creates the impression that the prosecutor 'sells them out'.[57]

Despite this perception, it was found, in an empirical study on plea bargaining in South Africa, that there is no doubt that the police attempt to influence the plea of the accused, most notably through attempts to obtain a confession.[58]

5.5 Circumventing the courts?

One of the foremost arguments against plea-bargaining is that the process constitutes a transfer of the sentencing discretion of the court to the prosecutor.[59]

This danger is avoided in South Africa by the explicit provisions made in relation to sentencing and by the power of the court to intervene in a plea-bargain in the circumstances described above.[60]

In addition, it has never been suggested that the discretion of the court in terms of section 112 should be disposed of.[61] It is submitted that, whatever the nature of more formalised plea negotiations, the procedure under section 112 must remain unaffected as it creates the necessary mechanism for the court to satisfy itself of the desirability of the plea agreement.

55 Joubert 1995:301.
56 Watney 1996:319.
57 Joubert 1995:301.
58 Smit and Isakow 1986:6.
59 Joubert 1995:303.
60 See the discussion at 3.2 above.
61 Allan 1987:53.

It is, in addition, submitted that the proposal that the agreement be reduced to writing and that that document be submitted to court will refute the objection that the practice of plea-bargaining circumvents the courts. The formulation provided by the South African Law Commission, discussed at 5 above is strongly supported.

5.6 Doing justice to the victim

The victim is frequently neglected in the process of plea bargaining and may harbour understandable objections on the practice.

It has been suggested that making a plea bargain public when the plea process is conducted in an open court will enable any person who has an interest in the process to monitor and check such proceedings.[62]

In the United States at least three states have enacted legislation which enables the victims to voice their opinion to the trial judge prior to the acceptance of a plea bargain by the court.[63] It has been suggested that following guidelines would establish a healthy dispensation in South African courts:-

a) that the victim be afforded an opportunity to be heard;

b) that the victim be informed of the planned plea bargaining proceedings and the possible contents of those proceedings, as well as his/her right to be heard; and

c) that, should that right be disregarded, a complaint can be lodged and where that complaint can be lodged; and

d) that the victim will have no right of appeal against the decision of the court in accepting or rejecting the plea agreement.[64]

The victim in South Africa has an additional avenue open to him/her to pursue the prosecution of an alleged perpetrator through the process of private prosecution. This process is dependant upon the issuing of a certificate *nolle prosecui* by the Director of Public Prosecution.

6. The nexus between plea and sentence

It has been argued that plea bargaining, from the perspective of the accused, is aimed primarily at influencing sentencing.[65] In this regard it has been submitted that the primary aims of plea negotiation by the accused is to:-

62 Watney 1996:320.
63 Labuschagne 1995:168.
64 Labuschagne 1995:170.
65 Joubert 1995:302.

a) minimise the ambit of the sentence through the negotiation of a reduction in the number or severity of charges; and

b) to determine the exact type of sentence as far as it is possible, in advance.[66]

Should a more formalised process of plea-bargaining be instituted, care must be taken to discourage the disparate treatment of offenders.[67] In plea-bargaining situations, sentences are frequently recommended, not on the facts that are admitted, but on the relative strength or weakness of the defense or prosecution.[68]

It is therefor of integral importance that the development of plea bargaining guidelines do not occur in isolation and that developments in sentencing guidelines are incorporated. So, for instance, the Canadian Sentencing Commission has advocated the creation of mechanisms requiring the disclosure in open court of the facts and considerations which formed the basis of any plea agreement.[69]

Attempts at imposing mandatory minimum sentences have, however, not been easy and have been met with considerable criticism.[70]

7. Conclusion

Though the court remarked *obiter dictum* in the judgment in *North Western Dense Concrete CC and Another v Director of Public Prosecutions, Western Cape* [71] that plea-bargaining can be adequately governed by the existing provisions in statutes, comon and constitutional law,[72] it is submitted that some (informal) guidelines are required to safeguard the process of plea-bargaining in South Africa.

It has to be agreed with previous suggestions that:-

> [It] would be well advised to confront the issue squarely and to develop positive guidelines that would provide a controlled legal context for the negotiation of pleas.[73]

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66 Allan 1987:48.
67 Labuschagne 1995:179.
68 Trichardt and Krull 1987:443.
69 Cohen and Doob 1989:89.
70 See especially the *Criminal Law Amendment Act* 105/1997 and the 2000 Discussion Paper 91 of the South African Law Commission on Sentencing (A new sentencing Framework).
71 2000 2 SA 78.
72 *North Western Dense Concrete CC v Director of Public Prosecutions, Western Cape* 2000 2 SA 78:86. It must be said that the notion of plea bargaining leaves one with an uncomfortable itch under the constitutional collar. A by-product of plea-bargaining is that the accused waives a number of constitutional and common law rights such as the priviledge against self-incrimination. See also the discussion of Labuschagne 1995:177.
73 Isakow and Smit 1985:138.

This suggestion was made (in 1985) conditional upon plea-bargaining becoming an integral part of the South African system of criminal justice. It has since been remarked that:

> If an observer looks closely, she will find that pre-trial negotiations persist at all levels of South African criminal courts, particularly among more experienced practitioners, despite the fact that the practice is neither formally sanctioned nor taught in law school trial advocacy courses.[74]

Plea bargaining guidelines should be developed for and developed from a trial implementation of such guidelines in prosecutorial practice.[75] These guidelines should ultimately form part of the broader prosecution policy.[76]

74 Clarke 1999:141.

75 Such a pilot programme was launched at the Broadmeadows Magistrate's Court in Australia and has developed into an overwhelming success. Melasecca 1998:53-55.

76 Trichardt and Krull 1987:444.

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