

EXECUTIVE SUMMARY

The South African legal system has, in recent years, proposed court specialisation as one solution to a number of problems confronting justice provision. Specialised courts have been proposed, and some set up, to hear labour, land, family and immigration matters. They have either been established or mooted for the hearing of hijacking cases, allegations of rape or domestic violence, and commercial crimes. This monograph seeks to provide an initial assessment of the policies and practices underpinning these proposals and initiatives, in order to begin to grapple with the question of whether specialised courts are likely to improve service delivery in the justice system.

This monograph considers both the desirability and practicality of court specialisation, and assesses the functioning of an existing court dedicated to cases of commercial criminality.

Ironically, the research showed that in terms of effectiveness and efficiency, the most important innovation of the Specialised Commercial Crime Court was not that it heard only one type of case. Rather, it was the improved integration of the work of the prosecutors and investigators whose cases came to these courts that made the difference. This suggests, of course, that more such gains can be made in the rest of the system. Some aspects of this innovation may however not be wholly replicable, and the results should not simply be assumed if rolled out elsewhere.

The case for and against court specialisation

There are, in essence, two sorts of cases that are made to justify the creation of a specialised court in South Africa. The first emphasises the transitional nature of South African law and asserts that particular areas of law associated with particular aspects of social transformation (such as land claims for example) necessitate the creation of courts dedicated to upholding the relevant legislation. The second is that specialisation allows skills to be developed in a particular area (for example hijacking) which in turn means cases can be

processed more efficiently. Moreover, the fact that court time is specifically dedicated to such crimes means that, once in court, they can be processed more speedily than may have been the case on an open court roll.

In reviewing these two alternative models of court specialisation, the monograph distinguishes between court specialisation proper and what is denoted court dedication or reservation. The former relates to the legislatively mandated creation of parallel courts designed to hear a narrow range of cases, while the latter relates to the mere 'dedication' of ordinary court resources—infrastructure as well as personnel in the magistracy and prosecution service—to the hearing of particular cases.

In relation to the two models of court specialisation the monograph suggests that, for a variety of reasons, specialisation is more difficult and problematic to implement than court dedication. Nevertheless, court dedication is not an entirely problem-free endeavour. The biggest risks associated with court dedication—risks that exist also in specialised courts—are that the creation of such courts will generate practices that work against the maintenance of professional objectivity among the judicial and prosecuting staff. Cases in such courts will, after all, tend to involve a rather limited number of professionals, and the resulting familiarity creates the potential for increased and unhealthy cosiness.

Despite these potential difficulties, the monograph argues that court dedication, if appropriately used, does offer rewards to deal with local and specific capacity constraints.

The Specialised Commercial Crime Court

In November 1999, the Specialised Commercial Crime Court in Pretoria opened its doors for business. With the assistance of Business Against Crime, the court was established in order to help rectify the perceived inability of the criminal justice system to cope with cases of commercial crime. Although these capacity-related problems were and are widely perceived to extend far beyond the relatively narrow range of cases of commercial crime, it was felt that they were compounded by the complexities of commercial crime cases.

The court itself is really just two ordinary regional courts set aside for the hearing of cases brought by the team of prosecutors housed in the Specialised Commercial Crime Unit (SCCU). And, given that most large regional courts

have magistrates and prosecutors dedicated to the hearing of commercial cases, there is, to all intents and purposes, nothing terribly innovative about the court itself. What is innovative, however, is the manner in which the work of the detectives of the SAPS Commercial Branch in Pretoria is integrated with the work of the prosecutors of the SCCU, as manifested in the completion of cases for presentation in the court. It is here that the innovative character of the court is evident.

The SCCU is composed of 20 prosecutors responsible for presenting the commercial crime cases investigated by Pretoria's Commercial Branch. However, unlike the practice in the rest of the criminal justice system, the prosecutor assigned to a particular case is involved in its investigation at a much earlier point in time. Indeed, shortly after the case first comes to the attention of an investigator at the Commercial Branch, she is required to present a draft investigation plan to the prosecutor. They will then be jointly responsible for ensuring that the docket from which a charge sheet is drawn, and which is eventually closed, is properly completed.

Assessing the impact of the dedicated court, and the integration of the investigative and prosecuting functions, is extremely difficult. Despite the complexities associated with proving a commercial crime case, as well as the fact that people charged with commercial crimes tend to have better legal representation, the Specialised Commercial Crime Court maintains a case completion rate similar to other regional courts: about nine cases closed per magistrate per month. This reflects well on the quality of the cases prepared by the responsible investigator/prosecutor teams. The conviction rate of nearly 90% of all closed cases also reflects this. As has already been suggested, however, these successes appear to have more to do with the integration of the investigation and prosecution functions than with the existence of the court itself.

Investigators, prosecutors and defence counsel interviewed in the course of this research suggested that the reasons for the relatively high level of success in the courts could be ascribed to three factors:

- In general, the involvement of prosecutors in the investigation phase meant that the investigation tended, on average, to be both more effectively and more efficiently completed, making it that much easier to complete the charge sheet and present an effective case.
- Prosecutors, having been involved in the investigation, were much more attuned to, and familiar with, the specific facts of the case, making their

presentation more effective. Moreover, this high level of preparedness made it that much more likely that defence counsel would advise their clients to plead guilty.

- The fact that particular magistrates were dedicated to commercial crimes meant that both defence and prosecution had a better sense of the needs of the court, making cases more efficient. In addition, the familiarity of the court with the nature of these cases meant that the cases could proceed more rapidly.

Although it is clear that these positive effects raise the effectiveness and efficiency of the court, it is also true that there are important features of this court that must qualify any assertion that this approach will necessarily succeed elsewhere.

- The first, and, probably most important advantage that this court enjoys is the quantity and quality of its prosecuting staff. Its endowment of resources, although justified by the nature of the cases brought, is obviously not replicable in every court, and it is impossible to be certain that dedicated courts without appropriate numbers of skilled staff will be a success.
- The co-location of investigators and prosecutors has also been a key factor pointed to by prosecutors in explaining the quality of the co-operation with the police. Again, this may not be achievable everywhere.
- The support of the private sector, facilitated by Business Against Crime, has helped to both facilitate the establishment of the organisational processes and to provide some additional resources to the SCCU, the Commercial Branch and the court.
- Finally, the inevitable tensions that arise whenever two distinct organisations begin to work together have been handled with grace, professionalism and competence by the management staff. This was not inevitable and reflects well on the decisions made and the people who made them. It is quite possible to imagine less successfully managed alternatives.

The evaluation of the Specialised Commercial Crime Court is, therefore, qualified. There is no doubt that the court itself is an effective and efficient institution. What is less certain is what accounts for that success, and whether it would be replicable in other jurisdictions or in relation to other categories of

crime. For this reason, it is unfortunately difficult to offer any clear-cut recommendations for rolling out the innovation. What is clear, however, is that specialisation by itself is no panacea.

In any event, the fact that specialisation in the case of commercial crime has been a success should not be used to justify any and all proposals for prosecuting or investigative specialisation. Such an approach, as has been argued in the case of some of the specialised units in the SAPS, often simply papers over the cracks in existing systems.