

**IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CAPE LOCAL DIVISION, BISHO)**

CASE NO. 593/2014

In the matter between:

UNATHI MYOLI

1st Applicant

SIYANDA NOBHATYI

2nd Applicant

And

**THE DIRECTOR OF PUBLIC PROSECUTIONS,
EASTERN CAPE**

1st Respondents

**THE DIRECTOR OF PUBLIC PROSECUTIONS,
BISHO**

2nd Respondent

MINISTER OF JUSTICE AND

CONSTITUTIONAL DEVELOPMENT AND

CORRECTIONAL SERVICES

3rd Respondent

THE SPEAKER OF THE NATIONAL

PARLIAMENT

4th Respondent

THE MINISTER OF POLICE

5th Respondent

NATIONAL COMMISSIONER OF THE

SOUTH AFRICAN POLICE SERVICES

6th Respondent

CAPTAIN BUYS

7th Respondent

THE PROVISIONAL CO-ORDINATOR FOR

SECTION 252A AUTHORITY, SOUTH

AFRICAN POLICE SERVICES, ZWELITSHA

8th Respondent

JUDGMENT

ALKEMA J

[1] The two applicants are police officers and members of the South African Police Services (SAPS). They are also two accused persons who stand charged for dealing in drugs. Their trial in the Regional Court stands adjourned to the end of October 2015 pending the outcome of this application. The evidence already adduced includes the setting of a trap upon which the State intends to rely for a conviction.

[2] Section 252A of the Criminal Procedure Act 51 of 1977 (CPA) permits the use of a trap or engaging in undercover operations in order to detect, investigate or uncover the commission of an offence.

[3] The applicants seek orders declaring section 252A to be unconstitutional; to review, set aside and declare unconstitutional the decision of the first respondent in approving an application for authority to make use of a trap and an uncover operation known as “*Cooler Bag*” in terms of section 252A; and certain other ancillary relief.

[4] Mr *Zilwa* SC, who appeared for the applicants, in essence relied on section 35 (3) of the constitution which provides that:

“Every accused person has a right to a fair trial, which includes the right ... (h) to be presumed innocent, to remain silent, and not to testify during the proceedings.”

[5] Mr *Zilwa* SC accordingly submitted that evidence of a trap and undercover agents in an operation to investigate a crime in general constitute an infringement of the right to a fair trial as meant by section 35 (3) of the constitution.

[6] The first respondent is the Director of Public Prosecutions, Eastern Cape, and the seven other respondents are all interested State organs who have an interest in the matter.

[7] The applicants have belatedly served and filed a replying affidavit and launched an application for the condonation of such late filing and service. Pursuant to an order I made at the outset of the hearing, the main application is now procedurally in order and may be disposed off with the replying affidavit as part of the papers.

[8] It is necessary to set out section 252A in its entirety:

“252A (1) *Any law enforcement officer, official of the State or any other person authorised thereto for such purpose (hereinafter referred to in this section as an official or his or her agent) may make use of a trap or engage in an undercover operation in order to detect, investigate or uncover the commission of an offence, or to prevent the commission of any offence, and the evidence so obtained shall be admissible if that conduct does not go beyond providing an opportunity to commit an offence: Provided that where the conduct goes beyond providing an opportunity to commit an offence a court may admit evidence so obtained subject to subsection (3).*

(2) *In considering the question whether the conduct goes beyond providing an opportunity to commit an offence, the court shall have regard to the following factors:*

- (a) *Whether, prior to the setting of a trap or the use of an undercover operation, approval, if it was required, was obtained from the attorney-general to engage such investigation methods and the extent to which the instructions or guidelines issued by the attorney-general were adhered to;*
- (b) *the nature of the offence under investigation, including-*
 - (i) *whether the security of the State, the safety of the public, the maintenance of public order or the national economy is seriously threatened thereby;*
 - (ii) *the prevalence of the offence in the area concerned; and*

- (iii) *the seriousness of such offence;*
- (c) *the availability of other techniques for the detection, investigation or uncovering of the commission of the offence or the prevention thereof in the particular circumstances of the case and in the area concerned;*
- (d) *whether an average person who was in the position of the accused, would have been induced into the commission of an offence by the kind of conduct employed by the official or his or her agent concerned;*
- (e) *the degree of persistence and number of attempts made by the official or his or her agent before the accused succumbed and committed the offence;*
- (f) *the type of inducement used, including the degree of deceit, trickery, misrepresentation or reward;*
- (g) *the timing of the conduct, in particular whether the official or his or her agent instigated the commission of the offence or became involved in an existing unlawful activity;*
- (h) *whether the conduct involved an exploitation of human characteristics such as emotions, sympathy or friendship or an exploitation of the accused's personal, professional or economic circumstances in order to increase the probability of the commission of the offence;*
- (i) *whether the official or his or her agent has exploited a particular vulnerability of the accused such as a mental handicap or a substance addiction;*
- (j) *the proportionality between the involvement of the official or his or her agent as compared to that of the accused, including an assessment of the extent of the harm caused or risked by the official or his or her agent as compared to that of the accused, and the commission of any illegal acts by the official or his or her agent;*
- (k) *any threats, implied or expressed, by the official or his or her agent against the accused;*
- (l) *whether, before the trap was set or the undercover operation was used, there existed any suspicion, entertained upon reasonable grounds, that the accused had committed an offence similar to that to which the charge relates;*
- (m) *whether the official or his or her agent acted in good or bad faith or*

- (n) *any other factor which in the opinion of the court has a bearing on the question.*
- (3) (a) *If a court in any criminal proceedings finds that in the setting of a trap or the engaging in an undercover operation the conduct goes beyond providing an opportunity to commit an offence, the court may refuse to allow such evidence to be tendered or may refuse to allow such evidence already tendered, to stand, if the evidence was obtained in an improper or unfair manner and that the admission of such evidence would render the trial unfair or would otherwise be detrimental to the administration of justice.*
- (b) *When considering the admissibility of the evidence the court shall weigh up the public interest against the personal interest of the accused, having regard to the following factors, if applicable:*
 - (i) *The nature and seriousness of the offence, including-*
 - (aa) *whether it is of such a nature and of such an extent that the security of the State, the safety of the public, the maintenance of public order or the national economy is seriously threatened thereby;*
 - (bb) *whether, in the absence of the use of a trap or an undercover operation, it would be difficult to detect, investigate, uncover or prevent its commission;*
 - (cc) *whether it is so frequently committed that special measures are required to detect, investigate or uncover it or to prevent its commission; or*
 - (dd) *whether it is so indecent or serious that the setting of a trap or the engaging of an undercover operation was justified;*
 - (ii) *the extent of the effect of the trap or undercover operation upon the interests of the accused, if regard is had to-*
 - (aa) *the deliberate disregard, if at all, of the accused's rights or any applicable legal and statutory requirements;*
 - (bb) *the facility, or otherwise, with which such requirements could have been complied with, having regard to the circumstances in which the offence was committed; or*
 - (cc) *the prejudice to the accused resulting from any improper or unfair conduct;*

- (iii) *the nature and seriousness of any infringement of any fundamental right contained in the Constitution;*
 - (iv) *whether in the setting of a trap or the engagement of an undercover operation the means used was proportional to the seriousness of the offence; and*
 - (v) *any other factor which in the opinion of the court ought to be taken into account.*
- (4) *An attorney-general may issue general or specific guidelines regarding the supervision and control of traps and undercover operations, and may require any official or his or her agent to obtain his or her written approval in order to set a trap or to engage in an undercover operation at any place within his or her area of jurisdiction, and in connection therewith to comply with his or her instructions, written or otherwise.*
- (5)
 - (a) *An official or his or her agent who sets or participates in a trap or an undercover operation to detect, investigate or uncover or to obtain evidence of or to prevent the commission of an offence, shall not be criminally liable in respect of any act which constitutes an offence and which relates to the trap or undercover operation if it was performed in good faith.*
 - (b) *No prosecution for an offence contemplated in paragraph (a) shall be instituted against an official or his or her agent without the written authority of the attorney-general.*
- (6) *If at any stage of the proceedings the question is raised whether evidence should be excluded in terms of subsection (3) the burden of proof to show, on a balance of probabilities, that the evidence is admissible, shall rest on the prosecution: Provided that the accused shall furnish the grounds on which the admissibility of the evidence is challenged: Provided further that if the accused is not represented the court shall raise the question of the admissibility of the evidence.*
- (7) *The question whether evidence should be excluded in terms of subsection (3) may, on application by the accused or the prosecution, or by order of the court of its own accord be adjudicated as a separate issue in dispute."*

[9] The guidelines referred to in sub-section (4) have been issued by all Directors of Public Prosecutions in South Africa jointly, including the First Respondent, on 4 June 2004 and are part of the application papers. It is unnecessary to detail such guidelines in this judgment. Suffice to say that the guidelines require the approval of the first respondent, which was sought and obtained. All other guidelines have been complied with.

[10] The legal profession in South Africa has for a long time been grappling with the moral, ethical and jurisprudential obstacles raised by the entrapment system. Theoretically, the State provokes a law-abiding citizen to commit a crime. Sometimes the trap creates the opportunity for someone who, but for the trap, would not have committed the crime, as was the case in *S v Malinga* 1963 (1) SA692 (a) AT 693G.

[11] Section 252A adopts the recommendations of the law commission dated 28 December 1994. A reading of these recommendations clearly show, in my view, that the drafters of the report had regard to the Bill of Rights, including the right to a fair trial, then embodied in the interim constitution.

[12] Section 252A was inserted into the CPA by s.1 of Act 85 of 1996. It did not introduce a general defence of entrapment in South Africa. Rather, it introduced an exclusionary rule of evidence to deal with the problems relating to the use of traps. (That was also the approach in Australia, United Kingdom and Singapore.) Accordingly, if the conduct surrounding the setting of the trap does not go beyond providing an opportunity to commit an offence, the evidence so obtained shall be admissible. If the conduct goes beyond providing an opportunity to commit an offence, the court may refuse to allow such evidence to be tendered or may refuse to allow such evidence already tendered to stand, if the evidence was obtained in an improper or unfair manner or would otherwise be detrimental to the administration of justice (sub-section (3 (a))).

[13] Of course, subsection (1) read with sub-section (3) must always be read subject to the constitution. The relevant parts of the constitution are these:

[14] Section 1 which provides that the constitution is the supreme law of the Republic, and that “... *law or conduct inconsistent with it is invalid.*”

[15] Section 35 (3) which gives every accused the right to a fair trial, read with sub-section (5) which provides that “... *evidence obtained in a manner that violates any right in the Bill of Rights must be excluded if the admission of that evidence would render the trial unfair or otherwise be detrimental to the administration of justice.*”

[16] Section 36 which deals with the limitation of rights to the extent that such limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking the relevant factors into account.

[17] Section 172 empowers the High Court to make an order concerning the constitutional validity of an Act of Parliament.

[18] It must be borne in mind that the applicants are not asking this Court to review the trial court’s enforcement or interpretation of section 252A, and this is not an appeal against the manner of enforcement of section 252A. This is an application to declare section 252A *per se* unconstitutional, subject to confirmation by the Constitutional Court. It is said to offend the right to a fair trial; not that the admission of certain evidence renders the trial unfair. It is said to be unconstitutional by its very terms.

[19] For the reasons which follow, I am unable to agree with Mr *Zilwa* SC's submissions. I am unable to find any sub-section of section 252A to be constitutionally invalid, nor am I able to find that section 252A as a whole offends any constitutional principle.

[20] The starting point is to recognize that there is always tension between the public interest on one hand; and the exercise of private constitutional rights on the other hand. In *casu*, between the use of traps and the right to a fair trial.

[21] Public interest demands that crime must be prevented and combated. In certain cases the use of a trap may be the only method of combating crime, and the facts of this case show that this is one of those cases. Evidence of members of the SAPS committing crimes are on the increase and public interest demand that such members be apprehended and criminally charged. Very often corrupt police officials can only be arrested and successfully prosecuted if a trap was used. If the use of a trap is the only practical method of successfully combatting crime and the evidence was obtained in a fair manner, then public interest demand that the evidence of a trap be admitted. On the other hand, the use of a trap always has the potential to limit the right to a fair trial, or to render a trial unfair.

[22] The constitution explicitly recognize such tension and provides a mechanism under section 36 to resolve the tension by, under certain circumstances, limiting the constitutional right. In this sense no constitutional right is absolute.

[23] It is now trite law that the limitation of rights under section 36 gives rise to two stages of enquiry. The first stage is to determine whether the right in question – in *casu* the right to a fair trial – is infringed. The second is to determine whether that infringement can be justified as a reasonable limitation of the right. (*S v Zuma and others* 1995 (4) BCLR 401 (SA at 414.)

[24] In regard to the first stage of the enquiry, the fairness of the trial will depend on the outcome of the operation of s.252A. If evidence which will render the trial unfair is admitted, there will be an infringement of the right. If the evidence is excluded, the trial will not be unfair. But those issues are not before me. What is before me is the constitutionality of the terms of section 252A. The exclusionary nature of the terms and of the proper operation of section 252A cannot be said to be unfair or said to infringe any constitutional right. The section specifically excludes any evidence which will render the trial unfair or detrimental to the administration of justice. And if the conduct does not go beyond providing an opportunity to commit an offence, the very mischief which arises from the use of a trap or undercover agent is prevented and the trial cannot be said to be unfair.

[25] Section 252A retains the tension between the public interest to use a trap in certain circumstances on the one hand, and the right to a fair trial on the other hand. To the extent that such tension may by the operation of section 252A limit the right to a fair trial, such limitation cannot be unconstitutional in circumstances where section 36 of the constitution itself recognises the tension and resultant limitation of rights.

[26] I therefore come to the conclusion that the terms of section 252A do not infringe upon any constitutional right including the right to a fair trial.

[27] Even if I am wrong in the above finding and there is an infringement of the right to a fair trial, I believe that having regard to the public interest, such infringement can be justified as a reasonable limitation under section 36 of the constitution. The terms of section 252A by which evidence which may render the trial unfair or which may infringe on the right to fair trial, is excluded, are reasonable and justifiable as meant by section 36. I therefore come to the conclusion that the second stage of the enquiry has been met.

[28] Mr *Zilwa* SC submitted, in the alternative, that the wording of section 252A lacks clarity and are in certain respects incomprehensible and have attracted justifiable criticism. In support of his submission he referred to Du Toit *et al* in *Commentary on the Criminal Procedure Act* at 24 -131; *S v Odengo* 2001(1) SACR 560 (WLD) at 565(h)-568(c); *S v Kotze* 2010 (1) SACR 100 (SCA) at 111 (para 20) and 113 (para 26). The criticism expressed in these authorities includes the view that in certain respects the section may be unconstitutional.

[29] It does not follow from criticism expressed in authorities that the section is *per se* unconstitutional.

[30] Applicant's case is that the entire section 252A is *per se* unconstitutional; not that certain parts or sub-sections are unconstitutional. Should the applicants rely on the unconstitutionality of certain sub-sections or on the wording of certain parts of the section, such wording or sub-sections must be identified and addressed. It is not

sufficient to merely refer a Court to criticisms expressed in other authorities.

[31] In any event, constitutional interpretation has many tools which may be used to avoid any potential unconstitutionality. For instance, see para.20 of the judgment of *Wallis AJA* (as he then was) in *Kotze (supra)*. The entire section 252A must be interpreted subject to the constitution including the right to a fair trial and the limitation of such right under section 36. I believe that the interpretation placed by *Wallis AJA* in *Kotze (supra)* on section 252A renders the section constitutional in its entirety.

[32] In the circumstances I believe this application must fail. I therefore make the following order:

The application is dismissed with costs, such costs to include the costs of the two counsel.

ALKEMA J

Heard on 13 August 2015

Delivered on 22 September 2015

Counsel for Applicants : Adv. P H S Zilwa SC

Instructed by : Makhanya Attorneys

Counsel for Respondents : Adv. A Beleveld SC
& Adv. M Pango

Instructed by : State Attorney, East London