



**IN THE HIGH COURT OF SOUTH AFRICA
EASTERN CAPE DIVISION, MAKHANDA**

NOT REPORTABLE

Case No.: CA&R 09/2025

In the matter between:

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

Appellant

and

RAYMOND MARK TAYLOR

First Respondent

ROLAND LEONARD CLYDE HUDSON

Second Respondent

**ACTING REGIONAL COURT MAGISTRATE,
MS E MKHARI (N.O.)**

Third Respondent

JUDGMENT

EKSTEEN J:

[1] This is an appeal by the Director Public Prosecutions, Eastern Cape Division (the DPP), in terms of s 310 of the Criminal Procedure Act, 51 of 1977 (the CPA),¹ against the decision of the third respondent, the acting Regional Magistrate, Region of the Eastern Cape (the magistrate) that evidence against the first and second respondents (the first and second accused, respectively, in the trial) that had been obtained in the course of an entrapment, or undercover operation, as envisaged in s 252A of the CPA, and secretly recorded, was inadmissible. The direct consequence thereof was that the first and second respondents were discharged, in terms of s 174 of the CPA, at the end of the DPP's case. The first and second respondents (to whom I shall refer jointly as 'the respondents') oppose the appeal.

Background

[2] The respondents had been charged with numerous serious offences, including contraventions of the Prevention of Organised Crime Act² and the Prevention and Combatting of Corrupt Activities Act,³ which arise from, and relate to, their alleged unlawful harvesting of abalone from Bird Island. Bird Island is a marine protected area off the coast of Gqeberha and it forms part of the Addo Elephant National Park (Addo). The DPP's case against the respondents was that they had proceeded to establish an ongoing, long-term abalone poaching racket, which envisaged that they would repeatedly poach abalone from the waters of the marine protected area surrounding Bird Island in the execution of a corrupt scheme whereby officials from the South African National Parks Board (SANParks) would turn a blind eye to their activities and aid and abet them in exchange for monetary gratification.

¹ The material portion of s 310 provides: '(1) When a lower court has in criminal proceedings given a decision in favour of the accused on any question of law, ... the attorney-general ... may require the judicial officer concerned to state a case for the consideration of the provincial or local division having jurisdiction, setting forth the question of law and his decision thereon and, if evidence has been heard, his findings of fact, in so far as they are material to the question of law.

(2) When such case has been stated, the attorney-general ..., may appeal from the decision to the provincial or local division having jurisdiction.

(3) The provisions of section 309 (2) shall apply with reference to an appeal under this section. ...'

² Act 121 of 1998.

³ Act 12 of 2004.

[3] Mr Shiloane was a field ranger at Addo in the employ of SANParks, and in that capacity he was a peace officer. He performed law enforcement duties at Bird Island from time to time, usually for a continuous period of a few weeks at a time. On 26 February 2022, whilst he was on Bird Island, he had received a WhatsApp message from an unknown number, and the sender had identified himself only as 'Ray'. The WhatsApp advised that Ray had received Mr Shiloane's number from a mutual friend, one Ollie, who had previously worked on Bird Island, and Ray enquired whether Mr Shiloane was still based in Gqeberha. Mr Shiloane confirmed that he was. Thereafter, he received a further WhatsApp message on 1 March 2022 which read as follows:

'Hi, sorry for the later reply, I have an idea, that could maybe work well for both of us, and Olee says you the right guy, could we maybe meet, to discuss, and introduce to each other. Thanks Ray' (*sic*)

[4] Mr Shiloane agreed to meet Ray, and he received a further WhatsApp message on 2 March 2022, this time from different number, as follows:

'Morning, it's Ray here, my other number is a work phone, we have heard that some guys are able to come dive at the island for a fee, and would like to discuss with you if possible, dont want to talk to much over the phone, please let me know' (*sic*)

Diving within the marine protected area is strictly forbidden and Mr Shiloane was surprised by the message. He realised that something may be amiss and replied that he had no idea what Ray was talking about. He offered to refer Ray to his superior in SANParks for assistance, to which Ray responded:

'No thats fine we got sorted out, thanks for the help, sorry to bother' (*sic*)

[5] Mr Shiloane nevertheless reported the matter to his superior, Mr Rob Milne, a senior ranger in SANParks. Mr Milne advised him that if Ray were to contact him again, he should express his willingness to meet him, and that he should keep Milne informed of all WhatsApp communications or phone calls. Accordingly, Mr Shiloane responded to Ray that same evening and expressed his willingness still to meet when he returned to the mainland. Ray accepted the invitation with alacrity. He responded:

'Great let me know when you are back, and we will make a plan, thanks for getting back to me'

[6] As I have said, Mr Milne was a senior ranger, and he reported these developments to Mr Fox, a senior investigator at the Environmental Crimes Investigations of SANParks, for his attention. Thus, when Mr Shiloane returned from Bird Island, Mr Fox interviewed him and minuted a statement from him on 14 March 2022. Armed with the statement Mr Fox reported the matter to the Directorate of Priority Crime Investigation (DPCI) of the South African Police Service (SAPS) on 18 March 2022.

[7] In the interim WhatsApp communications between Mr Shiloane and Ray continued with the aim of setting up a meeting between them. Mr Shiloane, in collaboration with Mr Fox, arranged to meet Ray at the Silver Cloud Spur in Newton Park on 24 March 2022. Warrant Officer Eksteen of the DPCI was mandated to observe the meeting at a distance from the parking lot outside the Spur together with one Erasmus. Mr Erasmus was an employee of Dark Water Ops, a private company mandated by the Department of Fisheries under the Phakisa Project to assist in combating unlawful harvesting of abalone. Mr Erasmus provided an audio recording device which was placed in the pocket of Mr Shiloane to record the conversations at the meeting. He had been asked to attend, together with Warrant Officer Eksteen, mainly to identify Ray, if possible, for he had come to know many of the abalone poachers in the course of his work.

[8] At the agreed time the first respondent arrived at the Spur, where he met with Mr Shiloane. Mr Erasmus knew him and could confirm his identity. The conversation was successfully recorded and later transcribed. At the meeting it was agreed, at the instance of the first respondent, that they would meet again and that each would introduce a second person to their project. Thus, the second meeting occurred on 12 April 2022 at the Galaxy Grill, a restaurant situated in the casino in the Moffet-on-Main Shopping Centre, Gqeberha. Mr Shiloane was accompanied by Mr Willie Fredericks, who is also employed by SANParks in the Environmental Crimes Investigation Unit, and like Mr Shiloane, he was a peace officer. The first respondent arrived alone and explained that his partner had fallen ill at short notice and was unable to attend.

Warrant Officer Eksteen again observed the events, this time from the control room in the casino, where the events were displayed on various television screens, but without any soundtrack. Warrant Officer Eksteen said that during the course of the meeting, the first respondent got up and left. He returned after a while, and when he was seated again, he handed over a parcel to Mr Shiloane. Warrant Officer Eksteen said that it appeared to be money, but he could not be certain. He did, however, see that Mr Shiloane handed over R20 000 to the DPCI immediately after the meeting. In this meeting, too, a recording device was supplied by Dark Water Ops at the request of the DPCI and carried by Mr Shiloane. The conversation was again recorded and later transcribed.

[9] After this meeting, further WhatsApp communications occurred between Mr Shiloane and Mr Fredericks, on the one hand, and the first respondent on the other. These events culminated in a third meeting being held, again at the Galaxy Grill on 6 May 2022, where the respondents and Mr Fredericks were present. Again, the events were observed from the control room, and a voice recording of the interaction was made on a device placed in Mr Fredericks' pocket. Again, a parcel containing R20 000 was handed to Mr Fredericks. As a result of the evidence gathered in the course of these events, the respondents were arrested at the conclusion of this meeting,

[10] The evidence of Warrant Officer Eksteen of his observations at the first and second meetings, and that of Mr Shiloane of his initial interaction with first respondent was received at the trial. However, when the DPP sought to present evidence of what was said at the meetings, counsel on behalf of the first respondent and second respondent, respectively, objected to evidence being presented in respect of the communications which occurred during these meetings, or between the meetings, and to the production of the transcript of the recordings made. The objection was founded on numerous grounds. Firstly, they contended that all the evidence gathered between 4 March 2022 and the arrest of the respondents on 6 May 2022 was obtained through an unauthorised and unlawful undercover operation which went beyond providing an opportunity to commit an offence. Secondly, it was argued that the evidence as to what

transpired at all three meetings, adjudged in the context of the WhatsApp exchanges, constituted a confession that the respondents had engaged in the unlawful activity. Thus, as the alleged confession was made to Mr Shiloane and Mr Fredericks, both peace officers, all the evidence of communications between them and the utterances of the second respondent at the third meeting form part of a confession which, it was argued, was inadmissible in terms of s 217 of the CPA. Thirdly, the respondents objected to the production of the transcript of the recordings made at the various meetings as it was done, so the objection proceeded, in contravention of s 5(2) of the Regulation of Interception of Communications and Provision of Communication-Related Information Act, 70 of 2002 (RICA), because Mr Shiloane and Mr Fredericks were acting as agents for the police during those meetings and accordingly, that the recordings of the conversations were done by the police without any prior application in terms of the Act, to the judge concerned, for permission to intercept the conversations. In any event, they contended that the DPP had failed to produce a written authority from the National Director of Public Prosecutions to utilise such information, as was required by s 47(2) of RICA. And finally, the fifth objection was that the evidence had been obtained unconstitutionally in breach of the respondents right to privacy and the reception therefore would render the trial unfair and would be detrimental to the administration of justice.

[11] A trial-within-a-trial ensued in which the DPP called six witnesses, but neither of the respondents testified. The magistrate upheld the objections and ruled that the evidence was inadmissible. I shall revert to the reasons advanced for her conclusion. As I have said as a direct consequence of the ruling the respondents were discharged at the end of the State case. Thus, the DPP requested the magistrate to state a case in terms of s 310 of the CPA.

[12] As adumbrated earlier, the appeal is in terms of s 310 of the CPA.⁴ Ordinarily where the accused person has been convicted of an offence, he may, on appeal, challenge the credibility of witnesses who testified at the trial, the factual findings made

⁴ See fn 1.

by the trial court and its conclusions on matters of law upon which the conviction was based. However, where the DPP is aggrieved by the acquittal of an accused person different considerations apply. They have no right of appeal save where there is a statutory right bestowed on them to do so.⁵ Section 310 of the CPA confers on the DPP a right to appeal where a magistrate has given a decision (a) in criminal proceedings; (b) in favour of an 'accused'; (c) on 'any question of law'. The requirements under (a) and (b) are not contentious in this matter, but there is a dispute in respect of (c).

[13] An appeal under s 310 of the CPA must be noted and prosecuted within the period and in the manner prescribed in rule 67(11) to (13) of the Magistrates' Court rules.⁶ The DPP is required to request the magistrate to state a case on particular questions of law identified and formulated by the DPP.⁷ The magistrate's role is to formulate the material findings of fact on which the questions of law were decided. The Magistrates' Court rule 67(12)(b) provides:

- '(b) The stated case contemplated in paragraph (a) shall be divided into paragraphs numbered consecutively and shall be arranged in the following order:
- (i) The judicial officer's findings of fact in so far as they are material to the questions of law on which decision in favour of the appellant was given;
 - (ii) questions of law; and
 - (iii) the judicial officer's decision on such questions and his or her reasons therefor.'

[14] A court of appeal is not bound by the facts set out in the stated case, although they are usually regarded as correct.⁸ In the present case, as I shall show, the magistrate has failed to formulate the stated case on the structure prescribed in rule 67(12)(b) and has provided virtually no material facts which she had found to be proved in order to underpin the legal conclusions to which she came. I shall revert to this issue.

⁵ *Director of Public Prosecutions, Gauteng v Pistorius* 2016 (1) SACR 431 (SCA).

⁶ Section 309(2) of the CPA; and *Kouwenhoven v Director of Public Prosecutions, Western Cape and Others* 2022 (1) SACR 115 (SCA) at para 43.

⁷ Magistrate's Court rule 67(11) and *Kouwenhoven* at para 44.

⁸ *Attorney-General, Transvaal v Flats Milling Co. (Pty) Ltd and Others* 1958 (3) SA 360 (A).

[15] Upon receipt of the stated case the DPP resolved to appeal against the finding of the magistrate. They lodged a notice of appeal as contemplated in rule 67(13). The notice was framed, in a number of instances, by formulating questions of law as 'grounds of appeal', rather than pointing to alleged errors in the interpretation or application of relevant legal principles. Mr *Daubermann*, who appeared on behalf of the first respondent, contended that these 'grounds of appeal' were invalid and that accordingly the court of appeal did not have the jurisdiction to entertain these grounds of appeal. I shall revert, to the extent necessary, to this issue, too.

The stated case

[16] In the ruling on the admissibility of the evidence the magistrate made no reference to the objection by the respondents that their communications with the various officials had amounted to confessions that were inadmissible by virtue of s 217 of the CPA. On the remaining objections she ruled in favour of the respondents. Accordingly, the question of law posed to the magistrate, as reflected in the stated case were:

- (i) 'Whether the trial court applied the correct test and legal principles applicable relating to the interpretation of Regulation of Interception of Communications and Provision of Communication Related Information Act, 70 of 2002';
- (ii) 'whether the trial court applied the correct test and legal principles applicable relating to section 252A(2) and 252A(3) of the Criminal Procedure Act, 51 of 1977';
- (iii) 'whether the trial court correctly applied the elements of the offence of corruption when it found that the State did not prove the offence of induces, to instigate or procure of another person to commit an offence of corruption';
- (iv) 'whether the court considered the statements made by the accused during the undercover operation is inadmissible because it amounts to a confession';
- (v) 'whether the court considered the recordings to be inadmissible as they were done in contravention of section 5(2) of Act 70 of 2002, RICA.'

Entrapment or undercover operations

[17] It is convenient to deal first with the question relating to s 252A of the CPA. Entrapment is an age old proactive investigative technique, and it may take various forms. Before I address the grounds of appeal and the arguments advanced, it is

necessary to consider the nature of the phenomenon. In *Malinga*⁹ Holmes JA considered the meaning of a 'trap' and described it thus:

'... [A] trap is a person who, with a view to securing the conviction of another, proposes certain criminal conduct to him, and himself ostensibly takes part therein. In other words, he creates the occasion for someone else to commit the offence.'

In similar vein, with reference to s 252A, the Supreme Court of Appeal has explained:

'As the section contemplates, a trap may usefully be employed to set up a situation of which a corruptly inclined official may take advantage. The provision of an attractive opportunity is the essence of a successful trap and the legislature recognises that fact in s 252A. It draws the line however at conduct which literally or figuratively lays a bait for the unsuspecting official by encouraging the commission of a crime.'¹⁰

[18] However, the use of traps in securing evidence against potential offenders has for long been criticised, especially where people who were not suspected offenders were thereby induced to commit offences. In certain jurisdictions, notably the United States of America, entrapment constitutes a substantive defence to the prosecution. In South Africa there is no defence of entrapment and prior to 1994, following the English law, our courts favoured the inclusion of any evidence which is relevant to the charge. The Constitution now provides that evidence obtained in a manner which 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.¹¹ Accordingly, s 252A was introduced. It authorises a law enforcement officer to make use of traps and undercover operation and for such evidence to be admissible in certain circumstances.¹² Not all undercover operations constitute entrapment, but both are

⁹ *S v Malinga and Others* 1963 (1) SA 692 (A) at 693F-G.

¹⁰ *S v Matsabu* 2009 (1) SACR 513 (SCA) at para 16.

¹¹ Section 35(5) of the Constitution.

¹² The material portion of s 252A provides: '(1) Any law enforcement officer, 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:

regulated by s 252A of the CPA. The magistrate did not distinguish between the two, but as I shall show, she approached the matter as an entrapment.

[19] Section 252A(1) distinguishes between two classes of conduct engaged in by traps or undercover operations. The first relates to evidence which 'does not go beyond providing an opportunity to commit an offence'. Evidence obtained in this manner is automatically admissible.¹³ However, where the conduct of the undercover operation goes beyond providing an opportunity to commit the offence the court must then, in the manner provided in s 252A(3), enquire into the methods by which the evidence was obtained and the impact that its submission would have on the fairness of the trial and

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- (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.'

¹³ See *S v Kotzé* 2010 (1) SACR 100 (SCA) at para 23.

the administration of justice in order to determine whether it should be admitted.¹⁴ Section 252A(3) mirrors the requirements of s 35(5) of the Constitution, but it prescribes the manner in which the enquiry into the fairness should be conducted.

[20] In determining whether the conduct of a 'trap' went beyond providing an opportunity to commit an offence the court 'shall' have regard to the thirteen specific factors set out in s (2)(a)-(m) as well as "any other factor which in the opinion of the court has a bearing on the question."¹⁵ The trial court is required to conduct a factual enquiry, and to determine whether, on the proven facts, the conduct of the 'trap' exceeded the threshold set by the CPA. In doing so it is enjoined by s 252A(2) to give consideration to the factors set out in the subsection. It may be accepted that not all the factors listed would necessarily be relevant to every enquiry, but the court is required to take into account the material facts and to view them holistically, and weigh them

¹⁴ Section 252A(3)(a) of the CPA provides: '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.'

¹⁵ Section 252A(2)(n).

cumulatively, as different factors may point to different answers.¹⁶ What is required in every case is to conduct a careful analysis of the evidence in order to determine whether the conduct of the trap goes beyond the limit set by the legislator.

[21] If the court finds that the ‘trap’ has gone beyond providing an opportunity to commit the offence, it does not render that conduct improper, nor does it imply that some taint attaches to the evidence obtained. All that it does is to create the necessity for the trial court to proceed to the enquiry mentioned in s 252A(3).¹⁷ Subsection (3)(a) empowers the court to refuse to allow evidence to be tendered or, where evidence has already been tendered, to stand if the evidence was obtained in an improper or unfair manner and the admission of such evidence would render the trial unfair or would otherwise be detrimental to the administration of justice. Subsection 3(b) prescribes the factors relevant to the exercise of the court’s enquiry into whether to exclude the evidence. It requires the court to weigh up the public interest against the personal interests of the accused.¹⁸ In *Molefe*,¹⁹ the SCA explained with reference to s 35(5) of the Constitution, that there are competing social interests in determining whether the impugned evidence should be admissible. They said:

‘The one is the social imperative to bring criminals to book, especially in South Africa, with its burgeoning and uncontrollable crime rate. But public policy not only demands that the guilty are held accountable but also that the police and prosecutorial officers uphold and respect the Bill of Rights. A trial which is not fair to an accused, will bring the administration of justice into disrepute. But an overemphasis on a technicality which leads to an acquittal of an accused who has committed a serious crime, will attach public opprobrium and engender a distrust in the legal system. This too, will be detrimental to the administration of justice.’²⁰

[22] I revert to the facts of the matter. In her ruling at the conclusion of the trial-within-a-trial the magistrate found that the evidence relating to the events which occurred, the conversations that took place at the respective meetings, and the audio and visual

¹⁶ Kotzé at para 27.

¹⁷ Kotzé at para 24.

¹⁸ See s 252A(3)(b) of the CPA.

¹⁹ *Molefe and Another v Director of Public Prosecutions, v Thato Molefe and Another* (417/2024) [2025] ZASCA 67 (26 May 2025).

²⁰ At para 15.

recordings made were inadmissible under s 252A. She advanced two reasons for this conclusion. Firstly, she found that prior to the 'setting of the trap', or the use of the undercover operation, in the circumstances of the present case, approval from the DPP to engage in such methods was required. Secondly, she considered that the 'trap' had created an opportunity for the respondents to commit a crime, as Mr Shiloane did not agree to the first respondent's proposal at first, but after discussing the matter with his superior, he was told to encourage the first respondent to further communicate with him. That, in her view, created the opportunity for the respondents to commit the crime, without which it would not have happened.²¹ Hence the question posed by the DPP in terms of s 310 of the CPA.²² In the stated case the magistrate reiterated these findings save that she recorded her reasoning in respect of the creation of the opportunity under the heading 'the conduct of the person concerned goes further than providing an opportunity to commit the offence'.

[23] In respect of the approval, the DPP is empowered by s 252A(4) of the CPA to issue general or specific guidelines regarding the supervision and control of traps and undercover operations, and he may require any official to obtain his approval in order to set a trap or to engage in an undercover operation within his area of jurisdiction. Evidence of such a directive was produced during the trial-within-a-trial and the authorisation of the DPP to engage in such an investigation is stipulated as a requirement. It was not in dispute that the law enforcement officers did not obtain the authority of the DPP prior to the first or second meetings. Warrant Officer Eksteen testified that he had approached Mr Govender, a member of the staff of the DPP in the Eastern Cape after the second meeting by virtue of the unsolicited payment made to Mr Shiloane during that meeting. There was correspondence between Warrant Officer Eksteen and Mr Govender at the time; however, the magistrate appears to have found that the State had failed to establish that the authority of the DPP had been obtained. The finding is purely factual, and any challenge under s 310 of the CPA must proceed on the acceptance of this factual finding. Accordingly, the findings that approval was not

²¹ She also found the evidence to be inadmissible by virtue of the provisions of RICA. Her reasons for this finding are addressed separately later in this judgment.

²² Para 17(ii) above.

obtained and that it was required are not open to challenge in these proceedings. However, this finding, of itself, cannot be decisive²³ of the issue and the magistrate recognised, correctly, that it is only one of the considerations to be weighed.

[24] In respect of the second finding advanced, the DPP raised, as one of the 'grounds of appeal', the question whether the court, considering all the facts in connection with the undercover operation in the trial-within-the-trial, applied the correct test and legal principles applicable to s 252A(1) and/or 252A(2) and/or 252A(3) of the CPA and specifically in weighing the mandatory provisions contained in the sections.' As adumbrated earlier Mr *Daubermann* argued that the said 'ground of appeal', formulated as a question, without identifying an error of law, was invalid and that the appeal ought not to be entertained in respect thereof. He submitted that for the appeal to be competent, the notice must identify a specific question of law and allege that the court a quo had erred in law in misinterpreting, misapplying or failing to apply the relevant legal principles. It is undoubtedly required, generally, that a notice of appeal must set out clearly and specifically the grounds, whether fact or law, or whether fact and law, on which the appeal is based. The failure to do so may result in a court declining to hear the appeal. But the purpose of the rule is to ensure that the real issues arising in any appeal are properly ventilated, with a full opportunity for all interested parties to properly apply their minds to these issues and to make an informed contribution to the resolution thereof. To achieve this essential purpose the notice of appeal must:

- (i) Enable the court to ascertain the grounds, in this case of law, on which the appeal is based;
- (ii) give the representatives of the respondents a fair opportunity to prepare for and to anticipate the grounds on which the appellant seeks to attack the judgment of the court a quo; and
- (iii) enable the magistrate to properly react to such grounds and to furnish to the court the benefit of such reaction.²⁴

²³ *Bilankulu and Another v S* (188/2020) [2020] ZASCA 114 (29 September 2020).

²⁴ *S v Maritz* 1994 (1) SACR 456 (T).

The facts of each case must be considered in order to determine whether a notice of appeal in a particular case is sufficiently specific to enable the court and all the relevant parties to fairly and properly apply their minds to the real issue on appeal without being taken by surprise. The question posed as a 'ground of appeal' coincides substantially with the question posed to the magistrate,²⁵ and she has responded to the challenge by presentation of the stated case. To my mind the notice of appeal conveys, in the context of the stated case, that the DPP contends that the magistrate erred in law when considering the evidence in connection with the undercover operation in failing to apply the mandatory provisions contained in s 252A(1), and/or 252A(2) and/or 252A(3) of the CPA. It cannot be read differently. Counsel for the respondents were afforded a fair opportunity to prepare for and to anticipate the ground on which the DPP seeks to rely in this paragraph and have not been taken by surprise.

[25] The DPP contended further that the magistrate had erred in finding that the evidence gathered at the various meetings was inadmissible because the conduct of Mr Shiloane and Mr Fredericks had created the opportunity to commit an offence, without finding that the conduct went beyond providing the opportunity to commit an offence. Applying the approach in *Maritz I* I consider that the objection to the notice of appeal proffered on behalf of the first respondent must be dismissed.

[26] Counsel for the respondents argued further that, on a proper reading of her ruling and the stated case, the magistrate had expressly found that the law enforcement officers had gone further than providing an opportunity for the commission of the offence and that such a finding was purely a factual finding not open to challenge. They contended that the extent of her finding was born out by her specific reference to some of the factors listed in s 252A(2). It must be emphasised that the magistrate did not record, either in her ruling nor in the stated case, that she had found that the conduct of Mr Shiloane or Mr Fredericks had gone beyond the mere provision of an opportunity to commit a crime. I shall revert to her reasoning.

²⁵ See para 16(ii) above.

[27] I turn to the second leg of the argument, that the finding is purely a factual issue. Section 252A undoubtedly prescribes a factual enquiry, but the decision as to the admissibility of the evidence is a legal decision that must be taken in accordance with the provisions of s 252A in the light of the proved facts.²⁶ The attack by the DPP relates to the manner in which the conclusion was reached that the evidence was inadmissible, which is a question of law in respect of which the magistrate had found in favour of the respondents.

[28] The magistrate's reasoning in this regard in the stated case was brief, and it was instructive to set out her reasons in full. She stated:

'Amongst other factors the degree of persistence and the number of attempts made by the official or his or her agent before the accused succumbed and committed the offence also has to be considered. It is my view that the trap created an opportunity for the accused to commit a crime as Mr. Shiloane did not agree with accused 1's proposal at first, but after discussing the matter with his supervisor he was told to encourage accused 1 to further communicate with him. That in my view created the opportunity for the accused to commit the crime which if Mr. Shiloane did not pursue would not have happened. Without the trap's influence the recording of the conversations in the meetings would not have taken place. In the circumstances of this case the Sanpark officials are the ones who were mostly doing all the running until the meeting took place, different to what was held in the case of *Lachman v State* 2010 (2) SACR 52.

My view is that before the trap was set or the undercover operation was used there existed a suspicion, entertained upon reasonable grounds (because of an alleged call by one Ray to Mr. Shiloane), that the accused had committed an offence similar to that to which the charge relates; hence an investigation was initiated against the accused. The evidence was rendered inadmissible and could not be admitted on account of the fact that it - would render the trial unfair.'

[29] The reasoning is problematic in a number of respects. She perceived the operation to have been a 'trap'. As I have said the essence of an entrapment, which is expressly authorised by s 252A of the CPA, is the creation of an attractive opportunity to commit a crime. A 'trap' by nature creates the opportunity by proposing criminal

²⁶ Kotzé para 20.

conduct to the suspect and himself ostensibly taking part therein. He is entitled to do so, subject to the limitations imposed in s 252A of the CPA. As I have explained, the law 'draws the line at conduct which literally or figuratively lays a bait for the unsuspecting official by encouraging a commission of a crime.'

[30] Absent an express finding of fact in the process of reasoning that Mr Shiloane and Mr Fredericks had 'gone beyond providing an opportunity', the ineluctable conclusion to be drawn is that the magistrate had misconceived the legal nature of an entrapment, which led to her finding. Mr *Hayes*, for the second respondent, invited us to find that the magistrate had made a simple mistake. He argued that, in the context of this case, the phrase 'going beyond providing an opportunity' is tantamount to 'creating an opportunity'. The argument cannot be sustained. The enquiry contemplated in s 252A is specifically directed at distinguishing between these concepts. Both Mr *Daubermann* and Mr *Hayes* found support for their argument in the fact that the magistrate referred expressly in the stated case to factors set out in s 252A(2) of the CPA. She recognised that 'the degree of persistence and the number of attempts made by the official or his/her agent before the accused succumbed and committed the offence also has to be considered'.²⁷ But, she made no finding that either Mr Shiloane or Mr Fredericks had made or persisted with any proposal to either of the respondents to commit a crime, or that they had succumbed to a temptation, nor could she have as there was no evidence thereof. On a proper understanding of the phenomenon of entrapment, the considerations referred to, which have been taken directly from s 252A(2)(e), relate to the frequency and force with which the proposal of criminal conduct is made, until the temptation cannot be resisted. The reluctance of a law enforcement officer to entertain a proposal emanating from a suspect to commit a crime is, at best for the respondents, a neutral factor. The magistrate found that Mr Shiloane was advised by his superiors to encourage the first respondent to continue to communicate, which is what he did. He was neither instructed to make any proposal of unlawful conduct nor to offer any benefit or inducement to the first respondent, nor is there any factual finding that he, or Mr

²⁷ This is a direct reference to s 252A(2)(e).

Fredericks, did so. The continued communication and the arranging of meetings serve only to set up the situation of which a corrupt suspect may take advantage. It does not provide a bait, or encouragement to commit a crime. Thus, the finding that it created the opportunity to commit the crime does not support the argument that the magistrate intended to hold that their conduct went further than providing an opportunity. If the magistrate did intend to hold that the continued communication of itself, and the arrangement of meetings by the SANParks officials provides evidence that they went beyond providing an opportunity to commit an offence, then it flows from a misdirection in law.

[31] In *Lachman (1)*²⁸ the High Court distinguished three scenarios involving a trap, thus:

‘One is where the trap creates the opportunity to commit a crime for someone who, but for the trap, would not have committed a crime. A second occurs where the “trap” merely creates such an opportunity for someone who wanted to commit the particular offence – and would have done so in any event, even without the trap’s influence. A third category is present ... ‘where the accused is himself or herself the initiator of the incriminating transaction and instigates the “trap” to conclude the transaction with him or her and the trap merely ostensibly participates therein, and in that sense creates the opportunity for the commission of the crime. *A fortiori* the accused in such a case commits the crime without any influence from the trap’.

[32] This finding was approved in *Lachman (2)*²⁹. There has been no dispute in the present matter that the first respondent was the initiator of the relationship with the view to concluding the incriminating transactions, which were initially resisted by Mr Shiloane. Thereafter Mr Shiloane re-established communications and arranged the meetings³⁰ with the first respondent. At the meetings it was the first respondent who instigated Mr Shiloane to conclude the transaction with him. I consider that the present case is one which falls squarely within the third category in *Lachman*.³¹

²⁸ *Lachman v S* [2008] ZAECH 202; 2008 JDR 1558 (E); [2009] JOL 24343 (E).

²⁹ *S v Lachman* 2010 (2) SACR 52 (SCA) at para 30.

³⁰ See paras 3 and 4 above.

³¹ See also *S v Odugo* 2001 (1) SACR 560 (W) at 566g-h.

[33] The magistrate found that there had existed a reasonable suspicion that the first respondent had committed an offence similar to that to which the charge relates, hence the investigation. This is purely a factual finding, but it militates in favour of the admission of the evidence.

[34] The magistrate also concluded that the SANParks officials were 'doing the running'. The expression is not explained, and it is wholly unsupported by any factual finding. It appears that the magistrate held the view that the offences would not have occurred had the SANParks officials not arranged the meetings, but this ignores the fact that it is the essence of a legitimate trap to set up a situation of which a corruptly inclined individual may take advantage. The initiative to commit the crimes emanated from the inception, from the first respondent, and the magistrate has made no factual finding of any inducement or encouragement offered by the SANParks officials. Thus, Mr *van der Merwe's* contention, on behalf of the DPP, is correct that the highwater mark of her factual finding in respect of s 252A is that the SANParks officials did no more than to create the opportunity for the first respondent to commit the offence. In respect of the second respondent there was no evidence at all of any contact whatsoever between the SANParks officials with him. The case against the second respondent is based exclusively on a single meeting, which he attended at the instance of the first respondent.

[35] Accordingly, I consider that the magistrate erred in law and it becomes necessary to consider whether the evidence should, nevertheless, have been excluded on a consideration of the factors set out in s 252A(2). I have dealt with the circumstances that have bearing on the execution of the trap, or undercover operation. However, the factors set out in s 252A(2)(a) to (c) relate to matters anterior to the conduct of the trap itself and must be considered holistically together with the further factors set out in s 252A(2)(d)-(m). The absence of the prior consent of the DPP is a factor militating against the admission of such evidence. However, it is to be weighed against, and together with, the provisions of s 252A(2)(b) and (c).³² The offences under investigation

³² The provisions are set out in full in fn 12 above.

related to the unlawful harvesting of abalone in a marine protected area and corruption. These are serious offences. The former may attract a fine of up to R5 million or a sentence of five years direct imprisonment. The latter is a more serious offence³³ that may attract a sentence of life imprisonment.³⁴ The prevalence of the unlawful harvesting of abalone in Algoa Bay is notorious. Similarly, the prevalence of corruption in South Africa is a matter of public record and the scale thereof constitutes a significant threat to the maintenance of the public order and the national economy.³⁵ Successful investigation techniques in respect of corruption have proved elusive in South Africa. The combatting, and prevention of unlawful fishing in the marine protected areas is complicated by the area of water involved, and the evidence in the trial-within-a-trial reflects that it occurred, in this case, at night, when aerial observation is difficult.³⁶ These considerations must be weighed against the failure to obtain the consent of the DPP and in this case they militate in favour of the reception of the evidence. It must be emphasised that the magistrate made no finding of mala fides, or flagrant disregard, on the part of Warrant Officer Eksteen, or any other law enforcement officer, in failing to obtain the authority initially. Warrant Officer Eksteen explained that he had not considered that approval of the DPP was required initially, as he viewed it as no more than an information gathering exercise. After the second meeting, when an unexpected payment was made to Mr Shiloane, he did consult with Mr Govender of the DPP in Makhanda who had expressed the view that approval was not required. Warrant Officer Eksteen applied, nevertheless. He believed that approval was then granted. His evidence on this issue did not satisfy the magistrate that the State had established that approval had in fact been obtained for this investigation, but I do not think that his failure can be said to have been deliberate. The difficulty with the magistrate's reasoning, which underlies the DPP's grounds of appeal on this issue, is that she appears to have disregarded all these considerations entirely.

[36] In the result, I consider that, but for the misdirection in law, the magistrate ought

³³ See s 252A(2)(b)(iii).

³⁴ Section 26(1)(a) of the Prevention and Combatting Corrupt Activities Act, 12 of 2004.

³⁵ See s 252A(2)(b)(i) and (ii), and *Glenister v President of the Republic of South Africa and Others* 2011 (3) SA 347 (CC) paras 83 and 166.

³⁶ See 252A(2)(c).

to have found that the DPP did discharge the onus, beyond reasonable doubt, that the evidence in issue was automatically admissible. In any event, if I err in this respect the magistrate ought to have proceeded to the second stage of the enquiry in terms of s 252A(3). She did not do so, but found, nevertheless, that the admission of the evidence would render the trial unfair. Section 252A(3)(a) provides for evidence obtained in entrapment which went beyond the provision of an opportunity to commit a crime to be excluded 'if ... the admission of such evidence would render the trial unfair or would otherwise be detrimental to the administration of justice'. In this respect the section mirrors s 35(5) of the Constitution.³⁷ It provides for a qualified 'exclusionary rule of evidence'³⁸, which contains a constitutional directive to exclude the evidence obtained in violation of the Bill of Rights, but only where the trial will be unfair if the evidence were to be admitted or otherwise be detrimental to the administration of justice. The enquiry under s 252A(3) centres on this question. As I have said it involves a balancing of the public interest against the personal interest of the accused.³⁹ The public interest is central to the enquiry.⁴⁰ In respect of the public interest the social imperative to bring criminals to book, especially in South Africa, with its burgeoning and uncontrollable crime rate has been recognised by the SCA in *Molefe*. Section 252A(3)(b) provides for the considerations which should be weighed up, one against the other.⁴¹ I have dealt earlier

³⁷ Section 35(5) of the Constitution provides: '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.'

³⁸ *Kotzé* at para 21.

³⁹ See *Molefe*: fn 19 above; and *Key v Attorney-General, Cape Provincial Division and Another* 1996 (4) SA 187 (CC) at para 13.

⁴⁰ *Molefe* para 14.

⁴¹ Section 252A(3)(b) provides: '(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 ... 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 ... 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-

with the seriousness of the offences involved in this instance and the impact of corruption on the economy of South Africa, the frequency with which these offences are committed and the difficulty in investigating them. As I have said there is no indication that the magistrate gave any consideration to these issues. The failure constitutes a misdirection giving rise to a decision in favour of the respondents on a question of law, being the admissibility of evidence.

[37] As recorded earlier, the magistrate did not find that Warrant Officer Eksteen, or anybody else, had intentionally disregarded the directive of the DPP to first obtain the approval for the undercover operation.⁴² Neither in her ruling nor in the stated case did she refer to his evidence on the issue. Whilst it is true that the approval could readily have been obtained prior to the undercover operation, Warrant Officer Eksteen explained that he had not considered it to be necessary at first, but when a payment was made, he did consult the DPP. In that respect he erred, but it cannot be said that his failure was deliberate. The engagement in the undercover operation and the means used were, in my view, proportional to the seriousness of the offences involved.⁴³ All these considerations militate in favour of receiving the evidence of the undercover operation. I do not lose sight of the fact that the communications were recorded, and much was made of the intrusion upon the privacy of the respondents.

[38] In circumstances similar to this case, where an unlawful recording had been made of a conversation with the accused, it was held, in *Kidson*,⁴⁴ that no constitutionally cognisable breach of privacy had occurred. Absent some special

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- (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.'

⁴² See s 252A(3)(b)(ii)(aa).

⁴³ See s 252A(3)(b)(ii)(bb) and (iv).

⁴⁴ S v *Kidson* 1991 (1) SACR 338 (W) at 352b-e.

relationship between the interceptor of the statements and the accused, Cameron J considered that the accused had sought to rely on ‘an inappropriately extravagant notion of privacy’. These remarks are appropriate in this matter, too. Suffice it to say that, if I do err in this respect, in the context of this matter, where the initiative for the crime and the proposal to commit it arose from the first respondent, who effectively instigated Mr Shiloane and Mr Fredericks to commit the offence, the breach was not an egregious one.⁴⁵ For these reasons the magistrate erred on a question of law by her failure to consider the provisions of s 252A(3)(a) and to weigh up the public interest against the personal interests of the respondents. If consideration is given to the provisions of s 252A(3), I do not consider that the admission of the evidence would render the trial unfair. On the contrary, the exclusion of the evidence would be detrimental to the administration of justice.

The confession

[39] Again, the appellant has framed its ‘ground of appeal’ in this regard in the form of a question as follows:

‘Whether statements made by Respondent 1 during the undercover operation amount to a confession upon which the requirements of Section 217 of Act 51 of 1977 are applicable and under circumstances inadmissible or whether it amounts to admissions made freely and voluntarily and made in the course of planning an offence.’

As in the previous case, I consider that the notice of appeal permits of no other understanding than that the DPP contends that the magistrate erred in holding that the statements made by the first respondent during the undercover operations amount to a confession upon which the requirements of s 217 of the CPA are applicable. This issue flows from the objection raised in the trial-within-a-trial. The magistrate made no reference to this issue in her ruling. However, in the stated case the magistrate confirmed that she had excluded the evidence because she had found that the utterances made by the respondents constituted confessions made to peace officers, being Mr Shiloane and Mr Fredericks, which ought to have been confirmed and reduced to writing in the presence of the magistrate in terms of s 217(1) of the CPA. Counsel on

⁴⁵ See s 252A(3)(b)(ii)(cc) and (iii).

behalf of the respondents understood the ground of appeal and have addressed it. Thus, applying the approach which I set out earlier, I consider that the objection to the notice of appeal must, in this case, too, be dismissed.

[40] For purposes of this judgment, it may be accepted, as the respondents contended, that the utterances made during the undercover operation constitute an unequivocal acknowledgement of guilt to one or more of the charges. But, as a matter of law, incriminating statements made by persons during entrapment do not constitute confessions to which s 217 of the CPA applies. *Zefferth and Paizes*⁴⁶ explain the difference between a policeman who unduly induces an accused to make a confession and incriminating statements made during entrapment. In the case of a confession made to a policeman, the unfair practice ensues after the commission of the offence and is directed at procuring evidence of an offence already committed and not at inducing the very commission of the offence. In the case of the entrapment the unfair practice takes place before the offence is even committed, and it is directed at inducing the accused to commit the offence and not at procuring evidence of an offence already committed. Thus, *Kriegler and Kruger*⁴⁷ suggest that the reason why such incriminating statements do not constitute confessions is because they form part of the unfolding transaction in the entrapment. In *Ahmed*⁴⁸ Williamson J explained:

'It was argued on appeal that ... the evidence of the statements alleged to have been made by the appellant to the witness Samuel acting as a trap were inadmissible in that they amounted to a confession and Samuel was a detective constable in the South African Police. The appellant, in making the offer to Samuel to buy the package in question and saying that he believed Samuel when he said that he had stolen the package, was not of course making any statement as far as he knew to a policeman and he was not of course induced in any way to make a statement because of the presence of a policeman. ... Samuel was merely testifying to incidents he said took place during an ordinary trapping transaction. When police officers take part in trapping transactions they are almost bound to hear statements from the person or persons being trapped which identify those persons with the commission of an offence; such statements, forming part of the transaction, are not made as admissions of the commission of the offence,

⁴⁶ *The South African Law of Evidence* (3rd ed) at p. 873.

⁴⁷ *Hiemstra: Suid-Afrikaanse Strafproses* (6th ed) at p. 568.

⁴⁸ *R v Ahmed* 1958 (3) SA 313 (T) at 315B-F.

although they may be completely incriminating and in my view they are in fact not admissions of the commission of the offence or confessions falling within the terms of sec. 244 (1) of Act 56 of 1955.⁴⁹ ... They were merely part of the transaction of the purchase of the package by the appellant and in my opinion the evidence was properly admitted.'

[41] The reasoning, in my view, is unassailable. Accordingly, again, the magistrate erred in law in excluding the evidence on the grounds of it constituting a confession in terms of s 217 of the CPA.

RICA

[42] For the reasons that I have explained, the evidence of the events that occurred at the meetings and the statements made on these occasions is admissible. The objections founded on the provisions of RICA have bearing only on the recordings. The recording evidence is merely corroboration of the oral evidence of Mr Shiloane and Mr Fredericks. Thus, even if the recordings are excluded, it cannot disqualify the direct evidence as to what was said.⁵⁰

[43] The material portion of the DPP's notice of appeal, in respect of RICA recorded, as a ground of appeal:

'Whether the trial court applied the correct test and principles applicable relating to the interpretation of Regulation of Interception of Communications and Provisions of Communication-Related Information Act 70 of 2002 (RICA).

(i) The Court erred in finding that the State did not comply with section 47(2) of Act 70 of 2002, RICA.'

This ground of appeal, too, was criticised for posing a question rather than identifying an error of law.

[44] The same question was posed to the magistrate for purposes of the stated case. Her response was brief. After referring to s 47(2) of RICA she said:

'There was no evidence presented before court that the above provision had been complied

⁴⁹ Section 244(1) of Act 56 of 1955 was the predecessor of s 217 of the CPA.

⁵⁰ *Andrew Barney August v The State* [2024] ZASCA 170 (4 December 2023) at para 39.

with. It may be so that failure to comply with the above provision cannot render the evidence inadmissible. This was not the only reason which led to the finding in the trial-within-a-trial.’ Her response was a thinly veiled acknowledgement that s 47(2) was not an impediment to the admissibility of the recordings.

[45] In the context of the matter, again, I do not think that the ground of appeal leaves any doubt. The DPP contended, in the notice of appeal, that the magistrate had erred in her interpretation of RICA which led to an erroneous finding that the State did not comply with s 47(2). Accordingly, for the reasons set out earlier, the objection to this ground of appeal, too, must be dismissed.

[46] There was a dispute at the trial whether the recordings were made pursuant to s 4 of RICA or s 5. The DPP contended that Mr Shiloane and Mr Fredericks were entitled to intercept the conversations by making the recordings of the meetings because they were participants in the conversation.⁵¹ The respondents, on the other hand, contended that Mr Shiloane and Mr Fredericks were in effect police agents and their status as such was not known to the respondents. Accordingly, so the argument went, the interception was done by the police, and must be viewed as a third-party interception as envisaged in s 5 of RICA. The magistrate declined to decide the issue.⁵² I have been unable to find any authority that has sought to interpret the provisions of s 4 or s 5 of RICA, nor was I referred to any. However, by virtue of the conclusion to which I have come it is not necessary for purposes of the appeal to decide the issue.

[47] The interpretation errors contended for by the DPP in the appeal relate to s 47. In terms of s 47(1) information regarding the commission of any criminal offence obtained by means of any interception may be admissible as evidence in criminal

⁵¹ The material portion of s 4 provides: **‘Interception of communication by party to communication**

(1) Any person, other than a law enforcement officer, may intercept any communication if he or she is a party to the communication, unless such communication is intercepted by such person for purposes of committing an offence.’ Whilst Mr Shiloane and Mr Fredericks are law enforcement officers for purposes of other legislation they are excluded from the definition of a law enforcement officer under RICA.

⁵² In her ruling she recorded: ‘The defence argued that the recordings of the meetings were in contravention of section 5(2) of RICA. The state, however, argued that they relied on section 4 thereof. The state, however, did not comply with section 47(2) of act 70 of 2002 of RICA. The state did not relieve the onus which rests upon them and the admission of the evidence will render the trial unfair.’

proceedings. Hence, the magistrate's concession in the stated case. The question raised in the appeal turns, however, on s 47(2). The subsection provides that any information obtained by the application of RICA may only be used in evidence in criminal proceedings with the written authority of the National Director of Public Prosecutions (the NDPP), or any member of the prosecuting authority authorised thereto in writing. In the event that the recordings were obtained by the application of s 4, as contended for by the DPP, written authority would be required before the evidence might be presented. In the event that the recordings were obtained in breach of s 5, as contended by the respondents, s 47(2) is irrelevant, for the evidence would not have been obtained by the application of RICA.

[48] I shall deal first with s 5(2). I have recorded earlier the objections raised to the presentation of the evidence at the commencement of the trial-within-a-trial. In respect of the alleged breach of s 5(2) of RICA the respondents contended that the recordings were done in contravention of RICA and that they were therefore unlawful and inadmissible in evidence. This is a misconception. Where evidence is obtained in unlawful breach of a statutory provision it does not automatically render the evidence inadmissible. It must be judged broadly in the same way as evidence obtained in a manner that violates a right in the Bill of Rights. The trial judge is required to assess, in the manner discussed earlier, whether the admission of such evidence would render the trial unfair or otherwise be detrimental to the administration of justice. I shall assume in favour of the respondents, without deciding the issue, that the written authority of the NDPP was required.

[49] I turn to the facts. After the objection was raised, and during the trial-within-a-trial, the prosecutor sought to present the written authority obtained pursuant to s 47(2). The respondents objected to the reception of the written authority. They contended that they had repeatedly requested the prosecutor to provide them with all the documentation that would be used in evidence against the respondents. Mr *Daubermann* had recorded a letter to the prosecutor. Therein he recorded:

'The defence assumes that all the State's witnesses made statements to the police and that

their statements are contained in the docket. The defence also assumes that the State has provided it with a copy of all the documents, photographs, video recordings, screenshots, cellphone records, cellphone data, other electronic records, maps and the like on which it intends to rely at the trial.

Kindly note that the defence will object to the State adducing evidence of which the defence was not apprised prior to the commencement of the trial.'

[50] Argument ensued and the magistrate was referred to various authorities that held that it is a requirement for a fair trial that the accused persons must know the case that they face before the trial commences and they may not be confronted with evidence of which they have had no notice, during the course of the trial. This principle is no longer contentious. The magistrate upheld the argument and ruled that the prosecutor was not permitted to hand up the written authority obtained in terms of s 47(2). Hence the first question posed to the magistrate.⁵³

[51] I have referred earlier to the provisions of s 47(2). It raises a procedural prerequisite for the presentation of evidence obtained by the application of RICA. The authority of the NDPP does not constitute evidence against the accused and the section does not require the authority to be obtained before the prosecution could commence. As I have said, the respondents were in possession of all the evidence that would be presented against them and there was no ambush. The magistrate's refusal to accept the written authority springs from a misdirection in law as to the nature of the authorities placed before her and the interpretation of s 47(2). It led directly to the finding at the conclusion of the trial-within-a-trial that the recordings were not admissible in evidence. In her ruling she appears to have perceived the authority to be 'evidence' that would be presented against the respondents and she refused the admission thereof. If that was her perception she erred in law. A presiding officer is not entitled to refuse to receive the written authority of the NDPP to present evidence that has been properly discovered.

⁵³ See para 16(i) above.

Conclusion

[52] In the result, the appeal must succeed. I pause to record that the DPP has raised one further ground of appeal relating to the magistrate's conclusion in respect of the application of the elements of the offence of corruption in her ruling under s 174 of the CPA. I do not consider that it is desirable in this judgment to resolve the matter. The effect of the order which I make below is that the matter be referred back to the magistrate to receive evidence of the events and statements made during the meetings, including the recordings. The consideration of the guilt or otherwise of the respondents should be assessed afresh at the conclusion of the trial when regard may be had to all the relevant admissible evidence.

[53] Accordingly, the following order is made:

1. The appeal succeeds.
2. The order of the Regional Court in terms of s 174 of the Criminal Procedure Act, 51 of 1977 discharging the first and second respondents on all counts is set aside.
3. The ruling of the magistrate in the trial-within-a-trial is set aside and is replaced with the following:

‘The evidence of the events that occurred, and the statements made by the accused, including the recordings made, at the meetings on 24 March 2022 at the Silver Cloud Spur, Newton Park, and 12 April 2022 and 6 May 2022 at the Galaxy Grill in Gqeberha is admissible in evidence.’

4. The matter is remitted to the Regional Court to re-open the trial and to receive the evidence set out in paragraph 3 above.

J W EKSTEEN
JUDGE OF THE HIGH COURT

MALUSI J:
I agree.

T MALUSI
JUDGE OF THE HIGH COURT

Appearances:

For Appellant: Adv G J van der Merwe
Instructed by: Director of Public Prosecutions (OCC)
EAST LONDON

For 1st Respondent: Mr P Daubermann
Instructed by: Griebenow Attorneys
GQEBERHA

For 2nd Respondent: Adv J J W Hayes
Instructed by: Gavin Knight Attorney
ROODEPOORT

Date Heard: 27 August 2025

Date Delivered: 2 December 2025