



**IN THE HIGH COURT OF SOUTH AFRICA  
NORTH WEST PROVINCIAL DIVISION, MAHIKENG**

**CASE NO: CC 2/2015**

**In the matter between:**

**THE STATE**

**And**

**PETRUS ANDRIES BYLEVELD**

**ACCUSED**

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**JUDGMENT**

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**Landman J:**

**Introduction**

[1] The State has indicted 16 persons in this court including Petrus Andries Byleveld who is accused no 8. Accused no 8 pleaded not guilty to the counts upon which he was indicted namely counts 2, 18, 23, 27, 28, and 29. These counts relate to conducting or participating in an enterprise through a pattern of racketeering and corruption – accepting a benefit - contravention of section

2(1)(e) and section 3(a)(i)(aa) of the Prevention and Combatting of Corrupt Activities Act 12 of 2004 (POCA). Count 2 allegedly spans the period June 2007 to April 2014.

[2] Accused no 8 elected to remain silent and did not make a plea statement. He was represented by Mr W A F Strydom.

[3] The indictment is issued under the name of JJ Smit SC, Director of Public Prosecutions, North West Division. But it appears to be signed by 'Neveling' a Deputy Director of Public Prosecutions. Two certificates in terms of the Prevention of POCA were all signed by the National Director of Public Prosecutions and handed in.

[4] After the trial had been underway for some time, Mr Strydom disputed the validity of the prosecution vis-à-vis accused no 8. This was after I had made an order, on request by Mr Strydom, directing the state to supply certain documents and information regarding accused no 8 to the defence. It was also after Mr Petzer, who testified for the state, had been cross-examined by Mr Strydom. During his cross-examination Mr Petzer admitted that the South African Police had informed him that accused no 8 had been an informer in the matters that concerned Mr Petzer. Accused no 8 was arrested by the Vryburg police at the behest of Nel. Moorcroft relates that accused no 8 was released from custody without a substantive bail application.

## **The facts**

[5] The facts upon which this application is based are to be found in the affidavits filed, the documentation supplied, an admission made by the State and inferences which I draw from the facts.

The facts presented by accused no 8 are the following:

- Accused no 8 became embroiled in the criminal activities of a syndicate that was directed at making money by selling fictitious tenders and letters of appointment.
- He felt that this was not entirely correct and approached Warrant Officer Dawie Engelbrecht of the SAPS stationed at Stella and confided in him. In the course of doing so he informed the warrant officer that members of the police were also involved in the syndicate. The warrant officer supplied accused no 8 with the cell-phone number of Brigadier Van Zyl.
- Cololonel Myburg of Crime Intelligence arranged for Lieutenant-Colonels Dince and Mothoagae to interview accused no 8. They travelled to Vryburg and interviewed accused no 8. The colonels requested accused no 8 to remain in the syndicate.
- He signed a statement on 28 December 2011.
- He also signed an undertaking as an informer on 30 December 2011. He undertook not to commit any offence in performing his duties as an informer.
- His handler was lieutenant colonel OD Mothoagae.

- Lieut-Colonel Mothoagae was the manager of project “Faranani” which involved the investigation of the offences with which this trial is concerned.
- He was registered as an informer on 3 January 2012 for ‘Fictitious Tender Fraud’.
- Accused no 8 says in spite of the prohibition in the undertaking against committing crimes he was requested and encouraged to continue with his criminal activities with the syndicate.
- At one stage the accused was requested by his handler to introduce two agents whose names have not been disclosed but who are known as Johnny and SA100 to the syndicate as potential targets or victims. He did so but a member of the police force blew their cover.
- He continued with his involvement and travelled some 200 000 kilometers using his own vehicle while engaging in the activities in order to assist the police.
- Save for two payments he was not compensated for the costs involved and he used his share of the spoils for this purpose. He estimates his travelling expense at R 800 000. He neglected his own business interests and he sustained a loss of income.
- He reported to his handler from time to time. Some entries have been made in Lieut-Colonel Mothoagae’s so-called black book pertaining to informers.
- He made affidavits on 18 December 2011, 28 December 2011, 18 May 2012, 12 July 2012, 16 August 2012 and 27 February 2013. These detail various criminal activities, his own conduct and the moneys received from the spoils.

- His affidavit made on 28 December 2011 refers to Mr Masoga the complainant in count 23 i.e. the period before he became an informer.
- He pointed out that the complainant testified merely indicated that he had held an Umbrella for a member of the syndicate when they met.
- He alleges that as a result of his information the police contacted the various victims of the crimes committed by the syndicate.
- He says that his last affidavit was made subject to section 204 of the CPA and that Lieut-Col Mothoagae gave him the assurance that he would not be prosecuted. See his affidavit of 27 February 2013.
- He also reported the circumstances of the activity involving the complainant Basie Nel.
- He says he had permission to deposit his share of the spoils of the syndicate into his own accounts.
- He continued with his covert operations for more than two years.
- He was arrested at the instance of Mr Nel at Vryburg and he was released the same day on the instructions of his handler.
- He was arrested on 6 March 2014 and released on 28 March 2014 on bail of R 50,000. While he was in custody Lieut-Colonel Dince visited him and gave him the assurance that he would be looked after.
- He submits, on legal advice, that he was more than an informer and acted as an agent in a covert operation covered by section 252A of the Criminal Procedure Act 51 of 1977 (CPA).

[6] The State made the following admission: Accused no 8 introduced crime intelligence police officials, 'Johnny' and 'SA100', to a client (called a victim) and accused no 8 introduced them as part of the syndicate and they

negotiated a deal for money to be paid over to obtain a tender. Accused no 8 and the two police officers and the syndicate people, took part in negotiations and the victim agreed to consider it and come back. But he did not come back as the cover of the two police officials was blown by a source inside the police service.

[7] Lieut-Colonel Mothoagae states in his affidavit that accused no 8 was an informer and was requested to assist in introducing an agent from crime intelligence to the syndicate. He says the police never intended using accused no 8 as an agent since he was not trained in covert operations. He confirms that accused no 8, introduced the agent to the syndicate, but a member of the syndicate later indicated to the agent that he did not trust them and the agents were withdrawn.

[8] Lieut-Colonel Mothoagae took a statement from accused no 8 and explained the provisions of section 204 to him on 27 February 2013. He informed accused no 8 that the Director of Public Prosecutions would make a decision with regard to the affidavits as to whether he would indemnify him from prosecution. He states that accused no 8 was not given authority by himself or any of his colleagues to utilise any of the proceeds of the offence for his own benefit. The rule is that the proceeds of crimes should be disclosed to the police and the proceeds will be taken and booked into the SAP 13 exhibit register.

[9] He says that accused no 8 was warned not to involve himself in any criminal activities in the process of assisting the police, but it was discovered that he was receiving funds and utilised the funds for his own benefit, without disclosing the funds. The Basie Nel incident was discovered after the arrest of accused no 8 and he had failed to disclose that he contacted Nel to facilitate the payment of R50,000 into the account of his employee. Accused no 8, also failed to disclose that he had received several payments from Mr Petzer, up until he was confronted about this. Lieut-Colonel Mothoagae states that accused no 8 betrayed their trust and that based on a lack of honesty on his part this led to him eventually being indicted.

[10] An affidavit filed by Lieut-Colonel Dince is substantially to the same effect. However, he adds that he did not visit accused no 8 in the police cells and never promised him that he would be taken care of. And that he did not grant accused no 8 permission to use his own vehicle for police purposes.

[11] An affidavit has been filed by a person identified only as 'SA 100'. This person says that he is a deep cover agent and that he was assigned to project Faranani during the period 2012/2013 to address a syndicate in the North West province that was involved in fraud. On 15 March 2013 he and someone described as 'CIA 1030' and Warrant Officer Esterhuizen met accused no 8 at Coligny. He says accused no 8 was an informant for the Hawks working on the same criminal group, which was the target of project Faranani. On 15 March 2013 accused no 8 signed an undertaking whereby he committed himself to become an informer for Covert Intelligence Collection, North West. It was

explained to accused no 8 that the two agents would be the undercover agents on the project and that he would only be an informer and should not be involved in any criminal activity at all. During the course of the project various meetings were held with accused no 8 and he provided information. Accused no 8 was also cautioned on a regular basis to avoid a criminal activities.

### **Evaluation**

[12] Mr Strydom initially sought an order staying the prosecution on a permanent basis but this relief cannot be granted when the prosecution is under way. What Mr Strydom seeks is an order that the prosecution of accused no 8 is unauthorised and therefore a nullity.

[13] The issue raised on behalf of accused no 8 is that:

- (a) he was an agent who participated in an undercover operation to detect, investigate or uncover or to obtain evidence of or to prevent the commission of an offence and therefore in terms of section 252A(5)(a) he is not criminally liable in respect of any act which constitutes an offence and which relates to the undercover operation (if it was performed in good faith);
- (b) prosecution for such an offence may be not instituted against an agent without the written authority of the attorney-general; and
- (c) the DPP has not authorized his prosecution.



[14] The objection that prosecution has not been properly authorised may be raised at any time and not necessarily at the stage that an accused pleads. See the remarks in **S v Domingo** 2002 (1) SACR 641 (C) at 647B-C where Williams AJ, Comrie J concurring, said:

*'The appellant's failure to have raised the issue of the Attorney General's written authority to prosecute prior to 1 June 2000, cannot be held against him. The prosecution on counts 1 and 2 was not competent in the absence of this authority and his conviction in respect of these counts are irregular. An irregularity can be raised at any stage during the proceedings.'*

See also **Ndlui v Wilken NO en Andere** 1991 (1) SA 297 (A) at 306B.

[15] Our law permits any law enforcement officer, official of the State (or any other person authorised thereto for such purpose) to 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. See section 252A(1) of the CPA which reads:

*'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).'*

[16] The evidence obtained is admissible provided certain conditions are met. See sections 252A(1) and (2) of the CPA. Certain safeguards have also been put in place. See section 252A(3).

[17] Section 252A(5)(a) of the CPA provides that:

*'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.'*

[18] In order to ensure that proper and due consideration is given to the immunity extended to an informer (an agent) as contemplated by paragraph (a), paragraph (b) requires that the informer may only be prosecuted with the written authorisation of the Attorney-General. In **S v Domingo** at 645 e-g it was said that:

*'A similar provision appears in s 64 of the Internal Security Act 74 of 1982. In **Minister of Law and Order v Kader** 1991 (1) SA 41 (A) the purpose of s 64 is stated to be the following:*

*"To ensure that the decision to prosecute a person for contravention of s 54 is a responsible one, taken by the person who, in terms of s 3 of the Criminal Procedure Act, has the authority to prosecute in the name of the Republic in criminal proceedings."*

*Section 252A(5)(b) no doubt serves a similar purpose. On a proper construction of this section it requires the Attorney-General to satisfy himself that the person designated in s 252A(5)(a) committed an offence and that it was not done in good faith.'*

[19] Paragraph (b) reads:

*'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.'*

**Was accused no 8 an authorized person who participated in an undercover operation?**

[20] This brings me to the question whether accused no 8 was an authorized person (an agent in the terminology of section 252A who participated in an

undercover operation to detect, investigate or uncover or to obtain evidence of or to prevent the commission of an offence. The agent's activities may be limited to gather and reporting information. See the observations of Wallis JA in **Kotze v S** (429/08) [2009] ZASCA 93; 2010 (1) SACR 100 (SCA); [2010] 1 All SA 220 (SCA) (15 September 2009) at 22:

*'The section deals with both traps and undercover operations. Whilst these usually go together there will be cases where an undercover operation may involve no element of a trap. Thus for example the infiltration of an undercover agent into a gang planning a bank robbery, a cash-in-transit heist or the overthrow of the government will not necessarily involve any element of a trap, but may merely be an exercise in obtaining information. Nonetheless it may involve infringements of rights to privacy – as with the use of a telephone tap or some other form of listening device – and could potentially be subject to constitutional challenge. The section explicitly addresses that situation and provides that such actions are permissible. It also recognises that undercover operations may have elements of a trap and hence treats the two together. The present case is a classic instance of an undercover operation that also involves the use of a trap.'*

[21] The undercover project or operation involving accused no 8 was not authorised by the DPP of this province in terms of section 252A(2)(a) of the CPA. But this is not a prerequisite to the use of an undercover covert operation in **Kotze v S** at para 23. It was authorised by the Police. I accept that there may be a difference between an agent and an informer as regards their roles but

section 252A does not make this distinction. Accused no 8 was an informer and he was obliged to keep his connection with the police secret while he continued to associate with the syndicate members.

**Are the offences with which the informer is indicted, the offences contemplated in section 252A(5)(a)?**

[22] The question whether the offences with which accused no 8 is indicted, are the offences contemplated in paragraph (a) involves an examination of the nature, scope and duration of the undercover operation. The authority of accused no 8 was supplied on 28 December 2011 and this may be taken as the date of commencement of the operation. The operation relates to fictitious tender fraud and would embrace the period and the offences mentioned in counts 23, 27, 28 and 30 on which accused no 8 has been indicted. The approval required to prosecute on these counts would probably have been considered together with counts 2 and 18 that relate, according to the indictment, to a period commencing prior to accused no 8's appointment. But the prosecution on these counts do not require special authorization.

**Has the 'Attorney-General' authorised the prosecution?**

[23] To whom does the reference to attorney-general refer? Section 45 of the National Prosecuting Authority Act 32 of 1998 provides:

'Any reference in any law to –

- (a) an attorney-general shall, unless the context indicates otherwise, be construed as a reference to the National Director; and
- (b) an attorney-general or deputy attorney-general in respect of the area of jurisdiction of a High Court, shall be construed as a reference to a Director or Deputy Director appointed in terms of this Act, for the area of jurisdiction of that Court.'

[24] In **Yoshen Naidoo and Others v The National Director of Public Prosecutions and Another** (SCA Case no: 062/04) the Supreme Court of Appeal considered the developments relating to the establishment of the National Prosecuting Authority and its relevance as regards the office of that is described in legislation as that of the 'attorney-general' and concluded at paragraph 37 that:

*'As is clear from what is set out above, the NPAA provides that the NDPP has overall control and maintains an oversight role in relation to all prosecutions nationally. However, as was the position under the AGA, the heads of prosecution authority offices at the seats of the High Courts mentioned above are responsible for and manage prosecutions within their areas of jurisdiction. They have comprehensive powers which, by necessary implication, must include the power to reinstitute prosecutions subject only to oversight by the NDPP. Directors such as the second respondent are the equivalent of the erstwhile attorneys-general.'*

[25] The Director of Public prosecutions must authorize the prosecution of an informer in the relevant circumstances. Much was made by the State of the ambit of accused no 8's mandate and it was emphasised that he was not permitted to commit crimes. I accept this. But the fact that the informer may have acted outside his or her mandate is the very question that the DPP must take into consideration; it does not excuse the requisite authorisation. See **S v Domingo** at 646 h-i where it was said:

*'... There is indeed a fine line to be drawn as to when he is acting intra vires his mandate and when he is acting outside of it. It is no doubt for this very reason that the Legislature deemed it necessary to insert 252A(5)(b) into the Criminal Procedure Act.'*

[26] Adv JJ Smit SC, the DPP for this Province, has not authorized the prosecution of accused 8 in writing. But Mr Rantsane (with him Mr De Beer) has submitted that as the indictment has been signed by a deputy DPP, that this implies that the prosecution is authorised. I am of the opinion that this inference cannot be made as section 252A(5)(b) speaks of authorisation and requires the DPP to apply his or her mind and authorise the prosecution in writing. This authorisation in writing is a separate administrative decision from the decision to indict an accused. I accordingly find that the prosecution of accused 8 on counts 23, 27, 28 and 30 was not authorised.

[27] It follows that as the DPP has not authorised the prosecution of accused no 8 on counts 23, 27, 28 and 29 that the prosecution vis-à-vis him on these counts are a nullity and of no force and effect.

## **Order**

[28] I make the following order:

1. The prosecution of accused no 8 on counts 23, 27, 28 and 29 instituted in this court was done without proper authorization and is a nullity and of no force and effect.
2. The indictment of accused no 8 on counts 2 and 18 stands.

**AA Landman**

**Judge of the High Court**



**Appearances**

Date of hearing: 19 April 2016

Date of Judgment: 29 April 2016

For the State: Adv De Beer with Adv Rantsane

For the Accused: Adv Strydom