THE SUPREME COURT OF APPEAL
OF SOUTH AFRICA

JUDGMENT

Case no: 429/08

In the matter between:

NICOLAAS PETRUS KOTZÈ Appellant

and

THE STATE Respondent

Neutral citation: *Kotzè v The State* (429/08) [2009] ZASCA 93 (15 September 2009)

Coram: HARMS DP, HEHER and SNYDERS JJA and GRIESEL and WALLIS AJJA

Heard: **20 August 2009**

Delivered: **15 September 2009**

Summary: **Criminal law – Police trap and undercover operation – Contraventions of s 20 of Diamonds Act 56 of 1986 – S 252A of the Criminal Procedure Act.**

ORDER

On appeal from: Cape High Court (Louw J, Saldanha AJ concurring), on appeal from the Regional Magistrates' Court, Bellville.

The appeal is dismissed.

JUDGMENT

WALLIS AJA (HARMS DP, HEHER and SNYDERS JJA and GRIESEL AJA concurring.)

[1] The appellant, Nick Kotzè, is a successful businessman and a prominent citizen of Port Nolloth. On four occasions between 14 July 2001 and 12 February 2002 he purchased unpolished diamonds from one Frik Terblanche. In all he bought 21 diamonds for a total amount of R63 000. Unbeknown to him (although, as will become apparent, he was alert to the possibility) Terblanche was a senior and experienced police officer attached to the Diamond and Gold Squad, who was operating as an undercover agent in a covert police operation known as Project Solitaire aimed at syndicates dealing unlawfully in diamonds in the Namaqualand region.

[2] On the basis of Terblanche's evidence Kotzè was convicted by the Regional Magistrates' Court, Bellville on four counts of purchasing unpolished diamonds in contravention of s 20 of the Diamonds Act 56 of 1986. He was sentenced on each count to pay a fine of R8 000, with an

alternative of 18 months imprisonment. In addition a further sentence of 18 months imprisonment was imposed, but suspended on certain conditions. An appeal against his conviction to the Cape High Court was dismissed. With the leave of that court he comes on further appeal to this Court. The appeal is confined to one against conviction only. The only ground advanced in support of the appeal is that in terms of s 252A(3) of the Criminal Procedure Act 51 of 1977 the magistrate should have declined to admit the evidence of Terblanche. In that event there would have been no admissible evidence of the transactions giving rise to the convictions and they would fall to be set aside.

[3] The use of traps and undercover agents by the police, both for the prevention and the detection of crime, is long established, both here and overseas. However, because it can be seen as generating the crimes under investigation, it is regarded as controversial as a matter of principle and, even in circumstances where resort to its use may be thought to be acceptable, there is room for concern because the methods adopted by the trap or agent involve deception and can readily be abused. The underlying fear is that people who would not otherwise be guilty of criminal behaviour may be induced by the conduct of the trap or undercover agent to commit crimes and their reluctance to commit crime may be overborne by the conduct and inducements offered by the trap or undercover agent. Our courts have in a number of cases expressed concern about the conduct of traps and it was the subject of an investigation and report by the South African Law Commission.[1] That in turn resulted in the statutory regulation of the admissibility of evidence derived from the activities of traps and undercover agents in the form of s 252A of the Criminal Procedure Act, although the section as ultimately enacted is in material

[1] South African Law Commission Report, Project 84, *The Application of the Trapping System*.

respects different from that proposed by the Law Commission. This appeal raises the interpretation and application of that section.

[4] The background to the case is that in about 2000 the police decided to undertake Operation Solitaire to address the widespread problem of syndicates engaged in unlawful dealing in diamonds in the Namaqualand region. Terblanche, who at that stage held the rank of inspector, was selected as the undercover agent. He and his wife would move to Port Nolloth on the pretext that he had retired from the police force and was now a pensioner. There he would make himself known to local people and seek to become accepted as part of the local community, a process that it was anticipated would take some nine months. Thereafter he would engage with various suspects (and possibly others he came to suspect as a result of his activities) in ways that it was thought would lead to either the purchase or sale of unpolished diamonds in contravention of the Diamonds Act. In doing so he would garner the evidence that would then be used against those persons in subsequent criminal trials. The operation was expected to last some two years.

[5] Kotzè was one such suspect whose name was given to Terblanche as a target to be approached. He is a prominent person in the Port Nolloth community having served for 27 years as a town councillor, 11 of them as mayor. He operates a motor retail business in the town and also runs a small shop and café from the same premises. Apart from this business he owns three farms, some 20 kilometres from Port Nolloth, and another farm across the border in Namibia that is leased to a company in the Anglo American group for a rental said at the trial to be in excess of R1 million per year. He owns and leases residential and business properties in Port Nolloth and elsewhere. He has over the years been

involved in the diamond industry, in prospecting for, mining, cutting and polishing diamonds, although at the time of these events he had ceased these activities, apart from having a stake in two diamond mining operations for which a licence was held in his son's name and a share in a diamond cutting business. Overall it is clear that he is person of financial substance and some wealth. He is also involved in the local congregation of the Nederduitse Gereformeerde Kerk and testified that it was customary for him and his wife to entertain members of the congregation at their home after the services each Sunday with tea and coffee and general hospitality and discussion about church affairs and religious matters. This hospitality loomed large in the evidence in this case.

[6] Terblanche arrived in Port Nolloth on 1 August 2000 and he met Kotzè for the first time on that day in the course of looking for suitable accommodation. Apparently he and his wife had first approached an estate agent in the town but she had nothing available that seemed suitable and, according to Terblanche, suggested that he should approach Kotzè. Although some point was made of this meeting in cross-examination, Kotzè himself did not regard it as odd or unusual, which is not surprising because he rented out houses through an agency operated by his daughter. Kotzè suggested a house owned by his mother but this was unsuitable and the following day the Terblanches found a house at McDougall's Bay. In the course of effecting introductions Terblanche told Kotzè that he was a retired policeman, to which he says Kotzè responded by saying; 'Ek is 'n smokkelaar.'[2] Kotzè said he had no recollection of making such a comment but accepts that he might have done so in jest. However, Terblanche seems to have taken it seriously as it was conveyed by him to his superiors in the course of the operation.

[2] 'I am a smuggler.'

[7] After this initial incident Terblanche and his wife moved into the house they had found on 7 September 2000 and settled into life in and around Port Nolloth on the basis of his cover story that he was a pensioner. It appears that the community accepted this story at face value. The evidence does not deal in detail with any matters other than the development of his relationship with Kotzè, but he must have been engaged in other activities as at the end of the operation nearly two years later 34 people were arrested for offences relating to unlawful dealing in diamonds and, apart from the present one, he gave evidence in a number of trials arising out of these arrests.

[8] Terblanche established a close and friendly relationship with Kotzè. He would regularly visit him at his business both to buy a newspaper and other small items and to chat socially and came to know him and his family, including Kotzè's elderly mother with whom he would on occasions sit and have coffee. He and his wife attended the NGK church although their affiliation had been with the Afrikaanse Protestante Church. They were from time to time invited with other members of the congregation to join Kotzè and his wife for tea at their home after service. Terblanche ascertained the birthdays of Kotzè's children and would telephone and wish Kotzè well on these occasions. At a later stage of the relationship they discussed personal matters such as the death of Terblanche's sister in January 2001, and later still the death of one of Kotzè's children and certain fears that Terblanche had about his health. On one occasion in September 2001 Terblanche and his wife, together with Mrs Kotzè, spent the day looking at the flowers for which the area is renowned, although business prevented Kotzè from joining them. However apart from the visits after church and occasional meals at

the Kotzè home they did not visit one another's homes. The only occasions on which Kotzè went to the Terblanche home were pursuant to two of the transactions giving rise to the charges against him.

[9] The first transaction occurred on 14 July 2001 when Terblanche sold four unpolished diamonds to Kotzè for a price of R10 000. He describes the circumstances in which that came about as follows. On 4 April 2001 after a visit to Johannesburg Kotzè asked where he had been. He told him he had been visiting his children and on the way back had stayed with a diamond cutter friend whom he wanted to repair his wife's ring. Kotzè's response was to say that if Terblanche had that type of problem he could have helped and then, according to Terblanche, added that he would also have a diamond cut and polished for him.[3] Kotzè also said that if Terblanche had any other unpolished diamonds he should bring those as well. There is some confusion in Terblanche's evidence whether this latter statement was made on 4 April 2001 or during a subsequent conversation on 10 May 2001, when he approached Kotzè on the instructions of his handlers to ascertain whether the earlier offer to have a diamond polished still stood and, if so, what it would cost. Be that as it may, Terblanche's handlers were prompted by his report of these exchanges with Kotzè to apply to the relevant authorities to use four unpolished stones for the purpose of Terblanche making an approach to Kotzè to have one stone polished and to sell three more. This was approved.

[10] The sale was made on 14 July 2001 when, according to his evidence, Terblanche went to Kotzè's business premises and in the latter's office showed him the stones. Kotzè told him that he had an

[3] 'Hy sal ook vir my 'n diamant slyp.'

appointment and that the stones could either be left there or taken away by Terblanche and brought back on his return. Terblanche left the diamonds in a desk drawer that Kotzè assured him was safe and returned about 15 minutes later to be told that the diamonds had been sent to be valued. When a message was received that the diamond cutter was not available Kotzè asked if he would sell all four stones and Terblanche said he would. He asked Kotzè to make him an offer and the latter wrote R10 on a desk calendar. Terblanche understood this to mean R10 000, which he accepted. Kotzè then sent his son to fetch the money and paid it to Terblanche, who left the premises and immediately reported the transaction to his superior.

[11] The second sale occurred on 7 September 2001. Terblanche testified that he visited Kotzè's business premises on 18 August 2001 and was asked if he had brought anything to sell.[4] Terblanche answered in the negative but assumed that the query related to unpolished diamonds and so on 1 September he told Kotzè that he had been offered a packet of diamonds but didn't have the money for them. He hoped that Kotzè would offer to take over the transaction, as this would enable him to have a second person present. The reason for this was that the recordings he had been trying to make on the occasion of the earlier sale were not satisfactory. He said that Kotzè told him that if he were short of cash for this purpose he would assist him.

[12] Terblanche returned on 7 September with four diamonds and wearing a coat with pockets in which he had a video camera. He told Kotzè he had brought him something and showed him the diamonds. Kotzè's response was to say in a whisper that he hoped that Terblanche

[4] 'Hy het my gevra of ek iets gebring het om te verkoop.'

was not trying to catch him. Kotzè then put the diamonds in the drawer of his desk and they drove out to his farm where he had something to attend to. During this journey Kotzè questioned Terblanche about his source for the stones and also his background. Terblanche told him that he had left the police force on early retirement under something of a cloud. When they returned from the farm Kotzè said that he would give him R10 000 for the stones. At the business premises a friend of Kotzè's, a Dr Coetzer, was waiting and Kotzè left him and Terblanche in conversation while he went and fetched the money. On his return Terblanche counted the money and then left. Dr Coetzer gave evidence and confirmed the payment and said that Kotzè told him after Terblanche left that he had got a 'bargain' and showed him a stone that Coetzer thought was an unpolished diamond.

[13] The third sale was effected on 14 December 2001 and involved seven diamonds and the payment of R26 000 by Kotzè to Terblanche. Kotzè had been away for much of the time after the second transaction. On 7 December 2001 Inspector Bruwer, who was part of the covert operation, gave Terblanche seven unpolished diamonds with instructions to offer them to Kotzè. On 14 December 2001 Terblanche took the diamonds and went to Kotzè's business premises. He says that when he arrived there Kotzè took him into his office and asked if he had again obtained unpolished diamonds.[5] Terblanche confirmed that he had and showed the packet of diamonds to him. He assumed Kotzè would want to value the diamonds and asked when he should return for his money. Kotzè said that he would bring it to his house. That evening Kotzè came to his house and gave him R25 000 and said that he would pay him another R1 000, which he should collect the next day from his business.

[5] 'Hy het my gevra of ek al weer ongeslypte diamante gekry het'

The events that evening were recorded on video and will be referred to in more detail later in this judgment.

[14] The fourth and last transaction took place on 10 February 2002 and involved the sale of six unpolished diamonds for a price of R17 000. According to Terblanche's evidence its background lay in Inspector Bruwer giving Terblanche the diamonds with instructions to offer them to Kotzè. In discussion with Captain Farber, to whom Terblanche was reporting, it was decided that it would be best if he could bring Kotzè to his home rather than trying to do a deal at the latter's business. This was no doubt due to the problems that had been experienced with recordings in the latter environment and the availability of the video cameras at the house. On 24 January 2002 Terblanche accordingly left a message for Kotzè at the business to come to his house. By chance, as he was driving home, he encountered Kotzè driving in the opposite direction. He stopped him and asked him to come to his house and drove off to wait for him. Shortly thereafter Kotzè arrived and after a brief social conversation Terblanche took him to his office to view the diamonds. As they left the lounge Kotzè sought reassurance from Mrs Terblanche that her husband was not still a policeman and trying to trap him. He then went into Terblanche's office where he was shown the diamonds. Kotzè took the diamonds and left after a lengthy and relaxed conversation with the Terblanches. No price was discussed at this time. Once again the events were recorded on video.

[15] The following day Terblanche went to Kotzè's business premises and whilst they were sitting in the office Kotzè asked him where he had got the diamonds he had taken the previous day. He told Terblanche that four black men driving a red VW Golf had approached two Portuguese

men in the town in a trap using the same diamonds. (There had in fact been an arrest of three men, two of whom were Portuguese, at a bakery in the town as a result of a trap and this appears to have been well known.) Terblanche told him that in that event he should give him back the diamonds and he would sell them to a contact in Johannesburg. Kotzè gave them back to Terblanche saying that he valued them at R17 000.

[16] Terblanche said that two Sundays later, on 3 February 2002, when he stopped at Kotzè's shop to buy a newspaper, Kotzè asked him if he still had the diamonds. Terblanche told him that he intended to sell them to his contact in Johannesburg and Kotzè responded that if he decided not to do so his offer to buy them for R17 000 stood. The following Saturday, 9 February, Terblanche went to Kotzè's premises and told him that he had cancelled his visit to Johannesburg and if Kotzè was still interested the diamonds were available. He said that he would come and see Kotzè on the following Monday. On the Monday evening at about 10.00 pm Kotzè arrived at his house and said that he had brought him some figs. He told Terblanche that he should give him the diamonds but Terblanche made an excuse about their accessibility and instead took them to him at the business the following day. Kotzè took the diamonds and paid him the R17 000.

[17] Much of this evidence was not disputed by Kotzè. However in the case of each sale he disputed the circumstances in which it had come about. He said that Terblanche had become an intimate friend of his and that they had shared many confidences. He claimed to have been instrumental in bringing Terblanche and his wife back to a life of faith by inviting them to the NGK and encouraging a new religious commitment.[6]

[6] Terblanche's more prosaic explanation was that he had liked the way in which the minister at the NGK preached and had decided to attend worship there at the invitation of the minister. He also said

He depicted himself as a person of an emotional and extremely generous disposition[7] who had been completely taken in by Terblanche's presentation of himself as a man who had been forced to leave the police force early with a diminished pension and no medical aid and who was battling financially. His impression, so he said, was that Terblanche was in a fairly desperate financial position[8] and needed to do things to increase his income. He laid stress on the fact that Terblanche peddled fish in a township called Sanddrif, some eighty kilometres away. He also alleged that on at least five occasions he lent Terblanche money in amounts varying between R1 000 and R3 000, which was always repaid. This was hotly disputed by Terblanche and no record of the loans was produced.

[18] Against that background of close friendship and apparent financial need Kotzè claimed that on each occasion that he bought unpolished diamonds from Terblanche the initiative for the transaction had come from Terblanche. He says that Terblanche incessantly brought the subject of diamonds into the conversation even though he begged him to desist. According to him each time a sale was concluded, Terblanche had approached him with a tale of financial woe and was insistent that Kotzè should purchase the diamonds so as to assist him. Against his better judgment and contrary to his religious beliefs and a spiritual commitment he had made at some time in the past never again to be engaged in the illegal buying and selling of diamonds, he succumbed to Terblanche's persistence on each occasion out of a spirit of Christian charity and a

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that the Afrikaanse Protestante Church was only a home church where worship was conducted by an elder and that when it was pointed out to him as the place that flew the old national flag he decided that it involved itself in politics. None of this evidence was challenged and Kotzè's claim was not put to either him or his wife.

[7] This contrasted with the impression of Dr Coetzer who said that whilst Kotzè was friendly he always had the impression that his approach was coloured by an attitude of 'what's in it for me'.

[8] 'Finansieël dit nie breed het nie.'

desire to help someone in need. His broad contention, as put to Terblanche in cross-examination by his leading counsel, was that:

'...hierdie hele wyse waarop u te werk gegaan het met die beskuldige, die misbruik wat u gemaak het van die kerk, van sy vriendskap, al die dinge wat ek reeds aan u gestel het, duidelik daarop dui dat u nie net die geleentheid wou skep vir hom om 'n misdryf te pleeg nie, u wou hom betrap en u het gesorg dat u hom ver genoeg uitlok, dat 'n man met sy tipe persoonlikheid sal val vir hierdie jammerhartige figuur wat die paar diamante wou verkoop?'[9]

[19] The magistrate ruled at the end of a trial within a trial that the evidence of Terblanche was admissible. It is unfortunate that in deciding to hold a trial within a trial the magistrate did not require Kotzè to furnish the grounds on which he challenged the admissibility of the evidence, as should have been done in terms of the proviso to s 252A(6). That might have focussed attention on the pertinent matters in dispute and limited the lengthy examination and cross-examination over a number of days of Terblanche and Kotzè, as well as obviating the need for some other evidence to be led. Instead a vast array of issues was traversed at considerable length and in great detail but at the end of the day most of these had little bearing on the central issue of admissibility. It is important for presiding officers faced with challenges to the admissibility of the evidence of a trap to be aware of and apply subsec (6), in terms of which the accused must 'furnish the grounds on which the admissibility of the evidence is challenged'. The matter may then, in terms of subsec (7), be adjudicated as a separate issue in dispute, ie, during a trial within a trial.

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[9] 'This whole way in which you went to work with the accused, the abuse you made of the church, his friendship, all the things I have put to you, all show clearly that you did not confine yourself to creating an opportunity to commit the offence, but you wanted to trap him and you made sure that you tempted him sufficiently that a man with his type of personality would fall for this type of sorry figure who wanted to sell a few diamonds?' (My translation.)

[20] Subsection 6 provides that the burden of proof to show that the evidence is admissible rests on the prosecution and this burden must be discharged on a balance of probabilities. This refers to the burden resting on the prosecution to prove the facts on the basis of which it contends that the evidence is admissible, whether under subsec (1) or subsec (3). The decision as to its admissibility is a legal decision taken in accordance with the provisions of s 252A in the light of the proved facts. Whilst the section refers to the burden being discharged on a balance of probabilities, it is in my prima facie view incompatible with the constitutional presumption of innocence and the constitutional protection of the right to silence. Those rights must be seen in the light of the jurisprudence of the Constitutional Court, in which it has been held that their effect is that the guilt of an accused person must be established beyond reasonable doubt.[10] That a confession was made freely and voluntarily and without having been unduly induced thereto must be proved beyond reasonable doubt and I can see no practical difference between that case and the case where a conviction is based on the evidence of a trap. Each deals with the proof of facts necessary to secure the admission of the evidence necessary to prove the guilt of the accused. In my prima facie view therefore, and in the absence of argument, in order for the evidence of a trap to be admitted, it is necessary that the trial court be satisfied that the basis for its admissibility has been established beyond a reasonable doubt. That was the case here, for the reasons set out below, so this issue does not affect the outcome of this appeal.

[21] The starting point for considering the admissibility of Terblanche's evidence is section 252A(1) of the Act, which provides that:

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[10] *S v Zuma & others* 1995 (2) SA 642 (CC) para 25. The cases in which the Constitutional Court has reaffirmed the principle are collected in *S v Manamela & another (Director-General of Justice intervening)* 2000 (3) SA 1 (CC) fn 30.

'(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).'

The section adopts the recommendation of the Law Commission that it is inappropriate to introduce a defence of entrapment in South Africa and preferable to deal with the problems surrounding the use of traps by way of an exclusionary rule of evidence.[11] Accordingly it excludes the possibility of such a defence by explicitly stating that the use of a trap or engaging in undercover operations in order to detect, investigate or uncover the commission of an offence is permissible. It is not correct to say, as does one leading commentator,[12] that it is an authority to use traps and undercover operations 'in certain circumstances'. There is no such qualification in the section. Absent a constitutional challenge – and there is no such challenge in the present case – there is no room for an argument that the use of a trap or the undertaking of undercover operations is unlawful in South Africa.

[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

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[11] That is also the approach in Australia, *Ridgeway v R* (1995) 184 CLR 19; the United Kingdom, *R v Looseley* [2001] 4 All ER 897 (HL) and Singapore, *Mohamed Emran Bin Mohamed Ali v Public* Prosecutor [2009] 2 LRC 484.

[12] E Du Toit, F J De Jager, A Paizes, A St Q Skeen and S van der Merwe*, Commentary on the Criminal Procedure Act* (Revision service 42, 2009) para 1, p 24-131.

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.

[23] The section lays down two approaches to the admissibility of evidence obtained as a result of the use of a trap. Evidence is automatically admissible if the conduct of the person concerned goes no further than providing an opportunity to commit the offence. If the conduct goes beyond that the court must enquire into the methods by which the evidence was obtained and the impact that its admission would have on the fairness of the trial and the administration of justice in order to determine whether it should be admitted.

[24] It must be stressed that the fact that the undercover operation or trap goes beyond providing the accused person with an opportunity to commit the crime does not render that conduct improper or imply that some taint attaches to the evidence obtained thereby. All that it does is create the necessity for the trial court to proceed to the enquiry mentioned in the previous paragraph. I stress this because there was a misconception in this regard at the trial. At various places in the cross-examination of Terblanche it was put to him that the section imposes constraints upon what may be done pursuant to a trap and this suggestion is repeated before us in the heads of argument for Kotzè. In summarising the

argument in his practice note counsel said: 'Die getuienis van die lokvink behoort as ontoelaatbaar gereël te word aangesien die optrede van die lokvink verder gegaan het as die blote skepping van 'n geleentheid om 'n misdryf te pleeg.'[13] This is a misconception as to the effect of s 252A(1) and it is as well therefore to lay it to rest. Section 252A(1) does not purport to prescribe the manner in which undercover operations or traps are to be conducted by the police. It merely distinguishes on the basis of the manner in which the trap is conducted between instances where the evidence thereby obtained is automatically admissible and instances where a further enquiry is called for before the question of admissibility can be determined.

[25] Section 252A(1) prescribes a factual enquiry into whether the conduct of the trap goes beyond providing an opportunity to commit an offence. Section 252A(2) describes a number of features that may indicate to a trial court that the undercover operation or trap went beyond providing an opportunity to commit an offence. It was conceded by the prosecution and held by both the magistrate and the court below that the conduct of Terblanche and this undercover operation went beyond merely providing the opportunity for the commission of the offence. Unfortunately the findings of both courts on this aspect were not fully reasoned. A closer examination of the provisions of sections 252A(1) and (2) is therefore desirable.

[26] The starting point is that, in each case where the evidence of a trap is tendered and its admissibility challenged, the trial court must first determine as a question of fact whether the conduct of the trap went beyond providing an opportunity to commit an offence. It does that by

[13] 'The evidence of the trap ought to be ruled inadmissible because the conduct of the trap went further than merely providing an opportunity to commit an offence.' (My translation)

giving the expression its ordinary meaning and makes its decision in the light of the factors set out in subsec (2). I accept that if one simply peers at the language of s 252A(2) there appears to be an anomaly arising from the fact that some matters logically anterior to the conduct of the trap itself are to be taken into account in considering whether it went beyond providing an opportunity to commit an offence.[14] However there are always dangers in such a linguistic analysis removed from the context of the section as a whole and the potential anomaly may on closer examination be more apparent than real. Thus the fact that the trap was set without the authority of the Director of Public Prosecutions or that the conditions set by the Director were disregarded may well indicate that the trap went beyond providing an opportunity to commit an offence. Otherwise they will be irrelevant. The fact that the offence in question is of a minor nature may indicate that the effect of the trap is to place disproportionate temptation in the path of the accused, so that it went beyond providing an opportunity to commit an offence.

[27] If one examines the context of subsec (2) it is clear that the legislature was concerned to identify situations that would be relevant to and bear upon the factual enquiry postulated in subsec (1). It adopted language taken from a leading United States decision on entrapment[15] in formulating the factual enquiry to be made. In its judgment the reference to the trap not going beyond affording an opportunity to commit an offence describes a situation where no issue exists about the propriety of the trap or the admissibility of the evidence derived therefrom. It

[14] The anomaly is dealt with in Du Toit *et al,* 24-134 to 24-135 and has been mentioned in some judgments. *S v Odugo* 2001 (1) SACR 560 (W) paras 32–34; *S v Makhanya & another* 2002 (3) SA 201 (N) at 206H-I; *S v Reeding & another* 2005 (2) SACR 631 (C) at 637i-j.

[15] *Sorrels v United States* (1932), 287 US 435. Other United States sources use the same language as appears from the Law Commission's report. The adoption of that language does not indicate an adoption of meaning.

appended in subsec (2) an open[16] list of factors relevant to the factual enquiry. Those factors must be viewed holistically and weighed cumulatively as different factors may point towards different answers. Not all of the factors will be relevant in every case. Sight must not be lost of the fact that there is only a single question to be answered, namely, whether the conduct of the trap went beyond providing an opportunity to commit an offence. If, on considering all relevant factors, the conclusion is that the conduct of the trap went beyond providing an opportunity to commit the offence, the enquiry moves on to s 252A(3) because, in the legislature's judgment, that conclusion may cast doubt upon the propriety of the trap and the evidence obtained thereby, so that the situation requires further scrutiny before the evidence is admitted. If the factors in subsec (2) are not taken as a checklist[17] but merely as matters that may be relevant to the proper determination of the factual enquiry, taking into account in any particular case those that are relevant on the facts of that case, they ought to pose few problems. What will be required in every case is a careful analysis of the evidence[18] in order to determine whether the conduct of the trap goes beyond the limit set by the legislature.

[28] Although it is difficult to discern the reasons for the magistrate's decision on this primary issue there seem to be three matters that could underlie it. They are that on the description of the operation a number of attempts were to be made to trap Kotzè (subsec (2)(e)). Secondly, in certain respects, sometimes inadvertently and sometimes deliberately, Terblanche acted outside the ambit of the conditions attaching to the approval of the undercover operation by the representatives of the

[16] 'Open' because it ends with sub-para (n), which includes 'any other factor which in the opinion of the court has a bearing on the question'.
[17] As this Court has already said should not be the case. *S v Hammond* [2007] ZASCA 164; [2007] SCA 164 (RSA); 2008 (1) SACR 476 (SCA) para 26.
[18] As occurred in *S v Matsabu* [2008] ZASCA 149; [2008] SCA 149 (RSA);2009 (1) SACR 513 (SCA) paras 16 and 17.

Director of Public Prosecutions (subsec (2)(a)). Thirdly, there can be no doubt that he was able to make the approaches that he did to Kotzè in consequence of having formed a friendship with him and this could have been construed as exploiting that friendship (subsec (2)(h)). The other grounds, approached holistically, indicate at least prima facie that Terblanche did not go 'beyond providing an opportunity to commit an offence'. For example, the DPP's prior approval was obtained; buying of unpolished diamonds in the area is prevalent; there are no other techniques for the detection of the offence; an average person would not have succumbed to the temptation because the parcels were small and the profit on each very small; and, as far as timing is concerned, the police had more than enough reason to suspect that the appellant was involved in illicit diamond buying to justify the laying of a trap.

[29] There are difficulties with each of the three factors mentioned above and hence with the magistrate's conclusion on this question. As to the first, repeated attempts did not have to be made before Kotzè succumbed, whether on the first or later occasions. He accepted the first offer immediately and the others equally readily. When he resisted the operation was terminated. As to the second, for reasons dealt with later, any non-compliance had no effect on the conduct of the trap. As to the third, I deal below with Kotzè's version of the facts and reject it. It follows that Terblanche did not exploit his relationship with Kotzè. In my view therefore it would appear that the finding that Terblanche's conduct went further than providing an opportunity to commit these offences was incorrect. However, as the prosecution did not press this issue and had conceded the point in both courts below, I turn to the enquiry under s 252A(3).

[30] Turning then to s 252A(3) it reads as follows:

'(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.'

[31] Subsection (3)(a) establishes two criteria for determining the admissibility of evidence obtained through the use of a trap or undercover agent. They are, firstly, whether the evidence was obtained in an improper or unfair manner and, secondly, whether its admission would render the trial unfair or would otherwise be detrimental to the interests of justice. As they are joined conjunctively it appears at first sight that both must be answered in the affirmative if the evidence is to be excluded, but I reserve any final decision on that question as there are arguments pointing in the opposite direction and we have not had the benefit of full argument on it. The language of the section suggests that such exclusion is discretionary ('the court may refuse to allow such evidence to be tendered or may refuse to allow such evidence already tendered to stand…') but insofar as there is a discretion it is a narrow one. The power of the court to exclude the evidence where the relevant circumstances are established will ordinarily be coupled with a duty to exclude it.[19] This in turn has implications for the powers of this court on appeal but it is unnecessary to explore these.

[32] Subsection (3)(b) sets out the factors relevant to the exercise of the court's power to exclude the evidence. Again this is not a closed list as the court may take into account any factor that in its opinion ought to be taken into account in that regard. In this case Kotzè's counsel confined himself to the following matters. He accepted that the nature of the offence and its seriousness is of such a nature that it is difficult to catch perpetrators without the use of traps.[20] He focussed his attack on the

[19] *Schwartz v Schwartz* 1984 (4) SA 467 (A) at 473H-474E.
[20] That traps are necessary for this purpose was accepted over a century ago by Innes CJ in *Myers and Misnum v R* 1907 TS 760 at 762, a view reaffirmed by the Law Commission.

nature of the approaches made to Kotzè as well as the use – or abuse as counsel would have it – of the relationship Terblanche had formed with Kotzè. He also argued that it appeared that certain affidavits were back-dated and characterised Terblanche as an unreliable and untrustworthy witness with a poor memory who adopted improper and unconventional methods in going about his task. Lastly reliance was placed on the failure to observe strictly the conditions attached by the Director of Public Prosecutions to the authority to pursue the undercover operation and particularly the fact that the audio and video recordings of encounters between Kotzè and Terblanche were incomplete in the sense that not every encounter between Terblanche and Kotzè was recorded and deficient in that large parts of the sound recordings were inaudible.

[33] In assessing these submissions the necessary starting point is the evidence of Kotzè in regard to the circumstances in which the transactions came about and his motivation for buying the diamonds. The magistrate disbelieved his evidence in this regard as did the court below and as do I. As counsel accepted, there is not a shred of objective evidence in the material captured on tape and video recordings that supports the notion that any of these transactions came about as a result of a plea by Terblanche that he had fallen upon hard times. Nor is there any evidence that Kotzè resisted blandishments from the side of Terblanche but that his resistance was overcome by such blandishments or pleas of financial hardship. There is nothing that indicates that Kotzè was anything other than a willing participant in the transactions. Indeed the recordings, both audio and video, reflect that this was the case. They show a man who was at ease with his surroundings and with what he was engaged in. The tone of conversation was always friendly and jovial and the moment they turned to discussions of the business at hand Kotzè

would drop his voice and conduct proceedings in a whisper as though he was aware of the risk that the discussions might be recorded. Although he claimed that in relation to the fourth transaction he had been brought to the Terblanche house by a gross misrepresentation, the videos give this the lie. If anything he is the dominant figure in the transactions in accordance with the picture one derives from the background sketched in paragraph [5] of this judgment.

[34] All this fell to be taken with Kotzè's references to the possibility that Terblanche might try and trap him or arrest him and his discreet enquiries of Mrs Terblanche whether her husband was still a policeman. These indicate someone who was well aware that he was engaged in unlawful conduct and was taking precautionary measures against the possibility that this might be a trap. Added to this is his denial of the transactions when confronted by Terblanche at the time of his arrest; his dishonest evidence at a bail hearing that the amounts of R26 000 and R17000 were loans and his unwillingness to disclose what happened to the diamonds he bought from Terblanche. Cumulatively it means that his evidence was rightly rejected and his counsel made no attempt to reverse that conclusion. He did however seek to contend that we should nonetheless accept Kotzè's version of what transpired prior to the first transaction, but that evidence is of a piece with the evidence that was rejected and cannot be separated from it. It too falls to be rejected.

[35] The rejection of Kotzè's evidence is destructive of the contention that the evidence was obtained unfairly by virtue of the methods adopted by Terblanche and is likewise destructive of the submission that its admission rendered the trial unfair or was detrimental to the administration of justice. That left counsel to concentrate his submissions

on areas of weakness in Terblanche's evidence such as the absence of a note of the offer to cut and polish a diamond, the backdating of certain statements and certain contradictions that were identified in great detail in the heads of argument but do not require repetition here. None of these affect the conclusion that Kotzè was a willing participant in the admitted purchase of diamonds from Terblanche. Nor does any of it bear upon the propriety or fairness of the methods adopted to obtain the evidence of those transactions, or the fairness of the trial.

[36] That left, as the last point in the argument, the proposition that because Terblanche and other members of the team conducting this undercover operation departed in certain respects from the conditions attaching to the Director of Public Prosecutions' authorisation for Operation Solitaire the evidence obtained as a result of Terblanche's actions should be excluded. Counsel rightly did not pursue a contention advanced in the heads of argument that these departures disregarded applicable legal and statutory requirements.[21] Part of this argument, based as it is upon the proposition that Terblanche induced Kotzè to enter into the transactions by playing upon the latter's tender emotions, fails with the rejection of Kotzè's evidence in this regard. As to the balance, the principal criticism related to the fact that Terblanche had not sought to record all of his encounters and conversations with Kotzè, starting from their first meeting when the Terblanches were seeking accommodation, but only those where Kotzè was purchasing diamonds. I am not sure that it was the intention of the Director of Public Prosecutions' conditions that every encounter should be recorded inasmuch as it was manifestly impractical to expect this of Terblanche during an undercover operation in which he was to spend nine months establishing his new persona and

[21] S 252A(3)(b)(ii)(aa).

two years engaged in undercover activities whilst maintaining the public image of a pensioner. However, even if that was the intention there is nothing to show that any failure in this regard was, as contended by counsel, detrimental to the interests of justice or rendered the trial unfair. The point is accordingly rejected as is the entire challenge to the admissibility of the evidence of Terblanche.

[37] My conclusion is that the evidence of Terblanche was correctly admitted. In the result Kotzè's appeal against his conviction on the four counts under s 20 of the Diamonds Act is dismissed.

M J D WALLIS
ACTING JUDGE OF APPEAL

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