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PRESIDENT'S OFFICE

No. 1977.

29 November 1996

It is hereby notified that the President has assented to the following Act which is hereby published for general information:—

No. 85 of 1996: Criminal Procedure Second Amendment Act, 1996.

KANTOOR VAN DIE PRESIDENT

No. 1977.

29 November 1996

Hierby word bekend gemaak dat die President sy goedkeuring geheg het aan die onderstaande Wet wat hierby ter algemene inligting gepubliseer word:—

No. 85 van 1996: Tweede Strafproseswysigingswet, 1996.

GENERAL EXPLANATORY NOTE:

Words underlined with a solid line indicate insertions in existing enactments.

ACT

To amend the Criminal Procedure Act, 1977, so as to regulate the setting of traps and the engaging in undercover operations; to determine the circumstances under which evidence so obtained will be admissible as evidence; and to provide for matters incidental thereto.

(English text signed by the President.)
(Assented to 6 November 1996.)

BE IT ENACTED by the Parliament of the Republic of South Africa, as follows:—

Insertion of section 252A in Act 51 of 1977

1. The following section is hereby inserted in the Criminal Procedure Act, 1977 (Act No. 51 of 1977), after section 252:

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“Authority to make use of traps and undercover operations and admissibility of evidence so obtained

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

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

(a) Whether, prior to the setting of a trap or the use of an undercover operation, approval, if it was required, was obtained from the attorney-general to engage such investigation methods and the extent to which the instructions or guidelines issued by the attorney-general were adhered to;

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(b) the nature of the offence under investigation, including—

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ALGEMENE VERDUIDELIKENDE NOTA:

_____ Woorde met 'n volstreep daaronder, dui invoegings in bestaande verordenings aan.

WET

Tot wysiging van die Strafproseswet, 1977, ten einde die stel van lokvalle en die gebruikmaking van bedekte operasies te reël; om die omstandighede te bepaal waarin getuienis wat aldus bekom word as getuienis toelaatbaar sal wees; en om voorsiening te maak vir aangeleenthede wat daarmee in verband staan.

*(Engelse teks deur die President geteken.)
(Goedgekeur op 6 November 1996.)*

DAAR WORD BEPAAL deur die Parlement van die Republiek van Suid-Afrika, soos volg:—

Invoeging van artikel 252A in Wet 51 van 1977

1. Die volgende artikel word hierby in die Strafproseswet, 1977 (Wet No. 51 van 1977), na artikel 252 ingevoeg:

“Bevoegdheid om van lokvalle en bedekte operasies gebruik te maak en toelaatbaarheid van getuienis aldus bekom

10 **252A.** (1) 'n Wetstoepasser, beampte van die Staat of enige ander persoon wat vir sodanige doel daartoe gemagtig is (hieronder in hierdie artikel 'n beampte of sy of haar agent genoem) kan 'n lokval stel of van 'n bedekte operasie gebruik maak ten einde die pleging van 'n misdryf op te spoor, te ondersoek of bloot te lê, of om die pleging van enige misdryf te voorkom, en die getuienis aldus bekom, is toelaatbaar indien daardie optrede nie verder gaan as die skepping van 'n geleentheid om 'n misdryf te pleeg nie: Met dien verstande dat indien die optrede verder gaan as die skepping van 'n geleentheid om 'n misdryf te pleeg, die hof getuienis wat aldus bekom is, onderworpe aan subartikel (3) kan toelaat.

15 (2) By oorweging van die vraag of die optrede verder gaan as die skepping van 'n geleentheid om 'n misdryf te pleeg, neem die hof die volgende faktore in ag:

20 (a) Of, voordat die lokval gestel is of 'n bedekte operasie gebruik is, goedkeuring, indien dit vereis is, van die prokureur-generaal verkry is om sodanige ondersoekmetodes in werking te stel en die mate waarin die instruksies of riglyne wat deur die prokureur-generaal uitgereik is, nagekom is;

25 (b) die aard van die misdryf wat ondersoek word, met inbegrip van—

- (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; 5
 - (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; 10
 - (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; 15
 - (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; 20
 - (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; 25
 - (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; 30
 - (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; 35
 - (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. 40
- (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. 45
- (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: 50
- (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; 55

- (i) of die veiligheid van die Staat, die veiligheid van die publiek, die handhawing van die openbare orde of die nasionale ekonomie ernstig daardeur bedreig word;
- (ii) die algemeenheid van die misdryf in die betrokke gebied; en
- 5 (iii) die erns van die betrokke misdryf;
- (c) die beskikbaarheid van ander tegnieke vir die opsporing, ondersoek of blootlegging van die pleging van die misdryf of die voorkoming daarvan in die besondere omstandighede van die geval en in die betrokke gebied;
- 10 (d) of 'n gemiddelde persoon wat in die posisie van die beskuldigde verkeer het, deur die tipe optrede wat deur die betrokke beampte of sy of haar agent in werking gestel is tot die pleging van 'n misdryf oorgehaal sou word;
- 15 (e) die graad van volharding en die aantal pogings aangewend deur die beampte of sy of haar agent voordat die beskuldigde geswig het en die misdryf gepleeg het;
- (f) die aard van die oorreding wat gebruik is, met inbegrip van die graad van misleiding, kullery, wanvoorstelling of beloning;
- 20 (g) die tydsberekening van die optrede, in besonder of die beampte of sy of haar agent die pleging van die misdryf aangestig het of in 'n bestaande onwettige bedrywigheid betrokke geraak het;
- (h) of die optrede 'n uitbuiting van menslike karaktereienskappe soos emosies, simpatie of vriendskap of 'n uitbuiting van die beskuldigde se persoonlike, professionele of ekonomiese omstandighede, ten einde die waarskynlikheid van die pleging van die misdryf te verhoog, ingesluit het;
- 25 (i) of die beampte of sy of haar agent 'n besondere kwesbaarheid van die beskuldigde, soos 'n geestelike gebrek of verslawing aan 'n stof, uitgebuit het;
- 30 (j) die verhouding tussen die betrokkenheid van die beampte of sy of haar agent vergeleke met die betrokkenheid van die beskuldigde, met inbegrip van 'n beraming van die omvang van die nadeel veroorsaak of gewaag deur die beampte of sy of haar agent vergeleke met dié van die beskuldigde, en die pleging van enige onwettige handeling deur die beampte of sy of haar agent;
- 35 (k) enige dreigemente, geïmpliseer of uitgespreek, deur die beampte of sy of haar agent teenoor die beskuldigde;
- (l) of, voordat die lokval gestel is of die bedekte operasie gebruik is, daar enige vermoede bestaan het, afgelei op redelike gronde, dat die beskuldigde 'n soortgelyke misdryf tot daardie misdrywe waarmee die aanklagte verband hou, gepleeg het;
- 40 (m) of die beampte of sy of haar agent te goeder trou of te kwader trou gehandel het;
- (n) enige ander faktor wat na die oordeel van die hof 'n invloed op die vraag het.
- 45 (3) (a) Indien 'n hof in enige strafregtelike verrigtinge bevind dat by die stel van 'n lokval of die gebruikmaking van 'n bedekte operasie die optrede verder gaan as die skepping van 'n geleentheid om 'n misdryf te pleeg, kan die hof weier om toe te laat dat sodanige getuienis aangebied word of weier om toe te laat dat sodanige getuienis wat reeds aangebied is, toegelaat word indien die getuienis op 'n onbehoorlike of onregverdige wyse bekom is en dat die toelating van sodanige getuienis die verhoor onregverdig sou maak of op 'n ander wyse tot nadeel van die regspraak sou wees.
- 50 (b) Wanneer die hof die toelaatbaarheid van die getuienis oorweeg, moet hy die openbare belang teenoor die persoonlike belang van die beskuldigde opweeg, met inagneming van die volgende faktore, indien toepaslik:
- 55 (i) Die aard en erns van die misdryf, met inbegrip van—
- 60 (aa) of dit van so 'n aard of so 'n omvang is dat die veiligheid van die Staat, die veiligheid van die publiek, die handhawing van openbare orde of die nasionale ekonomie ernstig daardeur bedreig word;

- (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 5
- (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— 10
- (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 15
- (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 20
- (v) any other factor which in the opinion of the court ought to be taken into account.
- (4) An attorney-general may issue general or specific guidelines regarding the supervision and control of traps and undercover operations, and may require any official or his or her agent to obtain his or her written approval in order to set a trap or to engage in an undercover operation at any place within his or her area of jurisdiction, and in connection therewith to comply with his or her instructions, written or otherwise. 25 30
- (5) (a) An official or his or her agent who sets or participates in a trap or an undercover operation to detect, investigate or uncover or to obtain evidence of or to prevent the commission of an offence, shall not be criminally liable in respect of any act which constitutes an offence and which relates to the trap or undercover operation if it was performed in good faith. 35
- (b) No prosecution for an offence contemplated in paragraph (a) shall be instituted against an official or his or her agent without the written authority of the attorney-general.
- (6) If at any stage of the proceedings the question is raised whether evidence should be excluded in terms of subsection (3) the burden of proof to show, on a balance of probabilities, that the evidence is admissible, shall rest on the prosecution: Provided that the accused shall furnish the grounds on which the admissibility of the evidence is challenged: Provided further that if the accused is not represented the court shall raise the question of the admissibility of the evidence. 40 45
- (7) The question whether evidence should be excluded in terms of subsection (3) may, on application by the accused or the prosecution, or by order of the court of its own accord be adjudicated as a separate issue in dispute.”. 50

Short title

2. This Act shall be called the Criminal Procedure Second Amendment Act, 1996.

- (bb) of, in afwesigheid van die gebruikmaking van 'n lokval of 'n bedekte operasie, dit moeilik sou wees om die pleging daarvan op te spoor, te ondersoek, bloot te lê of te voorkom;
- 5 (cc) of dit so gereeld gepleeg word dat spesiale maatreëls vereis word om die pleging daarvan op te spoor, te ondersoek, bloot te lê of te voorkom; of
- (dd) of dit so onwelvoeglik of ernstig is dat die stel van 'n lokval of die gebruikmaking van 'n bedekte operasie geregverdig was;
- 10 (ii) die omvang van die uitwerking van die lokval of bedekte operasie op die belange van die beskuldigde, met inagneming van—
- (aa) die opsetlike verontagsaming, indien wel, van die beskuldigde se regte of enige toepaslike regs- of statutêre voorskrifte;
- (bb) die gemak, of andersins, waarmee sodanige voorskrifte nagekom kon word, met inagneming van die omstandighede waarin die misdryf gepleeg is; of
- 15 (cc) die nadeel wat vir die beskuldigde uit enige onbehoorlike of onregverdigde optrede voortvloei;
- (iii) die aard en erns van enige skending van 'n fundamentele reg in die Grondwet vervat;
- 20 (iv) of by die stel van 'n lokval of die gebruikmaking van 'n bedekte operasie die middele wat gebruik is in verhouding tot die erns van die misdryf was; en
- (v) enige ander faktor wat na die oordeel van die hof in aanmerking geneem behoort te word.
- 25 (4) 'n Prokureur-generaal kan algemene of spesifieke riglyne uitreik betreffende die toesig oor en beheer van lokvalle en bedekte operasies, en kan van enige beampte of sy of haar agent vereis om sy of haar skriftelike goedkeuring te verkry ten einde 'n lokval te stel of om van 'n bedekte operasie gebruik te maak op enige plek binne sy of haar jurisdiksiegebied, en om in verband daarmee sy of haar opdragte, skriftelik of andersins, na te kom.
- 30 (5) (a) 'n Beampte of sy of haar agent wat 'n lokval stel of van 'n bedekte operasie gebruik maak ten einde die pleging van 'n misdryf op te spoor, te ondersoek of bloot te lê of om getuienis daaromtrent in te win of om die pleging van 'n misdryf te voorkom, is nie strafregtelik aanspreeklik ten opsigte van enige handeling, wat 'n misdryf uitmaak, en wat in verband staan met sodanige lokval of bedekte operasie indien sodanige handeling te goeder trou verrig is nie.
- 35 (b) Geen vervolging mag teen 'n beampte of sy of haar agent weens 'n misdryf beoog in paragraaf (a) sonder die skriftelike toestemming van die prokureur-generaal, ingestel word nie.
- 40 (6) Indien op enige stadium van die verrigtinge die vraag geopper word of getuienis ingevolge subartikel (3) uitgesluit moet word, rus die bewyslas op die vervolging om, op 'n oorwig van waarskynlikhede, die toelaatbaarheid van die getuienis aan te toon: Met dien verstande dat die beskuldigde die gronde moet aantoon waarop die toelaatbaarheid van die getuienis betwis word: Met dien verstande voorts dat indien die beskuldigde geen regsverteenvoering het nie die hof die vraag na die toelaatbaarheid van die getuienis moet opper.
- 45 (7) Die vraag of getuienis ingevolge subartikel (3) uitgesluit moet word, kan op aansoek van die beskuldigde of die vervolging, of *mero motu* op bevel van die hof, as 'n afsonderlike geskilpunt besleg word.”.
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Kort titel

2. Hierdie Wet heet die Tweede Strafproueswysigingswetsontwerp, 1996.

