

**THE USE OF INFORMERS DURING PRECIOUS METALS  
UNDERCOVER OPERATIONS**

**by**

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## **ABSTRACT**

The research was conducted as a result of the long standing criticism against undercover operations due to the conduct of informers and agents during these operations. Since both undercover operations and informers are controversial issues it may cause serious judicial problems if the system is not applied correctly.

The problem was investigated by means of qualitative research. A thorough literature study and semi-structured interviews were used to gather the required data. Semi-structured interviews were conducted with advocates of the Director of Public Prosecutions Free State and detectives from the Organised Crime Unit of the South African Police Service.

It has been found that undercover operations are an effective manner to address organised crime and especially precious metals related crimes. Undercover operations are an excellent barometer to determine the extent of organised crime. It gives investigators a clear view of the compilation of a syndicate and the roles of leaders, runners and associates. Informers are invaluable sources of information. Without the use of informers it will be virtually impossible to engage in undercover operations, since the police will have no intelligence to engage into an investigation of this nature.

The implications of the findings are that it is the responsibility of investigators, agents and informers to keep the system transparent, fair and acceptable. Their conduct may never violate their mandate and the boundaries of the investigation. Undercover operations are justified when the system is properly administered, structured, controlled and without bias.

Key terms used during the research are: undercover operations, precious metals, agent, informer, forensic investigation and trap.

## **ACKNOWLEDGEMENTS**

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To my supervisor: Me Juanida Horne and co-supervisor: Me Marielize van Zyl. Your exceptional guidance, patience, support and accessibility during the research are appreciated. Your friendly approach and encouragement has motivated me to conclude the research.

I want to thank the most important people in my life for their support and encouragement during the past few years. Yolanda, Yoné and Fransuné - I appreciate the sacrifices you made and your active interest in the research.

## **DEDICATION**

I dedicate this research to my late father Colonel PJJ (Flip) Flynn, who sadly passed away whilst this research was in its final stages. Father was the Commander of the then Diamond and Gold Branch of the South African Police Service at Klerksdorp from 1981 until his retirement in 1996. It is due to his influence and exemplary leadership that I developed a profound passion for detective work and in particular the activities of the Precious Metals and Diamond fraternity.

## **DECLARATION OF OWN WORK**

I declare that “The use of informers during precious metals undercover operations” is my own work and that all the sources that I have used or quoted have been indicated and acknowledged by means of complete references

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HF FLYNN

October 2009

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## CHAPTER 1

### GENERAL ORIENTATION

#### 1.1 Introduction

The Constitution of the Republic of South Africa stipulates under section 205(3) that the purpose of the South African Police Service (SAPS) is to prevent, investigate and combat crime (South Africa, 1996). It is indicated that investigation of crime is a reactive method of policing and that it is therefore the responsibility of the investigator to clear up crimes by making use of specific methods and techniques (Clarke, Cowley, de Klerk, Lamprecht, Mendes, Myburgh, van Schoor, van Zyl and Zinn, 2004:221).

Broodryk, Joubert, Nel and Struwig (2001:323) indicate that informers are invaluable to the police to prevent and detect crime. Although the use of informers is an important link to address crime it remains a controversial issue, under specific circumstances. With regards to organised crime, it is a well-known method to utilise informers in different roles during undercover operations. It may vary from information gatherers to observers and agents.

As discussed by Kriegler and Kruger (2002:636), the moral and lawful problems with traps and undercover operations accumulated over decades to the extent where the trapping system has been reviewed by the South African Law Commission during 1994. Broodryk et al. (201:324) indicate that evidence by informers will be approached with caution by courts and the cautionary rule will be applicable on their testimony. In *S v Ohlenschläger* 1992 (1) SACR 695 (T) the learned judge discussed the criticism against the system comprehensively. The controversy over the use of traps and undercover operations were defused to a large extent with the adding of section 252(A) to the Criminal Procedure Act, Act 51 of 1977, which regulates the setting of traps and undercover operations.

The researcher from his own practical experience has identified the following problems with the use of informers:

- Some informers play a double role and thereby promote their own interests and that of the syndicate they were supposed to infiltrate and expose. Their actions prove to be detrimental to the criminal justice system as criminal cases are lost in courts due to the behaviour of informers.
- Numerous problems occur during undercover precious metals operations when informers are utilised. Informers exceed the boundaries of their mandate, informer handling is sub-standard, inferior control over informers and insufficient corroboration during evidence gathering.
- Enticement by informers, who have lured suspects into committing crimes, has raised numerous criticisms by the judiciary in the past. In *S v Hayes and Another* 1998 (1) SACR 625 (OPD) the conduct of the informer and agent went further than the creating of an opportunity to commit an offence. The actions of the informer and agent led to the acquittal of the accused as the actions of the informer and agent violated the right of an accused to a fair trial, as enshrined in section 35 of the Constitution of the Republic of South Africa.

Because of all the problems with the use of informers during precious metals undercover operations the researcher decided to conduct research on the topic. The research was conducted during the time span of January to December 2008. Despite of the problems associated with the utilisation of informers it is still regarded as an effective and efficient manner to address precious metals related criminal conduct. It is therefore important to develop clear procedures to ensure that informers are correctly utilised during precious metals undercover operations. It will ensure that precious metals undercover operations are kept fair, transparent and without unwanted criticism.

This chapter will further focus on the research methodology that was used to conduct the research. Aspects such as aim and purpose of the research, the research design

and approach that were followed, sampling techniques and measurement instruments that were applied, data collection and analysis procedures that were followed, validity, reliability and ethical issues will be addressed. It will enable the reader to understand precisely how the researcher verified answers to the research questions.

## 1.2 Aim of the research

The purpose of aims is to obtain new data and establish interesting patterns in the data as explained by Mouton (1996:103). The aims of research should illustrate what the researcher wishes to establish through the research (Mouton, 1996:50). The aim of this research is firstly to determine what undercover police operations entail and secondly to determine how informers should be used by police investigators during precious metals undercover operations. These aims have enabled the researcher to make certain recommendations that can be used to improve on the procedures followed by investigators with informers during precious metals undercover operations.

## 1.3 Purpose of the research

According to Welman and Kruger (2002:18), the purpose of research is to define, explain and consequently predict or control human behaviour, its organisations and/or events. There must be a reason for doing the research, according to Denscombe (2002:25).

Denscombe (2002:26-27) further explains that research can serve many purposes such as describing problems and explaining things. Application can be to analyse, evaluate or improve existing procedures. Application is precisely what this research relates and pertains to - to determine how existing procedures with regard to the use of informers can be improved to enhance the performance of the police. Other purposes according to Denscombe (2002:26-27), is to make predictions about future

behaviour and to empower those who are involved in the research. This research aims to:

- evaluate and analyse the use of informers during precious metals undercover operations
- explore national and international literature sources to gather new and existing information on informers and undercover operations
- correct and enhance procedures relating to the use of informers during precious metals undercover operations
- empower and educate investigators who make use of informers during precious metals undercover operations.

#### 1.4 Research questions

The following research questions specify what is to be investigated as explained by Denscombe (2002:31). Research questions are formulated to focus on the research problem that has been identified, Mouton (1996:53).

- What do undercover police operations entail?
- How could informers be used during undercover police operations?

#### 1.5 Key theoretical concepts

The purpose of defining key concepts is to prevent any misunderstanding according to Leedy and Ormrod (2005:119). For the purpose of this research the following key concepts are defined as follows:

#### 1.5.1 Forensic investigation

“Forensic investigation is an investigation aimed at instituting court proceedings, criminal as well as civil” (Lambrechts, 2001:93).

#### 1.5.2 Undercover operation

According to Welch (2000:2) an undercover operation means “any operation to detect, investigate, uncover or prevent organised criminal conduct by using an official and/or his or her agent

(a) for the purpose of which the official and/or his or her agent will be expected to use an assumed name or cover identity and to keep secret the fact that he or she is such official or agent; and

(b) during the course of which it is reasonably foreseeable that the official and/or his or her agent may be expected to be involved in the commission of an offence or offences to ensure the success of the operation”.

#### 1.5.3 Informer

“An informer can be generally defined as a person who provides information regarding criminals, criminal activities and/or specific criminal activities to an investigator for reward or other motives” (South African Police Service, c2004:2).

#### 1.5.4 Precious metals

“The metal gold, any metal of the platinum group and the ores of such metals; and any other metal that the Minister has declared by notice in the Gazette to be a precious metal for the purposes of the Act, and the ores of any such metal” (Section 1 of the Precious Metals Act).

#### 1.5.5 Trap

“Trap means a trap set either as an isolated event or as part of an undercover operation and includes the person involved in such trap” (Welch, 2000:2).

### 1.5.6 Agent

“An agent is a person who with a view of securing the conviction of another proposes certain criminal conduct to the individual and he/she takes part in the operation thereof” (Welch, 2000:1).

## 1.6 Research design and approach

According to Mouton (2001:55), a research design is your plan of how you intend to conduct the research. An empirical design has been used in this research as the focus is on human behaviour as explained by Mouton (2001:55). Denscombe (1998:6) describes empirical research as: “*the getting out of the chair, going out of office and purposefully seeking for the information out there*”. This study takes the form of empirical research as the researcher made use of interviews and the analysing of secondary data sources (Welman & Kruger, 2002:57).

The qualitative research approach was used for this research. According to Leedy and Ormrod (2005:133), the qualitative research approach focuses on phenomena that occur in their natural setting “real world”. It involves the study of phenomena in all their complexity. Welman and Kruger (2002:178) state that it is advisable that when a researcher is concerned with explaining peoples’ behaviour, to conduct qualitative research, the latter is most suitable for the purpose of this research, since we are dealing with the behaviour of informers, agents and members of the South African Police Service during precious metals undercover operations.

The qualitative research approach is presented in the form of a comprehensive literature study and semi-structured individual interviews. Semi-structured face-to-face interviews were conducted with thirty detectives of the SAPS who are making use of undercover operations. Semi-structured face-to-face interviews were also conducted with five state advocates from the office of the Director of Public Prosecutions.

Although the collected data by means of interviews is subjectively collected, it will give the researcher a better understanding of the real life experience, thoughts, perceptions and behaviour of the participants during undercover operations. As discussed by Mouton (2001:71) the interviews are the primary data sources and the literature study provided the secondary data.

### 1.7 Population and sampling

Welman and Kruger (2002:46) indicate that the population refers to the study object, which may be individuals, groups, organisations, human products and events.

The study or target population as explained by Maxfield and Babbie (1995:186) for the purpose of this research comprised of a group of police detectives who are members of the National Investigation Task Team which forms part of the Organised Crime Component of the South African Police Service (SAPS). The team is accountable for the investigation of the most prevalent precious metals syndicates in South Africa and abroad. The Team consisting of forty members was selected, because it is cost effective and convenient to the researcher who is a member of the task team.

The team extensively make use of informers during undercover operations to neutralise and arrest these syndicates. The team members are situated in Klerksdorp, Rustenburg and Johannesburg respectively. Although the team members are situated in three cities, the team functions as a unit. The National Investigation Task Team represents all users of precious metals undercover operations.

As discussed by Welman and Kruger (2002:47), a probability sample will ensure that a representative sample is drawn from the population, where each member of the population has an equal opportunity to be selected. The simple random sampling method as described by Leedy and Ormrod (2005:201) was used to ensure that each element has an equal chance of being selected. The sampling frame therefore

consists of the names of thirty nine (39) members of the National Investigation Task Team, excluding the researcher. A number was assigned to each person in the sampling frame and all the numbers were put in a box. The researcher randomly picked thirty (30) numbers from the box, which ensured that each element had an equal chance of being selected. It prevented any bias in the selection process. Thirty (30) participants were selected, because it enabled the researcher to obtain sufficient knowledge about the subject under research. The thirty (30) participants are representative of the task team. The findings can be generalised for the entire population of thirty nine (39) detectives, since the majority of detectives participated in the research. There is a strong possibility that the findings can also be generalised for organised crime detectives who engage into precious metals operations, since they utilise the same methods to gather the required evidence. The findings cannot be generalised to all detectives, since detectives involved with general investigations do not make use of undercover operations to gather evidence.

It was also decided to make use of the purposive sampling method as described by Leedy and Ormrod (2005:206) to select five state advocates from the office of the Director of Public Prosecutions Free State, which is situated in Bloemfontein. These advocates are in the service of the state and they are responsible for the prosecution of organised crime cases, including precious metals investigations.

The researcher decided upon the Bloemfontein advocates, because the researcher is au fait (well-acquainted) with the fact that these advocates are dealing with a considerable number of undercover operations relating to precious metals investigations. It is convenient for the researcher to make use of these state advocates, since he frequently travels to Bloemfontein for official and personal purposes. The five advocates were selected as a result of their extensive knowledge and experience of precious metals related and organised crime cases.

## 1.8 Data collection

Maxfield and Babbie (2005:209) emphasise that the value of research depends on how the data is gathered. The manner in which the data is collected will depend on the type of research and the purpose of the research. In order to address the research objectives it was decided to gather the required data by means of interviews, literature and personal experience. Mouton (2001:98-105) indicates that frequently used data collection methods in qualitative research include observation, interviewing and documentary sources.

To ensure the validity of the data collection process, it was decided to make use of triangulation which refers to the use of multiple data sources as explained by Leedy and Ormrod (2005:99). The researcher will not consider analysis of case dockets as information regarding undercover operations is not reflected in case dockets.

### 1.8.1 Literature:

The literature was obtained by visits to libraries where the researcher conducted research to gather information on the topic. International and local sources such as books, journals, articles, newspapers, research dissertations and the Internet were consulted to obtain relevant information for the research. To ensure that the data sources were dealt with in the same manner the researcher extracted the relevant information from the sources. The contents and quotes were analysed by comparing the data to establish where the authors concur and where their views and findings differ.

No literature with the same topic was found. The researcher made use of literature that focus on methods and techniques to efficiently investigate crime. Information relevant to undercover operations and informers was collected. Data already gathered was obtained by visits to the Library at the UNISA Florida Campus, official South African Police Service directives and from documents that contains information

about informers and undercover operations. These documents are in possession of the researcher and were built-up over a prolonged period of time.

#### 1.8.2 Interviews:

With regards to interviews the researcher conducted semi-structured interviews as explained by (Mouton, 2001:105). Semi-structured interviews gave the researcher the opportunity to obtain elaborative and comprehensive views of the participants. The formulation of the questions was based on the research questions and aims of the research. Thirty face-to-face, semi-structured individual interviews were conducted with the selected detectives.

Semi-structured, face-to-face individual interviews were also conducted with the five advocates of the Director of Public Prosecutions. The five advocates were selected as a result of their extensive knowledge and experience of precious metals related and organised crime cases. The participant's feedback consists of their individual knowledge, experience and perceptions. Separate interview schedules were used for the detectives and advocates respectively, since all the questions are not applicable to the advocates.

The answers of the participants were written down comprehensively by the researcher. Permission was obtained from the individuals and the respective institutions prior to conducting the interviews. The interviews were conducted in privacy, after each of the participants had signed a letter of consent to continue voluntarily with the interview. The participants were assured of their right to privacy and anonymity.

The researcher made use of open-ended questions, since it gave the participants the opportunity to answer comprehensively. The research questions under investigation guided the researcher during the selection of questions. The researcher used current knowledge, practices and legislation to test the participant's knowledge of the issues

under investigation. This activated and motivated the participants to elaborate on their views. The interview schedules were tested by conducting interviews with precious metals detectives who were not involved in the research. After minor changes had been made, the final interview schedules were used during the research. Henceforth the interview schedules were approved by the supervisors. No problems were encountered during the interviews, since all the participants are conversant in English, since the interview schedules were compiled unambiguously. The researcher has studied all the interview considerations as described by Leedy and Ormrod (2005:147) and adhered to them.

### 1.8.3 Personal experience:

The researcher has twenty years experience in the investigation of crime in the South African Police Service of which eighteen years within the organised crime fraternity. The researcher has extensive experience of the investigation of precious metals and diamond related offences, robbery and theft. The researcher also has experience of money laundering, racketeering and asset forfeiture investigations and proceedings due to his involvement with the investigation of high profile precious metals syndicates.

During the eighteen years within the precious metals domain the researcher has investigated in excess of 2000 cases. The researcher was involved with the execution and investigation of thirteen project driven undercover operations. Currently the researcher heads the Precious Metals and Diamond Section of the Organised Crime Unit Potchefstroom, where he is responsible to manage in excess of 500 investigations per annum.

The researcher is the chairperson of the Regional Precious Metals Forum in Klerksdorp. The forum is a joint initiative between the South African Police Service, the precious metals mining industry and the National Prosecuting Authority (NPA).

The function of the forum is to manage and co-ordinate the investigation of precious metals related crimes and to formulate and execute strategies on an operational level.

The researcher obtained a National Diploma in Police Administration from Technikon SA during 1993 and a B-Tech degree in Forensic Investigation from UNISA during 2006. The researcher received internal as well as external training in the South African Police Service. The following courses and training sessions were completed: Detective Course, Diamond and Gold Branch Course, Organised Crime Course, Officers Course, Project Management to Specialised Investigations, Money Laundering control in South Africa and the investigation of Racketeering related offences.

### 1.9 Data analysis

Maxfield and Babbie (2005:107) and Welman and Kruger (2002:195) point out that content analysis by means of decoding is the most suitable technique for qualitative research. Strydom and Delport (2001:336-342) are referring to strategies for data analysis. All these theories agree that the following steps are of importance to effective data analysis and were therefore followed and executed by the researcher:

- Analysis took place by studying, comparing, breaking up and grouping similar answers and literature together. The remainder of the answers and literature were grouped into categories in the same manner.
- Synthesis was reached by combining the analysed data into a whole.
- Induction took place by incorporating known facts into the research to set a general rule. Legislation and reported cases falls within this category.
- Deduction was accomplished by studying all the facts (interviews, literature and personal experience) and as a result thereof arrived at answers for the research questions.

The data from the interviews and documentary sources were compared, analysed, and coded to establish what the degree of comparison is between the participant's versions. The obtained data was compared with the literature to point out differences and to establish trends and patterns. A combination of the above-mentioned approaches insured that the data was analysed comprehensively and efficiently.

#### 1.10 Methods taken to ensure validity

According to Leedy and Ormrod (2005:28), "*validity of an instrument is the extent to which the instrument measures what it is suppose to measure*". Denscombe (2002:100) indicates that validity is concerned with the accuracy of the questions asked, the data collected and the explanation offered. Generally it relates to the data and the analysis used in the research.

The research questions and aims of the research determined the contents of the interview schedules. A standard interview schedule was used for all the detective participants. All this ensured that the questions measured what they were supposed to measure. During the interviews with detectives the same questions were put to all participants. The process was replicated with each participant, which ensured and maintained quality throughout. During the interviews the researcher endeavoured to maintain control and to remain focused on the scope of and research questions of the research.

A shortened interview schedule was used in respect of the advocates, since many of the questions asked from the detectives were irrelevant to the advocates. The interview dealt with operational aspects of which the advocates have no experience. The same process was repeated with all the advocates, which in turn assured quality throughout. The researcher maintained control by focusing on the scope of and research questions of the research.

Data obtained by means of interviews were merged with literature and personal experience to ensure trustworthiness. Sample validity was ensured by making use of a representative sample of thirty detectives. The five advocates were selected by means of purposive sampling, as a result of their extensive knowledge and experience of precious metals related and organised crime cases. Collection validity was ensured by subjecting all the participants to the same process. The participants were allowed to complete the interview in an environment chosen by them where they were able to concentrate and respond freely. The triangulation approach which refers to the use of more than one method to obtain data as discussed by Leedy and Ormrod (2005:99) was used to strengthen the trustworthiness of the data.

#### 1.11 Methods taken to ensure reliability

Maxfield and Babbie (2005:129) and Mouton and Marais (1992:81) agree that reliability means that obtained results must be replicable if the same research is conducted by another researcher.

The semi-structured interview schedules ensured consistency throughout the interviews with regard to qualitative data collection. The interview schedules were compiled by referring to the research questions as sub-headings. The relevant questions were then included into the respective sub-sections of the interview schedule. The researcher ensured confidentiality by conducting the interviews in privacy. The interviewer did not lead the respondents to answer in a specific manner, thus not leading them in a specific direction. The answers to the questions were comprehensively noted to ensure an accurate record of the interviews. This ensured that when different researchers conduct the same research by means of the same interview schedules as measurement tools they will obtain the same results.

## 1.12 Ethical considerations

Mouton (2001:238) sensitises post graduate students to adhere to the principles and rules of ethics during research. The author stresses the importance of maintaining morally accepted norms and values in scientific research. The researcher is cognisant of the requirements and attempted to adhere to it at all times. Amongst others, the researcher assured the participants that answers and comments were treated confidentially and that their views will not be questioned in future. Anonymity will be protected and the researcher encouraged the participants to answer frank on the questions posed to them.

According to Leedy and Ormrod (2005:101-103), it is imperative for researchers to adhere to the following ethical issues during research:

- Obtain informed consent. Voluntary participation is a prerequisite. Participants should be given sufficient information concerning the research to be able to make an informed decision. The researcher gave the participants a comprehensive synopsis of the nature of the research, after which the necessary consent was obtained in writing.
- Protect the participants from harm. The researcher endeavoured to conduct the interviews under circumstances where the participants were comfortable and not exposed to stress or embarrassment.
- The right to privacy should be respected. No responses by a participant should be disclosed in a manner that exposes the specific participant, unless the participant agrees in writing to disclosure. The researcher allocated a code number to each of the participants to honour their privacy.
- Honesty with professional colleagues. Researchers may not fabricate data to support a specific finding. The researcher was cognisant of the requirement to ensure that all sources are acknowledged to refrain from committing plagiarism.
- Sources consulted. Reference was made to all sources incorporated in the research by including them into the list of references.

According to the South African Police Service National Instruction 1/2006, the purpose of the instruction is to regulate applications by civilians and members of the South African Police Service who would like to conduct research for private purposes (South African Police Service, 2006:5). The instruction sets out the procedure to be followed in order to obtain the necessary authority. The instruction was adhered to and the required authorisation was granted by the Provincial Commissioner North West. A copy of the authorisation is attached as per “Annexure D”.

### 1.13 Research structure

To ensure that the research report is well-structured, that the content follows a logical order and that the research aims and questions are addressed, the chapters are outlined as follows:

#### Chapter 2: Undercover Police Operations

In this chapter, the main focus is on undercover operations. It explains the legal framework for this covert investigation technique, the justification thereof and criticism against the system. The chapter devotes time to the phases of undercover operations and attempts to describe the relationship between undercover operations and forensic investigation.

#### Chapter 3: The use of informers during undercover police operations

In this chapter, the main focus is on how to use informers during undercover police operations. The chapter describe different types of informers, their motives for giving information and roles that informers may fulfil during undercover operations. The informer privilege and aspects that need consideration when making use of informers during undercover operations are discussed comprehensively.

#### Chapter 4: The conclusion

This chapter will inform the reader of what was discovered during the research and will relate to the aims and research questions on which the findings and recommendations are based.

## CHAPTER 2

### UNDERCOVER POLICE OPERATIONS

#### 2.1 Introduction

The word “detective” originated in 1853 when it was referred to the Scotland Yard investigators in that manner (Gilbert, 2004:9). According to the New English Usage Dictionary (2001:216), detection means: “*finding out, discovering and exposing*”. It is clear that the importance and need for proper investigations was already recognised in the 19<sup>th</sup> century.

According to Tilley (2005:178), investigative techniques and the development thereof focuses on the finding of guilt and the allocation of blame. The prevention of similar crimes stands secondary to the main purpose of clearing up crime. Tilley (2005:171) is of the belief that the use of science in policing techniques may lead to crime reduction where there are scientific endeavours to control crime.

Marais and Van Rooyen (1990:149) indicate that undercover operations are a universal accepted method at the disposal of the police to investigate certain criteria of criminal behaviour. Van der Westhuizen (1996:88) honours the opinion that undercover operations refer to the actions of people who are generally referred to as spies, informers or secret agents.

Van der Westhuizen (1996:88) and Clarke et al. (2004:332) emphasise that undercover operations are utilised in respect of consensual crimes or so-called “victimless” crimes such as the illegal dealing in gold. Broodryk et al. (2001:320) agree with van der Westhuizen and indicate that the method is in particular effective to address organised crime. Welch (2000:1) refers to organised criminal conduct as: “*criminal conduct or an endeavour thereto by any enterprise or group of persons who*

*have a common goal in committing crimes of whatever nature in an organised manner”.*

During the process of the investigation of crime it is important to differentiate between overt and covert techniques. Overt techniques refer to conventional police methods to gather evidence, such as for instance the obtaining of a witness statement. Undercover operations is a covert technique as the investigation is conducted in secrecy and the suspects are not aware of the fact that they are being investigated for organised crime related offences (Broodryk et al., 2001:320).

This chapter will further focus on important aspects with regard to forensic investigations and undercover operations. The chapter will also reflect on criticism against undercover operations and conclude with a discussion on legal aspects to consider ensuring that undercover operations are fair and within the boundaries of the law.

## 2.2 Meaning of forensic and criminal investigation

Marais and Van Rooyen (1990:17) and Lee, Palmbach and Miller (2001:16) indicate that the investigation of crime: *“is a scientific and systematic search for the truth with the purpose of clearing up the committed crime”*. Marais (1992:1) discusses the meaning comprehensively and states that criminal investigation is the lawful tracing of humans and objects. It directly and indirectly contributes to the reconstruction of a crime scene by conveying information regarding the persons involved in the crime.

Collins Thesaurus A-Z Discovery (2005:152) defines criminal as: *“unlawful, illicit, wrong, illegal, corrupt, crooked, felonious, immoral etc.”*. Investigation is defined by Oxford Advanced Learners Dictionary (2000: 632) as: *“carefully examine the facts of a situation, an event or a crime; to find out the truth about it”*. The New English Usage Dictionary (2001:435) defines investigation as: *“an enquiry or research”*. Monk (1998:

56) defines crime as: “*any act committed in violation of a law that prohibits it and authorises punishment for its commission*”.

It is the experience of the researcher that the investigation of crime is conducted according to tested and trusted investigative methods and techniques in order to ensure that evidence is complete and orderly gathered to pass the test of admissibility in court. Schmalleger (2005:237) defines criminal investigation as: “*The process of discovering, collecting, preparing, identifying and presenting evidence to determine what happened and who is responsible when a crime occurs*”. According to McDevitt (2005:5-7), the investigation of crime is a process that commences at the reporting of the crime and is only completed after the accused is convicted or the case is concluded due to some or another reason. Gilbert (2004:64) explains that the process consists of three phases namely:

- The preliminary investigation. Reporting of the crime, crime scene management and the gathering of evidence from the crime scene.
- In depth investigation. Comprehensive investigation of the matter by obtaining witness statements, forensic reports and identifying the suspects.
- Final investigation. Arrest of the perpetrator and submitting the comprehensive case docket to court for litigation purposes.

According to Van der Westhuizen (1996:9), forensic refers to a specific competency that is aimed at providing law enforcement with specific scientific knowledge. The author honours the opinion that the scientific approach evolved even before the establishment of the South African Police in 1913. Lambrechts (2001:93) explains that forensic investigation is aimed at the instituting of court proceedings, both for criminal and civil litigation. The author emphasises that scientific knowledge must be applied to a legal problem to be classified as a forensic investigation. According to the New English Usage Dictionary (2001:318), forensic is defined as: “*used in a court of law or in the tracking of criminals*”.

Saferstein (1990:1) and Van der Westhuizen (1996:9) concur that forensic science depicts the application of science onto law. Erzinglioglo (2000:14) is of the opinion that forensic investigation deals with a specific manner of thinking. A rational way of thinking is important, as it will determine which method or technique will be utilised to address the crime to be investigated. Forensic (2009) directs that the word forensic stems from the Latin word "*Forum*" and it means related to courts. Forensic refers to a broad spectrum of sciences to answer questions of interest to the legal system. According to Swanson, Chamelin and Territo (2003:3), forensic methods and techniques are utilised during the investigative process in order to gather evidence and information.

From the interviews conducted with the thirty (30) detective participants it became apparent that the participants have an idea about what the meaning of forensic investigation entails, although the participants do not know the exact meaning. Sixteen (16) participants referred to an in-depth investigation with the aim to institute criminal proceedings whilst nine (9) participants were of the opinion that forensic investigations have a scientific base. The remaining five (5) participants have the perception that forensic investigation is a financial investigation.

The researcher is of the opinion, based on the literature, the participant's views and his experience as a forensic investigator, that forensic investigation and criminal investigation is analogue to each other as both investigations are aimed at instituting court proceedings. The difference between the two concepts lies therein that the application of scientific knowledge is a pre-requisite for an investigation to be classified as a forensic investigation. The researcher agrees with Lambrechts (2001:93) in this regard. In recent years the private and corporate environment started to play an important role in conducting investigations. Almost all private and corporate companies refer to their investigation units as forensic investigation units. The South African Police Service used to refer to their investigations as criminal investigations, but recently started to use the new term of forensic investigations.

### 2.3 A scientific approach towards crime investigation

Vold, Bernard and Snipes (1998:317) emphasise that the investigation of crime is based on a scientific approach towards the problem of crime and that the approach must be advanced to the benefit of the science. The New English Usage Dictionary (2001: 771) defines science as: "*Knowledge gained by the observation of natural laws and behaviour and arranged according to a system*". It is clear that the word "scientific" is the key word for this section of the chapter. The question is which science is applicable to the investigation of crime?

According to Van der Westhuizen (1996:353), "*proven legal principles provide an acceptable point of departure for a discussion on the science of criminal investigation*". Gilbert (2004:560) states that more cases will be solved if evidence processing was more complete. The author is of the opinion that specialised crime scene processing will resolve the problem. The author's point of view is that a scientific approach with well-trained personnel is needed to locate and effectively gather maximum evidence and clues from a crime scene.

Van der Westhuizen (1996:357) argues that successfully prosecuted and convicted cases has improved substantially, since the South African Police Service adopted a scientific approach towards criminal investigation. This has led to the utilisation of scientific methods, techniques, models and resources.

- Examples of forensic methods:
  - Undercover operations
  - Informer management
  - Interviewing
- Examples of forensic techniques:
  - Ballistics
  - Questioned documents
  - Toxicology

The experience and training of the researcher as a forensic investigator, directs that organised crime is successfully addressed by means of a project driven approach where covert techniques such as undercover operations and informers are utilised to eliminate and investigate the specific threat. Knipe, van der Walt, van Niekerk, Burger and Nell (2002:9) reason that project management is a science, since it is supported by charts, graphs, mathematical calculations and other technical tools.

Carlen and Morgan (1999:64) are of the opinion that due to the seriousness of crime, the police had to change their existing reactive methods and techniques. They further explained that sophisticated covert techniques, databases and meaningful research have contributed towards effective criminal investigation. A scientific approach laid the cornerstone for the development and expansion of existing and new methods and techniques. Gilbert (2004:565) indicates that continuous and meaningful research will be necessary to expand investigative capacity and to provide competent investigators. Investigative research seeks to test or discover various areas of inquiry important to criminal investigators.

James and Nordby (2005:15-635) lists the following examples of forensic investigation methods that have a scientific baseline:

- Forensic Pathology
- Forensic Toxicology
- Forensic Entomology
- Evaluation of the crime scene
- Forensic Psychology, Forensic Psychiatry (Social sciences)
- DNA analysis
- Questioned documents
- Cyber Technology

Gilbert (2004:552) indicates that a scientific approach will empower investigators to project future trends by considering past occurrences and present developments.

According to Gilbert (2004:554-555), innovative law enforcement will result in the development of more effective investigative techniques.

From the research and views of the above-mentioned authors it has become apparent that the wide scope of the science under which, for instance, the natural science, economical science, cyber science, social science and forensic science resorts, finds application within the science of forensic investigation. The ingenuity and perseverance of investigators and researchers will determine how successful they are in the application of science to the investigation of crime.

#### 2.4 Objectives of forensic investigation

It is important to devote attention to the objectives of forensic investigation as it will direct investigators to concentrate and pay attention to the relevant and important aspects of forensic investigation. It will contribute to obtain the required results with the investigation of crime. McDevitt (2005:3-5), Marais and Van Rooyen (1990:17) and Marais (1992:1) agree that the primary objective of criminal investigations is to arrest criminals after sufficient evidence has been gathered.

The thirty (30) detective participants remarked as followed on the objectives of forensic investigation. Twenty one (21) participants referred to evidence gathering as paramount to ensure that justice is served. Nine (9) participants referred to a myriad of answers including the seizure of exhibits, to recover stolen property, successful prosecutions and the reconstruction of a crime scene. This is indicative of their own experience and knowledge of the objectives of forensic investigations.

Persad and Joubert (2001:225), Lyman (2002:14), Marais and Van Rooyen (1990:19), Smit, Minnaar and Schnetler (2004:161) and van der Westhuizen (1996:4) corroborate the statement by McDevitt (2005:3-5), Marais and Van Rooyen (1990:17) and Marais

(1992:1) and the detective participants and they agree that the following secondary objectives are important for effective investigation:

- Make a decision on whether a crime was committed or not. For example: Was it murder or did the deceased commit suicide?
- Identify the crime that was committed. It is important to correctly identify the crime. It may influence the immediate and follow-up investigations as decisions must be taken on specific methods and or techniques to be utilised to clear up the crime incident. A thorough and effective investigation of the crime scene is therefore important to correctly identify the committed crime.
- Gather evidence. As the crime scene is predominantly a reliable source of evidence it is important to comprehensively gather evidence from this important source. It is important for investigators to know that eye witnesses, exhibits, informers and technological evidence are amongst numerous other sources important sources of evidence.
- Gather intelligence. Investigators need to be cognisant that intelligence is the end product of information that was processed, verified and evaluated to a usable product. Intelligence is not per se evidence.
- Recover stolen property.
- Prevent crime.
- Individualise the perpetrator(s).
- Arrest the suspect(s).
- Connect the suspect(s) to similar offences.
- Involvement during the litigation process.

The above discussion has outlined the most important objectives, which will properly guide investigators in their search for the truth. The detective participants have adequate knowledge of the objectives of forensic investigations to properly guide them during the investigative process. From the discussion it has become clear that the investigation of precious metals related offences by means of undercover operations and utilising informers are in line with the objectives of forensic investigation. An undercover operation is a forensic method to gather evidence, to recover stolen

property (precious metals) and to identify and arrest the perpetrator. The use of informers during these undercover operations serves the purpose of gathering evidence and intelligence.

## 2.5 Meaning of undercover operation

New English Usage Dictionary (2001:969) defines undercover as: “*acting secretly, acting as a spy*”. Collins Thesaurus A-Z Discovery (2005:745) elaborates more on the meaning and defines undercover as: “*secret, covert, clandestine, private, hidden, intelligence, underground, spy, concealed, confidential*”. It is clear from the definitions that secrecy and spying is integral to undercover operations.

Ashcroft (2002:1) describes an undercover operation as a series of related undercover activities that is conducted over a period of time. Mention is made that these operations are operational for at least six to twelve months. Welch (2000:2) defines an undercover operation as: “*any operation to detect, investigate, uncover or prevent organised criminal conduct by using an official and/or his or her agent:*

- *For the purpose of which the official and/or his or her agent will be expected to use an assumed name or cover identity and to keep secret the fact that he or she is such official or agent*
- *During the course of which it is reasonably foreseeable that the official and /or his or her agent may be expected to be involved in the commission of an offence or offences to ensure the success of the operation”.*

All five (5) advocate participants share the opinion that undercover operations have the following characteristics:

- It is an unconventional method to gather evidence in respect of organised criminal activities.
- Agents are used to infiltrate and expose syndicates.

- The method is used to combat crime which can not be addressed effectively by means of conventional investigative methods.

The thirty (30) detective participants were requested to state what they understand of the concept undercover operation. Their responses were summarised and they associated the following characteristics with undercover operations:

- Secrecy is the key word.
- Undercover agents are used to infiltrate and expose organised crime syndicates.
- Controlled deliveries and purchases forms part of undercover operations.
- Undercover operations are medium to long term investigations.
- Agents who act *bona fide* will be indemnified against prosecution.

Based on the literature consulted, experience of the researcher and the views of the participants the researcher is of the opinion that an undercover operation is a covert investigative method to expose, detect and investigate crimes committed in secrecy by means of agents who ostensibly participate in the identified crime(s) to gather evidence against identified suspects. According to Broodryk et al. (2001:335), an undercover operation and a trap is analog to each other. Welch (2000:2) defines a trap as: “*set either as an isolated event or as part of an undercover operation and includes the person involved in such a trap*”.

The thirty (30) detective participants were requested to give their opinion on whether an undercover operation is analog to a trap. Twenty three (23) participants embraced the view that an undercover operation is in fact a trap, although a trap is a single event where the suspect is arrested directly after the transaction has been concluded. Seven (7) participants remarked that it is not similar concepts. They are of the opinion that an undercover operation is an ongoing process to gather evidence against syndicate role players.

The detective and advocate participants view an undercover operation as an operation that is an ongoing process where evidence is gathered over a prolonged period of time, before the termination and arrest of the syndicate role players. From the discussion it became clear that an undercover operation is not per se a trap, because undercover operations include traps and other methods to gather evidence against syndicate role players.

## 2.6. Background and justification for undercover operations

### 2.6.1 Historical background

According to Naudé (1999:21), the first trap is found in the Bible in Genesis 3:13 and it reads as follows: *“The Lord, God asked the woman, why did you do this? She replied the snake tricked me into eating it”*. Marais and Van Rooyen (1990:150) indicate that undercover operations came into existence in South Africa after the discovery of diamonds in 1882. The discovery led to serious crime threats concerning the illicit dealing in uncut diamonds. These escalating crimes influenced government to enforce a method to restore law and order.

In the case of *Meyers & Misnum v Rex TS 1907* the court approved of the trapping (undercover operation) system to investigate crime. The Judge remarked as follows: *“It is well that the court should in these trapping cases do all that in it lies to see that no restrictions are relaxed by the police who have charge of the operations”*. The researcher believes that the remark by the Judge unambiguously directed that undercover operations are to be transparent and fairly set by the police.

Lambrechts (2005:680) remarks that undercover operations were regulated previously in the South African law by the general principles of the law. This meant that if evidence before court is credible and admissible the accused would be convicted. The situation changed during 1996 with the adding of section 252(A) to the Criminal Procedure Act, Act 51 of 1977. Section 252(A) of the Criminal Procedure Act, Act 51

of 1977 now judicially regulates undercover operations in South Africa (South Africa, 1977: sec. 252(A)).

### 2.6.2 Justification for the system

According to Carlen and Morgan (1999:64) and Wright (2006:188), police resorted to proactive intelligence driven strategies to effectively address organised crime as traditional reactive methods are fragmented and insufficient. Carlen and Morgan (1999:64) are of the opinion that sophisticated covert techniques such as undercover police officers can successfully gain control over organised crime. Covert techniques are essential as it could reduce the growth and development of organised crime. In its report the Commission of Inquiry (1994:11) corroborate their belief and state that due to the nature of syndicate activities and their role in serious crime, such as the illicit dealing in gold, it is necessary to make use of undercover operations. It is an effective method to combat illegal activities and it is recognised throughout the world.

With regards to the use of informers and undercover operations Broodryk et al. (2001:320-324) and Nel and Bezuidenhout (1997:364-370) are in agreement that it is an effective and necessary method to investigate and address organised crime or the so-called "victimless crimes", of which the theft of precious metals is a major problem in South Africa. Overt techniques are not appropriate as no smuggler will admit his or her involvement to organised crime. Overt techniques refer to conventional investigative methods like for instance interrogation and to obtain a witness statement.

In *S v Pule* 1996 (2) SACR 604 (O) the Judge ruled that undercover operations is an indispensable tool to gather evidence against perpetrators during and after the undercover operation, since criminals are sly and they operate sophisticatedly. In *S v Tsochlas* 1974 (1) SA 565 (A) the Supreme Court of Appeal ruled that undercover operations (traps) is a means of controlling illicit diamond dealing, since it is detrimental to the diamond industry and the fiscus. Lambrechts (2005:681) is of the opinion that the Tsochlas decision is likewise applicable to precious metals.

Prince (2006:12) shows that history was made when the first accused was convicted on racketeering charges in South Africa, after his illegal dealing in uncut diamonds were investigated by means of an undercover operation over a prolonged period of time. This is a striking example of how successful syndicate leaders can be brought to book by means of an undercover operation. Prince (2006:12) agrees with Albanese (2004:15) by mentioning that a successful undercover operation can produce convictions and disrupt syndicates entirely.

According to Marais and Van Rooyen (1990:154), the application of undercover operations is justified and in the interest of the community, when other methods and techniques are not suitable under the circumstances. The author is of the opinion that the following considerations are important in deciding if undercover operations are justifiable:

- Interest of community. The community at large expects from the police to address crime effectively. The South African Police Service will adhere to the obligation placed on them by the Constitution of the Republic of South Africa, Act 108 of 1996 to combat crime.
- Nature of the offence(s).
- Preventative value. The utilisation of undercover operations will discourage intentional perpetrators to conclude illegal activities.

Naudé (1999:13-16) has pointed out that the following arguments are made on behalf of undercover operations:

- There must be a reasonable suspicion of criminal conduct against the suspect. It is the experience of the researcher that an affidavit based on facts will suffice to create the suspicion.
- Serious crime must be committed or planned. Examples: Organised crime and murder.

- Responsible, credible organisations and persons with a good character must lead these investigations, for instance the South African Police Service.
- The principle that those who are guilty of committing crime must be punished is applicable here.

Kleinig (1996:152) and Naudé (1999:13-16) concur by remarking that undercover operations are justified under circumstances where the suspect would have committed the said offence in any event even if there were no intervention by the state. Marais and Van Rooyen (1990:154) comment that undercover operations are justifiable against individuals who commit the said offence(s) on a regular and ongoing basis.

*S v Dube* 2000 (1) SASV 53 (N) is an excellent example of where the accused were actively and continuously involved in criminal conduct before the undercover operation commenced. The court ruled that the accused would have committed the offence, even if an undercover operation had not been set for the accused. Therefore the undercover operation only served as an instrument to conclude the transaction and to gather evidence against the accused.

Albanese (2004:13) honours the opinion that undercover operations and the use of informers are necessitated, as it can contribute towards determining if and to what extent links exist with organised crime. Albanese (2004:13) is in agreement with Buckwalter (1983:128) by adding that undercover operations is the tool to gather evidence that could not otherwise be obtained.

In a recent verdict by the High Court in *S v Thinta and Others* 2006 (1) SACR 4 (ECD) it was ruled that undercover operations are an acceptable method to gather evidence and exhibits. The Judge indicated that it is in the interest of justice to gather all evidence before terminating an operation. In the matter the South African Police Service purchased firearms from the accused over a prolonged period of time before arresting him.

The advocate participants were requested to state if undercover operations is an effective manner to address precious metals related crimes? All five (5) advocate participants agreed that undercover operations are especially an effective method to combat precious metals related crimes. One of the advocates made the striking remark that criminal trials over many years practically illustrated that undercover operations are an important and effective instrument to combat precious metals related crimes. The following reasons were offered to prove their views:

- It is the only effective method to gather evidence and prosecute syndicate king pins.
- Conventional methods will not suffice, since these syndicates are well organised and sophisticated in the execution of their illegal operations.
- Undercover operations aids towards the infiltration of the inner circle of syndicates to gather court driven evidence.

The same question was put forward to the thirty (30) detective participants. All the participating detectives agreed that undercover operations are an effective method to address precious metals related crimes. These detectives added the following as corroboration for the views of the advocates:

- The method is effective to address the “faceless” money suppliers and launderers, because they have a hands-off approach.
- Undercover operations give investigators a holistic view of the compilation of a syndicate and the respective roles of the leaders, runners and associates.
- Undercover operations give investigators the opportunity to successfully address all the role players within a syndicate hierarchy, from the lower echelon to the syndicate leaders.
- The method is effective, because the stolen precious metals can be recovered from the perpetrators.

From the discussion it is clear that the participating detectives and advocates, as substantiated by Marais and Van Rooyen (1990:154), Naudé (1999:13-16), Kleinig

(1996:152) and Albanese (2004:13) are of the opinion that the application of undercover operations are justified to control serious organised crime.

As a result of the afore-mentioned research the researcher strongly believes that the golden threat towards fair undercover operations is that the idea to commit serious crime must be born from the mind of the suspect. A reasonable suspicion must exist against such a person before an undercover operation may be launched against the syndicate.

## 2.7. Criticism against undercover operations

As discussed by Kriegler and Kruger (2002:636), the moral and lawful problems with traps and undercover operations accumulated over decades up to the point where the trapping system was reviewed by the South African Law Commission during 1994. In its report the Commission of Inquiry (1994:12) indicated that the community at large is of the opinion that undercover operations are set arbitrarily to catch whoever can be led into temptation.

The report on the Commission of Inquiry (1994:5) reports that Judge Van Heerden and his committee had to decide on the following aspects:

- The application of the trapping system in South Africa.
- Whether there is justification and a need for the system as a method of investigating crime.
- Is there sufficient control over undercover operations?
- What effect will a future human rights dispensation in South Africa have on the use of undercover operations?

Naudé (1999:20) indicates that the source of the criticism against undercover operations is vested in the application of the trapping system and not as such with the system itself. The author states that deception is used as technique to be successful with the proactive conduct by the South African Police Service. Lyman (2006:13)

cautions that although undercover operations are an effective manner to address serious crimes, protocol needs to be developed to eliminate unacceptable tactics during the investigative phase.

In *S v Ohlenschläger* 1992 (1) SACR 695 (T) the learned judge discussed the criticism against the system comprehensively and remarked that agents commit offences in many instances. The Judge added that the authorities need to decide to what extent the police are mandated to trap offenders in a criminal manner and manufacture offences in the name of combating crime.

Enticement by informers who has lured unwary suspects into committing crimes, raised numerous criticism by the judiciary in the past. In *S v Hayes and Another* 1998 (1) SACR 625 (OPD) the conduct of the informer and agent went beyond the creating an opportunity to commit an offence. Their actions led to the acquittal of the appellants on appeal, as the actions of the informer and agent violated the right of an accused to a fair trial, as enshrined in section 35 of the Constitution of the Republic of South Africa, Act 108 of 1996.

In *S v Nortjé* 1996 (2) SACR 308 (CPD) the appellant was arrested for the illegal dealing in uncut diamonds. She had a previous conviction for a similar offence. The appellant argued that she had been enticed by the informer to illicit diamond dealing. The informer did not testify in the case. The court of appeal ruled that the conviction and sentence were set aside as the court was satisfied that the appellant was enticed into illegal diamond dealing.

Kleinig (1996:153-159) argues that a distinction must be drawn between “unwary innocent suspects” and “unwary criminals” when determining whether a person is culpable of committing an offence during an undercover operation. If it is found that the disposition was to implant the offence in the mind of the innocent person, then the defendant is not culpable. Lambrechts (2005:690) concur with Kleinig (1996: 153-159) by stating that the initiative to commit the offence must come from the side of the

accused, not from the side of the agent or informer. The undercover operation must therefore be the result of the creative activity by the accused and not of the agent or informer.

In *R v Clever* 1967 (4) SA 256 (RA) the Judge ruled that the temptation affected by the trap must not be greater than the temptation which normally exists. Schmallegger (2005:166) and Madinger (2000:208) indicate that entrapment is a defence in the United States of America, when the criminal activity originates by the agent and or informer. Schmallegger (2005:166) and Madinger (2000:208) further stress that it is not entrapment when the agent merely provided an opportunity to the willing offender to commit a crime.

Clarke et al. (2004:336), Naudé (1999:16-20) and Welch (2000:1) comprehensively discuss the problems with the application of undercover operations. The identified areas are as follows:

- Deception is used to lure suspects into illegal transactions. A trap is a person with a view of securing the conviction of another, proposes certain criminal conduct to the person, and the trap ostensibly takes part therein. That depicts that since the agent or trap has a motive to obtain a conviction he or she can easily unfairly influence an individual into committing crime. The conduct of the agent and or informer favours the prosecution.
- Informers are dubious characters who are themselves involved in criminal activities.
- The authorities must combat crime, not create it.
- The poor and needy and mentally deficient are approached by the police.
- Undercover operations violate individual's right to privacy and freedom of expression.

Furthermore Lambrechts (2005:686) and Naudé (1999:16-20) concur with Marais and Van Rooyen (1990:156-157) and add that the following aspects also need consideration as founded criticism against undercover operations:

- Fabrication of evidence.
- Police corruption. The Parliamentary Portfolio Committee on Justice recommended during 1993 that legislation needed to be passed to regulate undercover operations due to high levels of police corruption.
- Abuse of the judicial process. Based on the comments by the authors the researcher is of the opinion that the SAPS has an obligation to ensure that only experienced, well trained and responsible investigators are entrusted to conduct undercover operations.

Madinger (2000:208) indicates that undercover operations will be fairly set by ensuring that no unreasonable temptation “entrapment” takes place. The question posed to the advocate participants was: “What measures they implement to ensure that undercover operations are fairly set?”. The five advocates gave a combination of the following answers:

- Strict boundaries must be set for the conduct of the agent(s) and informer.
- Regular contact between the assigned advocate, handler, investigator, informer and agent.
- Compliance with section 252(A) of the Criminal Procedure Act, Act 51 of 1977.
- The handler must have sufficient control over the informer and agent.
- The conduct of the agents and informers must not go beyond the creating of an opportunity to commit an offence.

The same question was posed to the thirty (30) detective participants. An array of answers was given of which the following were mentioned the most frequently:

- Corroborative evidence must be gathered.
- Obtain section 252(A) of the Criminal Procedure Act, Act 51 of 1977 authorisation.
- Proper communication channels and control measures over the agent.
- Proper training of the informer, agent, handler and investigator on legal aspects.

When the views of the authors, reported judgements and participants were studied it became eminent that the criticism against the trapping system has merit, due to the actions of informers and agents during the application of undercover operations. The criticism against the application of undercover operations and traps can be summarised as follows:

- Enticement by informers who are mostly dubious characters.
- Unacceptable tactics such as deception are used to lure suspects into the commissioning of an offence.
- Fabrication of evidence.
- Police corruption.
- Abuse of the judicial process.

Based on the personal experience of the researcher and the literature at hand the researcher concurs with Lambrechts (2005:690) that the suspect must be the architect to commit crime, whilst the informer and agent must play a passive role to a large extent. Investigators who engage in undercover operations must be cognisant of criticism against undercover operations. These investigators should endeavour to counter all possible criticism by implementing proactive measures to ensure that undercover operations are set in a fair manner. This might limit criticism to the minimum.

## 2.8 Legal aspects with regards to undercover operations

In order for undercover operations to be applied fairly and to minimise criticism it is important for users of undercover operations to be knowledgeable about and cognisant of the law that is applicable to the system. In addition it is equally important for detectives to adhere to the internal directives of the South African Police Service in order to apply the system correctly.

All the advocate and detective participants agree that undercover operations are judicially sufficiently regulated. The detective and advocate participants were requested to motivate their answers:

- All thirty (30) detective and five (5) advocate participants referred to section 252(A) of the Criminal Procedure Act, Act 51 of 1977.
- Twenty one (21) detective and four (4) advocate participants referred to *juris prudence* (case law).
- Nineteen (19) detective participants and all five (5) advocate participants referred to the Constitution of the Republic of South Africa, Act 108 of 1996.
- Seven (7) detective participants broadly referred to the Criminal Procedure Act, Act 51 of 1977.

Regrettably not one of the participants referred to section 208 (Cautionary rule) of the Criminal Procedure Act, Act 51 of 1977. The above-mentioned aspects and section 208 of the Criminal Procedure Act, Act 51 of 1977 will be addressed in this part of the chapter.

### 2.8.1 Cautionary rule and corroboration

Kriegler and Kruger (2002:518) indicate that the cautionary rule is to be found in section 208 of the Criminal Procedure Act, Act 51 of 1977. This section stipulates that a conviction may follow upon the testimony of a single witness. The cautionary rule is rules that compel magistrates to treat certain witnesses with suspicion. Joubert, Struwig and van Veenendaal (2001:398-402) state that the following categories must be treated with caution:

- agents/traps
- single witnesses
- accomplices
- children
- complainants of sexual crimes

When adjudicating the above-mentioned categories testimony the magistrate must seek for corroboration to make sure that a wrong verdict is not made. Kriegler and Kruger (2002:518) and Joubert et al. (2001:398-402) concur that corroboration in the form of co-agents, observations, interception and monitoring of conversations are important to enable the presiding officer to make the correct ruling.

In *S v Mabaso* 1978 (3) SA 5 (O) it was decided that the evidence of an undercover agent must be treated with suspicion as agents pretend to be involved with criminal activities, whilst they have a motive to arrest the suspect and secure his or her conviction. Sorgdrager, Coertzen, Bezuidenhout and Nel (1997:279) and Kriegler and Kruger (2002:638) concur and refer to the rules laid down by the court in *S v Mabaso* 1978 (3) SA 5 (O) to ensure that the evidence of agents are reliable. The following aspects need to be highlighted:

- Objects used during the undercover operation must be properly marked.  
Example: Money, unwrought gold.
- Agents must be searched before and after undercover operations.
- Agents must be kept under observation during the undercover operation.

Kriegler and Kruger (2002:522) indicate that the testimony of agents needs to be honest and in particular reliable. Welch (2000:8) agrees with the former authors and emphasises that courts must ensure that accused receive a fair trial. Therefore courts will carefully scrutinise the evidence relating to undercover operations against the cautionary rule.

The thirty (30) detective participants mentioned a myriad of important measures to corroborate the evidence gathered during an undercover operation. The participants were requested to indicate how they would ensure that corroborative evidence is gathered in terms of section 252(A) of the Criminal Procedure Act, Act 51 of 1977. The most prevalent answers are as follows:

- Make use of co-agents during the undercover operation. It will counter an averment by the defence council that misrepresentations were made to the accused.
- Obtain affidavits of all the role players directly after the transaction.
- The member/officer in charge of the operation must keep detailed crime scene notes of the occurrences.
- Observation and surveillance duties must be conducted, if possible.
- Make use of audio/video material if circumstances prevail.
- Take photos of the transaction.
- Obtain and verify documentary evidence, for instance gold transaction notes and calculations.
- Search agents before and after transactions.
- Conduct interception and monitoring in terms of sections 16 to 20 of the Regulation of Interception of Communications and Provision of Communication-related Information Act, Act 70 of 2002.

When the responses of the participants are compared with the literature it is clear that the detectives have a good knowledge basis of how to corroborate evidence gathered during an undercover operation. Section 208 of the Criminal Procedure Act, Act 51 of 1977, reported judgements and the above-mentioned authors unambiguously alerts users of undercover operations and traps to sufficiently corroborate evidence, since the evidence of agents or traps will be evaluated and scrutinised with circumspect.

#### 2.8.2 Section 35(5) of the Constitution of the Republic of South Africa, Act 108 of 1996

Section 35(3) of the Constitution of the Republic of South Africa, Act 108 of 1996 makes provision that every accused has the right to a fair trial. Section 35(5) of the Constitution of the Republic of South Africa stipulates that evidence obtained in a manner that violates any right in the Bill of Rights must be ruled inadmissible and excluded from the trial if it will render the trial unfair or be detrimental to the

administration of justice (South Africa, 1996: sec. 35(3)). It is commonly referred to as the exclusionary rule.

In *S v Mkonto* 2001 (4) BCLR (CPD) the judge held that our law makes provision for a determination if an accused had a fair trial or not by taking into consideration the provisions of section 252(A) of the Criminal Procedure Act, Act 51 of 1977. The Judge ruled that our law does not make provision for a defence of entrapment, but that the rights of an accused to a fair trial as enshrined in the Constitution of the Republic of South Africa is paramount.

In a recent verdict in *S v Mthembu* [2008] JOL 21609 (SCA) the Supreme Court of Appeal ruled that the conduct of the police was of such a nature that it would compromise the integrity of the judicial process and dishonour the administration of justice if the evidence is not excluded from the proceedings. It resulted in the exclusion of the inadmissibly obtained evidence in terms of section 35(5) of the Constitution of the Republic of South Africa, Act 108 of 1996.

In both *S v Hayes and Another* 1998 (1) SACR 625 (OPD) and *S v Nortjé* 1996 (2) SACR 308 (CPD) the learned judges ruled that the conduct by the agents/informers during these undercover operations were fundamentally so unfair that the right to a fair trial was violated and their convictions and sentences were set aside. In both instances the court found that the suspects were unfairly enticed and lured into traps by the agents/informers (Lambrechts, 2005:711-712). In *Mendes v Kitching* 1995 (2) SACR 634 (E) the Judge ruled that the specific circumstances of every undercover operation should be adjudicated separately, since all undercover operations are not unconstitutional.

All the detective and advocate participants were requested to mention what problems they encounter with informers during undercover operations. As can be seen from the advocate and detective participants responses more than one participant could have provided the same answer or more than one answer in the response to the question.

The thirty (30) detective participants responded as follows:

- Nine (9) participants mentioned that a limited number of informers entice suspects to commit crime.
- Seven (7) participants cited excessive drinking as a frequent reason for failure in the past.
- Three (3) participants reported that informers become so anxious to conduct a transaction that they abandon all safety rules.
- Four (4) participants referred to informers that act beyond their mandate.
- Nine (9) participants mentioned poor reporting abilities, both verbally and orally.
- Eleven (11) participants pointed to sub-standard informer handling that contributes to informers acting in an unacceptable manner.

The five (5) advocate participants reported as follows:

- Three (3) participants referred to informers that supply information that is not factually correct.
- All five (5) participants mentioned that some informers revert to enticement to obtain successes.
- Two (2) participants referred to informers with ulterior agendas as a matter of concern.
- One (1) participant mentioned that some informers who were used as witnesses in the past did not make a good impression to court.

The remarks by the thirty (30) detective participants and five (5) advocate participants in relation to enticement, ulterior motives and acting beyond their mandate are in line with the reported judgments that informers are in some instances the reason for a successful argument that the constitutional rights of an accused have been infringed. This is an area for concern, since it may jeopardise future undercover operations.

Based on the literature, interviews and personal experience of the researcher the researcher is of the opinion that the Constitution of the Republic of South Africa, Act 108 of 1996 is the supreme law of South Africa and the Law is protecting all the citizens of the country. It is therefore imperative for members of the South African Police Service, agents and informers to respect the rights of individuals as enshrined in the Constitution of the Republic of South Africa, Act 108 of 1996.

### 2.8.3 Section 252(A) of the Criminal Procedure Act, Act 51 of 1977

#### 2.8.3.1 Purpose and effect of section 252(A) of the Criminal Procedure Act, Act 51 of 1977

According to Brown (2001:125), it is of utmost importance that the prosecutor, investigator, informer and agent involved in an investigation have discussions with regards to undercover operations. This will ensure that legal aspects are adhered to, if the prosecutor is willing to agree to an undercover operation with the specific informer.

The five (5) advocate participants were requested to make suggestions as to how to minimise problems with informers during undercover operations. The following are their suggestions:

- Co-operation and communication between the investigator, prosecutor and agents are essential to achieve the desired results.
- Proper and thorough consultation and assessment of the informer is necessary to minimise problems during undercover operations.

Van Rooyen (2001:145) purports that the legislature sought to *inter alia* avoid the conviction of innocent people who was unfairly and improperly tricked into the offences when adding section 252(A) of the Criminal Procedure Act, Act 51 of 1977.

The thirty (30) detective participants summarise the purpose of section 252(A) of the Criminal Procedure Act, Act 51 of 1977 to be:

- A control measure to regulate undercover operations and to set limits. The agents, informer and handler are bound to these limits and they need to execute the operation within these boundaries.
- It provides guidelines to the parties involved.
- It authorises an undercover operation.
- The section indemnifies agents who acted in good faith.

Kriegler and Kruger (2002:637), Lambrechts (2005:685-686), Commission of Inquiry (1994:3) and Welch (2000:2) concur that the following aspects serve as the purpose for the adding of section 252(A) of the Criminal Procedure Act, Act 51 of 1977:

- Undercover operations to be retained in South Africa as a method to investigate and combat crime.
- Undercover operations are to be subjected to greater judicial control.
- Entrapment is not created as a defence.
- The court has the discretion to differentiate between good and bad undercover operations.
- Evidence gathered by means of admissible methods will be accepted.
- The court has the discretion to exclude evidence improperly obtained if it will render the trial unfair or it will be detrimental to the administration of justice. The onus rests on the state to prove on a balance of probabilities that the evidence is admissible.

From the discussions by the participating detectives and the above-mentioned authors it is evident that both groups embrace the view that the purpose of section 252(A) of the Criminal Procedure Act, Act 51 of 1977 is to regulate the setting of undercover operations. The above-mentioned author's views are from a judicial perspective, whilst the participating detectives view the purpose from an operational perspective.

The five (5) advocate and thirty (30) detective participants were requested to elaborate on the effect of section 252(A) of the Criminal Procedure Act, Act 51 of 1977 on the execution of undercover operations. The remarks of the thirty (30) detective participants were summarised as follows:

- The section promotes transparency by creating an environment in which undercover operations are set in a lawful and fair manner and suspects participate in the crimes voluntarily.
- It provides agents and informers with a mandate and guidelines and it prevents agents from going beyond the creating of an opportunity to commit an offence.
- The section demarcates undercover operations and limits enticement.
- Agents who acted in good faith are indemnified against prosecution.

The five (5) advocate participants remarked as followed:

- The section ensures a focussed, responsible and better controlled operation.
- Better evidential material is gathered.
- It prevents agents from going beyond the creating of an opportunity to commit an offence.
- It has the effect of regulating undercover operations and thereby promoting transparency and a fair trial.

From the different perspectives it is eminent that the two samples embrace each other on the effect of section 252(A) of the Criminal Procedure Act, Act 51 of 1977 on the execution of undercover operations. It is clear that this section has created an environment from where undercover operations are conducted in a transparent, focussed, controlled and fair manner. Section 252(A) of the Criminal Procedure Act, Act 51 of 1977 established a platform where agents and investigators need to conduct undercover operations within the boundaries set by the Director of Public Prosecutions and the framework of the section.

### 2.8.3.2 Discussion of section 252(A) of the Criminal Procedure Act, Act 51 of 1977.

Section 252(A) of the Criminal Procedure Act, Act 51 of 1977 consists of seven sub-sections. Clarke et al. (2004:338-340) indicate that sub-section (1) of section 252(A) of the Criminal Procedure Act, Act 51 of 1977 stipulates that any law enforcement officer, official of the state or any other person authorised for such purpose may engage in an undercover operation to: detect, investigate, prevent or uncover the commission of an offence.

Kriegler and Kruger (2002:637) are of the opinion that it is not clear what is meant by law enforcement officer and official of the state as none are defined in the act. The author suspects that it refers to policemen and peace officers. Lambrechts (2005:688) however explains that the terms refer to policemen, traffic officers, Correctional Service employees, National Intelligence Agency personnel and South African Secret Service members.

Sub-section (1) of section 252(A) of the Criminal Procedure Act, Act 51 of 1977 further entails that evidence obtained shall be admissible and admitted as evidence, if the conduct does not go beyond the creating of an opportunity to commit crime. Lambrechts (2005:690) and Welch (2000:2) agree that it means that the agent(s) are not permitted to incite, instigate, command or procure the accused into committing the offence. These authors are further of the opinion that if the agent played an active role in persuading the accused to commit the offence, a ruling that their conduct went beyond the creating of an opportunity to commit an offence is inevitable. Kriegler and Kruger (2002:639) add that it will not go beyond the creating of an opportunity to commit an offence if the temptation is not bigger than it normally appears in our community.

Sub-section (2) of section 252(A) of the Criminal Procedure Act, Act 51 of 1977 makes provision for the factors that need to be considered when the court rules on whether the conduct has gone beyond the providing of an opportunity to commit an offence.

The legislature deemed it fit to include fourteen factors that need to be considered. Lambrechts (2008:71) proposes that investigators need to properly prepare themselves to answer on all fourteen aspects, since defence council might cross-examine a state witness on the fourteen factors. In S v Hammond 2008 (1) SACR 476 (SCA) the Supreme Court of Appeal ruled that there is no requirement that all fourteen factors need to be considered by the trial court.

In a recent verdict in S v Van der Berg and Another 2008 (2) SACR 319 (CPD) the judge ruled that the conduct of the police went beyond creating an opportunity to commit an offence, as they failed to prove on a balance of probabilities, that subsection 2(a)(b)(c)(d)(e) and (f) of section 252(A) of the Criminal Procedure Act, Act 51 of 1977 were adhered to. This resulted in the exclusion of the evidence obtained by means of the trap. Subsequently the convictions and sentences were set aside. Kriegler and Kruger (2002:638) discuss the fourteen factors that investigators need to prepare themselves for as follows:

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

Welch (2000:2) decided that prior written approval shall be obtained from the relevant Director of Public Prosecutions before an undercover operation is undertaken. The author indicates that prior approval is not needed in circumstances where it is the objective to immediately arrest the accused for the committed crimes. Lambrechts (2005:694) indicates that court also have to consider if the instructions issued by the Director of Public Prosecutions have been adhered to. That is if specific guidelines or instructions were issued.

- (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.
- (iii) The seriousness of such offence.

Lambrechts (2005:694) indicates that specifically with regard to gold cases, it is important for investigators to have the necessary evidence to their disposal to prove that the occurrence of the theft of and dealing in gold threatens the national economy of South Africa. Based on the experience of the researcher in cases of this nature the researcher is of the opinion that investigators can also prove that the illegal smuggling of gold is a serious offence by indicating to court that it is listed as schedule 1 offences in the Prevention of Organised Crime Act, Act 121 of 1998. Coetzee and Horn (2006:35-37) illustrate by means of statistics the magnitude of the threat. Statistics on the prevalence of the crimes for the period January 2000 to June 2003 is reflected in tables 2-1 and 2-2.

<b>Year</b>	<b>Mass in kg.</b>	<b>Cases</b>	<b>Arrests</b>
2000	25,560.9	2164	1549
2001	43,127.9	1441	1497
2002	544,987.3	1806	1332
2003	19,578.5	1201	867
<b>Total</b>	<b>633,254.6 kg.</b>	<b>6612</b>	<b>5245</b>

Table 2-1: Police statistics of recovered precious metals from January 2000 to June 2003 (Coetzee & Horn, 2006:37)

<b>Branch</b>	<b>2000</b>	<b>2001</b>	<b>2002</b>	<b>2003</b>	<b>Total</b>
Klerksdorp	240	232	198	321	991
Barberton	118	84	119	61	382
Polokwane	26	20	9	23	78

West Rand	519	595	342	131	1587
East Rand	134	57	105	47	343
Rustenburg	0	0	0	0	0
Lichtenburg	4	0	26	0	30
Johannesburg	27	5	26	42	100
Welkom	481	504	507	242	1734
<b>Total</b>	<b>1549</b>	<b>1497</b>	<b>1332</b>	<b>867</b>	<b>5245</b>

Table 2-2: Amount of cases per unit for the period January 2000 to June 2003 (Coetzee & Horn, 2006:37)

- (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 of the accused.

The question that arises is how effective other techniques will be to gather the required evidence to prove the case. The question posed to all the detective and advocate participants was, are undercover operations an effective method to investigate precious metals related crimes? The question and detailed responses are to be found under paragraph 2.6.2 of this chapter.

The core of the participant's argument is that undercover operations are especially effective, because these crimes are committed in secrecy and it offers an opportunity to law enforcement officers to gather evidence against role players within the syndicate. Conventional methods will not suffice to effectively address these crimes.

- (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.

According to Lambrechts (2005:696), it is not clear what the legislature meant when this factor was included into the act.

- (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.

According to circular 43/2/1 of 2004 of the South African Police Service (par.16.2), every meeting or contact between the agent/informer and suspect must be noted and included into the statement of the witness. The contents of the discussions and who made the contact must also be embodied in the statement. Based on the experience of the researcher it is advised that investigators should obtain detailed telephone data to indicate how many times contact was established and by whom.

- (f) The type of inducement used, including the degree of deceit, trickery, misrepresentation or reward.

Frazier (1994:143) indicates that an agent should never suggest a crime or take part in a crime. The suspects must do the thinking, planning and talking to commit crime. This will ensure that the perpetrators cannot claim that they were induced by the agent to commit crime. Circular 43/2/1 of 2004 of the South African Police Service (Par. 14.1 & 16.1), point out that an investigator must ascertain whether enticement, procurement or instigation was employed by the informer or agent to infiltrate the suspect. This circular further directs that the agent who contacts the suspect must investigate the possibility that the suspect was enticed by the informer into the commission of an offence.

In *S v Spies and Another* 2000 (1) SACR 312 (SCA) the learned Judge found that it cannot be found that the accused had been induced to purchase diamonds at a reduced price, because the diamonds had initially been offered at their true value. The accused bargained down the price. The accused even brought along their own equipment to weigh the diamonds when they met the agent.

(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.

Circular 43/2/1 of 2004 of the South African Police Service (Par. 15.2) instructs that investigators need to verify whether the suspect are already involved with illegal activities. It is the experience of the researcher that investigators need to seek for corroboration that a suspect has an existing illegal enterprise, before engaging into an undercover operation. For instance: An informer reports that A is purchasing crude gold from thieves and he refines the gold at the back of his house. Confirm or refute the allegation by means of observation duties.

(h) Whether the conduct involved an exploitation of human characteristics such as emotions, sympathy or friendship or an exploitation of the accused personal, professional or economic circumstances in order to increase the probability of the commission of the offence.

Lambrechts (2005:697) advises that if investigators establish that any of the above-mentioned circumstances are present to rather cancel the undercover operation until the specific circumstances subside. As a result of the researcher's experience of undercover operations the researcher proposes that suspects who are in dire financial difficulty should not be considered to be targeted in an undercover operation. Alternative options should be considered. Rather warn the suspect that the South African Police Service is aware of his/her planned illegal activities and that he/she should refrain from continuing with this action. The argument is based on the belief that this conduct will strengthen the purpose of undercover operations to only use the method against individuals and syndicates who are actively involved in the commissioning of the offences.

- (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.

Based on the researchers experience it is important to be aware of possible vulnerabilities of the suspect before engaging into an undercover operation against the suspect, as it may jeopardise the prosecution of the suspect.

- (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.

Lambrechts (2005:698) is of the view that there must be a balance between the conduct of the agent and that of the accused.

- (k) Any threats, implied or expressed, by the official or his or her agent against the accused.

Based on the experience of the researcher it is advisable to let the suspect make voluntary decisions during an undercover operation and not to apply pressure onto the suspect at any stage before, during or after the undercover operation.

- (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.

In *S v Mkonto* 2001 (4) BCLR (CPD) the judge found that the suspicion of the police did not justify reasonable grounds that the accused had committed a similar offence previously. The conviction and sentence was set aside. Lambrechts (2005:699) advises that the state should revert to *Shabalala and Others v*

Attorney-General of Transvaal and Another 1995 (2) SACR 761 (CC) when section 252(A)(2)(l) of the Criminal Procedure Act, Act 51 of 1977 are under attack by the defence. The case stated that the identity of an informer may be protected against disclosure, if there is a reasonable risk that such disclosure might lead to the intimidation of witnesses or otherwise prejudice the proper ends of justice. Based on the discussion above it is the contention of the researcher that investigators must be cautious to ensure that reasonable grounds based on a suspicion existed before they embark on undercover operations.

(m) Whether the official or his or her agent acted in good or bad faith.

Lambrechts (2005:701) has remarked that officials need to act “reasonable” to be categorised as acting in good faith or bona fide.

(n) Any other factor which in the opinion of the court has a bearing on the question.

Sub-section 3(a) of section 252(A) of the Criminal Procedure Act, Act 51 of 1977 indicates that a court may refuse to allow evidence if the setting of the undercover operation has gone further than the creating of an opportunity to commit an offence. Sub-section 3(b) of section 252(A) of the Criminal Procedure Act, Act 51 of 1977 indicates that the court shall weigh the public interest against the personal interest of the accused when adjudicating the matter. Factors that need consideration are referred to under sub-section 3(b)(i)(ii).

Sub-section (4) of section 252(A) of the Criminal Procedure Act, Act 51 of 1977 rules that, any Director of Public Prosecutions may issue general and or specific guidelines to co-ordinate undercover operations in his area of jurisdiction. In *S v David and Another* 2008 (1) SACR 205 (WLD) the judge remarked that the South African Police Service members involved with the case did not obtain nor sought the authority of the Director of Public Prosecutions. Based on the experience of the researcher he is of the opinion that although it is not a pre-requisite to obtain authority it is advisable to

seek the authority and guidance of the Director of Public Prosecutions before engaging into an undercover operation.

Sub-section (5) of section 252(A) of the Criminal Procedure Act, Act 51 of 1977 directs that an agent who acted in good faith is not criminally liable. In *S v Ohlenschläger* 1992 (1) SACR 695 (T) the learned judge remarked that an agent is not liable for prosecution, since the absence of *mens rea*. The agent has no choice other than to co-operate and to take part in the offences to create an opportunity for the accused to commit an offence.

Buckwalter (1983:144) indicates that agents may be invited by syndicate members to take part in criminal activities by the syndicate. The researcher is of the opinion, based on his personal experience, that the agent will act in good faith by obtaining the necessary authority from the Director of Public Prosecutions to continue with the criminal activities if the agent is not already indemnified against the specific offences. It is important to mention that no Director of Public Prosecutions will grant authority to agents to commit murder or offences that may lead to the death or injury of any individual. It is recommended that agents refrain from this conduct or withdraw from a situation under these circumstances.

Sub-section (6) of section 252(A) of the Criminal Procedure Act, Act 51 of 1977 stipulates that the onus rests on the state to prove on a balance of probabilities that the evidence is admissible, provided that the defence indicates on what grounds the evidence is challenged.

Sub-section (7) of section 252(A) of the Criminal Procedure Act, Act 51 of 1977 provides that the adjudication of evidence may be heard as a trial within a trial. It is the experience of the researcher that some magistrates prefer to hear all the evidence before court, before making a ruling on the admissibility of the evidence, whilst others treat the matter as a trial within a trial.

#### 2.8.4 South African Police Service directives

According to Clarke et al. (2004:342), the South African Police Service has no specific guidelines in effect pertaining to undercover operations. The researcher agrees with the authors. The researcher sought specific South African Police Service directives with regards to undercover operations, but could not find any. The only guidance with regards to undercover operations was found in the following documents:

- Circular 43/2/1 of 2004 of the South African Police Service guides the investigation of precious metals and diamond investigations and undercover operations with regards to these commodities.
- Circular 26/88/2 of 2004 of the South African Police Service is the policy document for the Organised Crime Component. This document depicts that undercover operations will be regulated in terms of Section 252(A) of the Criminal Procedure Act, Act 51 of 1977. No discussion could be found on how to conduct an undercover operation.

The five (5) advocate participants share the view that in some instances the application of undercover operations is not sufficiently regulated within SAPS. Information sharing and communication are lacking. This leads to agents arresting each other during undercover operations. It is the experience of the researcher that it frequently happens that agents arrest one another due to a lack of communication, coordination and trust amongst the respective units.

Five (5) of the detective participants stated that undercover operations are not sufficiently regulated within the South African Police Service. These participants reported that secrecy is lacking during the approval and management of the operation. Too many people are involved in the process. The remaining twenty five (25) participants are of the opinion that undercover operations are sufficiently regulated in the South African Police Service. The participants argue that officers and project managers conduct regular inspections and they closely monitor progress and developments within the investigation.

To obtain an objective picture of the different views it is important to analyse the perspectives by the participants. The advocate participants and five detective participants are of the opinion that undercover operations are not sufficiently regulated. Twenty five (25) detective participants share the view that undercover operations are sufficiently regulated. The views of the participants are a reflection of their own personal experience and knowledge on the aspect.

From the perspective of the advocates it is apparent that a lack of communication and co-ordination of undercover operations are detrimental to obtain the desired results. Five (5) of the detective participants are of the opinion that secrecy is compromised during the registration process, while the rest of the detective participants honour the opinion that undercover operations are sufficiently regulated on an operational level.

The views from the participants clearly indicate that a dispute exists between the participants. From their perspectives it is clear that problems exist specifically with regards to co-ordination, communication and secrecy of undercover operations. This is indicative of the fact that no specific directives are governing undercover operations in SAPS, as purported by Clarke et al. (2004:342). The perspective by the majority of participants can not be rejected, since it is their experience that undercover operations are sufficiently controlled on an operational level.

## 2.9 Phases of undercover operations

Knipe et al. (2002:25) indicate that organisations that perform projects divide the project into phases to provide control and effective management over the ongoing operation. According to Knipe et al. (2002:27) and van der Walddt and du Toit (1999:321), every project consists of at least the four basic phases namely:

- initiation
- planning

- execution
- control and project closing

Only the sample of detectives was tested on their knowledge of undercover operation phases. The thirty (30) detective participants argued that the following phases are necessary to effectively conclude a precious metals undercover operation:

- intelligence gathering
- planning:
  - objectives
  - investigative strategy
  - role players
  - legal aspects
  - finance & logistics
- obtain mandate
- execution and evaluation
- termination phase:
  - arrest of syndicate members
  - seizure of exhibits: Precious metals, cash, documentary evidence, electronic evidence, gold processing equipment etc.
  - seizure of assets
- litigation phase

The argument by the participants is corroborated by the South African Police Service (c2000:5-6) that indicates that undercover operations in the South African Police Service are based on project management principles. The project process consists of three phases namely:

- plan and propose a project
- implement and control the project
- close the project

The researcher agrees with the literature and participants, since it is a logic and comprehensive manner to go about the execution of a precious metals undercover operation. The experience and training of the researcher directs that it is important for undercover operations to be properly managed by means of project management principles to ensure that the set objectives are obtained.

#### 2.10 Summary:

From the above exposition it is obvious that undercover operations are an internationally accepted method to address organised crime. Hence it is a forensic method to investigate crime, since the method is based on scientific knowledge. Although criticism has accumulated over the use of the system over many decades it remains an effective tool to successfully gather evidence against crime syndicates.

It is imperative for investigators to adhere to the applicable law, directives and Director of Public Prosecutions instructions to ensure that undercover operations are concluded in a fair and transparent manner. Without the use of informers it will be virtually impossible to engage into an undercover operation, since the police will have no intelligence to engage into an investigation of this nature. The following chapter will focus on the use of informers during undercover operations.

## CHAPTER 3

### THE USE OF INFORMERS DURING UNDERCOVER POLICE OPERATIONS

#### 3.1 Introduction

The use of informers originated from the Bible, where Judas sent out spies to trap Jesus (Madinger, 2000:19-20 & Lambrechts, 2005:679). Van der Westhuizen (1996:101) and Madinger (2000:20) concur that the primary duty of informers is to convey information about crime. The use of informers involves the community in the prevention and combating of crime.

Informers are and will remain an integral part to effectively combat crime around the globe. Billingsley, Nemitz and Bean (2001:5) claim that about one third of all crimes are cleared up as a result of informer information. Schmalleger (2005:300) indicates that the use of informers forms part of a complex information gathering process. This information gathering technique is an area of concern to ethics, since the police often pay individuals for information.

According to Marais and Van Rooyen (1990:131), the use of informers will continue to exist as a method to gather information, although the police have entered a technological advanced era. Carlen and Morgan (1999:57) add that informers are important instruments to gather information and evidence on serious crime networks in this era of rapidly growing trans-national organised crime.

This chapter will address the following important aspects regarding the use of informers. It will shed light on the meaning of an informer and an agent, informer privilege and justification for using informers will be discussed. The chapter will continue to address different types of informers and their motives for relating information. The focus will also be on the role of informers during precious metals

undercover operations and important aspects that need consideration when informers are used during precious metals undercover operations.

### 3.2 The different roles of the informer and agent

In order to understand the differences between an informer and agent it is necessary to take cognizance of their different meanings. In *R v Van Schalkwyk* 1938 AD 543 the Judge ruled that an informer is a person that gives information that is prejudicial to others. The information must be of a criminal nature which leads to a criminal prosecution. Broodryk et al. (2001:337) and Lambrechts (2005:648) indicate that an informer is a person who supplies information to the police about crime or the planned commission of a crime that is prejudicial to others and it may be the cause of a criminal prosecution.

According to Marais and Van Rooyen (1990:133), any person is a potential informer. The authors are of the opinion that it is difficult to connect a specific definition to the term informer, since the circumstances of informers vary. It is the experience of the researcher that informers do not operate within a rigid environment. Informers may be utilised for different roles within the crime-fighting domain.

Welch (2000:1) as well as Marais and Van Rooyen (1990:149) argue that an agent is a person who with a view of securing the conviction of another proposes certain criminal conduct to the individual and he or she takes part in the operation thereof.

Based on the researcher's experience it is important to be aware that agents are not necessarily always members of the police. Kriegler and Kruger (2002:638) indicate that when an informer is used as an agent during an undercover operation the informer is no longer regarded as an informer, but as an agent. The person is then a compellable witness who is subjected to cross examination by the defence during a trial. Lambrechts (2005:648) concurs with Kriegler and Kruger (2002:638) by stating

that an informer required to act as an agent is not entitled to the informer privilege as it is not in the public interest to protect him by means of section 202 of the Criminal Procedure Act, Act 51 of 1977.

All thirty (30) detective participants were requested to comment on the effect of the informer privilege when an informer is used as an agent during an undercover operation. All of them acknowledged that the informer is no more protected by the privilege, if he or she were used as an agent. However, eight (8) participants indicated that the disclosure of the agent to the broad public may be limited, by applying to the trial court to lead the evidence of the agent in camera. This is indicative of their knowledge and experience on how to protect an informer who had been used as an agent. Kriegler and Kruger (2002:338) direct that section 153(2) of the Criminal Procedure Act, Act 51 of 1977 makes provision for an informer and or agent to testify in camera. Section 153(2) of the Criminal Procedure Act, Act 51 of 1977 grants a magistrate the discretion to allow a witness to testify under circumstances where the witness is protected against the broad community or specific persons, when there is a possibility that the person's safety or that of his/her family are at risk.

In *S v Makhanya* 2002 (3) SA 201 (NPD) the court ruled that when the conduct of the informer is of such a nature that he or she formed part of the operation the person is regarded as an agent and the provisions of section 252(A) of the Criminal Procedure Act, Act 51 of 1977 is applicable to the person.

From the research it is eminent that differences exist between the terms informer and agent. An informer provides information about a criminal nature that is prejudicial to another person, whilst an agent conducts criminal activities with a suspect, whilst having a motive to secure a conviction against the person. An informer may be used as an agent on condition that the informer is then regarded a compellable witness who is bound by the stipulations of section 252(A) of the Criminal Procedure Act, Act 51 of 1977. Based on the research and the experience of the researcher it is the contention of the researcher that an informer is predominantly busy with the gathering of

information and intelligence, whilst an agent ostensibly takes part in criminal conduct and thereby gathers evidence against the identified suspects for purposes of litigation.

### 3.3 Informer privilege

Kriegler and Kruger (2002:503-505) and Lambrechts (2005:648-649) agree that the informer privilege is necessitated to protect informers from the revenge of criminals. Holtz (2005:384) corroborates their version by stating that the purpose of the privilege is the furtherance and protection of the public interest in effective law enforcement. According to Marais and Van Rooyen (1990:144-145) and Schmidt and Rademeyer (2000:583), it is important to protect the identity of informers to encourage information by the community. If their identity is not protected the community at large will be reluctant to convey information out of fear for revenge. Schmidt and Rademeyer (2000:583) indicate that not only the identity of the informer is protected but also the contents of the communication.

According to Broodryk et al. (2001:362), it is important to enforce the privilege not only to protect the informer but also to protect the community at large. Furthermore it is the obligation of the state to encourage citizens to convey information about crime (Broodryk et al., 2001:362). Marais and Van Rooyen (1990:145) mention that the state has the obligation to enforce and protect the substantive right of an informer to the privilege. In *Swanepoel v Minister of Safety and Security 1999 (2) SASV 284 (T)* the Judge ruled that the privilege belongs to both the state and the informer, since it is in the public interest to protect the privilege.

Schmidt and Rademeyer (2000:585) confirm that the court has the final authority to decide about the abdication of the privilege. The state does not have the discretion to disclose the identity of the informer. The question arises if the informer has the discretion to abdicate of the privilege. Schmidt and Rademeyer (2000:585) indicate

that there is no prohibition that forbids the informer to reveal his/her identity and the contents of the communication with the police.

In *Sulliman v Hansa* (2) 1971 4SA 69 (D) the Judge ruled that the informer privilege may be relied upon under the following circumstances:

- The reporting of the information must be made with the belief that the information will not be disclosed.
- The element of confidentiality must be essential to maintain the relationship between the parties. It is the intention of the state to protect their sources in an endeavour to combat crime.
- The relationship must be diligently promoted to encourage community involvement.
- The damage to the relationship by disclosing the identity of the informer must be bigger as the advantage of making public the identity of the informer.

In *R v Van Schalkwyk* 1938 AD 543 the Judge ruled that amongst the above-mentioned aspects it is required that the information must initiate criminal prosecution and the information must be given to officers of justice. In *Shabalala v The Attorney-General of Transvaal and Another* 1995 (2) SACR 761 (CC) the court recognised the right of the state to rely on the informer privilege. In *Els v Minister of Safety and Security* 1998 (2) SACR 93 (NCD) the Judge ruled that the informer privilege is one of the cornerstones in the fight against organised crime. The revealing of the identity of an informer would have far-reaching implications as it could deter would-be informers to give information. The Judge held that the new Constitution of the Republic of South Africa, Act 108 of 1996 does not have the effect of watering down the effect of the informer privilege.

*Kriegler and Kruger* (2002:503-505) indicates that the informer privilege is to be found in section 202 of the Criminal Procedure Act, Act 51 of 1997. The section deals with the privilege against the public making of information on grounds of public policy and public interest. It is important to notice that the privilege is not absolute, but there are

exclusions to the rule. Kriegler and Kruger (2002:503-505) concur with Broodryk et al. (2001:363) when indicating that the court restricted informer privilege to instances where public policy requires that the identity of the informer be kept secret. Madinger (2000:220) purports that the informer privilege must be balanced against the defendant's rights during criminal proceedings. Broodryk et al. (2001:363) are of the belief that the court has the discretion to reject the claim to informer privilege even if all the requirements have been met under circumstances where it is in the interest of justice to disclose the identity of the informer.

The exception to the rule is discussed comprehensively in *Ex parte Minister of Justice: In re R v Pillay* 1945 AD 653, the impact of the ruling can be summarised as follows:

- When it is in the interest of justice to reveal the identity of the informer.
- If the disclosure can contribute towards the acquittal of the accused.
- When the identity of the informer is known to the accused.

Steward, Murphy, Pilkington, Penney and Stribopoulos (2006:807) indicate that there exist exclusions to the informer privilege. These authors are of the opinion that the exclusions to reveal the identity are warranted under the following circumstances:

- When the informer has acted as an agent.
- When the informer is a material witness to the case.

All the detective participants were requested to give their views on the exceptions to the privilege. All thirty (30) detective participants acknowledged that exceptions to the rule exist. Their views can be summarised as follows:

- Seventeen (17) participants reflected that the privilege may not be relied upon when the identity of the informer is known to the accused, or when the informer acted as an agent during the operation.
- Five (5) participants referred to malicious actions by the informer that may contribute to the acquittal of the suspect.

- Eight (8) participants mentioned that the court may order that the informer must testify under circumstances where the informer became so involved with the criminal activities that it will be in the interest of justice for him/her to testify.

Schmallegger (2005:301) indicates that in the United States of America it is practice that the identity of the informer may only be kept secret if the source has been explicitly assured of confidentiality. Brown (2001:128) and Holtz (2005:385) concur that the disclosure of the identity of an informer is warranted when the testimony of the informer is material to the state or the defence. All informers are not presumably confidential sources. This is contrary to the position in South Africa, where informers are privileged sources except for circumstances as discussed in *Ex parte Minister of Justice: In re R v Pillay* 1945 AD 653.

All thirty (30) detective participants concurred that the informer privilege is protecting the identity of the informer. However, only seven (7) participants mentioned that the information is also protected by the privilege. The rest of the sample only referred to the protection of the identity aspect. This may cause problems during testimony at court, since unwary detectives may disclose privileged information.

The informer privilege is not an absolute privilege, without exclusions. It is therefore not possible to protect the identity and information tendered by the informer under all circumstances. Based on the research and the experience of the researcher it is the belief of the researcher that thought needs to be given to the stipulations relating to the informer privilege when deciding on an investigative strategy to follow-up information tendered by an informer. If the set requirements are not met, the identity of the informer might be disclosed. This will adversely affect the continuous utilisation of the informer as the informer will be exposed to the public and specifically to people involved in criminal activities.

### 3.4 Justification for using informers

The researcher is convinced that the use of informers is necessary to create a safe environment for all citizens of South Africa. The method of gathering information by means of informers is utilised universally. Billingsley et al. (2001:55) direct that the use of informers derives its strength from the following sources:

- Police have a general pursuit for intelligence as part of a move to proactive policing.
- From informers' long history in social control and law enforcement.

According to Billingsley et al. (2001:56), the use of proactive methods such as informers and undercover operations rely on deceiving the target and therefore the system needs to be properly managed to ensure justification. According to Marais and Van Rooyen (1990:131-132), the use of informers is justified, because the community at large expects the authorities to maintain public order. Reichel (2005:376) mentions that the use of informers stretches back some 600 years, when the Japanese linked citizens and the police together to maintain social order.

Clarke et al. (2004:308), Madinger (2000:26) and Marais and Van Rooyen (1990: 131-132) support the view that the use of informers is necessitated by the following arguments:

- Informers may present information about crime that has been committed or that is planned.
- Several crimes are committed in secrecy where there are no eyewitnesses or victims. Without the involvement of informers these crimes would hardly ever be brought to book.
- Informers can identify suspects and they can assist to profile individuals and crime syndicates.

The Constitution of the Republic of South Africa, Act 108 of 1996, under section 205 placed an obligation on the South African Police Service to maintain law and order by

means of pro and reactive policing (South Africa, 1996: sec. 205). According to Coetzee and Horn (2006:110), the nature of precious metals theft requires a combination of effective informer networks and undercover work to combat these crimes effectively.

All thirty (30) detective participants are at heart that although informers have different motives for relaying information they are invaluable sources to the police. The participants argue that the following reasons are justification to specifically make use of informers during undercover operations and to address crime in general:

- They may assist in the recovery of stolen property.
- Gathering of information and intelligence.
- Infiltration of a syndicate.
- Introduction of agents to syndicate role players.
- Identification of suspects and syndicate members involved in serious organised crime.

Since the researcher is a member of the National Investigation Task Team he has access to the unpublished statistics of the task team. The statistics are kept by the task team. An analysis of the precious metals statistics revealed that 86% of the successes obtained during the period 1 February 2002 to 15 May 2008 can be accrued to the information supplied by informers.

Naudé (1999:146) and Madinger (2000:205) stipulate that informers are necessitated, because of their criminal background and association with criminals. Informers' knowledge can therefore be used to the benefit of the police to implement strategies to reduce crime or to apprehend criminals.

An analysis of the participants' views, different authors and statistics clearly indicate that informers are necessitated due to their knowledge of and involvement with both general crime and crimes that are committed in secrecy and are syndicate related.

### 3.5 Types of informers

Interpretations by Clarke et al. (2004:314), Madinger (2000:27-30), Marais and Van Rooyen (1990:134-136) and South African Police Service (c2004:2-3) were compared with one another and the results indicate that the following categories are the most prevalent types of informers:

- Fulltime informer: This type of informer is utilised on a continuous and almost permanent basis. These persons receive payment on a monthly basis and are experienced and skilled individuals who are deployed to infiltrate crime syndicates. These persons can be utilised for prolonged periods of time, if the cover story of the person is not compromised during the undercover operation. The difficulty with these informers is vested there in that crime syndicates may expect of these people to commit serious crimes to become part of the syndicate.
- Public informers/Occasional informers. These categories of informers convey information when it comes to their attention. They may be criminals or law obedient citizens, but do not give information on a permanent basis. It is the experience of the researcher that these persons are potential fulltime informers. It is therefore important to treat these people fairly by remunerating them for valuable information and by training them properly.
- Paid informers. Financial gain is the exclusive aim before relaying information to the authorities. These individuals usually have close links with the underworld and decide which side will be to their benefit, before information is transferred to the police. They might commit crimes to their own benefit, under the auspices of a criminal investigation and thereby playing a double role. It is the experience of the researcher that this type of informer is especially valuable when dealing with organised crime, such as, for instance the illegal dealing in precious metals. These informers have inside knowledge about syndicate activities, modus operandi and planned criminal conduct.

The thirty (30) detective participants were requested to elaborate on which type of informers are predominantly active within the precious metals domain. Seventeen (17) of the participants referred to full time informers, whilst the remaining thirteen (13) participants were of the opinion that paid informers are especially active within the precious metals domain. This is indicative of their own operational experience with regard to the type of informers relaying information on precious metals related offences. It is the experience of the researcher that fulltime and paid informers are paramount to precious metals related investigations.

Based on the research and experience of the researcher it is the contention of the researcher that it is expected from detectives engaged in precious metals undercover operations to correctly identify the type of informer with whom they are dealing. The correct determination will determine and influence how the informer is used.

### 3.6 Motives of informers

In order for investigators to correctly approach, deal with and deploy informers it is necessary to be knowledgeable about their possible motives for conveying information. Madinger (2000:27) indicates that it is important for investigators to know where the informer fits in and to have the necessary control over the informer to be successful with the investigation at hand. Brown (2001:127) is of the opinion that before an informer's information can be utilised it must be established if the individual's information is credible and reliable. Reliability can be demonstrated by looking at the "track record" of the informer.

Brown (2001:124), Clarke et al. (2004:315-316) and Marais and Van Rooyen (1990:137) agree that the following are the most prominent motives of informers:

- **Financial gain.** Individuals make a living out of conveying information. Lambrechts (2005:679) honours the opinion that all informers want to be rewarded and they do not give information for free. Lambrechts (2005:679)

corroborates Brown's (2001:146) version by adding that these types of informers are difficult to manage and when the money dries up so does the information.

- **Collective responsibility.** An individual gives information as he/she regards it his/her responsibility as a law obedient citizen to assist the police to maintain public order.
- **Idealistic motives.** Religion, political affiliation and personal interest play a pivotal role under this section. Example: X and Y compete for the same post. X is aware of criminal behaviour conducted by Y a long time ago. X conveys the information to the police to eliminate Y as an opponent for the post.
- **Elimination of rival groups.** The sole aim of these informers is to gain control over a geographical area and to obtain the monopoly over the commodity. It is the experience of the researcher that this category of informers is valuable sources, since their information is accurate and it often leads to arrests or seizures. It is important for investigators to deal with these people circumspectly, because it is their secondary goal to be protected from prosecution or operations by the police.
- **The following are also listed as possible motives of informers:** Revenge, repentance, avoidance of prosecution, emotional needs such as jealousy and hatred. In the Bari/Cherney civil rights suit in the United States of America, John C Ryan stated that many subjects of prosecution would turn an informer to ensure release or lenient sentences (Ryan, 2001:4).

The thirty (30) detective participants were requested to give their views on the motives of informers for relaying information. All the participants are of the belief that the major motivation of informers for supplying information is to receive a monetary reward. In addition five (5) participants referred to the elimination of competition, whilst six (6) participants referred to double role motives.

Billingsley et al. (2001:68) and Fitzgerald (2007:36) caution investigators to be cognizant of informers who play a double role. On the one hand the person is seeking

the status of being a police informant, whilst he/she is promoting his/her own criminal activities on the other hand. The so-called “selective informing” influences the direction of an investigation whilst it also has bearing on accountable and ethical practice. It is the objective of the informer to learn how investigations are conducted and to identify agents, officers and other informers. It is the experience of the researcher that these informers often endeavour to create a position from where they can justify criminal activities. They will argue that specific information was reported and that they are conducting investigations accordingly. As mentioned above six (6) participants indicated that “double role” informers have a motive to enrich themselves and to benefit their own agendas. One (1) of the six (6) participants mentioned the example of an informer that was used as a co-agent on the West-Rand. It was discovered that the informer sent his own ill-gotten gold to an undercover operation, by means of his own couriers. He benefited financially and misused his mandate to promote his own agenda.

From the research it became apparent that not all investigators are cognizant of informers with ulterior motives and the elimination of rival groups. Investigators’ responses could portray the environment in which they function. Grounded on the research and experience of the researcher it is the belief of the researcher that financial motives, elimination of rival groups and ulterior motives are closely connected to precious metals investigations, due to the monetary incentives that it involves.

### 3.7 Different roles of informers during undercover operations

It is the experience of the researcher that the assignments given to undercover informers are of a broad scope. The informer may be required to perform an array of tasks and to deviate from the original tasking due to changing circumstances. The thirty (30) detective participants were requested to indicate what circumstances may direct an investigator to change the original role of the informer. The following is a summary of their remarks:

- The informer grows in his/her role from information gatherer to a point where it is expected of him/her to act as an agent.
- When the safety of the informer is at risk.
- When the modus operandi of the syndicate changes.
- When misconduct on behalf of the informer takes place that might jeopardise the investigation.
- When the informer turns corrupt and blows the cover of the operation.

Buckwalter (1983:136) claims that the tasks of an informer may vary from a simple assignment where it is required from the informer to conduct surveillance of premises to a highly sophisticated task where it is required of the informer to infiltrate a prime suspect and to gather evidence against the person. Madinger (2000:207) shows that informers take a more active role in law-enforcement today than just giving information about crime in general. They ostensibly participate in crime, under controlled circumstances.

The thirty (30) detective participants were requested to mention the roles that an informer can be availed for during undercover operations. These participants referred to an array of roles that an informer can be considered for. The researcher agrees with the participants' views on the different roles of informers, which are as follows:

- Information and intelligence gathering.
- Agent or co-agent.
- Introduction of agents to suspects.
- Infiltration of syndicates.
- Observation and surveillance duties.

### 3.7.1 The use of informers as agents

Madinger (2000:207) and Fitzgerald (2007:141-142) stress the importance of independent corroboration of all statements by an informer who is used as an agent during an undercover operation. It is necessitated by the fact that courts are nervous

to accept the evidence of untrained, possibly criminal individuals. Strong police control is essential under these circumstances. Fitzgerald (2007:143) reports that optimal control over the informer and maximum corroboration of the evidence is imperative to ensure a conviction. It is the experience of the researcher that a quest for corroboration will ensure that the active role of the informer is kept transparent, free of irregularities and admissible as evidence in a court of law.

The thirty (30) detective participants and five (5) advocate participants were requested to elaborate on whether they would consider utilising informers in the role of an agent.

Two (2) advocate participants remarked that they would not consider using informers in the role of agent due to the following reasons:

- A propensity to have their own agendas.
- They are contaminated with previous criminal activities and they are not always prepared to testify in court.

The remaining three (3) advocate participants are prepared to make use of informers in the role of agent, because of the following reasons:

- They are trusted by the syndicates.
- They have inside knowledge about the syndicate activities and role players.

Nine (9) of the thirty (30) detective participants are in agreement with the two (2) advocate participants and also pointed out that they will not consider using an informer in the role of an agent due to the following reasons:

- The identity of the informer will be compromised and the informer privilege will have no effect.
- The life of the informer might be in danger.
- Informers are not properly trained to act as agents and to testify in court.
- Informers are dubious characters with ulterior motives. They can not be trusted at all.

The remaining twenty one (21) detective participants embraced the view that they will make use of informers in the role of agent due to the following reasons:

- They are trusted by the suspects.
- Suspects would not continue with illegal transactions if the informer is not present.
- Use the informer as a co-agent to corroborate the evidence of the police agent.
- It will be advantageous to the investigation as the informer will be able to infiltrate police agents into the structures of the syndicate.

The different views by the detectives and advocates indicate that they are not unanimous on whether to use or not to use an informer in the role of agent. An analysis of the responses directs that the advocates and detectives who are not in favour of using informers as agents base their responses on the following reasons:

- Informers have ulterior motives and they are contaminated by previous criminal activities.
- Informers need to be protected for future use and they must not be exposed in an open court.
- Informers are not properly trained to act as agents. This view corresponds with Madinger (2000:207) and Fitzgerald (2007:141-142) as discussed above.

The advocates and detectives who are in favour of utilising informers in the role of agent reflect that it may hold the following benefits:

- Suspects trust informers and they will not continue with criminal activities if the informer is not present.
- Informers have inside information on the compilation and identity of syndicate role players.
- It will be advantageous to the investigation as the informer will be able to infiltrate police agents into the structures of the syndicate.

Based on the literature and views by the detective and advocate participants strong cases are made out on behalf of and against the use of informers as agents. When an informer is used as an agent corroboration of evidence is paramount to ensure that justice is served. Founded on the experience of the researcher the specific circumstances of each investigation will direct the investigation team to make an informed decision on whether to use the informer as an agent or not. The advantages and consequences as purported by the detective and advocate participants, needs to be considered. The credibility of the informer, his/her abilities, background, related experience and the task at hand will play a pivotal role in the decision making process.

### 3.7.2 Introduction of agents to suspects

Frazier (1994:173) argues that informers must only be used to introduce suspects to police agents and not to allow them to become agents or engage in undercover operations. The thirty (30) detective participants were requested to mention the roles that an informer can be used for during undercover operations. Three (3) participants embraced the view by Frazier (1994:173) that the informer should just introduce the agent to the suspect, where after he/she must withdraw. The other twenty seven (27) participants referred to aspects as reflected in 3.7 supra. Frazier (1994:173) further states that the undercover police agent must as soon as possible be the main role player. Although the argument has merit it is also open to criticism, since many syndicates only trust the informer.

It may be required of an informer to introduce an undercover policeman to the syndicate members and thereby create an opportunity for the agent to conduct controlled deliveries or purchases with the syndicate members. It is the experience of the researcher that the informer should endeavour to withdraw from the transaction, after introducing the agents to the suspect. It will ensure that police agents conduct the transaction. It will create an opportunity for the informer not to be exposed as the informer in an open court, since he/she did not actively participate in the transaction.

### 3.7.3 Intelligence gathering

According to Brown (2001:127), it is important to ensure that information is credible, reliable and corroborated before it is utilised. Frazier (1994:12) argues that undercover agents develop a large body of intelligence about criminal activities during an operation. If the agent is not compromised his/her intelligence may lead to several ad hoc arrests. It is the experience of the researcher that deploying an informer as an intelligence gatherer is an effective method of arresting precious metals syndicate role players and disrupting their activities without jeopardising the project. The undercover agent is subsequently in a position to reach the upper echelon of a syndicate and gather intelligence that might lead to the successful arrest and prosecution of a precious metals syndicate.

According to Newburn, Williamson and Wright (2007:427), organised crime investigations should be intelligence led. The use of informers to glean information is of utmost importance. The information must be evaluated systematically. Proactive investigative techniques can then be implemented to effectively address organised crime.

Clarke et al. (2004:314) advise that informers are an effective tool to compile comprehensive profiles on suspects. The researcher is a member of the National Investigation Task Team. As a result of his position he has access to statistics of the task team. The statistics are informal statistics kept by the Team itself. The task team is currently conducting eleven intelligence driven investigations. Eight of these investigations commenced as a result of informer participation. It is the experience of the researcher that informers are especially effective and of great assistance during the intelligence gathering phase of an undercover operation.

The thirty (30) detective participants were requested to mention the roles that an informer can be used for during a precious metals undercover operation. The following is a summary of their responses made with regards to intelligence gathering:

- Informers are excellent sources of crime information and intelligence due to their special relationship with criminals.
- Informers are especially valuable by infiltrating syndicates without participating actively in the activities of the syndicate.
- They are invaluable to determine:
  - modus operandi of the syndicate
  - operational areas and illegal smelt houses
  - associates of the syndicate
  - hierarchy of the syndicate
  - money laundering activities by the syndicate
- The importance of an electronic database to capture, analyse, corroborate and present information to benefit the effective utilisation of intelligence was also mentioned by the participating detectives.

From the above discussion it has become eminent that intelligence gathering is an important cornerstone to be effective with undercover police operations. The consulted literature and detective participants directs that intelligence gathered enables investigators to act proactively. Information supplied by the informer may lead to the arrest of syndicate role players, profiling of syndicate members and the seizure of illicit commodities and cash without compromising the position of the informer.

#### 3.7.4 The use of surveillance

Surveillance is the monitoring of behaviour. The word “surveillance” stems from French and literally means “watching over” (Surveillance, 2009). The term refers to all forms of observation and monitoring. It includes electronic surveillance, direct observation and observations with binoculars. The word is often used to describe all forms of observation or monitoring, not just visual observation (Surveillance, 2009).

Gilbert (2007:382) purports that surveillance is a secretive, close watch kept over persons, objects and locations. The New English Usage Dictionary (2001:887) defines surveillance as: “*a close watch kept on someone or something*”.

Surveillance is a useful method to investigate criminal activity and to gather evidence (Surveillance, 2009). Gilbert (2007:382) embrace the view that surveillance is one of the most frequently used techniques to secure arrests and convictions. Gilbert (2007:384) depicts that surveillance duties has the following purposes to:

- gather evidence by observing the activities within a premises
- protect and document the movement of an undercover agent
- obtain information for future use

Several types of surveillance are in existence. Surveillance (2009) depicts that the following types of surveillance are frequently used: Computer surveillance, aerial surveillance, surveillance cameras, human operatives, satellite imagery and counter surveillance.

Buckwalter (1983:147), Frazier (1994:145-154) and Clarke et al. (2004:325) stress the importance of counter surveillance for agents and informers to protect themselves. Counter surveillance can be described as the practice of avoiding surveillance or making surveillance difficult.

Buckwalter (1983:130) is of the opinion that the so-called “In-the-area assignments” cover a wide range of undercover activities. The informer needs to create a reason for being in a specific location for the duration of the undercover operation. Buckwalter (1983:130) stresses that whatever the operative pretends to be doing he must be able to do it effectively. According to Gilbert (2007:383), surveillance duties consist of both moving and static surveillance. Moving surveillance may either be by foot, vehicle or air. Static surveillance on the contrary involves no movement during the initial stages, since a specific premises and or person are observed. It is the experience of the researcher that only foot and static surveillance is applicable to

informers, since it does not require many resources. Vehicle surveillance (moving surveillance) is a specialised field that requires extensive resources and expertise and it is therefore not advisable to use informers in this role. An informer may, however, conduct static surveillance from a vehicle.

From the literature it is clear that surveillance is an effective manner to gather evidence and intelligence against suspects. Surveillance consists of a broad scope of activities. Based on the literature and experience of the researcher he is of the opinion that the nature and or the location of the surveillance to be conducted will determine the strategy to be followed.

### 3.8 Aspects to consider when engaging in an undercover operation

Buckwalter (1983:142) asserts that thought should be given to multiple aspects when planning an undercover operation. The author is of the opinion that secrecy is the most important aspect of any undercover operation. Frazier (1994:9) indicates that effectiveness of an undercover operation is determined by how well some of the variables involved are managed.

The thirty (30) detective participants were requested to elaborate on aspects that require consideration when engaging in an undercover operation. Their responses are summarised as follows:

- Training of the informer.
- Profile of the informer.
- Protection of the informer.
- Secrecy and cover story of the operation.
- Corroboration of information.
- Payment to the informer.
- Operational rules (Informer handling).

The thirty (30) detective and five (5) advocate participants were requested to list the problems which they encounter with informers during undercover operations. Their responses are as follows:

- Nine (9) participants mentioned that a limited amount of informers entice suspects to commit crime.
- Seven (7) participants cited excessive drinking as a frequent reason for failure in the past.
- Three (3) participants reported that informers becomes so anxious to conduct a transaction that they aboard all safety rules.
- Four (4) participants referred to informers that act beyond their mandate.
- Nine (9) participants mentioned poor reporting abilities, both verbally and orally.
- Eleven (11) participants pointed to sub-standard informer handling that contributes to informers acting in an unacceptable manner.

The five (5) advocate participants reported as follows:

- Three (3) participants referred to informers that supply information that is not factually correct.
- All five (5) participants mentioned that some informers revert to enticement to obtain successes.
- Two (2) participants referred to informers with ulterior agendas as a matter of concern.
- One (1) participant mentioned that some informers that were used as witnesses in the past did not make a good impression to court.

The remarks from the thirty (30) detective and five (5) advocate participants directs that they encounter numerous problems with informers during precious metals undercover operations. The researcher agrees that investigators often have to deal

with various challenges when informers are used to obtain information. Despite all the challenges it remains a very valuable tool to obtain information to solve cases. In order for investigators to obtain the determined objectives it is necessary that the problems are properly attended to by focussing on the under-mentioned aspects.

### 3.8.1 Training and developing informers

Barefoot (1995:25) emphasises that training is to the benefit of the organisation, since it increases the likelihood of winning a case and it increases the safety of the informer. The thirty (30) detective participants were requested to mention which aspects they attend to when training an informer for an undercover operation. All thirty (30) detective participants claimed that only reliable and experienced informers must be used to engage into precious metals undercover operations. It is imperative for the agent and or informer to be properly trained before the commencement of the operation. A single training session will not suffice. Follow-up training sessions are important to succeed with the development of the informer. The thirty (30) detective participants pointed out that the following aspects need attention during training:

- Legal aspects. (All thirty (30) the participants agreed)
- Gathering of evidence. (Thirteen (13) participants mentioned this aspect)
- Evidence giving. (Six (6) participants referred to this aspect)
- Report writing. (Twenty six (26) participants referred to this aspect)
- Operational training (Twenty one (21) participants)
- The tasking at hand: Who are the targets and what the investigative strategy is. (Seventeen (17) participants)
- Observation abilities. (One (1) participant mentioned this aspect)

As purported by the detective participants the important aspects that need attention during training include the following:

- **Legal aspects:** All thirty (30) detective participants share the view that informers must be trained in respect of the stipulations of section 252(A) of the Criminal Procedure Act, Act 51/1977. The contents of the section and mandate

of the authority must be explained to the agent and informer. The informer must know what the boundaries of his/her conduct will be. It is important for the informer to know that he/she may not take on the leading role to commit crime and thereby influence and encourage the suspect to commit criminal conduct. In addition three (3) detective participants recommended that the designated prosecuting advocate of the Director of Public Prosecutions would be the most suitable person to conduct the training. Fitzgerald (2007:245) embraces the view of the detectives by reiterating that training of informers with regards to legal aspects will ensure that informers act correctly and minimise claims of enticement. It is the opinion of the researcher that the need for proper training on legal aspects can not be over emphasised, since nine (9) detective participants reported enticement by informers and four (4) detective participants reported that some informers act beyond their mandate, as problems that they encountered with informers during undercover operations. In addition all five (5) advocate participants referred to the enticement aspect.

- **Suspected role players within the precious metals domain:** The agent needs to know who is in the market, where and to what extent are they involved. The agent must know who is associated with whom and who is in competition with each other. One (1) detective participant made the valid remark that an association-chart will suffice to illustrate the connections between the suspects and who is to be addressed. The remaining sixteen (16) detective participants reported that briefing sessions will be sufficient to convey the necessary information to the informer and agent(s).
- **Evidence giving:** Four (4) detective participants advised that experienced, well trained detectives should conduct this important aspect. Two (2) detective participants stressed the importance that the trainer must have knowledge and experience of precious metals undercover operations and testimony. One (1) advocate participant mentioned that some informers that were used as witnesses in the past did not make a good impression to court. This is indicative of a quest for proper and intensive training.

- **Evidence gathering:** Three (3) detective participants indicated that agents need to maintain the chain of evidence. The researcher supports their view since the proper sealing and handling of precious metals exhibits are important building blocks in cases of this nature. The other ten (10) detective participants mentioned that evidence gathering must focus on comprehensive statements, video and audio material and photo albums to corroborate the evidence.
- **Observation and memory abilities:** Only one (1) detective participant referred to this aspect as an important aspect during training. Buckwalter (1983:139) advised that a good memory is imperative, since many events may occur in a short space of time and the agent must be able to reflect on the events comprehensively and in detail. Based on the experience of the researcher it is advised that informers are trained by experienced, professional individuals in the field of surveillance.
- **Report writing:** The thirty (30) detective participants were requested to mention which problems they encounter during undercover operations. Seven (7) detective participants remarked that intelligence reports are sub-standard and incomprehensive. Two (2) detective participants remarked that important information is not embodied in reports. These participants referred to full particulars of suspects, addresses and registration numbers that are omitted from reports. The researcher advises that the informer handler must compile a list of aspects that need to be embodied in intelligence reports. It must be brought to the attention of the informer for compliance. The remaining twenty-one (21) detective participants mentioned other aspects, as discussed above. According to Barefoot (1995:101), report writing is essential during an undercover assignment, since agents tend to incorporate more detail in written reports. These reports may be tendered as evidence in upcoming criminal matters.
- **Operational training:** Frazier (1994:16) shows that the knowledge and experience of former undercover agents may be utilised to train and develop other undercover agents. As mentioned above, twenty one (21) detective participants referred to the importance of operational training to empower the

informer for his role. The remaining nine (9) detective participants did not mention this important aspect. The twenty one (21) detective participants advised that the informer must be fully knowledgeable and conversant with the following aspects:

- How to refine gold & platinum.
- Calculating and determining percentages and prices of the commodities.
- Applicable terminology and the meaning of the words, like for instance “mat, mercury and amalgam”.
- The identification of the different forms of the commodities.

The fact that all the participants support the need for training confirms that proper and practical training is required to ensure successful undercover operations. The researcher reiterates that the training needs to be applicable and valuable to precious metals undercover operations. An analysis of the responses by the detective participants directs that they do not all agree on all the important aspects that require training before the commencement of an undercover operation. It could be as a result of their perception of aspects that require training.

### 3.8.2 Informer handling

Billingsley et al. (2001:63) take a strong stand by arguing that: *“Formal, documented, and strict risk management through fully evaluated training, rigorous supervision and quality assurance systems will be the only way that the police service can continue to practice the use of informers with majority public consent and minimize the chances of further damaging instances of abuse”*.

Billingsley et al. (2001:12) indicate that effective handling and exploitation of information calls for judgment, experience and management of risk. According to Billingsley et al. (2001:56), the use of proactive methods such as informers and undercover operations rely on deceiving the target and therefore the systems need to be properly managed to ensure justification. Eleven (11) detective participants cited

sub-standard informer handling as an aspect that contributes to informers acting in an unacceptable manner. The remaining detective participants cited other reasons, as discussed above.

According to Brown (2001:125), it is important to provide for proper and adequate control over informers. This will ensure that the informer does not embarrass the handler or department at a later stage. Brown (2001:125) agrees with Madinger (2000:98-99,123-138) by stating that it is important to adhere to the following aspects to maintain proper informer management:

- Never threaten, bluster or bluff. This argument is open to debate, as it is the experience of the researcher that a bluff at the right time may instantly motivate a non co-operative informer to deliver the required results. It is further an effective manner to test a suspected “double role” informer.
- Establish and maintain control over the informer. Fitzgerald (2007:237) and Clarke et al. (2004:322) point out that it is essential that informers know what their mandate is and they must obey instructions and tasks at all times. In addition Gilbert (2007:137) justifiably argues that the handler must always control the informer and not *visa versa*. These three authors agree that the informer is not permitted to act on own discretion.
- Mutual respect is imperative to establish rapport and to be effective with informer management. Gilbert (2007:138) adds that trust is the cornerstone of the relationship between the handler and the informer.
- Effective communication is a pre-requisite. Two-way communication is imperative to succeed in effective informer handling. It is important that both parties need to understand each other and the expectations of both parties. The handler needs to be capable of extracting information from the agent or informer in an orderly and chronological manner.
- Share information. It is important that every piece of information is used to its potential maximum. If it is necessary to divulge information to another unit, do so as it will be to the benefit of the organisation.

- See to it that the informer sticks to the rules brought to his/her attention when he/she was registered. Always have a copy of this agreement available.
- Document information properly by means of entries into the operational informer file, affidavits and notes.
- Evaluate and assess the informer regularly.
- Ethics and informer management:
  - Do not accept or take anything from an informer except his/her information. The Code of Conduct of the Precious Metals and Diamond Unit directs that no member should become familiar with an informer. Based on the experience of the researcher he agrees with Lambrechts (2005:679) that an investigator should never become familiar with an informer, since your informer of today may be your suspect of tomorrow.
  - Do not overlook criminal activity by the informer. Billingsley et al. (2001:26) point out that it is necessary for police to manage informers in such a manner that they do not believe that they have a “license to deal”. Since many informers themselves are involved with criminal activities, it is important to also investigate their activities and not to favour them because of their participation.
  - Do not use the informer to commit crime, unless it is authorised by the Director of Public Prosecutions.
- Emergency contacts. It is important for a handler to be available to adhere and react to calls from informers. It may just be the breakthrough that is needed to conclude an investigation.
- Important aspects to consider with regards to meetings with informers:
  - Never meet the informer at a Police station or offices of the investigative unit.
  - Place of meeting - a car, safe house or public places.
  - Always have a witness present.
  - Prepare yourself in advance for a meeting.
  - Listen carefully to what the informer has to say.

- Task the informer unambiguously.
- Debrief the informer comprehensively.

The researcher proposes that investigators need to keep to the above-mentioned golden rules of informer handling to be successful with this discipline. The answers by the detective participants clearly direct that some investigators lack proper informer handling skills.

### 3.8.3 Legend of an undercover operation

Buckwalter (1983:142) and Van Rooyen (2001:138) concur that the success of an undercover operation depends on how well the agent lives his/her role, the surroundings, the circumstances and above all his relationships with his associates. These authors discuss the point comprehensively and argue that the cover story or legend of an undercover operative must be realistic and believable. The cover story must always be true to real-life situations. The legend or cover story refers to the fictitious background, occupation and life that the agent assumes during the undercover operation.

Buckwalter (1983:136-137), Frazier (1994:155-161) and Van Rooyen (2001:138-139) point out that the following aspects need to be adhered to for the legend to hold up:

- An undercover operation requires that the agent assumes another lifestyle. The legend must be carefully created and planned in a manner that the agent is comfortable with. The agent needs to be able to live the assumed life. Frazier (1994:155) stresses that the deeper the agent infiltrates a syndicate the more sound the legend needs to be. High profile suspects are professionals with the necessary links to check out the agent's identity. Frazier (1994:155) states that syndicate leaders recruit corrupt police officials to verify the cover of the agents and to educate syndicates on police methods and techniques.
- The legend must be developed to be inline with the suspects to be infiltrated.

- The legend must fit the agent's profile. If you act as a rich businessman you need to fit into the role by dressing smartly and driving around in a luxurious vehicle. Lyman (2000:26) reports that the agent must be equipped with documents that coincides his undercover identity.
- The undercover operative needs to prepare himself to live the role convincingly, naturally and effectively, while maintaining secrecy of his true identity. It is important for agents to act, speak and react like criminals during the undercover operation. Agents must refrain from acting as policemen would do under specific circumstances. It may lead to the exposure of the agent.
- It is advised that only the agents surname to be changed, but to stick to his first name. This will ensure that the informer is not easily exposed.
- Identification documents should be kept to a minimum. A fictitious driver's license and identity document is a prerequisite.
- An instant criminal record will definitely pave the way for an agent to infiltrate a syndicate. The agent must be aware not to be bragging about certain events that he cannot give account for. For example that he /she served time in a prison without even knowing the location of the prison or the wardens.
- The duration of the undercover operation will determine the degree of cover that is required by the agent. If the operation continues for a prolonged period the informer/agent will need to have real life acting ability.

The discussion by the authors directs that agents need to be cognizant of the identified aspects to protect their cover story.

#### 3.8.4 Corroboration of information

According to Madinger (2000:132), corroboration for an informer's information is an important mechanism to control the informer and to keep him/her truthful. If the informer knows that his/her information will be verified he/she will be deterred from

lying. Fitzgerald (2007:171) emphasises that failure to corroborate information may have devastating consequences.

Gilbert (2007:137), Madinger (2000:133) and Ryan (2001) agree by stating that the following ways are essential in trying to corroborate information:

- Undercover agents must be infiltrated, with or without the knowledge of the informer.
- Other informers. The information can be checked against the other informer's version.
- Surveillance on the informer. It will be an indication of the involvement of the informer and accuracy of the information.
- Monitoring of conversations. The conversations between the informer and suspects may be intercepted to verify his information.
- Background checking. Compare information with the outcome of previous information tendered by the informer. It will give the investigator a good idea of the reliability of the informer and the general accuracy of the information.

Based on the experience of the researcher he agrees with the viewpoints of the authors of the literature consulted, since it is practice during precious metals undercover operations to corroborate information from informers. Informers can never be tasked properly and accurately, if information was not properly evaluated and refined to a usable product.

### 3.8.5 Protection of informers

According to Buckwalter (1983:145) and Gilbert (2007:138-139), the informer is to a large extent responsible for his/her own personal safety. Buckwalter (1983:145) indicates that the informer can secure his own safety by being constantly alert when in the presence of the suspects. The informer needs to constantly observe their attitudes.

Buckwalter (1983:147), Frazier (1994:145-154) and Clarke et al. (2004:325) concur by indicating that there are numerous hazards and cautions that the agent or informer needs to be aware of when conducting an undercover operation. The most important are listed below:

- The agent must refrain from getting arrested, since it may expose his true identity. Never carry a police identity or personal identification document. Syndicate members may attempt to determine the true identity of the agent by either letting him/her get arrested or acquiring the services of corrupt policeman to do a check-up on your past. Anticipate all possibilities.
- Frazier (1994:146) warns that agents should be cognisant of being set up during an undercover operation. He suggests that the agent should always determine the location, time and place for the transaction. This argument is open for criticism, since precious metals suspects are well equipped for transactions at their “business premises” and they require of the agent(s) to conduct transactions at these premises.
- Agents should not be overzealous by asking direct questions about the syndicate activities. This might arouse suspicion on the side of the syndicate. The undercover agent should be cognisant not to interrogate the associates. The thirty (30) detective participants were requested to list the problems that they encounter with informers during undercover operations. Three (3) participants confirmed this view by commenting that it is their experience that some informers becomes so anxious to conduct a transaction that they aboard all safety rules. The remaining twenty seven (27) participants referred to aspects, as indicated above.
- Telephone numbers of the investigation team must be memorised and not stalled on the memory of the informer’s mobile phone.
- Never take any associate, manager, co-worker into your confidence by revealing your true identity and the nature of the assignment. Van Rooyen (2001:140) cautions agents never to reveal their true identity.
- All communications must be dealt with in a secret manner. No notes, statements and reports must be accessible to any outsiders or suspects.

Important aspects need to be memorised and documented at a later stage (Van Rooyen, 2001:140). If the need arises to have a meeting with the handlers it must be conducted at a safe house after proper counter surveillance was conducted. Frazier (1994:61) emphasises the importance of a safe house by stating that a safe house is the location where intelligence files and criminal cases are protected from outsiders. It is imperative that no unauthorised people overhear conversations.

- A contingency plan must be decided upon for unplanned and emergency occurrences. Frazier (1994:143) suggests that a handler should train his undercover operatives for foreseeable emergencies, although it is not possible to predict all possible emergencies. Agents are to make the correct decisions to avoid disaster.
- The agent must refrain from sexual encounters and excessive drinking. Frazier (1994:90) stresses, that sexual relationships may be the reason for the agent to be exposed and the undercover operation to end up in a disaster. The thirty (30) detective participants were requested to list the problems that they encounter with informers during undercover operations. Seven (7) participants and Van Rooyen (2001:140) cited excessive drinking as a frequent reason for failure in the past. The remaining twenty three (23) participants cited various other reasons, as reflected above.
- Counter surveillance is important to secure that the agent, handler and safe house is not exposed.

Based on the literature consulted, the responses by the participants and the experience of the researcher he believes that all the cited aspects are valid and need to be addressed with the informers before and during an undercover operation. Informers and agents who are reluctant to adhere to the stipulations may endanger their lives and the investigation may be compromised to such an extent that it needs to be terminated.

### 3.8.6 Profile of informer

Buckwalter (1983:139) indicates that the following personal characteristics are needed for an agent to be successful with an undercover operation:

- **General type of personality.** A good actor, cool-headed, a resourceful imagination, self-confidence and the ability to think quickly. It is important for the agent to be unobtrusive, self-disciplined and able to control his feelings. A good memory is imperative, since many events may occur in a short space of time and the agent must be able to reflect on the events comprehensively and in detail. Van Rooyen (2001:137) adds that the agent must always be a gregarious person and never an introvert. The researcher agrees with this view as it is the primary goal of the agent to infiltrate a syndicate. He needs to act in such a manner that he is trusted by the syndicate members.
- **Adaptability.** The agent must be able to assume any role as required from him as if it is his natural environment.
- **Good judgement.** The agent needs to be able to make the correct decision under difficult circumstances, after a quick evaluation of the events that is unfolding. Gilbert (2007:377) embraces the view by reporting that an undercover operative must be quick thinking, since there are no ways to prepare for unpredictable situations.
- **Effective communicator.** An art which can contribute towards the speedily infiltration of the identified targets or to the exposure of the agent if he is not able to talk himself out of trouble. Not only is it essential to communicate well with the syndicate members, but also with the investigation team. Verbal and written communication skills are necessitated. It is the experience of the researcher that the informer needs to be computer literate to be able to communicate with the investigation team electronically when briefing and debriefing sessions is out of the question. It is an effective manner to communicate if the situation permits.

According to Frazier (1994:90), fear and anxiety may also jeopardise an operation if an undercover agent is not able to control his feelings and emotions. It is therefore necessary to properly evaluate an informer before engaging into an undercover operation.

The thirty (30) detective participants were requested to list the personal attributes of the informer that are taken into consideration when deciding on the role for the informer. Their responses are summarised as follows:

- The race and gender of the informer is an important consideration. The person needs to associate with the suspects on a personal level. It is therefore important for the informer to blend in with the surroundings.
- The informer must be an effective communicator.
- Previous experience of undercover operations.
- Reliability and trustworthiness.
- The personality of the informer. The informer must be able to remain focussed under difficult circumstances and he or she must be acceptable to the syndicate that he or she needs to infiltrate.

Not one of the participants referred to the language issue. Based on the researcher's experience it is to the benefit of the investigation if the informer is capable of communicating with the syndicate members in their mother tongue. Informers who are from the same descent as the suspects relate easier to those people and it facilitate the infiltration of the syndicate.

From the discussion it is eminent that the authors and participants are at heart that the correct person needs to be identified for the undercover operation. It is imperative that the informer fits into the situation and not visa versa. The mentioned attributes need to be considered to make an informed decision on the undercover operative.

### 3.8.7 Remuneration

#### 3.8.7.1 Payment of informers

Madinger (2000:214) strongly warns against the determining of a reward for a specific informer to gather evidence against a specific suspect. It may lead to deception, enticement and untruthfulness on the side of the informer. In the case of *S v Corns* 1993 (2) SACR 350 (NCD) the informer received a partly reward of one thousand rand before testifying. The court on appeal ruled that the situation was fraught with possibilities of bribery and extortion. On the contrary Madinger (2000:210) advises that the informer must be paid before testifying, because it will refute an argument by the defence that the informer is lying under oath to obtain a conviction and secure a reward.

Lambrechts (2005:641) asserts that a conviction is not a pre-requisite for the payment of a one-third reward, under section 3 of the Finance and Financial Adjustments Act Consolidation Act, Act 11 of 1977. The author indicates that seizure and forfeiture of precious metals and or money are the determinations for this type of reward. Based on the facts as set out by Lambrechts (2005:641) above, the researcher is of the opinion that it must be brought to the attention of the trial court that a conviction is not needed for payment of the reward to the informer. It is imperative that the informer, acting as an agent, should duly be informed of this stipulation. This will increase the credibility of the informer, since he will have no motive to colour a picture that will favour the prosecution.

The thirty (30) detective participants were requested to state and motivate if they would pay an informer before or after testifying. Seventeen (17) detective participants argued that they will remunerate the informer after testifying. The participants asserted that it will direct the informer to remain faithful in court by remaining to his statement. Another contention by the participants is that an informer might refuse to testify or abscond and thereby jeopardise the case. Three (3) detective participants

contended that the specific circumstances of the matter on hand will determine the approach. These participants propose that a pre-determined percentage of the reward may be paid to the informer, since these types of cases has a tendency to drag out for long periods. Ten (10) detective participants however remarked that they would pay the informer before testifying, as it will minimise an attack by the defence that he/she has a financial motive to testify. They are therefore in agreement with Madinger (2000:210) who also believe that it is better to pay the informer before he or she has to testify in court.

The discussion above directs that the authors and participants are not in agreement on the procedure to be followed in this regard. It is important to recognise that both arguments have merit, because the views of the participants are corroborated by the different authors and reported judgment. Based on the literature and views by the participants the researcher is of the opinion that the specific circumstances of the case will determine the procedure to be followed. It is the belief of the researcher that the sting of the attack on the payment of rewards will be refuted, by always indicating to court that a conviction is not the only determining factor or a pre-requisite when deciding on a reward for the informer.

#### 3.8.7.2 Type of rewards

On the question put to the thirty (30) detective participants on the type of rewards that are applicable to precious metals investigations the explanations of the participants were summarised as follows:

- **Operational expenses.** The purpose of this incentive is to reimburse the informer for expenses incurred with regards to a specific police action or undercover operation
- **Monthly rewards.** This type of reward is specifically valuable, where an informer is involved with an undercover operation over a prolonged period of time. The payment may be the same every month or vary. The specific circumstances of the operation will direct the route to follow. It is advisable to

draw up an agreement or contract with the informer to ensure that both parties are protected. Under circumstances where an informer is remunerated over the period of the undercover operation it is unlikely that the informer will receive a one-third reward, after the completion of the court cases. A merit reward may be considered if the informer produced high quality work during the operation and the objectives were achieved.

- **One-third reward.** The reward is justified under section 3 of the Finance and Financial Adjustments Act Consolidation Act, Act 11 of 1977. This type of reward is only payable after completion of the criminal case (Section 3 of the Finance and Financial Adjustments Act Consolidation Act).

According to the South African Police Service National Instruction 2/2001 (par. 24) the following criteria; as reflected on the SAPS 164; are used to determine the reward for an informer:

- Seriousness of the offence.
- Value of the information.
- Degree of difficulty of the investigation.
- Actual time and effort spend by an informer to obtain the information.
- Level of infiltration.
- Judicial process, continuance of services and giving of evidence.
- Priority of particular crime.
- Informers motive for co-operation.
- Value of the commodities seized.

Fitzgerald (2007:70) and Clarke et al. (2004:327) point out that informer's may be paid for services rendered and expenses incurred. Specific considerations are helpful in determining the amount. From the discussion it is clear that the detective participants have sufficient knowledge on the different options available to them, to properly remunerate informers. The researcher is satisfied with the criteria of the South African Police Service, since it is a comprehensive list of aspects that needs to be embodied

in an application for a reward. This minimise the possibility that important aspects are omitted from the application.

### 3.9 Summary

In order for investigators to optimally utilise informers it is imperative to have sufficient knowledge and experience about the types of informers, their motives, the difference between an informer and an agent and legal aspects with regards to this intelligence source. No police service can sufficiently combat crime without informers. Therefore it is important to properly manage, train and utilise informers to the benefit of the institution at large.

Informers deployed during precious metals undercover operations may be required to fulfil an array of roles during the undercover operation. The task at hand and the profile of the informer shall determine which role is most suitable for the person under the specific circumstances. The use of informers and undercover operations will not diminish, but it is important for transparent and effective law enforcement to use these investigative tools in a responsible manner. The following chapter is the concluding chapter where findings and recommendations are made to address the research problem and provide answers to the research questions.

## CHAPTER 4

### CONCLUSION

#### 4.1 Introduction

The decision to conduct research on this topic was as a result of the criticism against undercover operations and the role of the informer during these operations. The judiciary and users of undercover police operations have further pointed at various problems with regard to the use of informers such as: Informers exceeding the boundaries of their mandate, informer handling is sub-standard, inferior control over informers and insufficient corroboration during evidence-gathering.

The aim of the research is therefore to establish what undercover police operations entail and to determine how informers should be used by detectives during precious metals undercover operations.

In order to achieve the aims and address the shortcomings and problems with the use of informers the researcher formulated two research questions. The research was then conducted and the following research questions were answered:

- What do undercover police operations entail?
- How could informers be used during undercover police operations?

The research questions enabled the researcher to focus on the identified problem and ensure that findings and recommendations relate to the research problem.

A sample of thirty (30) detectives from the National Investigation Task Team was selected from the universe of detectives in the South African Police Service. The sample is regarded as representative of only the target population namely the detectives of the National Investigation Task Team. The findings of this study can thus only be valid for all detectives stationed at the National Investigation Task Team, since

all of them had an equal chance of being included in the study. A relatively large sample was selected (75%), namely 30 of the 40 detectives stationed at the National Investigation Task Team. However, there is a high probability that these findings might also be valid for all the other detectives who deal with similar cases since all of these police officials received the same basic training. All of these police officials are suppose to follow the same national prescribed procedures in handling informers and. Investigations are regulated and prescribed by the same organisational policies, guidelines and directives. It remains, however, only an assumption since the sample size is too small to be representative of the entire detective service and did the police officials from other investigation units not stand a chance of being included in the sample.

This chapter will provide information on what was discovered within the research. The findings and recommendations that were made relate to the initial research problem, aims and research questions. The researcher believes that if the findings and recommendations can be implemented in practice it could enhance precious metals undercover operations to a great extent.

## 4.2 Findings

The research findings are based on secondary information obtained from national and international literature sources and primary information from the interviews with police detectives and state advocates.

### 4.2.1 Research question 1: What do undercover police operations entail?

The research revealed the following:

- Undercover police operations are integral to forensic investigation, since it is a scientific method to gather evidence against precious metals perpetrators. Undercover operations may be concluded on an ad hoc basis or over a

prolonged period of time. It is a covert investigative method that is conducted in secrecy where the police make use of agents to propose criminal conduct to syndicate role players. Comprehensive evidence and intelligence are subsequently gathered against the identified syndicate role players. Undercover operations are an effective method to obtain and maintain control over organised crime. Undercover operations are an excellent barometer to determine the extent of organised crime. It gives investigators a clear view of the compilation of a syndicate and the roles of leaders, runners and associates. It is of paramount importance that the conduct of the informers and the agents do not go beyond the creating of an opportunity to commit an offence. That will ensure that the evidence obtained by means of an undercover operation will be adjudicated to be admissible in a court of law.

- Forensic investigation is synonymous to criminal investigation, since both concepts have the aim to ensure litigation, both criminally and civilly. Scientific knowledge needs to be applied for it to be classified as forensic investigation. Undercover operations and informers are likewise part of forensic investigation, since it has the same objectives. Stolen precious metals are recovered during an undercover operation, evidence and intelligence are gathered and suspects are arrested and brought before court to serve justice. Crime prevention in action is when prospected perpetrators are discouraged to commit these crimes when they take notice of similar operations and the successes that it produced.
- Undercover operations are a justified method to gather evidence against suspected precious metals syndicate role players under the following circumstances:
  - There must be a reasonable suspicion of criminal conduct against the suspect. An affidavit based on facts by the informer, agent or investigating officer will suffice to create the suspicion.
  - Serious crime must be committed or planned. Example: Organised crime, precious metals related offences or murder.
  - Responsible, credible organisations and persons with a good character must lead these investigations like for instance SAPS detectives.

- The golden thread towards fair undercover operations is that the idea to commit crime must be born from the mind of the suspect and a reasonable suspicion must exist against such a person before an undercover operation may be launched against the syndicate. Undercover operations are the tried and tested method to properly investigate precious metals investigations.
- Negative *juris prudencia* over undercover operations is the consequence of the irresponsible actions and conduct by informers and agents. They brought the system into disrepute. Criticism against the system is vested in the application of the system and not the system per se. Criticism against the use of undercover operations is justified under the following circumstances: Enticement by informers who are mostly dubious characters, unacceptable tactics like deception are used to lure suspects into the commissioning of an offence, fabrication of evidence, police corruption and abuse of the judicial process.
- Undercover operations are sufficiently judicially demarcated by means of the following measures:
  - Section 252(A) of the Criminal Procedure Act, Act 51 of 1977. This section is the corner stone for the South African Police Service to ensure that undercover operations are fairly set. Investigators, agents and informers need to comply with the contents of the section to ensure that evidence thus obtained is admissible in court.
  - Section 208 of the Criminal Procedure Act, Act 51 of 1977.
  - Section 35 of the Constitution of the Republic of South Africa, Act 108 of 1996.
  - Reported judgments.
- Insufficient directives are in place to regulate Undercover Operations within the South African Police Service.
- Not all users of precious metals undercover operations have sufficient knowledge of judicial measures to regulate undercover operations.

- The participating detectives are not completely conversant with the meaning of forensic investigation and what it encompasses.

#### 4.2.2 Research question 2: How could informers be used during undercover police operations?

It was established that:

- Informers and undercover operations are interrelated and closely connected. Undercover operations will not be successful without the use of informers. Informers are an indispensable method to gather information, intelligence and evidence against suspected criminals. The use of informers during precious metals undercover operations are necessitated due to their knowledge of and involvement with syndicate role players. Informers may be considered for the following roles during an undercover operation: Agent, introduction of agents to suspects, intelligence gathering and surveillance. Crimes committed in secrecy will not be uncovered without the assistance and participation of informers. To curb precious metals related crime requires well planned undercover operations and an effective informer network.
- The credibility of the informer, his or her abilities, background, profile, related experience and the task at hand will determine the role of the informer during an undercover operation.
- Only reliable, well-trained and experienced informers should be considered for use during an undercover operation.
- Informers and agents do not share the same meaning. An informer is protected by means of the informer privilege. When an informer is used as an agent, the informer cannot resort to the informer privilege, since he or she is bound by the stipulations of section 252(A) of the Criminal Procedure Act, Act 51 of 1977.
- Full-time informers and paid informers are predominantly active within the precious metals domain. Detectives need to possess the necessary knowledge and experience to correctly identify, classify and handle informers. This will

ensure that these individuals are optimally utilized during undercover operations.

- Financial motives, elimination of rival groups and ulterior motives are closely connected to precious metals investigations, due to the monetary incentives that it holds.
- Problems with informers during precious metals undercover operations are the result of the following:
  - Failure by the South African Police Service to properly train informers for the task at hand.
  - A lack of proper control over informers.
  - The unscrupulous conduct by some informers that led to the acquittal of suspected precious metals syndicate members and leaders.
  - A lack of training of agents and detectives involved with informers during precious metals undercover operations.
- The majority of participants have a good understanding of and vast experience of aspects that need contemplation before a precious metals undercover operation. However, a few participating detectives do not have the necessary knowledge to successfully plan and execute an undercover operation. The following aspects need especial attention: informer handling, training of the informers and profile of the informer. Not all of the participating detectives are fully aware of the requirements and contents of the informer privilege. Not all investigators are cognizant of informers with ulterior motives and a motive to eliminate rival groups.

#### 4.3 Recommendations

In order to address the shortcomings with regards to the use of informers during precious metals undercover operations the following recommendations are made to improve undercover operations:

- An undercover operations user guideline/manual needs to be compiled to assist and guide investigators during the phases of undercover operations. It needs to consist of all legal requirements, reported judgments, internal South African Police Service directives and best practices. Aspects that need consideration before embarking onto an undercover operation needs to be included into the guidelines. It is submitted that the manual needs to be updated on an annual basis with regards to *juris prudencia* and best practises. The updated version should be circulated to all users of undercover operations.
- A database that is inter-connected between all users of undercover operations should be created because of a dire need by all users of undercover operations. The database needs to furnish detectives, agents and advocates with new tendencies amongst syndicates and successful strategies and methodologies utilised by detectives. It is imperative that a data capturer and analyst should be appointed at the South African Police Service Head Office to administer the system. The database should be to the disposal of all users of undercover operations, since it may enrich all users of undercover operations and not just users of precious metals undercover operations.
- It is recommended that practical and theoretical training need to be combined to be successful with this approach.
  - Prosecuting advocates should be trained with regards to the operational side of an undercover operation and the assumed life of the agent. Prosecutors need to be acquainted with the terminology used, procedures with regards to the processing and refining of precious metals and modus operandi of precious metals syndicates.
  - Informers need to be trained on operational aspects, by experienced agents who participated in similar undercover operations. It is recommended that role-playing need to take place where prospected agents can be properly evaluated and guided on possible scenarios that may come their side. It is further recommended that informers be trained intensely by the prosecuting advocate on all legal issues that may have bearing on the individuals and the operation.

- It is strongly recommended that a training course for detectives and informer handlers needs to be developed and implemented on undercover operations. Detectives should be trained on the following aspects:
  - Legal issues.
  - Project management principles.
  - Informer's motives and type of informers.
  - The roles that an informer can be considered for during an undercover operation.
  - Aspects that need consideration during precious metals undercover operations.
- An internal South African Police Service directive should be developed and implemented to ensure uniformity with the application of undercover operations. The emphasis needs to be based on guidelines for the proper execution of undercover operations. Undercover operations are not rigid and therefore it is important not to captivate detectives with strict directives, rather guide them to the effective planning, execution and termination of undercover operations in general.
- Continuous research on forensic investigation methods and techniques are recommended, because it is invaluable towards combating crime in South Africa. Crime phenomena, crime patterns and modus operandi by criminal syndicates should be researched to keep track with the ever changing technological advanced era that we function in. It is the only way of keeping up with criminals and developing methods, techniques and operational strategies to counter and control criminal activities.

#### 4.4 Conclusion

The use of informers and undercover operations will remain an important and effective manner to gather evidence and intelligence against precious metals perpetrators. It is

a justified method within the forensic investigation field to address organised crime activities.

This research has revealed many challenges in the use of informers during undercover operations. Training of role players and proper guidelines are of vital importance to ensure that undercover operations are conducted properly and within the boundaries of the law. It is of essence that users of undercover operations need to do all in their power to keep the system clean of unlawful practices. If the recommendations that were made to address these challenges can be implemented by the South African Police Service and justice role players it will definitely enhance undercover operations and limit criticism against the system to the minimum.

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INTERVIEW SCHEDULE: DETECTIVE PARTICIPANTS

THE USE OF INFORMERS DURING PRECIOUS METALS UNDERCOVER OPERATIONS.

SECTION A

PERSONAL DETAILS

1. How old are you?
2. Designation?
3. State the name of the unit you are attached to?
4. For how long have you been employed within the crime investigation domain?
5. Did you attend a detective training course?  
Yes/No
6. Did you undergo specialised training with regards to the following fields?

Organised Crime	Yes/No
Precious Metals	Yes/No
Undercover operations	Yes/No
Informer handling	Yes/No
7. In how many undercover operations did you participate in?

SECTION B

UNDERCOVER OPERATIONS

8. What do you understand of the concept forensic investigation?
9. Name the objectives of forensic investigation?
10. Are you of the opinion that the use of informers during precious metals undercover operations is integral to forensic investigation?  
Yes/No Motivate

11. What do you understand of the concept undercover operation?
12. What is the purpose of undercover operations?
13. Are you of the opinion that an undercover operation is analog to a trap?  
Yes/No Motivate
14. Is an effective method to investigate precious metals related crimes?  
Yes/No Motivate
15. Discuss the phases of an undercover operation?
16. Are you of the opinion that undercover operations are judicially sufficiently demarcated?  
Yes/No Motivate
17. Name as many as possible judicial measures to control undercover operations.
18. Is the application of undercover operations sufficiently regulated and controlled within SAPS?  
Yes/No Motivate
19. What is the purpose of section 252(A) of the Criminal Procedure Act, 51/1977?
20. What effect does section 252(A) Act 51/1977 has on the execution of undercover operations?
21. Indicate how you would ensure that evidence gathered in terms of section 252(A) of the Criminal Procedure Act is corroborated?
22. What measures do you implement to ensure that undercover operations are fairly set?

## SECTION C

### INFORMERS

23. Name as many as possible motives of informers for giving information.
24. Which of these are the most applicable to precious metals undercover operations?
25. Name as many as possible types of informers?
26. Which of them are the most applicable to precious metals undercover operations?
27. What is your understanding of the informer privilege?
28. Are there exceptions to the informer privilege?

Yes/No Motivate

29. What is the effect of the informer privilege when an informer is used as an agent during an undercover operation?
30. Mention the roles that an informer can be used for during precious metals undercover operations?
31. Which factors do you take into consideration when deciding on the role for the informer during an undercover operation?
32. Under which circumstances would you deviate from the original role decided upon for the informer?
33. Is there any role that you would not consider an informer for?
34. Would you consider using an informer in the role of agent during an undercover operation?

Yes/No Motivate

35. Briefly discuss aspects that need consideration when making use of informers during undercover operations?
36. What aspects do you attend to when training an informer for an undercover operation?
37. Which of these aspects lacks attention during precious metals undercover operations?
38. Make suggestions on how to improve and rectify the situation?
39. What problems do you encounter with informers during undercover operations?
40. Make suggestions on how to minimise these problems?
41. What measures do you implement to corroborate the evidence gathered by an agent/informer?
42. What type of informer rewards is applicable to precious metals investigations?
43. How do you determine the reward to be paid to an informer?
44. If your informer still has to testify in your case, would you pay his reward before he has testified or afterwards?

Before/ Afterwards Motivate:

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INTERVIEW SCHEDULE: ADVOCATE PARTICIPANTS

THE USE OF INFORMERS DURING PRECIOUS METALS UNDERCOVER OPERATIONS.

SECTION A

PERSONAL DETAILS

1. How old are you?
2. For how long have you been an advocate with the DPP?
3. Did you undergo specialised training with regards to the following fields?

Organised crime prosecutions	Yes/No
Precious metals investigations	Yes/No
Undercover Operations	Yes/No
4. How many undercover operations did you prosecute?

SECTION B

UNDERCOVER POLICE OPERATIONS

5. What do you understand of the concept undercover operation?
6. What is the purpose of undercover operations?
7. Is it an effective method to address precious metals related crime?  
Yes/No Motivate
8. Are you of the opinion that undercover operations are judicially sufficiently regulated?  
Yes/No Motivate

9. Is the application of undercover operations sufficiently controlled and regulated within SAPS?

Yes/No Motivate

10. What is the effect of section 252(A) Act 51/77 on the execution of undercover operations?

11. What measures do you implement to ensure that undercover operations are fairly set?

12. Would you consider utilising informers as agents during undercover operations?

Yes/No Motivate

13. What problems do you encounter with the use of informers during undercover operations?

14. Make suggestions on how to minimise these problems?

15. What problems do you encounter in general with regards to undercover operations?

16. Make suggestions on how to minimise these problems?

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