

Unconstitutionally obtained evidence

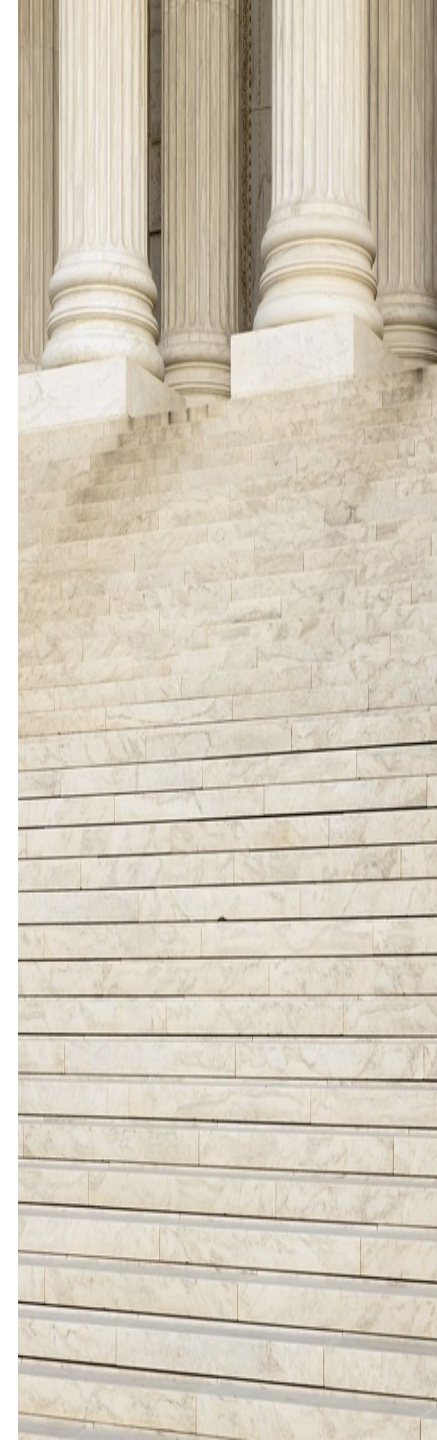
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Schwikkard & Mosaka *Principles of Evidence* 6 ed (2023)

Text

- S 35 (5) Evidence obtained in a manner that violates **any** right in the Bill of Rights must be excluded if the admission of that evidence would render the trial unfair or **otherwise** be detrimental to the administration of justice.
- *S v Ndlovu* 2021 (1) SACR 299 (ECMA)
 - S 35(5) strikes a balance between competing interests



The threshold test

- Evidence must be obtained as a result of a breach of a right
- Not necessary that it is the accused's rights that were violated
- *S v Mthembu* 2008 (2) SACR 407 (SCA): witness's right breached
- *S v Dube* 2000 (1) SACR 53 (N): also applied to evidence obtained by persons acting in a private capacity

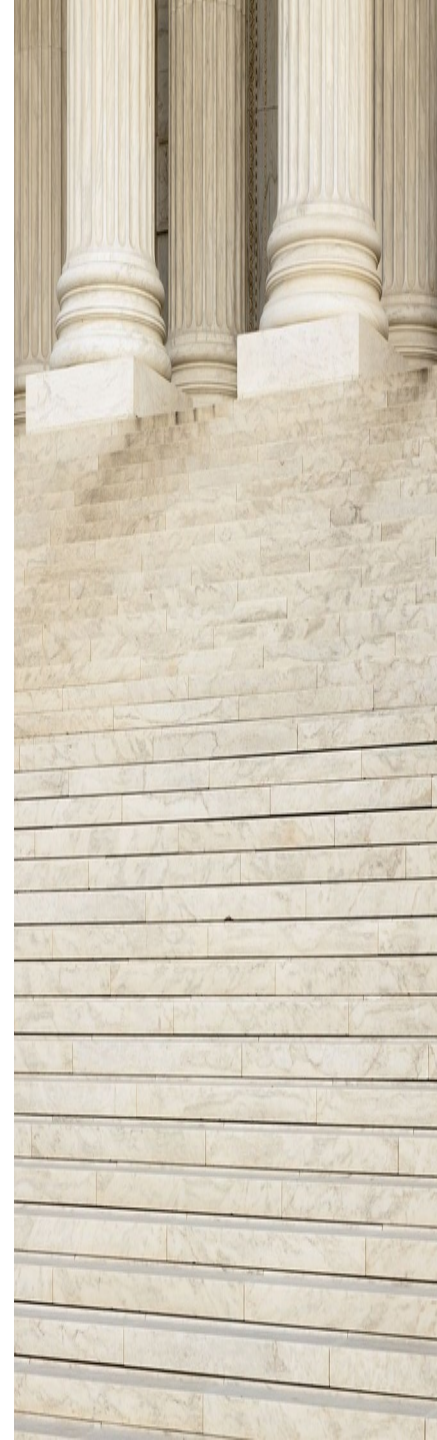


Discretionary/Peremptory

- *S v M* 2002 (2) SACR 411 (SCA):
- Discretion: would admission render trial unfair or otherwise be detrimental to the administration of justice?
- Peremptory: if admission would render trial unfair or otherwise be detrimental to the administration of justice then MUST exclude
- *S v Naidoo* 1998 (1) SACR 479 (N) 527: where admission will render the trial unfair to admit it will always be detrimental to the administration of justice
- If admission would not render the trial unfair it is still possible that admission will be detrimental to the administration of justice.

Render the trial unfair? (introduction)

- Nature of constitutional breach: breach of a s 35 right does not automatically render a trial unfair
- *S v Dzukuda; S v Tshilo 2000 (2) SACR (CC)*: 'the right to a fair trial is a comprehensive and integrated right the precise content of which has to be established on a case to case basis'
- Competing policy interests: protection of citizens from invasion of liberty by authorities v protection of citizens by securing evidence to convict the guilty



Render the trial unfair? (factors)

- *S v Tandwa* 2008 (1) SACR 613 (SCA)
 - Type and degree of breach
 - Degree of prejudice to the accused
 - Reasonableness of police conduct
 - Privilege against self-incrimination (see also *S v Soci* 1998 (2) SACR 275 (E); *S v Lottering* 1999 (12) BCLR 1478 (N); *S v Pillay* 2004 (2) SACR 419 (SCA); *Naidoo* supra; *S v Nell* 2009 (2) SACR 37 (C); *S v Seseane* 2000 (2) SACR 225 (O); *S v Mphala* 1998 (1) SACR 388 (W)
 - Suspects: *S v Sebejan* 1997 (1) SACR 626 W); *S v Khan* 2010 (2) SACR 476 (KZP); *S v Makhala* 2022 (1) SACR 485 (SCA)
 - Real evidence: *S v Gumede* 2017 (1) SACR 253 (SCA); *S v R* 2000 (1) SACR 33 (W)



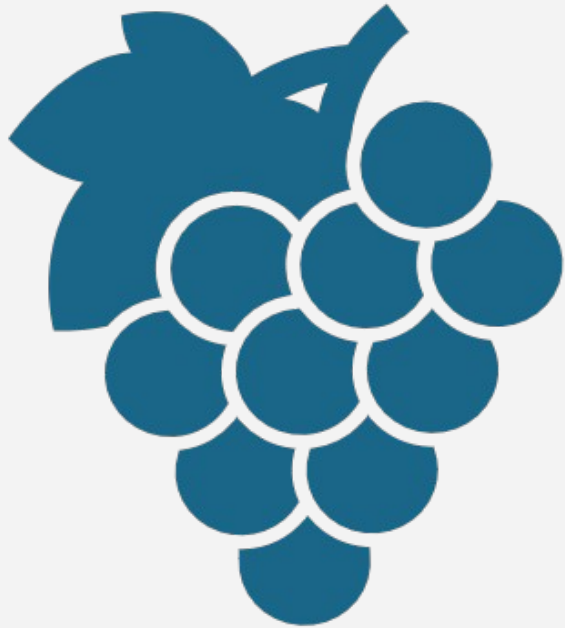
Detrimental to the administration of justice? (introduction)

- *Mphala supra*: balance needs to be struck between respect for the Bill of Rights and respect for the judicial process
- *Ferrier v Levin NO; Vryenhoek v Powell NO* 1996 (1) SA 984 (CC); *S v Ngcobo* 1998 (10) BLCR 1248 (N): public opinion & public confidence in the criminal justice system
constitutional values remain important
court has an educational role to play

Detrimental to the interest of justice? (factors)

- *Lottering supra*: Would admission encourage non-compliance? (see also *Pillay supra*).
- *Naidoo supra*: reasonableness and good faith (see also *S v Hena* 2006 (2) SACR 33 (SE); *Mphala supra*; *S v Madiba* 1998 (1) BCLR 38 (D))
- *S v Soci* 1998 (2) SACR 275 (E): systemic bad practice
- *Madiba supra*: public safety & urgency
- *S v Mark* 2001 (1) SACR 572 (C): nature and extent of the violation
- *Mkhize supra*: real evidence that pre-existed breach (see also *Ndlovu supra*)

Derivative evidence



- ‘fruit of the poisoned tree’
- *Pillay supra*: initial breach = privilege vrs self incrimination = unlikely to be admitted
- Real evidence that pre-existed the breach = more likely to be admitted
- *Ferreira v Levin supra*: nature and extent of initial breach (see also *Tandwa supra*)
- Inevitably discovery by lawful means
- All other factors mentioned above
- S 218 of CPA: always subject to s 35(5)

Procedural matters

trial-within-a-trial

DPP, Tvl v Viljoen 2005 (1) SACR 505 (SCA): GR: trial-within-a-trial

S v Kidson 1999 (1) SACR 388 (W): trial-within-a-trial not required in certain circumstances

S v Brown 2024 (1) SACR 403 (ECMK): ruling on admissibility must be made prior to close of prosecution case

burden of proof?

defence must allege infringement

disputed facts to be proved by state

ultimately court makes value judgment – no onus applicable

Civil proceedings

Hohne v Super Stone Mining 2017 (3) SA 45 (SCA): s 35(5) not applicable – admissibility determined to the common law

