

Illegally or unconstitutionally obtained evidence: a South African perspective*

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1 Introduction

The admissibility of illegally or unconstitutionally obtained evidence has become a much discussed issue since our new constitutional dispensation came into operation in 1994. This is especially evident in the context of criminal proceedings. But this issue has also on occasion engaged the attention of the civil courts. This paper focuses on recent developments in South African jurisprudence regarding the admissibility of such evidence. The emphasis falls mainly on the position in criminal cases and the influence of Canadian jurisprudence on our case law. Special attention is given to the most recent approach regarding real evidence obtained in such a manner adopted by the Canadian supreme court.¹ In view of the importance South African courts have attached to Canadian case law on constitutional issues, this development is likely to have an impact on our jurisprudence.

Since this contribution is based on a national report aimed at foreign readers, it is necessary to provide a brief background to put the subject in perspective. Thereafter the paper proceeds to address the issues identified above.

2 Background

The South African legal system has a hybrid nature, which is due to historical developments in the Cape during the early nineteenth century. During the era when the Cape was under Dutch rule, from the middle of the seventeenth century to the end of the eighteenth century, Roman-Dutch law, which was the law of Holland, reigned in all spheres in the Cape. The dominant position of Roman-Dutch law was, however, curtailed in the early part of the nineteenth century when the British authority, which then ruled in the Cape, transformed the civil and criminal procedural systems, including the court structures, to conform mainly to the English system. Substantive law was, however, left intact. Needless to say, substantive law has been the subject of numerous legislative enactments in South Africa through the years but Roman-Dutch common law still forms the foundation of large parts of private substantive law in particular.²

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¹ A recent article by a Canadian author, containing a clear exposition of the latest decisions of the Canadian supreme court on the subject-matter at hand, came to my attention too late to be incorporated in this discussion. The reference is: Stuart "Welcome flexibility and better criteria from the supreme court of Canada for exclusion of evidence obtained in violation of the Canadian Charter of Rights and Freedoms" 2010 *Southwestern Journal of International Law* 313.

² On this development, see Cilliers, Loots and Nel *Herbstein and Van Winsen The Civil Practice of the High Courts of South Africa* (2009) 4-5.

The law of evidence, which regulates the proof of facts in both criminal and civil proceedings, was of course part and parcel of the English-oriented procedural system that was introduced in the Cape. It follows that our law of evidence is characterized by the same salient features as the traditional English model.³ As a result of the influence of the jury on the English trial proceedings, a body of rules regulating the admissibility of evidence developed.⁴ This consists mainly of categories of evidence that are, as a rule, inadmissible.

Whilst there are also rules applicable to the evaluation of evidence and other matters pertaining to trial proceedings, these exclusionary rules form the gravamen of the law of evidence. The South African law of evidence recognizes the following categories of evidence that are, as a rule, excluded: character evidence; similar fact evidence; opinion evidence; and previous consistent statements. These categories are excluded on the basis that the evidence is irrelevant.⁵ In addition to this, evidence that is relevant can be excluded in terms of the rules relating to the various forms of privilege.⁶ Apart from the previous categories of evidence, hearsay evidence is also excluded, although the court has a wide discretion to admit such evidence if it is in the interests of justice.⁷ Finally, evidence can be excluded if it was obtained in an improper, illegal or unconstitutional manner. In this regard a distinction must be drawn between the legal position prevailing before and after the adoption of the constitution of 1996.⁸

Prior to the current constitutional era⁹ South African courts followed the English common law inclusionary approach, in terms of which the determining test for the admissibility of evidence was relevance and the manner in which the evidence was obtained was, as a rule, of no concern to the court.¹⁰ In *Kuruma, Son of Kaniu v R* the court qualified this approach by adding that “in a criminal case a judge always has a discretion to disallow evidence if the strict rules of evidence would operate unfairly against the accused”.¹¹ South African courts also adopted the qualification of the general approach by endorsing a judicial discretion in criminal cases to exclude improperly or illegally obtained evidence. Although the courts’ approach was not uniform, the general trend was to exercise this discretion on the grounds of fairness and public policy.¹²

The interim constitution¹³ did not contain a provision dealing specifically with the admissibility of unconstitutionally obtained evidence. However, an *accused* was accorded the right to a fair trial and the courts merely adapted their common law discretion to meet the demands of the constitutional era.¹⁴

³ On the incorporation of English law of evidence into the South African law, see Schwikkard and Van der Merwe *Principles of Evidence* (2009) 25 *et seq.*

⁴ Schwikkard and Van der Merwe (n 3) 4-6.

⁵ See Schwikkard and Van der Merwe (n 3) ch 5-9.

⁶ Schwikkard and Van der Merwe (n 3) ch 10-11.

⁷ Schwikkard and Van der Merwe (n 3) ch 13.

⁸ Constitution of the Republic of South Africa, 1996. The position in terms of the Interim Constitution 200 of 1993 was of short duration and will for this reason not be considered. See Schwikkard and Van der Merwe (n 3) 208.

⁹ South Africa was, of course, also governed by a constitution prior to the new constitutional era commencing in 1994. However, it was marred by constitutional and legislative measures aimed at maintaining the apartheid system.

¹⁰ *Kuruma, Son of Kaniu v R* 1955 AC 197 203.

¹¹ 204.

¹² *Cf S v Forbes* 1970 2 SA 594 (C); *S v Hammer* 1994 2 SACR 496 (C).

¹³ See n 8.

¹⁴ See Schwikkard and Van der Merwe (n 3) 209.

The bill of rights in the constitution of 1996¹⁵ deals specifically with unconstitutionally obtained evidence in *criminal proceedings*. Section 35(5) provides as follows: “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.”¹⁶

This provision deals only with *unconstitutionally* obtained evidence. It follows that evidence that has been obtained improperly or illegally – but not in violation of a constitutional right – must still be determined in accordance with the common law discretion. However, in my view such cases would be limited by reason of the extensive rights accorded to arrested and accused persons in the constitution. Furthermore, in these cases the accused’s right to a fair trial must be taken into account, which means that the test laid down in the section 35(5) should also be applied in this context.¹⁷

The position in civil proceedings regarding improperly or illegally obtained evidence before and after the adoption of the constitution will be considered separately.¹⁸

3 *The exclusion of unconstitutionally obtained evidence in criminal cases in terms of section 35(5) of the constitution*¹⁹

3.1 Elements of section 35(5)

It is evident from the wording of section 35(5) of the constitution (“evidence ... *must* be excluded ...”) that it places a *duty* upon the court to exclude evidence that has been obtained in a manner that violates any constitutional right. However, this duty is activated only if the admission of the unconstitutionally obtained evidence would render the trial unfair or would otherwise be detrimental to the administration of justice. It seems equally clear that the court is also endowed with *discretion* to determine if one of the two stated consequences would ensue if the said evidence were to be admitted. Schwikkard and Van der Merwe give a succinct description of the court’s duty and discretion in this regard:

“There is a duty to exclude if admission would have one of the consequences identified in the section. In this respect there is no discretion but a fixed constitutional rule of exclusion. However, in determining whether admission would have one of the two identified consequences a court is required to make a value judgment and in this respect there is a discretion which must, obviously, be exercised having regard to all the facts of the case, fair trial principles and, where appropriate, considerations of public policy.”²⁰

It seems clear, therefore, that there are three distinct elements contained in section 35(5). First, the court must determine if the evidence in question was obtained in a manner that violated any of the accused’s constitutional rights. If the answer to this question is in the affirmative the next question is whether admission of such evidence would render the trial unfair or otherwise be detrimental to the administration of justice. If the court, in the exercise of its discretion, has determined that one

¹⁵ See n 8.

¹⁶ s 35(5).

¹⁷ See n 16. Schwikkard and Van der Merwe (n 3) 207; *S v Kidson* 1999 1 SACR 338 (W) 349b-c.

¹⁸ See *infra* par 4.

¹⁹ See n 8.

²⁰ Schwikkard and Van der Merwe (n 3) 215.

of the stated consequences would ensue, it reaches the final stage, which involves a duty to exclude the evidence. At this stage there is no discretion – only a duty.²¹

3.2 Section 24(2) of the Canadian charter

It is apposite to refer briefly to the position under section 24(2) of the Canadian charter of rights and freedoms, since section 35(5) of our constitution is clearly modelled on the former provision, and our courts have been inclined to follow Canadian precedents.

Section 24(2) of the charter provides as follows:

“Where ... a court concludes that evidence was obtained in a manner that infringed or denied any rights or freedoms guaranteed by this Charter, the evidence shall be excluded if it is established that, having regard to all the circumstances, the admission of it in the proceedings would bring the administration of justice into disrepute.”²²

It seems clear from the wording of the provision (“shall be excluded”) that it also places a *duty* on the court to exclude evidence obtained in violation of any right enshrined in the charter. However, this duty arises only in the event of the court making a finding that admission of such evidence would bring the administration of justice into disrepute. In determining this issue the judge is directed by section 24(2) to have regard to “all the circumstances”. This means that the court must consider and balance a range of actions, which involves making a value judgment and, therefore, exercising a discretion.²³

The framework within which this discretion is exercised and the factors to be taken into account have been the subject of contradictory decisions and critical academic comments in Canada.²⁴ In *R v Grant*²⁵ the supreme court of Canada broke new ground by declining to follow its own previous jurisprudence on the application of section 24(2) of the charter and by adopting a revised approach in this regard. The court was in essence confronted by two contradictory precedents, namely *R v Collins*²⁶ and *R v Stillman*,²⁷ decided in 1987 and 1997 respectively.

In *R v Collins*²⁸ Lamer J, writing for the majority, grouped the factors to be considered under section 24(2) into three categories, *viz* those that –

- (i) are “relevant in determining the effect of the admission of the evidence on the fairness of the trial”;
- (ii) are “relevant to the seriousness of the *Charter* violation and thus to the disrepute that will result from judicial acceptance of evidence obtained through that violation”; and
- (iii) “relate to the effect of excluding the evidence. The question ... is whether the system’s repute will be better served by the admission or exclusion of the evidence ...”.

²¹ The judge in *S v Hena* 2006 2 SACR 33 (SE), who purported to exercise a discretion at this stage of the inquiry, clearly misconstrued s 35(5) – see De Vos “Judicial discretion to exclude evidence in terms of s 35(5) of the constitution: *S v Hena* 2006 2 SACR 33 (SE)” 2009 *SACJ* 433.

²² cited in Schwikkard and Van der Merwe (n 3) 201.

²³ *Cf* De Vos 2009 *SACJ* 433 435.

²⁴ See the cases and articles cited in *R v Grant* 2009 2 SCR 353 par 101; 2009 SLC 32.

²⁵ *ibid*.

²⁶ 1987 28 CRR 122 (SCC); 1987 1 SCR 265.

²⁷ 1997 42 CRR (2d) 189 (SCC); 1997 1 SCR 607.

²⁸ (n 26) 137-139.

According to Lamer J the factors relevant to determining the fairness of the trial include the nature of the evidence in question. He explained further:

“Real evidence that was obtained in a manner that violated the *Charter* will rarely operate unfairly for that reason alone. The real evidence existed irrespective of the violation of the *Charter* and its use does not render the trial unfair. However, the situation is very different with respect to cases where, after a violation of the *Charter*, the accused is conscripted against himself through a confession or other evidence emanating from him. The use of such evidence would render the trial unfair, for it did not exist prior to the violation and it strikes at one of the fundamental tenets of a fair trial, the right against self-incrimination.”²⁹

In *R v Stillman*³⁰ the court adhered to the framework laid down in *R v Collins*³¹ but adopted a different approach regarding the fair trial enquiry. Cory J, writing for the majority, rejected the notion that the distinction between real evidence and testimonial evidence is of any significance in the context of the fair trial enquiry. The court held that instead it is crucial to determine if the challenged evidence was obtained in a conscriptive or non-conscriptive manner. Cory J explained:

“The crucial element which distinguishes non-conscriptive evidence from conscriptive evidence is not whether the evidence may be characterized as ‘real’ or not. Rather, it is whether the accused was compelled to make a statement or provide a bodily substance in violation of the *Charter*. Where the accused, as a result of a breach of the *Charter*, is compelled or conscripted to provide a bodily substance to the state, this evidence will be of a conscriptive nature, despite the fact that it may also be ‘real’ evidence. Therefore, it may be more accurate to describe evidence found without any participation of the accused, such as the murder weapon found at the scene of the crime, or drugs found in a dwelling house, simply as *non-conscriptive* evidence; its status as ‘real’ evidence, *simpliciter*, is irrelevant to the s 24(2) inquiry.”³²

The majority also rejected the common-law rule that the privilege against self-incrimination is confined to testimonial evidence (*ie* utterances or conduct with a communicative element) and, therefore, not applicable to real evidence (*ie* physical objects or bodily substances). The court, therefore, held that the compelled provision of bodily substances “in breach of a *Charter* right for purposes of self-incrimination will generally result in an unfair trial as surely as the compelled or conscripted self-incriminating statement”.³³

In terms of Cory J’s “fair trial analysis”, the admission of non-conscriptive evidence would not render the trial unfair and the court will proceed to consider the two other questions stated in *R v Collins*.³⁴ On the other hand, the admission of conscriptive evidence – both testimonial and real – would, as a rule, render the trial unfair and should be excluded solely on this basis.³⁵ However, if the challenged evidence would inevitably have been discovered by alternative non-conscriptive means, its admission would generally not render the trial unfair.³⁶

²⁹ (n 26) 137.

³⁰ n 27.

³¹ n 26.

³² (n 27) 219 – emphasis in the original.

³³ *ibid* 223.

³⁴ See n 25.

³⁵ It is then unnecessary to consider the other two questions since an unfair trial “would necessarily bring the administration of justice into disrepute” – *R v Stillman* (n 27) 231.

³⁶ See *R v Stillman* (n 27) 231 for a summary of this “fair trial analysis”.

The contradictory decisions and critical arguments on the application of section 24(2) of the charter alluded to above³⁷ persuaded the supreme court to revisit the issue in *R v Grant*,³⁸ where McLachlin CJ and Charron J, writing for the majority, encapsulated the criticism against the decision in *R v Stillman*³⁹ in these words:

“[I]t has been criticized for casting the flexible in ‘all the circumstances’ test prescribed by s 24(2) into a straight-jacket that determines admissibility solely on the basis of the evidence’s constrictive character rather than all the circumstances; for inappropriately erasing distinctions between testimonial and real evidence; and for producing anomalous results in some situations ...”⁴⁰

In order to address these concerns the majority adopted a revised approach, which was phrased as follows:

“A review of the authorities suggests that whether the admission of evidence obtained in breach of the *Charter* would bring the administration of justice into disrepute engages three avenues of inquiry, each rooted in the public interests engaged by s 24(2), viewed in a long-term, forward-looking and societal perspective. When faced with an application for exclusion under s 24(2), a court must assess and balance the effect of admitting the evidence on society’s confidence in the justice system having regard to: (1) the seriousness of the *Charter*-infringing state conduct (admission may send the message the justice system condones serious state misconduct), (2) the impact of the breach on the *Charter*-protected interests of the accused (admission may send the message that individual rights count for little), and (3) society’s interest in the adjudication of the case on its merits. The court’s role on a s 24(2) application is to balance the assessments under each of these lines of inquiry to determine whether, considering all the circumstances, admission of the evidence would bring the administration of justice into disrepute. These concerns, while not precisely tracking the categories of considerations set out in *Collins*, capture the factors relevant to the s 24(2) determination as enunciated in *Collins* and subsequent jurisprudence.”⁴¹

Although trial fairness is not specifically mentioned in this new framework, it is clearly a factor that can be accommodated under the second enquiry.⁴² The court proceeded to elaborate on the content of these three lines of enquiry in the context of the following types of evidence.⁴³

- (i) Statements by the accused.⁴⁴
- (ii) Bodily evidence (*ie* substances taken from the body of the accused).⁴⁵
- (iii) Non-bodily physical evidence.⁴⁶
- (iv) Derivative evidence (*ie* “physical evidence discovered as a result of an unlawfully obtained statement”).⁴⁷

The court emphasized that the same three lines of enquiry must be pursued in the case of each type of evidence.

It seems that the revised framework adopted in *R v Grant* constitutes a more flexible approach than the framework laid down in *R v Collins*, as constricted by the constrictive or non-constrictive test in *R v Stillman*. The new framework can still

³⁷ n 23.

³⁸ n 23.

³⁹ n 27.

⁴⁰ par 101.

⁴¹ par 71.

⁴² *Cf* the last sentence of the above *dictum* and see also par 65 of majority judgment.

⁴³ par 89 *et seq.*

⁴⁴ par 89.

⁴⁵ par 99.

⁴⁶ par 112.

⁴⁷ par 116.

accommodate the factors enunciated in *R v Collins* and it gives proper recognition to the requirement of “all the circumstances” contained in section 24(2) of the charter. It also maintains the distinction between testimonial and real evidence.⁴⁸

3.3 Application of tests contained in section 35(5) of the South African constitution

The wording of section 35(5) of the constitution (“or otherwise”) makes it clear that the consequence “detrimental to the administration of justice”, constitutes a broad criterion under which the other consequence, “unfair trial”, must be accommodated. In other words, if admission of evidence would render the trial unfair, it would inevitably be detrimental to the administration of justice. However, if admission of the evidence would not render the trial unfair, it might be necessary nevertheless to exclude the evidence on the basis that admission would be detrimental to the administration of justice. In brief, whereas admission that would lead to an unfair trial would always be detrimental to the administration of justice, the reverse is not true. It is possible that admission would not result in an unfair trial but would be detrimental to the administration of justice because of other factors, such as the flagrant disregard of individual rights or legal procedures by the police.⁴⁹

Although the question whether admission of the evidence would otherwise be detrimental to the administration of justice is an over-arching test, which embraces the test relating to the fairness of the trial, section 35(5) has created two separate tests that must be applied as such. A court must, therefore, first enquire if the fairness of the trial would be affected by admission of the impugned evidence and if the answer is in the negative proceed with the second enquiry.

Naudé, however, expresses the view “that it is unnecessary to consider the two legs ... as separate tests”. According to him “[t]here should in principle only be one test: namely whether the admission of certain evidence would be detrimental to the administration of justice ...”⁵⁰ He finds support for this opinion in the revised approach adopted in *R v Grant*.⁵¹ However, in my view one should be mindful of the fact that the wording of section 24(2) of the Canadian charter is quite different from that of section 35(5) of the constitution. Whereas the Canadian provision lays down one broad test, section 35(5) clearly provides for two tests. It is respectfully submitted that Naudé’s view is not supported by the wording of section 35(5) of the constitution, and that his reliance on *R v Grant* in this regard is misplaced.⁵²

3.3.1 Fair trial enquiry

The accused’s right to a fair trial, which is embodied in section 35(3) of the constitution, embraces a number of more specific rights. The rights that are of special importance in the present context are the right to be represented by counsel and to be informed of this right, the right to remain silent, the right not to be compelled to give self-incriminating evidence and, prior to the trial, the right not to be compelled

⁴⁸ For a South African assessment of *R v Grant* see Naudé “The revised Canadian test for the exclusion of unconstitutionally obtained evidence” 2009 *Obiter* 607.

⁴⁹ Schwikkard and Van der Merwe (n 3) 215-216; *S v Tandwa* 2008 1 SACR 613 (SCA) par 116.

⁵⁰ (n 48) 608.

⁵¹ n 24.

⁵² Cf Schwikkard and Van der Merwe (n 3) 216; Steytler *Constitutional Criminal Procedure* (1998) 36.

to make any confession or admission that could be used in evidence against the accused.⁵³

Once it has been established that the impugned evidence had been obtained in violation of any of the accused's constitutional rights, the court must proceed with the fair trial enquiry, taking into consideration all the facts of the case, as well as certain factors such as "the nature and the extent of the constitutional breach, the presence or absence of prejudice to the accused, the need to ensure that exclusion of evidence does not tilt the balance too far in favour of due process against crime control, the interests of society and, furthermore, public policy".⁵⁴ Some of the factors suggested in this phrase, such as the "interests of society" and "public policy", should, perhaps, more appropriately, be considered under the second leg of the enquiry, *viz* the effect of admission on the administration of justice. However, a question which is crucial under the fair trial enquiry is whether the manner in which the evidence was obtained violated the accused's privilege against self-incrimination.

Our courts have thus far adhered to the common-law principle that the privilege against self-incrimination is confined to testimonial evidence – *ie* utterances or conduct with a communicative element such as a pointing out.⁵⁵ An illustration in this regard would be where the police fail to inform an accused upon his arrest of his right to counsel and thereafter proceed to interrogate him continuously until he makes an incriminating statement. Such action would clearly constitute an infringement of the accused's right to remain silent and privilege against self-incrimination, and the statement may be excluded on the basis that its admission would render the trial unfair. The right to counsel and to be informed thereof is, of course, crucial for the protection of the accused's right to remain silent and his privilege against self-incrimination.⁵⁶

The privilege against self-incrimination is, therefore, not applicable to real evidence, which may take the form of bodily substances emanating from the accused or physical evidence discovered as a result of an unlawfully obtained statement from the accused (derivative evidence, or fruit of the poisonous tree).⁵⁷

Bodily evidence emanating from the accused includes substances such as hair samples, blood samples, fingerprints, voice samples and handwriting.⁵⁸ Non-bodily physical evidence discovered as a result of an unlawfully obtained statement from an accused may present itself in a variety of different types. Illustrations of such evidence are the discovery of the murder weapon⁵⁹ or the money taken in a robbery.⁶⁰ Both forms of real evidence may, of course, be highly incriminating, but they are not *self-incriminating*. Such evidence pre-existed the breach of the accused's constitutional rights and, thus, unlike a statement, it did not come into *being* because of the accused's action.

It is to be welcomed that our courts have thus far declined to follow that part of the decision in *R v Stillman*⁶¹ that extended the common-law privilege against self-incrimination to include evidence of bodily substances emanating from an accused.

⁵³ The latter right is contained in s 35(1)(c) of the constitution.

⁵⁴ Schwikkard and Van der Merwe (n 3) 227-228 with reference to case law; *S v Tandwa* (n 48) par 117.

⁵⁵ Schwikkard and Van der Merwe (n 3) 238 and the cases cited there.

⁵⁶ *Cf S v Agnew* 1996 2 SACR 535 (C); Schwikkard and Van der Merwe (n 2) 229.

⁵⁷ Schwikkard and Van der Merwe (n 3) 238-245.

⁵⁸ (n 3) 238.

⁵⁹ *Cf R v Burlingham* 1995 28 CRR (2d) 244 (SCC).

⁶⁰ *S v Tandwa* (n 49).

⁶¹ n 27.

Such an extension would be unnecessary and artificial.⁶² Where real evidence was obtained in an unconstitutional manner and the court's finding is that such action did not infringe the accused's privilege against self-incrimination and that admission of such evidence would not render the trial unfair, it does not mean that the evidence would be admitted. Depending on the facts (*eg* the seriousness of the infringement), the court may still exclude the evidence on the basis that its admission would be detrimental to the administration of justice.⁶³

Although our courts have adhered to the distinction between testimonial and real evidence in the context of the privilege against self-incrimination, the same cannot be said about the enquiry into the fairness of the trial in terms of section 35(5) of the constitution. At first our courts followed the approach adopted in *R v Collins*⁶⁴ relating to the fair trial enquiry. For purposes of this enquiry they, therefore, distinguished between real evidence that was obtained in violation of the accused's constitutional rights and testimonial evidence that was acquired in like manner. On this basis a court could, therefore, find that real evidence obtained in such a manner would not render the trial unfair. Unlike a compelled statement, real evidence pre-existed the constitutional breach and was, therefore, not produced under compulsion of the accused.⁶⁵ This, of course, does not mean that such real evidence was necessarily admitted. It could still be excluded because its admission would be detrimental to the administration of justice.⁶⁶

In *S v Tandwa*⁶⁷ the supreme court of appeal declined to follow the *Collins* test for purposes of the fair trial enquiry, and instead aligned itself with the reasoning in two later Canadian cases, namely *R v Burlingham*⁶⁸ and especially *R v Stillman*.⁶⁹ In *S v Tandwa*⁷⁰ two of the accused charged with robbery were severely assaulted by the police, as a result of which they made incriminating statements. One pointed out a part of the stolen money whilst the other pointed out a part of the stolen money and an AK 47 rifle. The trial court applied the *Collins* test by focusing on the nature of the evidence (testimonial or real) and excluded the statements accompanying the pointing out. The court, however, admitted the real evidence (the money and AK 47) that was discovered in this manner.⁷¹ The supreme court of appeal disagreed with this approach. Relying on *R v Stillman*⁷² the court stated that the distinction between real and testimonial evidence in this context "is misleading, since the question should be whether the accused was compelled to provide the evidence".⁷³

The supreme court of appeal, in *S v Tandwa*, elaborated as follows on the factors that a court should take into account in determining whether admission of the challenged evidence would render the trial unfair:

"[T]he courts must take into account competing social interests. The court's discretion must be exercised by weighing the competing concerns of society on the one hand to ensure that the guilty are brought to book against the protection of entrenched human rights accorded to ... accused persons.

⁶² *Cf* Schwikkard and Van der Merwe (n 3) 240.

⁶³ *Cf* Schwikkard and Van der Merwe (n 3) 240.

⁶⁴ n 26.

⁶⁵ *Cf S v Mkize* 1999 2 SACR 632 (W).

⁶⁶ *Cf S v Pillay* 2004 2 SACR 419 (SCA); Schwikkard and Van der Merwe (n 3) 238-239.

⁶⁷ n 49.

⁶⁸ n 59.

⁶⁹ n 27.

⁷⁰ n 49.

⁷¹ *ibid* par 113.

⁷² n 27.

⁷³ (n 49) par 125.

Relevant factors include the severity of the rights violation and the degree of prejudice, weighed against the public policy interest in bringing criminals to book. Rights violations are severe when they stem from the deliberate conduct of the police or are flagrant in nature. There is a high degree of prejudice when there is a close causal connection between the rights violation and the subsequent self-incriminating acts of the accused. Rights violations are not severe, and the resulting trial not unfair, if the police conduct was objectively reasonable and neither deliberate nor flagrant.⁷⁴

The court proceeded to express itself as follows on the admissibility of the real evidence *in casu*:

“Though ‘hard and fast rules’ should not be readily propounded, admitting real evidence procured by torture, assault, beatings and other forms of coercion violates the accused’s fair trial right at its core, and stains the administration of justice. It renders the accused’s trial unfair because it introduces into the process of proof against him evidence obtained by means that violate basic civilized injunctions against assault and compulsion. And it impairs the administration of justice more widely because its admission brings the entire system into disrepute, by associating it with barbarous and unacceptable conduct.”⁷⁵

Against this background the court concluded that the evidence of the recovered money and AK 47 should have been excluded and proceeded to deal with the appeal on that basis.⁷⁶

In my view the court conflated the two separate concepts embodied in section 35(5), *viz* whether admission would render the trial unfair and whether it would be detrimental to the administration of justice. It seems that some of the factors that the court considered in determining the fairness of the trial, like “public policy” and “basic civilized injunctions”, should rather have been taken into account under the second leg of section 35(5). Since the issue was the admissibility of real evidence, the privilege against self-incrimination was clearly not applicable and it was also not considered by the court. On the other hand, the incriminating statements of the two accused were clearly obtained in a manner that violated this privilege and admission thereof would clearly have rendered the trial unfair. In my view the court should have answered the fair trial enquiry pertaining to the real evidence in the negative and proceeded to exclude such evidence on the basis that admission thereof would have been detrimental to the administration of justice. The fact that unconstitutionally obtained real evidence is excluded under the second leg of section 35(5) – and not in terms of the fair trial requirement – does not make the security of the accused’s body “less worthy of protection”.⁷⁷ The suggested approach would have kept the distinction between real and testimonial evidence intact in the context of the fair trial enquiry, which would have been in line with the position regarding the privilege against self-incrimination. At present the situation is confusing, because the said distinction is maintained in the context of the privilege but not in the context of the fair trial enquiry.

The criticisms against the reasoning in *R v Stillman*⁷⁸ have been vindicated by the decision in *R v Grant*,⁷⁹ which, in my view, will prove to be a seminal judgment. Hopefully the supreme court of appeal will take note of this case and reconsider the

⁷⁴ par 117.

⁷⁵ par 120.

⁷⁶ par 121 and 128.

⁷⁷ Schwikkard and Van der Merwe (n 3) 241.

⁷⁸ n 27.

⁷⁹ n 24; Naudé (n 48) 608.

Tandwa approach on the next occasion it is called upon to apply section 35(5) to real evidence.

3.3.2 Whether admission of evidence would be detrimental to the administration of justice

In *S v Mphala* Cloete J stated the following with regard to this leg of section 35(5):

“So far as the administration of justice is concerned, there must be a balance between, on the one hand, respect (particularly by law enforcement agencies) for the Bill of Rights and, on the other, respect (particularly by the man in the street) for the judicial process. Overemphasis of the former would lead to acquittals on what would be perceived by the public as technicalities, whilst overemphasis of the latter would lead at best to a dilution of the Bill of Rights and at worst to its provisions being negated.”⁸⁰

It is a well-known fact that South Africa suffers from an unacceptably high level of violent crime. This makes it difficult for the courts to maintain the balance referred to above. It is submitted that the high crime rate and public opinion on the exclusion of incriminating evidence are factors that may persuade a court to admit evidence under the second leg of section 35(5), although it was obtained in violation of an accused’s constitutional rights.⁸¹

Other factors that the courts take into account in the interpretation of the second leg of section 35(5) include good faith and reasonable conduct of the police, as opposed to bad faith and unreasonable conduct of the police.⁸² In a case where circumstances dictated that a police official act quickly to seize a dangerous weapon and he failed to warn the accused of his constitutional rights, it was held that evidence of the accused’s pointing out of the weapon was admissible. In the opinion of the court it would not have been detrimental to the interests of justice to admit the evidence.⁸³ This was clearly an example of good faith and reasonable conduct on the part of the police. However, in another case the opposite occurred. The police infringed the accused’s constitutional right to privacy in a flagrant manner by deliberately submitting false information under oath to a judge in order to obtain the necessary judicial permission to intercept and monitor certain telephonic conversations, which led them to the two accused. *In casu* the court held that admission of the telephonic conversations would be detrimental to the administration of justice.⁸⁴ This case serves as a “text-book example” of the effect of bad faith on the part of the police.⁸⁵

Another factor that our courts would also take into account in this context is the inevitable discovery of real evidence or the discovery of such evidence on the basis of an independent source. This approach is in line with American and Canadian jurisprudence on the topic.⁸⁶

Finally, a question, which to my knowledge has not engaged the attention of our courts, may be phrased as follows: “What would the position be if the accused were to use unconstitutional means to obtain evidence in support of his defence?” An illustration of this would be where the accused violates a person’s constitutional rights (*eg* the right to privacy) in order to obtain evidence. The fair trial enquiry

⁸⁰ 1998 1 SACR 654 (W) 657g-h.

⁸¹ *Cf S v Ngcobo* 1998 10 BCLR 1248 (N).

⁸² Schwikkard and Van der Merwe (n 3) 251-256.

⁸³ *S v Lottering* 1999 12 BCLR 1478 (N) 1483.

⁸⁴ *S v Naidoo* 1998 1 SACR 479 (N).

⁸⁵ *Cf* Schwikkard and Van der Merwe (n 3) 252.

⁸⁶ Schwikkard and Van der Merwe (n 3) 258-259.

would clearly not be applicable in this scenario, since the right to a fair trial pertains specifically to the *accused*. However, it is submitted that such evidence could be excluded on the basis that its admission would be detrimental to the administration of justice.

4 *Improperly or unlawfully obtained evidence in civil cases*

The position in this regard can be stated briefly. In terms of the common-law position, prior to the adoption of the constitution of 1996, recognition was accorded in several cases to a judicial discretion to exclude illegally or improperly obtained evidence.⁸⁷ In *Motor Industry Fund Administrators (Pty) Ltd v Janit Myburgh J* mentioned the following reasons justifying such a discretion:

“Modern technology enables a litigant to obtain access to the most private and confidential discussions of his opponent: his telephones can be tapped, a listening device can be planted in the boardroom (or bedroom) of the opponent, documents can be photostatted, tape recordings of meetings stolen.”⁸⁸

Myburgh J therefore concluded that “as a matter of public policy, a Court should have a discretion to exclude evidence which was unlawfully obtained”.⁸⁹

After the commencement of the constitutional era the judicial discretion in civil proceedings to exclude illegally or otherwise improperly obtained evidence was again specifically recognized. To deny the existence of such a discretion would, in the words of Brand J in *Fedics Group (Pty) Ltd v Matus*, be “a retrogressive step in the development of our law ...”.⁹⁰

The constitution also provides a basis for such a discretion, although section 35(5) is applicable only to criminal proceedings. The constitution guarantees the right to a fair trial to civil litigants, which clearly provides a framework within which this discretion can be exercised.⁹¹ Section 34 provides as follows:

“Everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum.”

In *Lotter v Arlow*⁹² the applicant in compulsory sequestration proceedings sought to introduce evidence against the respondents, which had been obtained in a manner that was not only unlawful but also constituted a deliberate infringement of the respondents’ right to privacy. After confirming the common-law discretion Bertelsmann J continued:

“Since the advent of the Constitution, the Court is obliged to uphold its principles and foundational values. The citizen has a right to protection against violation of his or her fundamental rights. As a matter of public policy and in upholding the constitutional rights of the respondents, this Court must set its face against the unwarranted intrusion into the private sphere of individuals. ... This

⁸⁷ *Cf Shell SA (Edms) Bpk v Voorsitter Dorperaad van die OVS* 1992 1 SA 906 (O); *Motor Industry Fund Administrators (Pty) Ltd v Janit* 1994 3 SA 56 (W); *Lenco Holdings Ltd v Eckstein* 1996 2 SA 693 (N).

⁸⁸ (n 87) 63H.

⁸⁹ *ibid* 64A; see Schwikkard and Van der Merwe (n 3) 264.

⁹⁰ 1998 2 SA 617 (C) 636 par 76; Schwikkard and Van der Merwe (n 3) 264.

⁹¹ De Vos “Civil procedural law and the constitution of 1996: an appraisal of procedural guarantees in civil proceedings” 1997 *TSAR* 444.

⁹² 2002 6 SA 60 (T).

Court has a discretion to exclude evidence in civil matters which has been obtained in violation of the Constitution or ‘... by a criminal act or otherwise improperly’.⁹³

Against this background Bertelsmann J concluded that “evidence which has been obtained in breach of a fundamental constitutional right can only be admitted if such admission would not lead to an unfair trial, or would not bring the administration of justice into disrepute.”⁹⁴ He accordingly excluded the evidence on the basis that admission thereof would bring the administration of justice into disrepute.⁹⁵

The above scenario should not be taken to mean that, whenever a party to civil proceedings resorted to illegal/unconstitutional conduct in obtaining evidence against his adversary, such evidence would be excluded on the basis that its admission would lead to an unfair trial or bring the administration of justice into disrepute. A crucial factor to be taken into account by the court in exercising its discretion is the conduct of the party objecting to the admission of the impugned evidence. A hypothetical example can serve as a case in point. Mr and Mrs X, married out of community of property with two minor children born of the marriage, are in the process of getting divorced. Whilst the case is pending a dispute arises between the parties in respect of *inter alia* maintenance *pendente lite* for Mrs X and the minor children. Mrs X, who has knowledge that Mr X has considerable financial resources at his disposal, launches an application in terms of rule 43 of the Uniform Rules of Court to obtain interim relief in this regard. Her case is set out on affidavit as required in terms of the rule. Mr X responds on affidavit setting out his financial position, including his assets and liabilities. Mrs X firmly believes that Mr X supplied false information under oath regarding his financial resources. She, thereafter, surreptitiously gains access to Mr X’s apartment to search for documents supporting her belief. (Mr X moved to this apartment when the parties separated.) She finds bank statements and other documents showing clearly that Mr X’s financial position is much better than what he portrayed in his affidavit. Mrs X now wants to use these statements and documents to refute the evidence presented by Mr X. However, counsel representing Mr X objects to the admission of Mrs X’s proposed evidence on the basis that it was obtained in a manner that infringed Mr X’s right to privacy and that its admission would render the trial unfair or bring the administration of justice into disrepute. It is submitted that the conduct of Mr X to supply false information under oath is an important consideration, which may persuade the court to admit the impugned evidence despite the fact that it was obtained in an unconstitutional manner. *Fedics Group (Pty) Ltd v Matus*⁹⁶ is an illustrative case in this regard.

In the *Fedics* case the facts were briefly as follows. The applicants were companies involved in the catering business, which entailed tendering for and, in the event of success, supplying meals on contract to government entities, such as the defence force. They sought to interdict five of their erstwhile employees from unlawfully competing with them. The applicants’ case was that while some of the respondents were still in the employ of a division of the applicants the respondents set up two business entities for the purpose of competing directly with the applicants in the catering market. One of the respondents (M), who was still in the employ of the applicants at the time, was stationed near a military base, where she stayed in a mobile home and worked in a temporary office erected nearby. When the applicants

⁹³ 63J-64B referring to the *Lenco* case (n 87) 704C.

⁹⁴ 64F.

⁹⁵ 65G.

⁹⁶ n 89.

received information that M was about to remove documents concerning the competing business from her office, the applicants' attorney, accompanied by four other persons involved in the investigation, proceeded to the site where M was deployed. They confronted M and conducted a search of her home and office, despite her protests. In the office they found documents to support the applicants' case. Consequently, the applicants sought to introduce these documents in evidence to support their case. However, the respondents objected to the admission of this evidence on the basis that it was obtained in contravention of M's constitutional right to privacy and that its admission would render the hearing unfair. The court declined to deal with the fair trial argument, which was based on section 34 of the constitution, because there was some uncertainty whether the interim constitution or the constitution governed the dispute. Brand J preferred to base his decision on other considerations, which made it unnecessary to decide this issue.⁹⁷ As alluded to above,⁹⁸ he confirmed the existence of a judicial discretion to exclude illegally or improperly obtained evidence in civil proceedings and proceeded to exercise his discretion in favour of the applicants by allowing the tainted documents in evidence. In essence the decision was based on two considerations. First, he referred to the fact that the respondents, who were now objecting to the admission of the impugned evidence, were themselves engaged in unlawful conduct. Brand J explained:

“[M and three other respondents] were engaged in a dishonest and blatant attempt to compete with [the applicants] which they had successfully concealed from the applicants' board for several months. The extent to which they were prepared to go to conceal the true position, appears from the admitted fact that [two of the respondents] were prepared to falsify documents and the fact that [M] was admittedly prepared to perjure herself.”⁹⁹

Secondly, the court relied upon the fact that the documents seized by the applicants' attorney were all discoverable. The documents would, therefore, have been subject to the discovery procedure in terms of the rules of court, which would have enabled the applicants legitimately to obtain such documents at some stage during the proceedings. According to Brand J “[the] advantage gained by applicants as a result of the search of [M's] office, though of significant importance, was, therefore at best, a procedural one”¹⁰⁰.

Although the facts of the *Fedics* case are not on a par with the hypothetical case stated above, it is submitted that the case is analogous to the latter and could be used as authority in this scenario. Mr X's perjury, coupled with fact that Mrs X would in due course, when the case proceeds to trial, be entitled to obtain the said documents in terms of the discovery procedure, could, therefore, constitute grounds to admit such evidence.

It is submitted that the right to a fair trial and the broader concept, repute of the administration of justice, constitute a sound basis for the exercise of this discretion.

5 Conclusion

The rules regulating the admissibility of improperly, illegally or unconstitutionally obtained evidence are aimed at protecting the rights of the accused in criminal proceedings and the parties in civil proceedings, as well as upholding the repute of

⁹⁷ 638, par 85.

⁹⁸ n 89.

⁹⁹ 642, par 102.

¹⁰⁰ 642, par 106.

the administration of justice. In the process, relevant evidence may be excluded but the integrity of the system is maintained, which, it is submitted, is a worthy goal to pursue. It may also happen that tainted evidence is admitted in both criminal and civil proceedings. In a criminal case such a finding may be based on the *bona fide* conduct of the police, whilst in civil proceedings the unlawful conduct of the party objecting to the admission of the evidence may provide the grounds for this. The court's function is to balance the conflicting interests at stake, taking all relevant circumstances into account.

SAMEVATTING

ONWETTIG OF ONGRONDWETLIK VERKREË GETUIENIS: 'N SUID-AFRIKAANSE PERSPEKTIEF

Hierdie artikel is gebaseer op 'n nasionale verslag wat aan 'n internasionale kongres van die *International Association of Procedural Law* gelewer word. Die bydrae fokus op onlangse ontwikkelinge in die Suid-Afrikaanse regspraak betreffende die toelaatbaarheid van onwettig of ongrondwetlik verkreë getuienis. Daar word veral aandag gegee aan die posisie in strafsake en die invloed van Kanadese regspraak op ons howe. In die verband is dit veral van belang om kennis te neem van die nuutste benadering betreffende die toelaatbaarheid van aldus verkreë reële getuienis wat die Kanadese hooggeregshof aanvaar het. In die lig van die gewig wat ons howe aan Kanadese beslissings oor grondwetlike kwessies heg, sal die ontwikkeling waarskynlik 'n invloed op ons regspraak uitoefen.

Die artikel skets eerstens kortliks die agtergrond van die Suid-Afrikaanse bewysreg en die hantering van onwettig verkreë getuienis ten einde die onderwerp vir 'n buitelandse leser in perspektief te plaas. Strafsake kom eerste aan die beurt en in hierdie konteks val die soeklig op die inhoud en toepassing van artikel 35(5) van die grondwet. Vanweë die invloed van Kanadese gewysdes op ons regspraak word veral aandag gegee aan 'n drietal beslissings van die Kanadese hooggeregshof, naamlik *R v Collins*, *R v Stillman* en *R v Grant*. Die *Grant*-beslissing is veral van belang aangesien die hof in hierdie saak 'n nuwe benadering gevolg het betreffende die toelaatbaarheid van reële getuienis wat teenstrydig met die bepalings van die Kanadese *charter* bekom is. Kortliks kom dit daarop neer dat die hof in *R v Grant* die benadering in *R v Stillman* verwerp het en 'n nuwe raamwerk daargestel het waarbinne howe artikel 24(2) van die *charter* moet toepas. Die *Stillman*-benadering het ingehou dat vir doeleindes van die navraag na die billikheid van die verhoor die onderskeid tussen reële en kommunikatiewe getuienis as irrelevant beskou is. Die enigste vraag was of die getuienis – reële of kommunikatiewe – op 'n gedwonge wyse bekom is. In *R v Stillman* is ook weggedoen met die reël dat die privilegie teen selfinkriminasie net op kommunikatiewe getuienis van toepassing is. Die *Stillman*-beslissing het geregverdigde kritiek in beide Kanada en Suid-Afrika uitgelok. Ongelukkig het die hoogste hof van appèl in *S v Tandwa* die *Stillman*-beslissing gevolg en die *Collins*-benadering, waarvolgens die onderskeid tussen reële getuienis en kommunikatiewe getuienis gehandhaaf is, verwerp. Die *Grant*-beslissing lê 'n breë soepel benadering neer waarbinne genoemde onderskeid in die konteks van die billike verhoornavraag steeds 'n rol kan speel. Die hoop word uitgespreek dat die hoogste hof van appèl, by die volgende geleentheid wanneer hierdie kwessie voor die hof dien, sy rug op *S v Tandwa* sal draai en deeglike oorweging aan die uitspraak in *R v Grant* sal gee.

Die posisie in siviele sake betreffende onbehoorlik of onwettig/ongrondwetlik verkreë getuienis word hierna bespreek. Die fokus val veral op regspraak oor hierdie problematiek sedert die nuwe grondwetlike bedeling in werking getree het. Twee sake van belang in die konteks is *Lotter v Arlow* en *Fedics Group (Pty) Ltd v Matus*.

Ten besluite word daarop gewys dat die reëls wat die toelaatbaarheid van onwettig of ongrondwetlik verkreë getuienis reguleer daarop gerig is om die regte van die beskuldigde in 'n strafsake en die partye in siviele sake te beskerm. Die reëls het ook ten doel om die belang van die regspleging te dien. Dit kan egter ook gebeur, in beide straf- en siviele sake, dat getuienis wat op die gewraakte wyse bekom is, nogtans toegelaat word. In 'n strafsake kan tot so 'n bevinding geraak word op grond van die *bona fide* optrede van die polisie, terwyl in 'n siviele saak die onregmatige optrede van die party wat beswaar opper teen die getuienis die grondslag daarvoor kan verskaf. Die taak van die hof is om 'n balans te handhaaf tussen die strydende belange deur alle omstandighede in ag te neem.