

# Constitutional exclusion under s 35(5) of the Constitution: should an accused bear a ‘threshold burden’ of proving that his or her constitutional right has been infringed?

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DANE ALLY\*

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## ABSTRACT

This article examines the incidence of a threshold burden of proof in admissibility challenges based on s 35(5) of the South African Constitution. The following question is asked: Should the accused bear the onus of showing that his or her fundamental right has been infringed during the evidence-gathering process, or should the prosecution bear the burden of proving that the disputed evidence has been obtained in a constitutional manner? South African case law and the opinions of scholarly writers are incompatible on this issue. This article explores the conflicting lines of reasoning followed by the Supreme Court of Appeal in *Director of Public Prosecutions, Transvaal v Viljoen*, and the full bench decision of the Transvaal Provincial Division (now Northern Gauteng) in *S v Mgcina*. The author concludes that, having regard to a contextual interpretation of s 35(5) and the textual differences between s 24(2) of the Canadian Charter and s 35(5), the accused should not be saddled with a threshold burden. The prosecution should therefore bear the onus of showing that the evidence has been obtained in a constitutional manner, once the accused alleges that it has been obtained in violation of his or her rights.

## 1. Introduction

South African case law on the issue as to whether an accused who relies on s 35(5) of the South African Constitution should bear a threshold burden of showing that the disputed evidence had been obtained in violation of a right guaranteed by the Bill of Rights is incompatible. Section 35(5) of the South African Constitution is silent on this issue.

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\* BA (Law) (UWC) BProc (UNISA) LLM (UP), *Lecturer, Department of Law, Tshwane University of Technology*. This article is based on research undertaken by the author in fulfilment of the requirements for the LL.D degree at the Faculty of Law, University of Pretoria, under the supervision of Professor Frans Viljoen. The author acknowledges the prompt and valuable input made by Ms Jackie Viljoen and Ms Christel Troskie-de Bruin, who edited a previous draft of this article as part of a workshop.

Section 35(5) should be interpreted in two phases. The first phase is the threshold phase, and the second, the substantive phase. This contribution is focused on the threshold phase, more particularly, the threshold issue of who should bear the burden of showing or disproving that a rights violation occurred during the evidence-gathering process. It is common knowledge that one of the functions of judicial systems is to prevent the unnecessary overburdening of their resources with claims that fall outside the scope of their protection. Threshold requirements serve the purpose of separating such claims from those that warrant judicial scrutiny. In the light hereof, overcoming the threshold hurdles of s 35(5) is important, because a court must be satisfied that the threshold requirements of this provision have been complied with before it proceeds to consider the substantive phase of the s 35(5) analysis. Failure to satisfy this burden would imply that an accused may not rely on the exclusionary remedy contained in s 35(5), regardless of the fact that his or her fundamental rights have been infringed. It is against this background that the fundamental importance of the incidence of a threshold burden of proof (or preliminary onus of proof) should be understood.

The fact that s 24(2) of the Canadian Charter and s 35(5) of the South African Constitution are couched in strikingly similar terms, has been noted both by the courts of South Africa and scholarly writers. Section 35(5) provides as follows:

'Evidence obtained in a manner that violates any right contained 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.'

The Canadian Supreme Court held in *R v Collins*,<sup>1</sup> that an accused bears the burden of showing, on a balance of probabilities, that the police violated his or her Charter rights in the process of procuring the evidence. In other words, an accused bears the threshold burden. In *Director of Public Prosecutions, Transvaal v Viljoen*,<sup>2</sup> the Supreme Court of Appeal followed the *Collins* approach. By contrast, the full bench of the Transvaal Division of the High Court<sup>3</sup> held in *S v Mgcina*<sup>4</sup> that the prosecution bears the burden of proving that the evidence had not been obtained in an unconstitutional manner. The views held by commentators are also not harmonious on this issue.<sup>5</sup> The Constitutional Court

<sup>1</sup> (1987) 33 CCC (3d) 1 (SCC).

<sup>2</sup> [2005] 2 All SA 355 (SCA).

<sup>3</sup> Now known as Northern Gauteng.

<sup>4</sup> *S v Mgcina* 2007 (1) SACR 82 (T).

<sup>5</sup> See F Snyckers 'Criminal Procedure' in Chaskalson et al (eds) *Constitutional Law of South Africa* revision service 3 (1998) 27-38. Cf SE van der Merwe 'The Exclusion of Relevant Evidence: Unconstitutionally Obtained Evidence' in PJ Schwikkard & SE van der Merwe (eds) *Principles of Evidence* 2ed (2002) 245.

of South Africa has yet to consider this question. The primary purpose of this article is to consider whether the courts of South Africa should adopt the approach suggested in *Collins* and *Viljoen*, as opposed to that followed in *Mgcina*, when interpreting s 35(5).

This article will further explore the issue raised in three main parts. It commences with the approach applied in the *Viljoen* decision. Thereafter the opposing point of view, adopted in *S v Mgcina*, is considered. This is followed by a conclusion. The issue of the burden of proof, if any, which is applicable during the substantive stage of the s 35(5) assessment, is not discussed in this contribution.<sup>6</sup>

## 2. An accused bears the burden of satisfying the threshold onus: the *Viljoen* approach

It is trite law in South Africa that, in the event of factual disputes, the admissibility issue should be determined by means of a trial-within-a-trial.<sup>7</sup> The Supreme Court of Appeal demonstrated the importance of this procedural law rule in *Viljoen*.<sup>8</sup>

<sup>6</sup> For a discussion of the burden of proof relating to the substantive phase, as well as the admissibility of unconstitutionally obtained evidence in general, see Van der Merwe op cit (n5) 167-246. For a general discussion on the admissibility of unconstitutionally obtained evidence, see also SE van der Merwe in FJ De Jager et al (eds) *Commentary on the Criminal Procedure Act* revision service 34 (2005) 24-988 to 24-98M; N Steytler *Constitutional Criminal Procedure: A Commentary on the Constitution of the Republic of South Africa, 1996* (1998); CHW Schmidt & H Rademeyer *Schmidt Bewysreg* 4ed ((2000); PJ Schwikkard 'Arrested, Detained and Accused Persons' in I Currie & J de Waal *The Bill of Rights Handbook* 5ed (2005) 791-7; PJ Schwikkard 'Evidence' in Woolman et al (eds) *Constitutional Law of South Africa* 2ed (2007) 52-8 to 52-64; DT Zeffertt et al *The South African Law of Evidence* (2003) 621-41.

<sup>7</sup> See, for example, *S v Motloutsi* 1996 (1) SACR 78 (C); *S v Hobo* 1999 (2) SACR 159 (C); *S v Soci* 1998 (2) SACR 275 (E); *S v Madiba* 1998 (1) BCLR 38 (D); *S v Mfene* 1998 (9) BCLR 1157 (N); *S v Shongwe* 1998 (9) BCLR 1170 (T); *S v Gumede* 1998 (5) BCLR 530 (D); *S v Sebejan* 1997 (8) BCLR 1086 (T); *S v Mathebula* 1997 (1) BCLR 123 (W); *S v Melani* 1996 (2) BCLR 174 (E); *S v Ndblovu* 2001 (1) SACR 85 (W); *S v Mayekiso* 1996 (2) SACR 298 (C); *S v Cloete* 1999 (2) SACR 137 (C); *S v Malefo* 1998 (1) SACR 127 (W); *S v Gasa* 1998 (1) SACR 446 (D); *S v R* 2000 (1) SACR 33 (W); *S v August* [2005] 2 All SA 605 (NC); *S v Mphala* 1998 (1) SACR 388 (WLD); *S v Van der Merwe* 1997 (19) BCLR 1470 (O); *S v Mashumpa* 2008 (1) SACR 128 (E). See further Van der Merwe op cit (n6) 24-98N-1.

<sup>8</sup> *Supra* (n2). See also *S v Langa* 1996 (2) SACR 153 (N), where Magid J had to make a ruling on the admissibility of a certified copy of the proceedings which took place in the magistrate's court in terms of the provisions of s 119 of the Criminal Procedure Act. It was common cause that the accused were not informed of their rights to legal representation and to remain silent before they tendered pleas of guilty. The judge noted that he is bound by the majority decision in *S v Mabaso* 1990 (3) SA 185 (A), but mentioned obiter that the reasoning of the minority judgment is preferable in a democratic society. Milne JA (dissenting) reasoned as follows at 211J-212C in *S v Mabaso*:

In *Viljoen*,<sup>9</sup> the accused was charged with the murder of his wife. During the proceedings in terms of ss 119<sup>10</sup> and 121<sup>11</sup> of the Criminal

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I cannot, with respect, agree that there is any difference in principle between the witness who is not warned of his right not to answer incriminating questions and the accused who is not advised of his right to legal representation. True, the choice between a plea of guilty and a plea of not guilty is an untrammelled one, but in the case of an unlettered and unsophisticated layman, the choice is a totally uninformed one. While the standard of literacy in the Republic is no doubt increasing, a great many people who come before the courts are illiterate and unsophisticated. This is recognised by the Legislature. The primary object of questioning an accused person who pleads guilty at s 119 proceedings is to protect him from the consequences of an incorrect plea of guilty. It can and frequently does happen that an unrepresented accused pleads guilty when, on his version, he should have pleaded not guilty<sup>7</sup>.

It is submitted that these warnings clearly serve to protect the privilege against self-incrimination.

<sup>9</sup> *Supra* (n2).

<sup>10</sup> Section 119 provides that, when an accused pleads not guilty, the court shall deal with the matter in terms of s 115 of the Criminal Procedure Act. Section 115 reads as follows:

'115(1) Where an accused at a summary trial pleads not guilty to the offence charged, the presiding Judge, regional magistrate or magistrate, as the case may be, may ask the him whether he wishes to make a statement indicating the basis of his defence.

115(2)(a) Where the accused does not make a statement under ss (1) or does so and it is not clear from the statement to what extent he denies or admits the issues raised by his plea, the court may question the accused in order to establish which allegations in the charge are in dispute.

115(2)(b) The court may in its discretion put any question to the accused in order to clarify any matter raised under ss (1) of this subsection, and shall enquire from the accused whether an allegation which is not placed in issue by the plea of not guilty, may be recorded as an admission by the accused of that allegation, and if the accused so consents, such an admission shall be recorded and shall be deemed to be an admission under s 220<sup>8</sup>.

<sup>11</sup> Section 121 reads as follows:

'(1) Where an accused under section 119 pleads guilty to the offence charged, the presiding magistrate shall question him in terms of the provisions of paragraph (b) of section 112(1). (2)(a) If the magistrate is satisfied that the accused admits the allegations stated in the charge, he shall stop the proceedings. (b) if the magistrate is not satisfied as provided in paragraph (a), he shall record in what respect he is not so satisfied and enter a plea of not guilty and deal with the matter in terms of section 122(1): Provided that an allegation with reference to which the magistrate is so satisfied and which has been recorded as an admission, shall stand at the trial of the accused as proof of such allegation. (5aA) The record of proceedings in the magistrate's court shall, upon proof thereof in the court in which the accused is arraigned for summary trial, be received as part of the record of that court against the accused, and any admission made by the accused shall stand and form part of the record of that court unless the accused satisfies the court that such admission was incorrectly recorded<sup>9</sup>.

Procedure Act, the accused pleaded guilty,<sup>12</sup> furnishing details of how the crime was committed. After the plea proceedings, he applied to be released on bail, which application was unsuccessful. In terms of s 60(11B)(c) of the Act, portions of the bail proceedings formed part of the trial record. The bail record included a document containing details of a pointing-out and an annexure containing a confession, and a document containing the heading 'notice of rights in terms of the Constitution', including a document marked 'waarskuwingsverklaring deur verdagte'.<sup>13</sup>

At the trial in the court below, the accused tendered a plea of not guilty and the prosecution requested that a trial-within-a-trial be held so as to determine whether the pointing-out and confession that formed part of the bail record had been made freely and voluntarily. The same would apply to the plea proceedings. Seemingly as a result of confusion between the presiding judge, the prosecution and the defence, the attorney representing the accused addressed the court a quo on the admissibility of the s 119 proceedings. The attorney argued that, when these proceedings are contested on the basis of the involuntariness of the disputed self-incriminatory conduct of the accused, a trial-within-a-trial should be held. By contrast, thus the attorney argued, when the admissibility is challenged on the basis

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<sup>12</sup> See Van der Merwe op cit (n6) 19-1 to 19-4, and J Kriegler *Hiemstra: Suid-Afrikaanse Straffproses* 5ed (1993) 330-4 for a discussion of the combined effect of ss 119 and 121. The effect is briefly the following: the accused is asked to plead in a matter to be tried in the High Court (s 119). When he/she pleads guilty, s 121 is applied. In other words, the accused may be questioned by the magistrate in the same manner as provided for in s 112 of the Criminal Procedure Act. When he/she pleads not guilty, s 122 is applied. The magistrate reduces the plea to writing and the matter is postponed to obtain instructions from the Director of Public Prosecutions (s 122(2)). When proven in terms of s 235, the record of the plea proceedings forms part of the evidentiary material before the High Court. Any statement made by the accused during these proceedings would be admissible against him/her in the High Court trial. Any admissions made by the accused and recorded in terms of s 220 may severely prejudice an uninformed and unrepresented accused. The importance of the warnings to be given to an accused before he/she is called upon to plead, is therefore significant to ensure that he/she does not, in violation of the rights contained in the Constitution, incriminate him/herself, thereby potentially rendering the trial unfair. In *Mabaso* supra (n8), a pre-constitutional case, where the unrepresented accused were not informed about the right to legal representation before a plea in terms of ss 119 and 121, the trial of the accused was held to be ipso facto unfair. However, pursuant to provisions of the Criminal Procedure Act, the court held that the failure to inform them accordingly did not result in a failure of justice.

<sup>13</sup> A warning statement made by a suspect.

that the accused's fundamental rights had been violated, the latter issue had to be dealt with first.<sup>14</sup>

The attorney then proceeded to argue the issue of the constitutional exclusion of the s 119 proceedings (contending that the accused was not warned of his right to remain silent), the confession and the pointing-out, while relying exclusively on the contents of the bail record. Despite an objection by the prosecution that the court a quo should not decide the issue of admissibility without first hearing evidence that establishes the facts, the bail record was entered into evidence.<sup>15</sup> The application by the prosecution to have the admissibility issue determined by means of a trial-within-a-trial was dismissed. The court a quo held that the trial judge had a discretion to deal with the issue of constitutional admissibility first, before proceeding with a trial-within-a-trial.<sup>16</sup>

The judge in the court a quo ruled that the s 119 proceedings, the confession as well as the pointing-out were 'unconstitutionally obtained' and held that the admission thereof would render the trial unfair and would likewise be detrimental to the administration of justice. The prosecution reluctantly closed its case. The accused was acquitted.

The prosecution reserved the following questions of law for consideration by the Supreme Court of Appeal.<sup>17</sup> First, was the judge in the court below entitled to make factual findings based on inferences drawn from documents forming part of the bail proceedings and to make a ruling on the admissibility of evidence without a trial-within-a-trial being held? Secondly, was the judge in the court below correct in holding that the question of admissibility of a confession, challenged by the accused and disputed by the State, could not be resolved by means of a trial-within-a-trial, but should instead be dealt with before such trial-within-a-trial is held? Thirdly, did the failure to inform the accused of his right to remain silent during

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<sup>14</sup> It is assumed that the attorney and the judge a quo formed an incorrect opinion of the judgment of Chaskalson P in *Zantsi v Council of State, Ciskei* 1995 (4) SA 615 (CC) at para 4, where he held that in exceptional circumstances only and where a matter cannot be disposed of without the constitutional issue being resolved, and subject further to the condition that it would be 'in the interests of justice' to do so, a constitutional matter may be 'decided first, where there are compelling reasons that this should be done'. It is submitted that it does not appear from the judgment delivered by the Supreme Court of Appeal that compelling reasons existed to follow this route in the court a quo. With respect, the judgment of Chaskalson P clearly states that in instances where a dispute can be decided without considering a constitutional matter, this should be the course to follow.

<sup>15</sup> See *S v Gabriel* 1971 (1) SA 646 (RA), for the effect thereof.

<sup>16</sup> Cf *Zantsi v Council of State, Ciskei* supra (n14), where Chaskalson P, at para 3 arrived at a different conclusion.

<sup>17</sup> Supra (n2) at 366-7.

the section 119 and 121 proceedings of the Criminal Procedure Act, constitute a violation of the accused's rights, rendering the answers given by the accused at such proceedings, by that very fact, inadmissible at his trial?

In a unanimous judgment written by Streicher JA,<sup>18</sup> the Supreme Court of Appeal answered these questions of law, in the sequence above, as follows. First, The judge a quo was not entitled to make factual findings, based on the record of the bail application, without a trial-within-a-trial having taken place. The record of the bail application, for purposes of the trial, constituted hearsay evidence.<sup>19</sup> Secondly, the reasons why a trial-within-a-trial should be held to determine the disputed voluntariness of a confession, are also applicable when the admissibility of a confession is disputed on the grounds that a fundamental right of the accused had been violated in the course of obtaining the disputed evidence. The judge a quo accordingly erred in holding that the constitutional issue should not be dealt with in a trial-within-a-trial.<sup>20</sup> He further erred in holding that the constitutional dispute should be held before the trial-within-a-trial, which would have been limited to the issue of the voluntariness of the pointing-out and the confession.<sup>21</sup> Thirdly, referring to s 35(3)(b) of the Constitution, the court reasoned that the accused is entitled to rely on the right to a fair trial, which includes the right to remain silent – not the right to be informed of the right to remain silent. Citing *Director of Public Prosecutions, Natal v Magidela*,<sup>22</sup> the Supreme Court of Appeal held that an accused should nevertheless be informed of the right to remain silent (to ensure that when she waives such right, an informed decision is made). This approach, the court continued, is preferred, because failure to inform an uninformed accused about the right to remain silent may result in an unfair trial. Unfairness in the trial process may only result, the Supreme Court of Appeal reasoned, when the accused places evidence before the court of the fact that she had no knowledge of the right to remain silent and therefore had to be informed accordingly. In this case, the accused failed to place any such evidence before

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<sup>18</sup> Navsa, Van Heerden JJA, Erasmus and Ponnar AJJA concurring.

<sup>19</sup> Supra (n2) at para 32.

<sup>20</sup> This ruling is a clear application of the ruling of Chaskalson P in *Zantsi* supra (n14).

<sup>21</sup> Supra (n2) at para 33-4.

<sup>22</sup> 2000 1 SACR 458 (SCA) at para 18.

court. Against this background, it was held that the court below erred in holding that the right to remain silent had been violated.<sup>23</sup>

The third question of law was framed in such fashion, suggesting that the Supreme Court of Appeal is invited to respond to the question whether s 35(5) constitutes an automatic exclusionary rule. However, the Supreme Court of Appeal reached its judgment without having to resolve the issue on that basis.

The *Viljoen* judgment could be read as postulating that the threshold burden of proof settled the admissibility issue. The Supreme Court of Appeal was at pains to show that an accused should convince a court by means of admissible evidence<sup>24</sup> that he or she has successfully cleared the hurdle of satisfying the threshold onus before she may rely on the exclusionary relief guaranteed by s 35(5). In other words, it was held that the accused failed to establish the required preliminary foundation for the reliance on s 35(5). This judgment is firmly allied to the approach followed in the leading Canadian case of *Collins*.<sup>25</sup> However, it is argued below<sup>26</sup> that the textual differences between s 24(2) of the Charter and s 35(5) of the South African Constitution allows for a different approach to this issue.

In the final analysis, the reasoning of the Supreme Court of Appeal in *Viljoen* has created a threshold burden which must be satisfied by an accused before she may claim the relief guaranteed by s 35(5). It further suggests that, in order to satisfy the threshold onus, an accused

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<sup>23</sup> *S v Viljoen* supra (n2) at para 43; see also *S v Mfene* supra (n7) at 1167C-F, where McCall J followed the submissions made by counsel for the defence in *Mgcina v Regional Magistrate, Lenasia* 1997 (2) SACR 711 (W), to the effect that once it was shown that the accused was not informed of her rights, the prosecution bears the burden of proving that the accused had knowledge of her rights. In other words, the accused must prove that her rights were infringed. Only after this preliminary burden has been satisfied does the prosecution bear the burden of disproving a violation. Cf *S v Soci* supra (n7) at 289d, where it was held that the prosecution does not bear any such burden.

<sup>24</sup> The contents of the bail application were held to constitute hearsay evidence, which was held to be inadmissible. On this basis, it was held that the accused did not satisfy the burden of proving that his right to remain silent had been infringed.

<sup>25</sup> *Collins* supra (n1); see also *R v Ross* (1989) 46 CCC (3d) 129; *R v Black* (1989) 50 CCC (3d) 20; *R v Brydges* (1990) CCC (3d) 330; *R v Kokesh* (1990) 61 CCC (3d) 61 207; *R v Grant* (1993) CCC (3d) 173; *R v Plant* (1993) 84 CCC (3d) 203; *R v Wiley* (1993) 84 CCC (3d) 161; *R v Bartle* (1994) 92 CCC (3d) 309; *R v Goldbart* (1996) DLR (4th) 502; *R v Stillman* (1997) 113 CCC (3d) 330; *R v Feeney* (1997) 115 CCC (3d) 138; *R v Bubay* (2003) 1 SCR 631; *R v Mann* (2004) 185 CCC (3d) 308; *R v Grant* (2006) 38 CR (6th) 58 (Ont CA); *R v Buendia-Alas* (2004) 118 CRR (2d) 32; *R v Williams* (2008) 52 CR (6th) 210 (Ont SC).

<sup>26</sup> See the discussion below, under the heading 'The significance of the textual differences between ss 24(2) of the Charter and 35(5) of the Bill of Rights read with s 39(3)'.

should generally establish a factual basis,<sup>27</sup> including proof of facts about the conduct – or lack thereof – of a rights violator which shows that a right guaranteed by the Bill of Rights has been infringed.

### 3. The incidence of the threshold onus revisited: the *Mgcina* approach

Erasmus J held in *Soci*, that the prosecution does not, in a s 35(5) dispute, bear the burden of disproving an alleged infringement of the rights of the accused.<sup>28</sup> The nature of the prosecutorial evidentiary duty, more particularly with regard to the incidence of a threshold burden under s 35(5), was revisited in *Mgcina*.

*Mgcina* was an appeal from a decision of the Transvaal Provincial Division (now North Gauteng) of the High Court of South Africa to the full bench. The appellant was convicted on two counts of murder and five counts of attempted murder. The case for the prosecution hinged exclusively on the admissibility of a confession made by the appellant while he participated in a pointing-out. The appellant challenged its admissibility based on two legs: First, that the dictates of s 217 of the Criminal Procedure Act had not been complied with, and secondly, that it had been obtained in violation of s 35(2)(b) of the Constitution, which guarantees the right to legal representation.<sup>29</sup> In the light hereof, the appellant contended that the disputed evidence should be excluded in terms of s 35(5). This discussion is focused on the second leg of the appellant's challenge.

Counsel appearing on behalf of the appellant maintained that the prosecution bears the burden of proving that the appellant's right to legal representation was not infringed. Put differently, it was contended that the prosecution bears the burden of proving that the appellant was properly informed of the right to legal representation.<sup>30</sup>

The appellant testified and called a witness to testify on his behalf during the trial-within-a-trial. It was common cause that the appellant was, on two occasions prior to participating in the pointing-out, informed of his right to legal representation. Thereafter, he was once more informed by Superintendent Westraad (a different police officer) of the right to legal representation immediately before the appellant

<sup>27</sup> However, compare, *Pillay v S* 2004 (2) BCLR 158 (SCA), where the Supreme Court of Appeal was not called upon to decide the issue of the threshold onus, because the parties argued the matter based on a statement of agreed facts.

<sup>28</sup> *S v Soci* supra (n7) at 289d.

<sup>29</sup> The relevant part of s 35(2)(b) reads as follows: 'Everyone who is detained ... has the right ... to choose, and to consult with, a legal practitioner, and to be informed of this right promptly.'

<sup>30</sup> *S v Mgcina* supra (n4) at 93e.

accompanied him to make the pointing-out.<sup>31</sup> The only factual dispute was whether the gist of the explanation by Westraad was such that the appellant understood it to mean that he may consult a legal representative before the pointing-out was made.

Against this background, the court considered whether the prosecution bore the burden of proving that the right to legal representation had not been infringed, while having regard to two issues. Du Plessis J,<sup>32</sup> writing the judgment on behalf of the court, asserted that one should, first, distinguish between instances when an accused challenges the constitutionality of legislation and when he or she avers that the evidence had been obtained in violation of his or her constitutional rights. Secondly, the judge reasoned, that the dictum of the Constitutional Court in *S v Zuma*<sup>33</sup> should serve as an important guide when a court determines the incidence of the applicable burden of proof in s 35(5) disputes. Two additional grounds are added by the author, which serve to confirm the rectitude of the *Mgcina* approach: The notable textual difference between ss 24(2) and 35(5), which makes an allowance for a different interpretation of s 35(5), and, as a final point, a contextual reading of s 35(5) with the provisions of s 39(3) of the Constitution. These four issues are discussed below.

### 3.1 Distinguishing between the determination of the constitutionality of legislation, custom, or the common law and the interpretation of s 35(5)

It is important to distinguish between situations where an accused, on the one hand, challenges the constitutionality of legislation, a provision of the common law or customary law, and on the other hand, relies on s 35(5), asserting that his or her rights have been violated by governmental conduct.<sup>34</sup> When an accused contests the constitutionality of legislation, a common law rule or customary law practice, the two-phased approach must be followed. In such circumstances, the accused bears the onus of showing that his or her rights were violated by an Act of Parliament, the common law or customary law.<sup>35</sup> The respondent would bear the onus of showing that the limitation is justifiable.<sup>36</sup> The incidence and nature of the burden, in such disputes, were decided

<sup>31</sup> *S v Mgcina* supra (n4) at 96i-96a.

<sup>32</sup> Basson and Preller JJ concurring.

<sup>33</sup> 1995 (1) SACR 568 (CC).

<sup>34</sup> *S v Mgcina* supra (n4) at 94.

<sup>35</sup> See *Quozelini v Minister of Law and Order* 1994 (3) SA 625 (EC); Steytler op cit (n6) 14-8.

<sup>36</sup> Currie & De Waal op cit (n6) 165-88.

in a number of decisions by the South African Constitutional Court.<sup>37</sup> However, the Constitutional Court has yet to decide on the incidence and nature of the threshold burden, if any, in s 35(5) challenges.

It is submitted that the South African Supreme Court of Appeal has decided this issue erroneously in *Viljoen*, by saddling the accused with an onus of showing that his constitutional rights had been violated. Like the Supreme Court of Appeal, Ebrahim AJ failed to differentiate between the two situations mentioned above, when he decided on the admissibility of evidence in *S v Zwayi*.<sup>38</sup> In *Zwayi*, the admissibility of evidence in terms of s 35(5) was in dispute. The judge held, relying on *Quozeleni*,<sup>39</sup> that the onus rests on the accused to show, on a balance of probabilities, that his constitutional right to legal representation had been infringed.<sup>40</sup>

### 3.2 The significance of the textual differences between ss 24(2) of the Charter and 35(5) of the Bill of Rights (read with s 39(3))

Section 24(2) of the Canadian Charter reads as follows:

'Where in proceedings ... 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 ... the admission of it in the proceedings will bring the administration of justice into disrepute.'<sup>41</sup>

One of the noteworthy differences between s 35(5) of the South African Constitution and s 24(2) of the Charter is the fact that s 35(5) does not contain the italicised phrase.<sup>42</sup> Lamer J declared in *Collins* that the presence of this phrase in s 24(2) is indicative of the fact that an accused bears the onus of persuading a court that his or her Charter right has

<sup>37</sup> *Du Plessis v De Klerk* 1996 (3) SA 850 (CC); *S v Mbatha* 1996 (2) SA 464 (CC); *S v Bbulwana* 1996 (1) SA 388 (CC); *President of the RSA v Hugo* 1997 (4) SA 1 (CC); *Larbi-Odam v MEC for Education (North-West Province)* 1998 (1) SA 745 (CC); *August v Electoral Commission* 1999 (3) SA 1 (CC).

<sup>38</sup> 1997 (2) SACR 772 (CkH).

<sup>39</sup> *Quozeleni* supra (n35).

<sup>40</sup> *Zwayi* supra (n38) at 782b; see also *S v Gumede* 1998 (5) BCLR 530 (D) at 538f; *S v Naidoo* 1998 (1) SACR 479 (N) at 523a; *Sebejan* supra (n8) at 628e; *Mathebula* supra (n8) at 16i-j. It must be mentioned that *Mathebula* was decided before the advent of s 35(5).

<sup>41</sup> Emphasis added.

<sup>42</sup> The text of s 35(5) appears in the introduction above.

been infringed or denied.<sup>43</sup> It is submitted that the omission of this phrase from s 35(5) is of paramount importance when interpreting this section. It is further submitted that the omission of the phrase from s 35(5) is indicative of the fact that the drafters of the South African Constitution seemingly did not deem it necessary to saddle an accused with the onus of having to show that a constitutional right he or she is entitled to rely on, has been violated during the evidence-gathering process.<sup>44</sup>

This argument is fortified by a contextual reading of s 35(5) with the provisions of s 39(3) of the South African Constitution.<sup>45</sup> Section 39(3) of the South African Constitution provides as follows:

'The Bill of Rights does not deny the existence of any other rights or freedoms that are recognised or conferred by the *common law*, customary law or legislation, to the extent that they are consistent with the Bill.'<sup>46</sup>

Currie and De Waal argue that 'context' has both a wide and a narrow meaning.<sup>47</sup> According to them, contextual interpretation in a wide sense refers to the historical and political background of the Constitution. In a narrow sense, however, contextual interpretation requires of the courts to 'harmonise the various provisions' of the Constitution to determine its purpose in order to 'give effect to them'.<sup>48</sup> Against this background, s 39(3) preserves the common law position insofar as the common law is not incompatible with the Constitution. For the reason that s 35(5) is silent on the issue of who should bear the burden of proving a violation, it is submitted that it cannot plausibly be argued that the common law is in conflict with the provisions of s 35(5).

In the light hereof, it is submitted that the common law position should be of particular importance when a court determines the incidence of the burden of proof in s 35(5) challenges. In terms of the common law, the prosecution bears the burden of showing that a con-

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<sup>43</sup> *Collins supra* (n1) at para 21, where the judge reasoned that 'it appears from the wording of s 24(1) and (2), and most courts which have considered the issue have come to that conclusion ... The standard of persuasion required is only the civil standard of a balance of probabilities ...'.

<sup>44</sup> See *S v Brown* 1996 (2) SACR 49 (NC) at 73. The court held that the prosecution bears the burden of proving that the rights of the accused had not been infringed.

<sup>45</sup> For a discussion of contextual interpretation, see Currie & De Waal op cit (n6) 153-8.

<sup>46</sup> Emphasis added.

<sup>47</sup> Op cit (n6) 153.

<sup>48</sup> Currie & DeWaal op cit (n6) 156.

fession was made freely and voluntarily.<sup>49</sup> Differently put, the accused does not have to show that an admission or a confession was made involuntarily. The *Mgcina* court developed the basis for the analogous application of the common law approach to s 35(5) disputes by properly relying on the often-quoted dictum of Kentridge AJ in *S v Zuma*,<sup>50</sup> where he wrote:

‘... (T)he common law rule in regard to the burden of proving that a confession was voluntary has been ... an integral and essential part of the right to remain silent after arrest, the right not to be compelled to make a confession, and the right not to be a compellable witness against oneself. These rights, in turn, are the necessary reinforcement of Viscount Sankey’s ‘golden thread’ – that it is for the prosecution to prove the guilt of the accused beyond reasonable doubt.’<sup>51</sup>

Applying a contextual reading of s 35(2)(b) with s 35(3), which guarantees the right to a fair trial, the full bench reasoned that the former section forms part of the ‘golden thread’ referred to by Kentridge AJ.<sup>52</sup> It is submitted that the approach of the full bench is consistent with a contextual interpretation in the narrow sense, as explained by Currie and De Waal:<sup>53</sup> the court harmonised the two provisions in order to determine the incidence of the burden of proof. In the same vein, it could be argued that one of the purposes of s 35(5) is to ensure that an accused has a fair trial. The right to legal representation during the pre-trial phase, guaranteed by s 35(2)(b), is essential to ensure that an accused effectively exercises the right to remain silent and the right not to make a confession. These pre-trial rights, in turn, seek to achieve the goal of preventing an unfair trial – one of the purposes sought to be protected by s 35(5). In this manner, the ‘golden thread’ could likewise be preserved.

By analogy of the common law approach, together with the reasons mentioned in 3.1 above, the *Mgcina* court held that the prosecution bears the burden of proving that the evidence had been obtained *in a constitutional manner*.<sup>54</sup> This approach is supported. It accords with a purposive and contextual interpretation of s 35(5). Furthermore, it

<sup>49</sup> *S v Mgcina* supra (n4) at 95d. According to Kriegler op cit (n12) 543, in terms of the precursor to s 217 of the Criminal Procedure Act, (s 244), the prosecution bore the burden of proving, beyond reasonable doubt, that a confession was freely and voluntarily made. However, s 217(1)(b) shifted the onus to the accused when the confession was reduced to writing in the presence of a justice of the peace or magistrate. This sub-section was declared unconstitutional in *Zuma* supra (n3). For the position before *Zuma*, see *S v Lebone* 1965 (2) SA 837 (A); *S v Radebe* 1968 (4) SA 410 (A).

<sup>50</sup> Supra (n33).

<sup>51</sup> Supra (n33) at para 33.

<sup>52</sup> Supra (n4) at 95g-b.

<sup>53</sup> Op cit (n6) 156.

<sup>54</sup> Supra (n4) at 95b-i.

relieves an accused from having to satisfy a burden based on facts that might, more often than not, be within the particular knowledge of the police. The rationale for this approach is based on the protection guaranteed by the right to remain silent, the privilege against self-incrimination, the presumption of innocence and the sound procedural law principle that the prosecution bears the burden of proving the guilt of the accused beyond reasonable doubt.<sup>55</sup> Consequently, there appears to be even more reason why the accused should *not* bear the burden of showing that his or her rights had been violated, given that the right to remain silent, the privilege against self-incrimination and the presumption of innocence has, after South Africa became a constitutional democracy, been elevated to constitutionally protected guarantees.<sup>56</sup>

Furthermore, placing the burden of proof on accused persons would imply that they were better protected during the pre-constitutional era, when compared with the present position. In my view, the drafters of s 35(5) consciously avoided such an anomaly. One can confidently assume that the drafters of the Bill of Rights were wary of the position in Canadian s 24(2) jurisprudence and that they, for that reason, ostensibly by design, omitted the phrase 'if it is established' from s 35 (5).

To summarise, the *Mgcina* judgment has adopted the following standard: once the accused asserts that the evidence has been obtained in violation of his or her constitutional right and that the admissibility thereof is disputed, the prosecution bears the burden of proving that the evidence had been obtained in a constitutional manner.<sup>57</sup>

#### 4. Conclusion

The approach to the interpretation of s 24(2) of the Charter,<sup>58</sup> and it is submitted also of s 35(5) of the Bill of Rights, should be informed by a purposive and contextual approach. To this end, the courts of South Africa should consciously remind themselves that one of the goals of s 35(5) is to prevent 'detriment' to the justice system, while another is to promote the truth-seeking function of the courts. It is submitted that these values are applicable even when issues like the incidence of the preliminary burden of proof is considered. It is further contended that the *Viljoen* judgment is exclusively focused on the truth-seeking goal of s 35(5), and, in this manner, establishes a threshold requirement that is not sanctioned by s 35(5). The danger of such an approach is that it

<sup>55</sup> *S v Mgcina* supra (n4) at 94; see also *S v Zuma* supra (n4) at para 33.

<sup>56</sup> See ss 35(1)(a), (b), (c), 35(2)(b), (c), 35(3)(b), (j), which collectively serve to protect the mentioned rights.

<sup>57</sup> Supra (n5) at 95j-96a.

<sup>58</sup> K Roach *Constitutional Remedies in Canada* (1994) 10-10, para 10.240.

might be perceived by right-thinking South Africans as tantamount to judicial condonation of unacceptable conduct, especially in instances when the violation could be typified as serious.<sup>59</sup> Granted, the enforcement of the rights of an accused is an inherently counter-majoritarian exercise: judges, who are a minority compared to the public at large, are more often than not called upon to make rulings without having to appease the public at large. However, the courts should be especially wary not to interpret s 35(5) in a manner which indirectly legitimises unwarranted governmental conduct.

The phrase 'if it is established' contained in s 24(2) of the Charter led to the remark by Lamer J in the landmark decision of *Collins*<sup>60</sup> that an accused bears the onus of showing, on a balance of probabilities, that his or her Charter rights have been infringed. However, the drafters of s 35(5) have, ostensibly by design, omitted this phrase from s 35(5). The decision by the Supreme Court of Appeal in *Viljoen*,<sup>61</sup> suggesting that s 35(5) should, on this issue, be interpreted in a similar manner as s 24(2), should not be followed. Rather, it is submitted that the full bench decision of the Transvaal Provincial Division in *Mgcina*,<sup>62</sup> where it was held that the prosecution bears the burden of proving that the disputed evidence had not been procured in an unconstitutional manner, should be welcomed. The judgment in *Mgcina* is based on sound constitutional policy, given that it serves to protect the right to remain silent and the privilege against self-incrimination, and furthermore reaffirms that the onus to prove criminal culpability should be satisfied by means of constitutionally obtained evidence.

Moreover, an accused who relies on s 217 of the Criminal Procedure Act as a ground for exclusion should not be better off than an accused who relies on s 35(5) for exclusion arising from a breach of a *constitutional* guarantee. Access to the remedy of constitutional exclusion should not be subjected to a threshold requirement that unreasonably limits the utility of s 35(5). It is therefore submitted that in South Africa, unlike the position in Canada, accused persons should not bear the onus of showing that their rights have been infringed. The point of view held by Van der Merwe, that the accused should allege that – but

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<sup>59</sup> For a discussion of the 'seriousness of the violation' requirement, see Van der Merwe op cit (n5) 242; see also Roach op cit (n45) 10-13, para 10.320.

<sup>60</sup> *Collins* supra (n1) at 21.

<sup>61</sup> *Viljoen* supra (n2).

<sup>62</sup> *Mgcina* supra (n4). Schmidt & Rademeyer *Schmidt Bewysreg* 4ed (2006) 383, refers to *Fedics Group (Pty) Ltd v Matus* 1997 (9) BCLR 1199 (C) and express the opinion that, in civil matters, the party that had obtained the evidence in an unconstitutional manner bears the onus of providing reasons why it was obtained in this manner.

does not have to prove – the evidence had been obtained in violation of a right guaranteed by the Bill of Rights, is supported.<sup>63</sup>

In addition to the text of s 24(2), the strict threshold onus, applicable in Canada, may be attributed to the following two factors: first, the adoption by the Supreme Court of Canada of the United States approach to threshold requirements, instead of a purposive interpretation;<sup>64</sup> and secondly, the drastic impact of the rule of 'near automatic' exclusion whenever trial fairness has been impaired.<sup>65</sup> It is assumed that the regular exclusion of evidence based on the Canadian approach to trial fairness<sup>66</sup> could be considered a factor that contributed to the restrictive threshold onus requirement in that country.<sup>67</sup>

In terms of the *Viljoen* approach, a potential beneficiary of fundamental rights should be saddled with the duty of showing that the police conduct did not comply with the provisions of the Constitution. Failure to satisfy this onus would render the police conduct immune from the rigours of scrutiny provided by s 35(5). In other words, if the accused cannot satisfy this threshold requirement, the court may receive the evidence without investigating the manner in which it had been obtained. The danger of such an approach is that it may create the public perception that the courts are prepared to condone or indirectly encourage unconstitutional governmental conduct. Such an approach evidently runs counter to the judicial integrity rationale.<sup>68</sup>

By comparison, the approach followed by the full bench of the Transvaal Provincial Division in *Mgcina*,<sup>69</sup> to the effect that the burden of proving that the evidence had not been obtained in a manner that violated a fundamental right of the accused, rests on the prosecution, serves to protect constitutional values generally associated with the enhancement of substantive fairness. The courts of South Africa should embrace the standard that was established by the *Mgcina* court. This

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<sup>63</sup> Van der Merwe op cit (n5) 245, where he makes the following submission: 'It is submitted that an alternative approach is possible. First, the defence must allege – but need not prove – that there has been an infringement of a constitutional right of the accused ...'. Emphasis in original.

<sup>64</sup> PD Godin 'A comparative study of the exclusionary rule and its standing threshold in Canada, the United States and New York State: The relation of purpose and practice' (1995) 53 *UT Fac LR* 49.

<sup>65</sup> See R Mahoney 'Problems with the Current Approach to s 24(2) of the Charter: An "inevitable discovery"' (1999) 42 *CIQ* 443.

<sup>66</sup> See paragraph A 3.3 below.

<sup>67</sup> Steytler op cit (n6) 35, raises a similar argument with regard to the Canadian standing threshold requirement.

<sup>68</sup> For a discussion of this rationale, see Van der Merwe op cit (n5) 117-78; Roach op cit (n45) 10-13, par 10.299; D Stuart *Charter Justice in Canadian Criminal Law* 3 (2001) 446-69; S Penney 'Taking Deterrence seriously: Excluding Unconstitutionally Obtained Evidence under Section 24(2) of the Charter' 49 *McGill LJ* 105.

<sup>69</sup> *Mgcina* supra (n4).

approach is consistent with the jurisprudence of the Constitutional Court and it is furthermore not in conflict with the rationale of s 35(5). Those whose unwarranted conduct allegedly impinged upon constitutional guarantees should be required to show that their conduct was not unconstitutional. Such an approach complies with sound policy considerations because it conveys a clear message that, in order for an accused to challenge the admissibility of evidence that was, for example, not obtained in terms of a law of general application, as dictated by the limitations clause,<sup>70</sup> he or she should not be subjected to the procedural challenge of having to satisfy an unjustifiable threshold burden.

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<sup>70</sup> See Van der Merwe op cit (n5) 209.