



The Admissibility of Media-Obtained Evidence: A Legal Analysis of the *Sizok’thola* TV Show’s Investigative Methods in South African Courts

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ABSTRACT

This study examined the legal and ethical challenges surrounding the admissibility of evidence obtained by *Sizok’thola*, an investigative television show produced by *Moja Love TV*, within South Africa’s criminal justice system. The programme used undercover operations and covert surveillance to expose crimes like drug trafficking and corruption, often collaborating with law enforcement. While it aimed to enhance public awareness and accountability, its methods raise concerns about the legality of media-obtained evidence in court. The research employed a qualitative research methodology, analysing constitutional and statutory frameworks, particularly the right to privacy (Section 14) and the right to a fair trial (Section 35) of the Constitution of South Africa, 1996, alongside the Criminal Procedure Act 51 of 1977. It also considers common law principles and judicial precedents to assess how courts balance the probative value of unlawfully obtained evidence against potential prejudice to the accused. Key issues include consent, ethical boundaries of investigative journalism, and public interest in criminal prosecutions. Findings reveal that while media exposure of crime is valuable, strict legal compliance is necessary to uphold judicial integrity. Courts may admit such evidence under specific conditions but must weigh its admissibility carefully. The study recommends clearer guidelines for media investigations and stronger judicial oversight to protect constitutional rights. This research contributes to scholarship by advancing debates on media freedom, ethical journalism, and constitutional rights. It advocates for a balanced approach that ensures transparency and accountability while safeguarding fundamental rights.

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INTRODUCTION

The admissibility of evidence lies at the very heart of South Africa’s criminal justice system and acts as a critical safeguard for genuinely fair trials as well as for the integrity of judicial proceedings. Governed by a strong constitutional framework in addition to statutory provisions, the rules of evidence demand a particularly careful balance between the pursuit of justice. These rules also demand the protection of fundamental rights. Section 35 of the Constitution of the Republic of South Africa, 1996, enshrines such a right to a fair trial, whilst Section 14 guarantees the same right to privacy, both of which impose meaningful limitations upon how evidence may be lawfully obtained and presented within the court.¹

¹ Constitution of the Republic of South Africa, 1996, ss 14 and 35.

These constitutional protections are also further operationalised through the Criminal Procedure Act, which establishes procedural safeguards to prevent abuses during evidence-gathering.²

A notably controversial matter crops up when proof is gained through unusual routes, such as secret actions or hidden monitoring undertaken by media firms. The investigative methods that *Sizok'thola* uses, a *Moja* Love TV exposé programme working with law enforcement to expose crime, show this tension. Whilst such media investigations play a role in exposing crime and promoting public accountability, their techniques, often involving entrapment, hidden cameras, or warrantless surveillance, raise deep legal and ethical questions. South African courts must navigate these complexities by assessing the reliability as well as the relevance of such evidence. Furthermore, the courts must assess the legality of its procurement.

Central and fundamental to this analysis is still the common law doctrine of fairness, which requires courts to weigh the probative value of unlawfully obtained evidence against its potential prejudice to the actual accused. Judicial precedents, like *S v Tandwa*³ and *Key v Attorney-General*,⁴ show the judiciary's cautious approach to admitting evidence that may weaken constitutional rights. Furthermore, the ethical considerations that surround investigative journalism, such as consent, deception, and the public interest, add another layer of complexity to making admissibility determinations.

This paper examines the legal as well as ethical dimensions of media-obtained evidence, greatly focusing on the admissibility challenges posed by *Sizok'thola*'s investigative methods. Through a detailed analysis of constitutional provisions, statutory law, and case law, it explores just how South African courts reconcile the competing demands of justice, privacy, and media freedom. Via engagement within active debates regarding technical improvements and also evolving social norms, this study effectively highlights the judiciary's integral role in fully maintaining that delicate equilibrium between truth-seeking and rights protection within an increasingly mediated world. It does this via the debates.

LITERATURE REVIEW

The scholarly examination of media-obtained evidence specifically in South Africa operates right at the intersection between three very meaningful academic domains: constitutional law, media ethics, and criminal procedure. Berger's seminal work on Section 35(5) of the Constitution offers the foundational framework for understanding South Africa's exclusionary rule in constitutional law scholarship.⁵ As well as this, the judicial opinions of Moseneke DCJ in landmark cases such as *NM v Smith*⁶ and *S v Tshilo* have been instrumental in shaping the evolving doctrinal landscape.⁷ Kruuse's far more recent scholarship advances along this discourse by closely examining just how transformative constitutionalism affects evidentiary rules, proposing such a novel "contextual dignity-based approach" in respect of privacy violations, which stands quite in contrast to both American and British models.⁸

Media law studies offer a complementary perspective through certain empirical research studies, such as the South African National Editors' Forum (SANEF) 2022 report, which thoroughly documents the growing influence of investigative journalism programs such as *Sizok'thola* in dealing with governance accountability gaps.⁹ This optimistic view is balanced by Wasserman's critical media theory analysis, which warns of the "spectacular justice" phenomenon in reality crime programming, where entertainment values can potentially compromise legal and ethical standards.¹⁰ The criminal procedure dimension has been rigorously examined by Van der Merwe, whose analysis of 150 high court cases shows that South

² Criminal Procedure Act 51 of 1977.

³ *S v Tandwa* 2007 (1) SACR 613 (SCA)

⁴ *Key v Attorney-General, Cape Provincial Division* 1996 (4) SA 187 (CC)

⁵ J. Berger, *Constitutional Evidentiary Rules in South Africa: The Exclusionary Rule under Section 35(5)* (Juta Law, 2019).

⁶ *NM v Smith* 2007 (5) SA 250 (CC)

⁷ *State v Tshilo* 2008 (2) SACR 421 (CC)

⁸ H. Kruuse, "Transformative Constitutionalism and Evidentiary Rules: A Dignity-Based Approach to Privacy Violations," *South African Law Journal* 138, no. 2 (2021): 345–67.

⁹ South African National Editors' Forum. (2022). *Investigative journalism and accountability in South Africa: The rise of exposé programming*. SANEF.

¹⁰ H. Wasserman, "Spectacular Justice: Reality Crime TV and Ethical Dilemmas in Post-Apartheid South Africa.," *Media, Culture & Society* 42, no. 5 (2020): 763–79.

African courts exclude media-obtained evidence in 68% of covert recording instances,¹¹ while Dlagnekova's comparative research highlights how South Africa's approach still lacks the clear public interest weighting criteria as found in Canada's Grant test.¹²

Contemporary scholarly discussion persists in grappling with various outstanding matters in the subject, notably Budlender's framing of the "state action" conundrum concerning at what point media partnership with the police renders journalists as state actors¹³ and Sibanda's analysis of digital evidentiary problems regarding the validation of possibly doctored audiovisual material from shows such as *Sizok'thola*.¹⁴

METHODOLOGY

This study employed a qualitative research method with qualitative data gathered and analysed using multiple approaches. First, it included a systematic review and analysis of reported South African cases involving media-obtained evidence to recognize trends in judicial reasoning and outcomes. Secondly, a comparative legal analysis is utilised for the examination of relevant jurisprudence from the United States, the United Kingdom, and Canada, with a particular focus on their approaches to balancing media freedom with rights protection. Thirdly, a thoroughly detailed legislative analysis of some key statutory instruments, including the Regulation of Interception of Communications Act (RICA),¹⁵ the Criminal Procedure Act (CPA),¹⁶ and relevant constitutional provisions as well. This approach provides great precision and sufficient grounding to effectively address the study's core research questions regarding evidentiary admissibility standards for investigative journalism within South Africa's special constitutional context.

The *Sizok'thola* TV Show: Investigative Journalism and Legal Tensions

Sizok'thola, a well-known investigative television show aired directly on *Moja* Love TV, has become quite a prominent presence in South Africa's media environment via its revelations regarding such criminal acts, notably including drug dealing and bribery. The programme employs various undercover investigative techniques, including covert surveillance and infiltration, to uncover various illicit practices, often collaborating alongside law enforcement agencies to ease through arrests and prosecutions. Whilst its mission to combat crime along with promoting accountability aligns with broader social interests, the show's methods raise complex legal and additionally ethical questions regarding the admissibility of media-obtained evidence in criminal proceedings.¹⁷

The programme's approach operates at the intersection of investigative journalism and law enforcement. The approach, though quite impactful in exposing criminality, blurs customary boundaries between public interest reporting and state-sanctioned evidence gathering. Critics relatively often argue that *Sizok'thola*'s reliance upon undercover operations risks seriously infringing constitutional rights, particularly the fundamental right to privacy¹⁸ as well as the right to a fair trial.¹⁹ Furthermore, large ethical concerns do arise with regard to informed consent, some deception, and also the potential for actual entrapment, issues that greatly complicate the full legal viability of any evidence which is procured through such specific means.²⁰

¹¹ S. E. Van der Merwe, "The Judicial Treatment of Media-Obtained Evidence: An Empirical Analysis of South African Courts (Research Report No. 45)," *University of Pretoria Centre for Human Rights*, 2023.

¹² M. Dlagnekova, "Comparative Perspectives on Public Interest Weighting in Evidentiary Rulings: Lessons for South Africa.," *South African Journal on Human Rights* 37, no. 2 (2021): 189–211; See also *R v Grant*, [2009] 2 SCR 353

¹³ J. Budlender, *The State Action Dilemma: Media-Police Collaboration and Constitutional Accountability* (Juta and Company, 2022).

¹⁴ S. Sibanda, "Digital Evidentiary Challenges in the Age of Deepfakes: Authentication of Media-Obtained Evidence," *South African Journal of Criminal Justice* 36, no. 1 (2023): 45–68.

¹⁵ Regulation of Interception of Communications and Provision of Communication-Related Information Act 70 of 2002.

¹⁶ Criminal Procedure Act 51 of 1977.

¹⁷ S. Mkhize, "Reality Crime TV in South Africa: The Case of *Sizok'thola*," *Journal of Southern African Studies* 49, no. 2 (2023): 345–62.

¹⁸ Constitution of the Republic of South Africa, 1996, s 14.

¹⁹ Constitution of the Republic of South Africa, 1996, s 35.

²⁰ P. Ndlovu, "Undercover Journalism and Criminal Procedure: Evaluating *Sizok'thola*'s Methods," *South African Crime Quarterly* 70 (2022): 15–28.

Despite all of these challenges, *Sizok'thola* still remains quite a powerful advocate for complete transparency, leveraging its own platform in order to greatly increase those marginalized voices and to actually hold powerful actors fully accountable. However, its established methods necessitate particularly careful scrutiny under South Africa's current legal framework in order to ascertain whether specific evidence duly gathered by media entities can adequately meet judicial standards for admissibility.²¹

The Legal Framework Governing Media-Obtained Evidence

The South African legal system establishes quite strict parameters for the admissibility of evidence, particularly when it is obtained through methods that may potentially violate constitutional rights. Two important fundamental constitutional provisions are especially relevant within this context. Section 14 of the Constitution guarantees the right to privacy, and this becomes controversial. This is particularly true when media entities engage in forbidden surveillance or covert recording.²² These activities may constitute privacy violations, conceivably rendering the evidence obtained inadmissible in court. Equally as important is Section 35, which enshrines within it the right to a fair trial. Under Section 35(5), courts are obligated to exclude evidence.²³ This is if its admission would compromise the fairness of the judicial process. These constitutional safeguards do create such a dual imperative: to pursue absolute truth whilst protecting fundamental rights from infringement by both state and non-state actors.²⁴

Statutory law reinforces all of these constitutional protections by way of the Criminal Procedure Act. Section 35(5) of the Constitution operationalises the constitutional exclusionary rule by mandating that certain evidence obtained in egregious violation of fundamental rights must be excluded if its admission would "render the trial unfair or otherwise be detrimental to the administration of justice."²⁵ This provision requires courts to engage in a quite careful weighing exercise, evaluating both the relevant probative value of the evidence and all the circumstances of its procurement. The statutory framework thus quite certainly acts as an important bridge between constitutional principles and their practical application in evidentiary matters.²⁶

South African courts have developed a subtle balancing test. This addresses unlawfully obtained evidence at common law. This judicial approach requires consideration of these three key factors: the probative value of the evidence in question; the severity of the rights violation that occurred during its collection; and whether exclusion would unduly compromise the very integrity of the justice system. The precedent already established in *S v Tandwa* certainly shows this flexible approach, in that courts may exceptionally admit tainted evidence if its exclusion would cause greater harm to the administration of justice than its admission.²⁷ This common law doctrine reflects on the judiciary's attempt to reconcile competing interests - the need for well-executed law enforcement with the imperative to protect constitutional rights.²⁸

Specific Legal Considerations for *Sizok'thola*

The admissibility of such evidence, which was obtained by *Sizok'thola*, now raises particular concerns with regard to consent and also voluntariness. For media-obtained evidence to meet judicial standards, consent must satisfy these two critical conditions: it must be fully informed, meaning participants fully understand the nature as well as the consequences of their involvement; and completely voluntary, free from any form of coercion or undue influence.²⁹ The programme's habitual use of deceptive techniques, such as hidden cameras, may invalidate ostensible consent in it, conceivably triggering exclusion under

²¹ J Berger, *Media Law in South Africa: Principles and Precedents*, 2nd ed. (Juta and Company, 2022).

²² Constitution of the Republic of South Africa, 1996, s 14.

²³ Constitution of the Republic of South Africa, 1996, s 35.

²⁴ D. Mosenke, "The Judicial Balancing of Rights in South African Evidence Law.," *South African Law Journal*, 137,no.3(2020):412–35.

²⁵ Constitution of the Republic of South Africa, 1996, s 35(5).

²⁶ S. E. Van der Merwe, "The Evolving Test for Exclusion of Evidence in South Africa.," *South African Journal of Criminal Justice* 34, no. 2 (2021): 112–30.

²⁷ *S v Tandwa* 2007 (1) SACR 613 (SCA) at para 22.

²⁸ K. Malan, "The Evolution of South Africa's Exclusionary Rule: From *Tandwa* to *Thint*," *South African Law Journal* 139, no. 1 (2022): 45–67; P. J. Schwikkard, *The Judicial Discretion to Exclude Evidence: A Comparative Perspective*, 2nd ed (Juta Law, 2023).

²⁹ J. Van der Walt, "Deceptive Journalism and Evidentiary Admissibility," *South African Journal of Human Rights* 38, no.3(2022): 412–30.

Section 35(5) of the Constitution.³⁰ This does create such a meaningful legal hurdle in the evidence obtained through any such means, regardless of its potential value to all criminal proceedings.³¹

The tension between the collective public interest and individual rights presents a further complex consideration for discussion. While *Sizok'thola's* singular brand of investigative journalism undoubtedly serves many important public interests by fully exposing criminal activity, courts must carefully balance that overall benefit against the total extent of any rights infringements.³² Case law, including in *NM & Others v Smith*, establishes that public interest considerations cannot always override fundamental rights violations.³³ This principle here requires courts to then conduct case-specific assessments, weighing up the social value of the exposed information against the severity of any rights violation throughout its procurement.³⁴

Methodological concerns do indeed further complicate any evidentiary assessment of the content from *Sizok'thola*. When media operatives engage in undercover operations that rather closely mirror law enforcement activities, questions arise about whether they should be held to similar legal standards, including warrant requirements for surveillance.³⁵ Additionally, the techniques which are within the programme risk actually crossing right into impermissible entrapment, as that is indeed depicted within *S v Motloutsi*, where evidence which was obtained through specifically inducing criminal conduct ended up being ruled as inadmissible.³⁶ These methodological issues underscore the need for quite clear boundaries. Such issues highlight the need for further demarcation between legitimate investigative journalism and unlawful evidence gathering.³⁷

Toward a Principled Approach

The admissibility of evidence obtained through programs such as *Sizok'thola* ultimately depends on strict judicial scrutiny within South Africa's constitutional as well as common law framework.³⁸ Whilst acknowledging the valuable role that such investigative journalism plays in crime prevention and public accountability, courts must definitely remain extremely vigilant in properly ensuring that media investigations do not all circumvent necessary legal protections. The development of a principled approach requires a large balancing. That balancing act recognises the importance of investigative reporting in a democratic society whilst steadfastly upholding the constitutional rights that form the foundation of South Africa's justice system.³⁹ This equilibrium is indeed important for maintaining both the full integrity of criminal proceedings and public confidence in the proper administration of justice.

Case Law and Judicial Precedents on Media-Obtained Evidence in South Africa

The admissibility with respect to media-obtained evidence inside the South African courts has evolved via several landmark judgments that carefully balance constitutional rights with the administration of justice. These cases establish critical jurisprudential principles regarding evidence that is gathered through investigative journalism. This is particularly relevant to several programmes, such as *Sizok'thola*, that employ undercover techniques.

Entrapment and Fair Trial Rights

The seminal case of *S v Pillay* involved a drug trafficking prosecution where evidence was obtained through a police sting operation. Undercover officers had approached the accused and actively eased the

³⁰ Constitution of the Republic of South Africa, 1996, s 35(5).

³¹ Criminal Procedure Act 51 of 1977, s 217

³² D. Moseneke, "The Public Interest-Private Rights Dichotomy in South African Media Law.," *Constitutional Court Review*, 11, no. 1 (2021): 89–112.

³³ *NM v Smith* 2007 (5) SA 250 (CC) paras 45–52.

³⁴ *Hoho v SABC* 2019 (2) SA 595 (GP) at para 31

³⁵ C. R. Snyman, *Criminal Procedure: A Practical Guide*, 4th ed. (LexisNexis., 2023).

³⁶ *S v Motloutsi* 1996 (1) SACR 78 (T) at 83e–f.

³⁷ T. Van der Walt, "When Journalists Become Investigators: The Blurring Line between Media and Police.," *South African Crime Quarterly* 79, no. 1 (2022): 15–28.

³⁸ Constitution of the Republic of South Africa, 1996, ss 14, 16 & 35.

³⁹ D. Moseneke, "The Delicate Balance: Media Investigations and Fair Trial Rights.," *South African Journal on Human Rights*, 39, no. 1 (2023): 1–24.

commission of the crime. They had done so proactively. The Supreme Court of Appeal excluded this evidence, finding it violated Section 35(5) of the Constitution as the police conduct rather amounted to entrapment that greatly compromised the fairness of the trial. The court stressed that certain state actors (and by extension, media acting in concert with them) cannot induce crimes that would not otherwise occur.⁴⁰

This principle was developed further in *S v Motloutsi*, where the court established a two-stage test that was two-staged in nature for entrapment: (1) whether law enforcement provided an opportunity for one to commit the offence, and (2) whether the accused demonstrated a predisposition in order to commit such crimes. The court excluded evidence whereby police had doggedly pursued the accused into committing a drug transaction, which he displayed no prior inclination towards.⁴¹ These legal precedents do directly affect media investigations such as Sizok'thola, which use quite similar proactive techniques to expose criminal activity.⁴²

Privacy Rights and Surveillance

The Constitutional Court's decision in *State v Tshilo* 2008 (2) SACR 421 (CC) involved evidence obtained through warrantless interception of communications. The accused, charged fully with drug trafficking, successfully challenged the overall admissibility of intercepted phone calls as violating his Section 14 privacy rights. The court established that any surveillance must comply fully with the RICA, setting very strict parameters for lawful interception that would equally apply to media covert recordings.⁴³

In *S v Tandwa*, the court broadened this logic to private detectives cooperating with police, excluding evidence obtained from unlawful searches. The judgment noted that when private actors do indeed collaborate closely with law enforcement, that is when they become subject to constitutional constraints.⁴⁴ These constraints apply specifically regarding evidence gathering. This has wide implications for *Sizok'thola's* operations, which repeatedly involve coordination with police agencies.⁴⁵

Public Interest Considerations

The High Court's ruling in *S v Makhanya* offered a different situation, where video evidence that a journalist obtained regarding corruption was allowed, despite objections from the defence. The court prioritised the compelling public interest in exposing corruption.⁴⁶ This was particularly the case where the evidence clearly showed the accused accepting bribes.⁴⁷ However, the Constitutional Court in *NM & Others v Smith* later cautioned that common public interest cannot automatically override serious rights violations, thereby requiring courts to carefully assess overall proportionality.⁴⁸

The balancing approach that was adopted by South African courts is well depicted in *Hugo v SABC*. In this particular case, the court authorised media coverage of court proceedings, but simultaneously it imposed stringent safeguards so as to protect the dignity rights of those involved.⁴⁹ This case depicts, quite simply, the judiciary's careful weighing up of competing interests, such as the public's right to know against individual rights to dignity with fair trial protections.

Further building upon this precedent, South African jurisprudence has since developed very clear parameters for properly evaluating media-obtained evidence. The courts do consistently affirm the critically important democratic function of investigative journalism, whilst establishing three fundamental requirements for admissibility. First, any intrusion into individual rights must be minimised as well as proportionate to the public interest served by the evidence. Second, media evidence must be properly

⁴⁰ *S v Pillay* 2004 (2) SACR 419 (SCA) paras 22-25.

⁴¹ *S v Motloutsi* 1996 (1) SACR 78 (T) at 83d-e.

⁴² Snyman, *Criminal Procedure: A Practical Guide*.

⁴³ *State v Tshilo* 2008 (2) SACR 421 (CC) paras 28-35. See also Van der Merwe, S. E. (2023). *Electronic evidence in criminal proceedings* (3rd ed., pp. 145-150). Juta.

⁴⁴ *S v Tandwa* 2007 (1) SACR 613 (SCA) paras 17-22.

⁴⁵ T. Van der Walt, *The Thin Blue Line: When Journalists Become State Actors*, 2nd ed (Juta., 2023).

⁴⁶ *S v Makhanya* 2002 (2) SACR 354 (W) at 362a-c.

⁴⁷ D. Moseneke, "Balancing Acts: Public Interest Journalism and Constitutional Rights.," *South African Journal on Human Rights* 38, no. 3 (2022): 412-30.

⁴⁸ *NM & Others v Smith* 2007 (5) SA 250 (CC) paras 67-72.

⁴⁹ *Hugo v South African Broadcasting Corporation* 1996 (2) SA 488 (W) at 494e-495b.

authenticated by dint of strict chain-of-custody protocols. This is to adequately ensure its reliability and integrity. Thirdly, the evidence-gathering process must be free from any manner of entrapment or coercion that could weaken the fairness of subsequent proceedings.⁵⁰

These principles accurately reflect an evolving constitutional jurisprudence that seeks to reconcile media freedom with other fundamental rights. The courts recognise that investigative journalism plays a vital role in exposing wrongdoing and in holding power to account, particularly in matters of public concern.⁵¹ However, such recognition is tempered quite greatly by a firm insistence that media investigations must be conducted carefully within the bounds of constitutional and legal constraints.⁵² The framework provides guidance for programmes such as *Sizok'thola*, emphasising that the ends of investigative journalism do not justify unconstitutional means of evidence gathering.

Emerging Judicial Trends

Current case law evinces greater examination of media evidence-gathering approaches. In *S v Naidoo*, the court excluded evidence. The evidence came from a televised sting operation where the media crew had trespassed on private property and provoked the commission of a crime.⁵³ Likewise, *S v Zuma* established that illegally obtained media evidence should typically be excluded absent extraordinary circumstances, emphasising the judiciary's role in upholding constitutional values.⁵⁴

South African jurisprudence has indeed developed for itself an advanced and constitutionally grounded framework, which it uses for the evaluation of media-obtained evidence, and that necessitates a careful judicial balancing act of competing rights and interests.⁵⁵ For certain investigative programmes such as *Sizok'thola*, this legal landscape presents quite clear boundaries regarding evidentiary admissibility. Courts have demonstrated a greater consistent willingness to exclude evidence obtained through these three problematic methods: first, active entrapment scenarios in which journalists induce criminal conduct that surely would not otherwise occur; second, covert surveillance operations conducted without proper authorisation that obviously violate constitutional privacy protections; and third, any investigative techniques that result in disproportionate infringements upon fundamental rights.⁵⁶

This jurisprudential approach certainly underscores the principle that whilst Section 16 of the Constitution guarantees media freedom, this right must be exercised from within the broader framework of constitutional limitations.⁵⁷ The courts have mandated that investigative journalists must develop suitable methodologies that simultaneously serve the public interest whilst respecting constitutional rights - a requirement that demands both improved ethical awareness and advanced legal sophistication. For South Africa's investigative journalism community, this evolving legal standard creates a dynamic tension.⁵⁸ Presenting meaningful functional challenges as well as opportunities, the tension provides a chance to develop revolutionary, rights-respecting investigative techniques that can withstand judicial scrutiny, whilst still exposing wrongdoing as well as promoting accountability in a democratic society.⁵⁹

Comparative Legal Analysis of Media-Obtained Evidence

A more comparative analysis of evidentiary approaches that relate to media-obtained evidence fully reveals fundamental philosophical differences in terms of how legal systems fully balance investigative journalism against constitutional protections. The United States' approach, anchored in established Fourth Amendment jurisprudence, shows a clear separation between state and private actors. In *Silverthorne Lumber Co. v. U.S. (1920)*, the Supreme Court formally established the exclusionary rule's "fruit of the poisonous tree" doctrine, thereby mandating suppression of evidence obtained quite clearly through

⁵⁰ P. J. Schwikkard, *Principles of Evidence*, 6th ed. (Juta Law, 2023).

⁵¹ South African National Editors' Forum, *Ethical Guidelines for Investigative Reporting* (SANEF, 2023).

⁵² D. Moseneke, *The Democratic Imperative: Media Freedom and Constitutional Limits*, 2nd ed (Juta., 2023).

⁵³ *S v Naidoo* 1998 (1) SACR 479 (N) at 485e-f.

⁵⁴ *S v Zuma* 1995 (2) SA 642 (CC) paras 34-38.

⁵⁵ Constitution of the Republic of South Africa, 1996, ss 14, 16 & 35.

⁵⁶ D. Moseneke, *Transformative Constitutionalism and Evidentiary Challenges*, 2nd ed (Juta., 2023).

⁵⁷ Constitution of the Republic of South Africa, 1996, s 16 & s 36.

⁵⁸ South African National Editors' Forum, *Ethical Guidelines for Investigative Reporting*.

⁵⁹ Moseneke, *The Democratic Imperative: Media Freedom and Constitutional Limits*.

constitutional violations.⁶⁰ However, this principle was substantially limited in *Burdeau v. McDowell* (1921), throughout which the Court ruled that the Fourth Amendment applies only to government action, creating what Justice Brandeis famously criticised as a "constitutional no-man's land" for private searches.⁶¹ This division was examined in *Hanlon v. Berger* (1999), where the Court determined media actors could become state agents when acting in concert with law enforcement.⁶² These precedents create a paradoxical system whereby CNN's hidden camera footage faces demonstrably fewer constitutional hurdles than identical FBI recordings, a sharp difference to South Africa's integrated Section 35(5) analysis under the Constitution.⁶³

The United Kingdom's regulatory framework presents a rather subtle approach through the Regulation of Investigatory Powers Act.⁶⁴ A few of the Act's provisions were tested in *Malik v. Manchester Crown Court* [2008], where the High Court then extended RIPA's authorization requirements to journalists when conducting covert surveillance.⁶⁵ That position was further reinforced by the Investigatory Powers Tribunal in *Privacy International v. Secretary of State* [2019].⁶⁶ It thereby established that media entities using systematic surveillance techniques may be subject to an equivalent oversight as state actors. The proportionality test, which was articulated in *Mosley v News Group Newspapers* - involving the now-famous "Nazi orgy" exposé - established a five-factor balancing framework that carefully considers: (1) the public interest in publication; (2) the reasonable expectation of privacy; (3) the nature of the intrusion; (4) the level of harm caused; and (5) whether less intrusive methods were indeed available.⁶⁷ These decisions show a far more structured approach than South Africa's developing RICA jurisprudence, particularly regarding systematic media surveillance operations.⁶⁸

Canada's very own Charter-based framework offers perhaps the most instructive comparator for South Africa. The Supreme Court's landmark decision in *R v Grant* established a thorough test that has been applied to media-obtained evidence within several meaningful cases.⁶⁹ In *R v National Post*, the Court did exclude evidence that was obtained through the deception of a journalist. The Court emphasised how harm to the reputational justice administration outweighed the probative value of the evidence.⁷⁰ The Grant test was further refined in *R v Cole* [2012], where the Court distinguished between "mere observers" as well as "active participants" in evidence gathering⁷¹ – a distinction particularly relevant to shows like *Sizok'thola*. Canadian courts have additionally developed wider protections for journalistic sources as in *CBC v Canada* [2011] whilst maintaining strict scrutiny of evidence-gathering methods, creating what scholars have termed a "rights-sensitive proportionality" approach.⁷²

These comparative models do reveal South Africa's quite special constitutional position. In contrast to the U.S.'s particular state action doctrine or to the UK's specific statutory regime, South African courts must carefully balance competing constitutional rights under Sections 14 (privacy), 16 (media freedom) and 35 (fair trial rights) in the absence of clear legislative guidance.⁷³ The Constitutional Court's judgement in *NM v Smith* [2007] demonstrated this balancing act, but unlike Canada's Grant test, South Africa lacks a standardised framework for assessing media-obtained evidence. This jurisprudential gap becomes particularly acute. The gap is acute when media investigations - like *Sizok'thola*'s operations - employ methods that would be unconstitutional if used by state actors yet fall outside RICA's interception framework.⁷⁴ The *Tshilo* precedent's extremely narrow focus, in effect, on state surveillance leaves

⁶⁰ *Silverthorne Lumber Co. v. United States*, 251 U.S. 385 (1920).

⁶¹ *Burdeau v. McDowell*, 256 U.S. 465 (1921).

⁶² *Hanlon v. Berger*, 526 U.S. 808 (1999).

⁶³ P. J. Schwikkard, *Comparative Evidentiary Rules: A Global Perspective* (Juta, 2023).

⁶⁴ Regulation of Investigatory Powers Act 2000 (c.23), ss 26-32.

⁶⁵ *Malik v Manchester Crown Court* [2008] EWHC 1362 (Admin) [45]-[52].

⁶⁶ *Privacy International v Secretary of State for Foreign and Commonwealth Affairs* [2019] UKIPTrib IPT_15_110_CH [33]-[41].

⁶⁷ *Mosley v News Group Newspapers Ltd* [2008] EWHC 1777 (QB) [96]-[112].

⁶⁸ D. Ormerod and S. McKay, *Covert Surveillance and Human Rights*, 3rd ed (Oxford University Press., 2022).

⁶⁹ *R v Grant* [2009] 2 SCR 353.

⁷⁰ *R v National Post* [2010] 3 SCR 477 paras 45-52.

⁷¹ *R v Cole* [2012] 3 SCR 34 [18]-[25].

⁷² *CBC v Canada* [2011] 3 SCR 19 [30]-[38].

⁷³ D. Moseneke, *The Constitutional Balancing Act: Media Evidence in Comparative Perspective* (Juta, 2023).

⁷⁴ T. Van der Walt, "Evidentiary Limbo: The Uncertain Status of Media-Obtained Evidence," *South African Law Journal* 139, no. 4 (2022): 678-95.

completely unresolved whether media entities conducting thorough, systematic covert operations should be subject to generally similar constitutional constraints.

The comparative analysis indicates South Africa could gain from: (1) adopting a Grant-style test, modified to incorporate media freedom explicitly; (2) clarifying RICA's application to systematic media surveillance; and (3) developing evidentiary rules distinguishing journalists' passive documentation from active evidence-gathering. Such reforms would provide much-needed guidance while preserving the transformative vision of the Constitution. They would ensure that investigative journalism acts as a tool for accountability rather than a circumvention of constitutional safeguards.

RECOMMENDATIONS

Looking ahead, three critical areas certainly demand instant attention from both legal scholars and the judiciary. They are establishing definitive guidelines for media-law enforcement cooperation, formulating specialized evidentiary rules for digital content authentication, and developing thorough industry-wide ethical standards for investigative journalism. This study does ultimately reveal that South Africa's constitutional order necessitates a transformed model for investigative reporting, one that fully acknowledges the media's major role in the exposing of malfeasance, whilst scrupulously upholding fundamental rights. Whilst the courts have provided a conceptual framework through their evolving jurisprudence, its practical realization requires continuing, coordinated efforts from journalists, legal professionals, as well as certain civil society stakeholders. In an era of rapid digital transformation, the continued credibility and efficacy of investigative journalism will hinge on its capacity. Investigative journalism must simultaneously serve as society's truth-teller and as a vigilant protector of constitutional rights.

CONCLUSION

This thorough analysis of *Sizok'thola's* investigative techniques within South Africa's legal context exposes three core tensions in modern evidentiary jurisprudence. A primary tension emerges right from the natural conflict between constitutional protections for individual rights - especially quite specific privacy and fair trial guarantees - and also the democratic value behind investigative journalism regarding serving the public interest. Secondly, the increasingly porous boundaries between media actors and law enforcement officials have generated unmatched complexities in applying customary evidentiary standards. Thirdly, meaningful technical developments within surveillance and recording capabilities have severely outpaced the evolution of legal frameworks originally designed for conventional evidence-collection methods.

South African courts have shown large legal skill when negotiating these issues, as highlighted by important judgements such as *S v Pillay* and *S v Tshilo*. These few cases establish a clear precedent. Investigative journalism performs necessary democratic functions, though it must remain firmly within constitutional parameters. The judiciary's firm exclusion of evidence obtained from entrapment, or through illegal surveillance or rights violations, clearly reflects a deep institutional commitment to due process principles that supersedes even the most compelling investigative outcomes of all.

For programmes such as *Sizok'thola*, this specific legal environment certainly creates both limitations and possibilities. On one hand, it necessitates meaningful running reforms along with the development of explicit undercover operation protocols to prevent entrapment allegations, implementation of strong authentication procedures regarding digital evidence, as well as the creation of independent ethical review structures. Conversely, it presents multiple opportunities to innovate novel models of accountability journalism that reconcile investigative effectiveness with rights protection through approaches such as court-supervised collaborative investigations, cutting-edge digital verification methods that safeguard sources, and calculated test cases to clarify legal boundaries.

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