

POLYGRAPH TESTING IN THE SOUTH AFRICAN WORKPLACE
THE LAW AND PRACTICE

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EXTERNAL EXAMINER: _____

This research dissertation is submitted in partial fulfillment of the requirements for the MPhil: Dispute Resolution degree. The other part of the requirements for this qualification was the completion of a programme of courses.



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ACKNOWLEDGEMENTS

The journey to the completion of my master's studies in the faculty of Law at University of Cape Town was made manageable and possible through the harnessing of my mental model through input and support of others during this period and during my life-time.

Henceforth I want to give thanks to

- **Glory** be to **God** who Strengthened me, in order for me to complete this paper
- To my wife, **Jacqueline Weaver Marks**, for all your love, support, patience, encouragement. This dissertation and the completion of the degree would not have been possible without you. I am truly indebted to our Lord Jesus Christ for putting you on my path.
- To my late Dad **Joseph (Joe) Johannes Marks** and mother **Maggie Marks** for the encouragement from a tender age, their ability to install in me to be a continues lifelong learner. You will continue to live through me!
- My eldest brother Matthew Marks, for your encouragement support and continuous motivation.
- Professor **Alan Rycroft** for your consistent support, guidance, and glasnost. I enjoyed your classes and enjoyed every moment of the thought provoking discussions.
- Professor **Evance Kalula** for putting me on this path in 2001
- **Molefi Makhetha** and **Rosita Botha** of JDG PTY LTD SA for availing yourselves to be interviewed by me, in order to get a workplace application
- **Zakade Salman** of MTN SA for availing yourself to be interviewed by me, and the access to unrelated policies to be able to draw a reference from.
- **Joseph Williams** CCMA commissioner Western Cape for his support
- **BREAK THROUGH HUMAN RESOURCES SOLUTIONS CC** for allowing me to access your unrelated policies as a reference

'I am, because of others'

DECLARATION

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Signed at Cape Town this 28th day of October 2014

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ABSTRACT

The South Africa Labour Market is, after the enactment of the Constitution of the Republic of South Africa and Bill of Rights, faced with the enormous challenge of limitations placed in the workplace to the constitutional guarantees. The limitations referred to are specific to the extent to which some institutions restrict the employee's rights to dignity, privacy and just administrative action. The perception of just administration questions evidence obtained by the use of lie detector (polygraph) tests comes under scrutiny as far as the admissibility and weight of such evidence is concerned.

This research paper will recommend and conclude the following:

1. Constitutional guarantees are sacrosanct as enshrined in Sections 8(2),10,12,14,23,25.39
2. In the absence of SA legislation the common law has developed to the level where the jurisprudence have accepted polygraph testing as admissible when certain conditions are met inter alia: Polygrapher must be registered and qualified; the consent of the employee must be given before test are conducted; the test are used to corroborate evidence such as for example circumstantial evidence.
3. The South African Qualification Authority development of unit standards is an indication of the acceptance of Polygraph testing in the South African Labour Law sphere.
4. The private sectors in South Africa are utilizing these tests in the absence of policies and procedures in the workplace, hence the need for directives, policies and procedures to guide against the abuse or misuse.
5. That polygraph testing have developed to a level of sufficient acceptance in the workplace.

CHAPTER ONE: INTRODUCTIONS AND DEFINITIONS

The South African constitution is the supreme law of the Republic of South Africa. It follows that polygraph testing must comply with the tenets stipulated within the constitution. The constitutional guarantee against unfair labour practices impacts upon procedural fairness in disciplinary hearings.

In the labour sphere there is a saying that 'he who alleges must prove'. The Labour Relations Act 66 of 1995 (hereafter LRA) provides that there are two bridges that the alleger must cross before proving their case on a balance of probabilities. The employer must engages in (1) a fair process and (2) have substantively fair grounds before dismissing an employee.

At the disciplinary enquiry, the alleger (commonly referred to as the Presenter| Initiator) will have to introduce different forms of evidence, inter alia, real, documentary and corroboratory evidence.

This Chapter will point out the relevance and impact of the South African Constitution and the Bill of Rights on the use of polygraph testing. It will further touch on the cautionary rule in the law of evidence, corroboration and what is meant by proving a case on a balance of probability and beyond reasonable doubt. The writer will further look at the interpretation of the labour Relations Act and in Particular the Code of Good Practice

The above issues will all coming under scrutiny due to the fact that polygraph examinations are so widespread not only for specific incident testing but also for pre-employment screening.

1. The Constitutional Guarantees

The South African Constitution obliges all legislation, regulations, acts and exercise of power to be consistent with it to be valid. Section 2 of the South African Constitution provides:

‘The Constitution is the Supreme Law of the Republic; law or conduct inconsistent with it is invalid, and the obligations imposed by it must be fulfilled’¹.

Hence when the common law is inconsistent with a constitutional provision an adaptation will be required to resolve this inconsistency.² Where it is not inconsistent but however does fall short of its spirit, purport and objects, the common law must also be adapted in order for it to grow in harmony with the ‘objective normative system’ found in the Constitution³. Polygraph testing in the common law and its application falls within this second instance. The Constitutional considerations in relation to polygraph testing relates to the fundamental human right of individuals in relation to their right to privacy which includes the right against unlawful search and seizure, infringement of a person’s right to dignity, the right to remain silent and the right to fair labour practices. The use of polygraph testing may result in different effects, as highlighted in the following section.

1.1. Search and Seizure

Section 12 of the SA constitution upholds the right to ‘Freedom and Security of the person’. It states (1) everyone has the right to freedom and security of the person which includes the right ‘Not to be treated or punished in a cruel, inhuman or degrading way’.

¹ The Constitution of South Africa, Act 108 of 1996, s2.

² Section 8(3) provides that when applying a provision of the Bill of Rights a court, in order to give effect to a right in the Bill, must apply, or if necessary develop, the common law to the extent that legislation does not give effect to that right and may develop rules of the common law to limit the right.

³ *S v Thebus and another* 2003(6) SA 505 (CC).

Everyone has the right to bodily and psychological integrity, which includes the right ‘(c) not to have to be subjected to medical or scientific experiments without their informed consent’.⁴

Christianson states⁵ that ‘although it is unlikely that a polygraph examination falls within the ambit of a medical or scientific experiment, it may come within the general concept of bodily and psychological integrity’, and in terms of S 12 of the Constitution, it is conceivable that an individual may be constitutionally protected against involuntary examination.

1.2. The Right to Privacy and Dignity: Section 10 and 14 of the Constitution⁶

In South Africa the right to privacy is protected by both our common law⁷ and the constitutional right to privacy. A fundamental issue at stake, however, concerns the extent to which the Bill of Rights has application in common law disputes. Section 14 states everyone has the right to privacy, which includes the rights not to have (a) their person or home searched; (b) their property searched; (c) their possession seized; or their privacy of their communication infringed.

The *locus classicus* for the recognition of an independent right to privacy in South African law is considered to be *O’Keeffe v Argus Printing and Publishing Co Ltd*⁸. In this case Watermeyer AJ correctly interpreted *dignitas* widely as to include the whole legally protected personality except corpus (bodily integrity) and fama (reputation). As such *dignitas* includes not only a single right of personality, but all ‘those rights relating to . . . dignity. Although

⁴ Marylyn Christianson ‘Polygraph Testing in South African Workplace: ‘Shield and Sword’ in the Dishonesty Detection versus Compromising privacy debate (2000) 21 ILJ 16.

⁵ Christianson (n4) 28.

⁶ Section 10 of the Constitution contains the right to dignity and reads: ‘Everyone has inherent dignity and the right to have their dignity respected and protected’.

⁷ See Neethling’s Law of Personality Ch 8.

⁸ 1954 3 SA 244 (C);

it was not explicitly stated by the court, the judgment leaves one in no doubt that the right to privacy is included as one of these ‘rights’⁹.

In *Bersntein v Bester*¹⁰ the constitutional court accepted the fact that the common law recognizes the right to privacy as an independent personality right which the Courts have included within the concept of *dignitas*.

‘The invasions of privacy is the ‘unreasonable intrusion into private sphere, public disclosure of private facts, appropriation of likeness (or infringement of the right to identity) and false light in the public eye.’¹¹

The conclusion is therefore that, despite the decisions equating privacy with dignity (or honor), it can safely be accepted that nowadays the right to privacy is recognized by the common law as an independent right of personality and that it has been delimited as such within the *dignitas* concept¹².

In *National Media Ltd and others v Jooste*¹³, the Supreme Court of Appeal Harmse accepted the following definition of privacy:

‘Privacy is an individual condition of life characterized by exclusion from the public and publicity. This condition embraces all those personal facts which the person concerned has determined him to be excluded from the knowledge of outsiders and in respect of which he has the will that they be kept private’¹⁴.

Neethling defines privacy as follows.¹⁵

⁹ <http://old.ispa.org.za/regcom/privacyfiles/chapter-2-righttoprivacy.pdf> accessed on the 7 March 2014.

¹⁰ 1996(4)BCLR 449 at supra 789.

¹¹ Jonathan Burchell *Principles of Delict* 3 ed.(1993) 199.

¹² <http://old.ispa.org.za/regcom/privacyfiles/chapter-2-righttoprivacy.pdf> accessed on the 5 March 2014 p.9.

¹³ 1996 (3) SA 262(A)at supra 271.

¹⁴ <http://old.ispa.org.za/regcom/privacyfiles/chapter-2-righttoprivacy.pdf> accessed on the 5 March 2014 at page11.

¹⁵ Neethling.J, Potgieter J M et al. *Law of Delict* 2 ed. (1994)333.

‘Privacy is an individual condition of life characterized by seclusion from the public and publicity. This implies an absence of acquaintance with the individual or his personal affairs in this state.’

Prinsloo¹⁶ cites *Goosen v Carline’s Frozen Yoghurt Parlour* [1995] 2 BLLR 68 (IC) 148 where the industrial court had the opportunity to comment on the privacy of the employer in relation to the employer, employee relationship. The facts were the following: The employee obtained a recorded conversations between the chairperson of the disciplinary enquiry and management, suggesting bias from the chairperson. The employee wanted to introduce this recording as part of her evidence, to which the employer objected. The employer argued that this evidence is inadmissible as it infringes on the employers right to privacy. The industrial court referring to the limitations clause in the interim Constitution, held that the tape recordings were admissible as the employee wanted to introduce this evidence for a legitimate and valid purpose and that the limitation of the employer’s right to privacy was in this instance, both reasonable and justifiable¹⁷.

Prinsloo¹⁸ cites *Makhale v Vitro Building Products*¹⁹ was the first reported case to be decided which concerned the employee’s right to privacy. The facts were the following: The employee was instructed by employer to visit medical practitioner of employer choice and not the employees. Employee thenceforth refused and was charged with insubordination and was subsequently dismissed for refusal to adhere to a direct instruction from employer. The industrial court found that an instruction must be both lawful and reasonable for it to be fair. The court found that the instruction issued the by employer was unreasonable and unlawful because it breached the employees’ right to privacy with reference to her right to bodily integrity and self-incrimination. Her dismissal was held to be unfair.

¹⁶ R Prinsloo: Theses ‘Exploring the use of polygraph test in the workplace and evidence in labour disputes. LLM(University Cape Town) (2007)58.

¹⁷ [1995] 2 BLLR 68 (IC).

¹⁸ Prinsloo (n16)59.

¹⁹ [1996] 4 BLLR 506 (IC).

Prinsloo²⁰ cites *De Lange v Costa*²¹ that laid down the general test for determining dignity: (a) the plaintiff's self-esteem must have been actually (subjectively) impaired; and (b) a person of ordinary sensibilities would have regarded the conduct as offensive (tested by the general criterion of unlawfulness – objective reasonableness). The issue is whether the conducting of a polygraph, where the examiner reads into the graphs information that the employee does not realize or know they are imparting, is an invasion of the 'right to have their dignity respected and protected'? The issue of polygraph evidence and the right to dignity has not per se presented itself to our courts and no reported cases where this issue had come to be decided could be found²².

It is important where an employee gives permission / consent to a polygraph test that they are revoking their right to privacy in the labour sphere. Due to the imbalance in power relations it is submitted that employees will in most cases subject themselves to the tests to show that there is no guilt from their side. The opportunity to infringe the right to privacy and dignity is bigger for a prospective employee than for a current employee. The writer submits this to be based on the fact that questions to be asked for pre-employment will be about general activities, honesty and attitudinal issues and are not related to any specific incident as for a current employee.

1.3. The right to remain silent: the SA Constitution and The Bill of Rights

Section 35 (1)(a) of the Constitution states that anyone who is arrested who has allegedly committed an offence, has the right to remain silent and may in terms of section 35(1)(c), not be compelled to make any confession or admission that could be used in evidence against him or her. **In terms of section 35(3) ... the right to remain silent.** In *Davis v Tip NO* and others²³ the employee was faced with the choice, on the one hand, between remaining silent at a disciplinary

²⁰ Prinsloo(n16)64.

²¹ (1989) 2 SA 857 (A)862E.

²² Prinsloo(n16)64.

²³ (1996) SA 1159 (T) in *Contemporary Labour Law* (1996) at 1158H- 1159B.

enquiry and possibly losing his employment and, on the other, testifying to defend the charges, thereby providing possible incriminating evidence which could be used in a later or pending criminal trial. He was thus charged criminally as well as in a workplace disciplinary enquiry. He argued for a postponement of the disciplinary enquiry as the evidence might be used in the criminal trial and would therefore infringe on his right to remain silent. The applicant's submission suggests that, if the alternative is equally unattractive, then choice is tantamount to compulsion, and the right to silence entitles an accused person not to be faced with that choice. The applicant submitted that where an accused is left with only two choices and both will result in incriminating his constitutional right to silence, he will be left without a choice but to incriminate himself. The Judge did not agree that the applicant may well be required to choose between incriminating himself and losing his employment. If he loses his employment that is a consequence of a choice which he has made, but not a penalty for doing so. It will be the natural consequence of being found guilty of misconduct, and not punishment to induce him to speak. The court found that the employee's right to silence would not be violated and therefore, he was not entitled to a postponement of the disciplinary hearing.

Applying this case to polygraph testing it will not require the individual to answer the questions and will not therefore incriminate him/herself when he refuses to undergo the polygraph tests. Taking cognizance of this the writer will later in Chapter 2 and 3 discuss why courts accept polygraph evidence as corroboration when permission is given by employee and no negative inference can be drawn and be held against the employee when he refuses to undergo the test. In section 39 (2) of the Constitution requires the court, when developing the common law²⁴ to promote the purport, spirit and objects of the Bill of

²⁴ Common law means unwritten laws that have not been made by parliament or any other government. The courts used these laws and developed them when they made decisions the common law can be changed by new decisions in the courts. . But statutory law is stronger than common law. It is only when there is no statutory law about something that the common law will apply.

rights. In *S v Thebus and another*²⁵, the court noted at least two instances where it had to develop the common law under the section and said:

‘The first would be when a rule of the common law is inconsistent with a constitutional provision. Repugnancy of this kind would compel an adaptation of the common law to resolve the inconsistency. The second possibility arises even when a rule of the common law is not inconsistent with a specific constitutional provision but may fall short of its spirit, purport and objects. Then the common law must be adapted, so that it grows in harmony with the ‘objects normative value system ‘found in the Constitution. Section 36 of the Constitution the limitation clause, lays down a test that any limitation must meet’.

Hence, in the absence of legislation on Polygraph testing, the Bill of Rights applies to all law and binds the legislature, the executive and the judiciary and all organs of state²⁶. The Rights enshrined in the Bill of Rights therefore mould the practice of polygraph testing

Taking cognizance of the constitutional guarantees and the limitations placed on these rights, and the absence of legislation on polygraphs in South Africa, common law has been developed.

The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including- the nature of the right; the importance of the purpose of the limitation;

- The nature and extent of the limitation;
- The relation between the limitation and its purpose; and
- Less restrictive means to achieve the purpose.²⁷

²⁵ 2003(5)SA 505(CC)12.

²⁶ Section 8(1) of South African Constitution.

²⁷ Constitution of the Republic of South Africa, 1996 (Act No. 108 of 1996) Chapter 2 –Bill of Rights Section 36 ,Limitations of rights.

In terms of the Constitution, when interpreting the Bill of Rights, the values which underlie an open and democratic society based on human dignity, freedom and equality should be promoted. This means that an exercise is required analogous to that of ascertaining the boni mores or legal convictions of the community in the Law of Delict²⁸. What is clear through the common law developments is that the right to remain silent may be limited but there exist at present no law of general application that makes the submission to a polygraph a requirement.

1.4. The right to fair labour practice in terms of section 23

An employee who is required to undergo a polygraph test, could allege that when he is given an instruction to undergo such a test, and he refuses and the refusal is held against him, this constitutes an unfair labour practice.

The term or concept of fair labour practice is not defined in the Constitution but the LRA section 186(2)²⁹ states that an unfair labour practice is: “any unfair act or omission that arises between an employer and an employee involving:

- (a) Unfair conduct by the employer relating to the promotion, demotion, probation (excluding dismissals of probationers) or training of an employee or relating to the provision of benefits to an employee,
- (b) The unfair suspension of an employee or any other unfair disciplinary action short of dismissal in respect of an employee,
- (c) A failure or refusal by an employer to reinstate or re-employ a former employee in terms of any agreement, and
- (d) An occupational detriment, other than dismissal, in contravention of the Protected Disclosures Act, 2000, on account of the employee having made a protected disclosure defined in that Act.

²⁸ <http://old.ispa.org.za/regcom/privacyfiles/chapter-2-righttoprivacy.pdf> accessed on the 4 March 2014 p.14.

²⁹ A discussion of this section however outside the scope of this dissertation as the subsection do not relate to polygraph testing.

The Constitutional Court in *Nehawu*³⁰ found that the concept is incapable of precise definition, as what is fair depends on the circumstances of each case and involves a value judgment. Reading section 23(1) of the Constitution³¹ with section 186(2) of the LRA may shed light on whether the results of a polygraph test will be admissible. In *Z Sidumo*³² Ngcobo J refers to *Nehawu v University of Cape Town*³³ where the Court said:

‘The focus of s 23 (1) is, broadly speaking, the relationship between the worker and employer and the continuation of that relationship on terms that are fair to both. In giving content to that right, it is important to bear in mind the tension between the interests of the workers and the interests of the employers which is inherent in labour relations. Care must therefore be taken to accommodate, where possible, these interests so as to arrive at the balance required by the concept of fair labour practices. It is in this context that the LRA must be construed’.

The Code of Good Practice: Dismissal issued under the LRA has a ‘key principle’ which is that

‘... employers and employees should treat one another with mutual respect. A premium is placed on both employment justice and the efficient operation of business. While employees should be protected from arbitrary action, employers are entitled to satisfactory conduct and work performance from their employees’.

In *Denel v Vorster*³⁴ the employer incorporated its disciplinary code into the employment contract. The employer did not follow the provisions of the code in dismissing Vorster and argued that it does not have to follow its own

³⁰ National Education Health and Allied Workers Union v University of Cape Town and other 2003(3) SA 1 (CC);2003(2)BCLR 154(CC).

³¹ Provides: ‘everyone has the right to fair labour practice’.

³² Z SIDUMO & OTHER V RUSTENBERG PLATINUM MINES LTD & OTHERS (CCSA CASE CCT 85/06) supra 17.

³³ National Education Health and Allied Workers Union v University of Cape Town and other 2003(3) SA 1 (CC);2003(2)BCLR 154(CC) 0102 para 40.

³⁴ 2004 (4) SA 481 (SCA).

disciplinary code as long as it acts in a fair manner. The Supreme Court of Appeal held that:

‘the right to fair labour practices does not relieve the employer from adhering to his own disciplinary code which, because it was incorporated in the employment contract became contractually binding. This argument can be turned around and extended to the employee as well. Where the consent to undergo a polygraph test has been included in the employment contract that consent becomes a contractual term entered into between the employer and the employee. One could argue that the right to fair labour practices should not be interpreted as giving the employee the right to opt out of the contractual terms and obligations of the employment contract’. The court further stated that Section 23(1) of the constitution introduces into the employment relationship a reciprocal duty to act fairly.³⁵

It is clear that an employee has the right to remain silent, not to involuntarily undergo a test and not to have his dignity transgressed by subjecting him/her to the test. Section 23 further entrenches the right to fair labour practices from which it can be construed that if an employee is placed under duress to undergo such tests, his right to fair labour practice are further curtailed, as this will result in the employee’s constitutional right to silence being arbitrarily infringed.

What is clear from the opinions in these introductory remarks is that polygraph testing is unconstitutional within the labour sphere if consent is not received before the test phase. It is the writer’s submission that as the employee has a duty to act in the interest of his employer, and this does not amount to a departure from the right to privacy. Catching the ‘thief’ through utilizing a polygraph test is a legitimate and valid purpose if prior consent is given by the employee. The writer therefore believes that this common law development is not falling short of the spirit, purport and objects of the Act.

³⁵ (n35) 665(D).

The courts will have to look at the rules pertaining to polygraphs with circumspection. Hence, where subjection to a polygraph test is part of the pre-employment contract and the employee for constitutional reasons refuse to undergo a test, a negative inference cannot be drawn³⁶. The only role that the polygraph can play is therefore corroboration of other evidence submitted. Hence, he who alleges must prove on balance of probability that he has followed fair procedure, that dismissal was based on substantively fair grounds. The writer's view is that where the polygrapher has followed the process of prior consent, did not ask questions outside the investigation in order to transgress the right to privacy, the results of the polygraph can be utilized to corroborate other evidence.

In the South African context polygraph tests and practices are frequently used, and because of the unequal power relationship in the workplace, the writer submits that a balancing act for employers and employees at large is required to prevent abuse and ensure fairness to both.

2. Corroboration and Cautionary rule

The word 'corroboration' arises in this dissertation a great deal and requires understanding. Corroborating evidence (in "corroboration") is evidence that tends to support a proposition that is already supported by some initial evidence, therefore confirming the proposition. For example, W, a witness, testifies that she saw X drive his automobile into a green car. Meanwhile Y, another witness, testifies that when he examined X's car, later that day, he noticed green paint on its fender. Or there can be corroborating evidence related to a certain source, such as what makes an author think a certain way due to the evidence that was supplied by witnesses or objects.³⁷

In the English decision of *DPP v Kilbourne*³⁸ corroboration was described as

³⁶ *Truworths Ltd v CCMA and other* (JR789/07)ZALC 115 at 36.

³⁷ http://en.wikipedia.org/wiki/Corroborating_evidence accessed on the 20 October 2014.

³⁸ 1973 ALL ER 440:447H.

‘nothing other than evidence which ... confirms or supports or strengthens other evidence. It is in short, evidence which renders other evidence more probable. If so, there is no essential difference between, on the one hand, corroboration and on the other, supporting evidence’.

All kinds of evidentiary material may serve the function of corroboration or oral, documentary, or real evidence. Corroboration can also be found in an admission by the accused, albeit in conduct or words. Here the accused corroborates herself or himself by means of words.³⁹

The cautionary rule is a rule of practice that aims to assist judges in assessing evidence. It requires judicial officers to exercise caution before adopting the evidence of certain witnesses on the ground that the evidence of such witnesses is inherently potentially unreliable. The rule therefore requires the presiding officer to cautiously regard the evidence of children, complainants in sexual offence cases and accomplices⁴⁰.

Cautionary rules are described by Schwikkard and Van der Merwe⁴¹

‘... as a constant reminder to courts that the facile acceptance of the credibility of certain witnesses may prove dangerous. The courts must be reminded to be careful in considering evidence which practice has taught should be viewed with circumspection, and secondly that the court should seek some or other safeguard reducing the risk of a wrong finding based on suspect evidence. They however haste to comment that the exercise of caution should not be allowed to displace common sense.’

The cautionary rule and corroboration during polygraph evidence places a duty on presiding officers to establish the credibility, reliability and admissibility of evidence of a witness in order for it to corroborate other sets of facts.

3. Proving a case on a balance of probabilities in Labour Law

In criminal courts a finding by judicial officer is based on proof beyond reasonable doubt. No other logical explanation can be derived from the facts except that the defendant committed the crime, thereby overcoming the

³⁹ *S v Mjoli* 1981 3 SA 1233 (A) at p 1248.

⁴⁰ 1 Hoffmann & Zeffert “The South African Law of Evidence” 3ed (1988) 572.

⁴¹ Schwikkard PJ et.al. Principles of Evidence(2005):51.3.

presumption that a person is innocent until proven guilty. In workplaces disciplinary hearings and arbitrations, proof need only to be established on a balance of probabilities.

Under this heading it will be investigated who, how, what should be proved to get a guilty finding on balance of probabilities.

According to the Labour Relations Act, (LRA) a dismissal is unfair if it is not effected for a fair reason and in accordance with a fair procedure. Section 188 of the LRA stipulates that a dismissal is unfair if the employer fails to prove that the reason for the dismissal is a fair reason based on the misconduct or incapacity of the employee, or is based on the employer's operational requirements, and that the dismissal was effected in accordance with a fair procedure.

In the labour sphere discipline must be effected by a fair procedure and based on substantive grounds the presiding officer must decide the case on balance of probabilities⁴² .

Without the facts of a case having been proven, the burden of proof standard is of no use, fact finding therefore should precede the application of the burden of proof. Hence he who alleges must prove his case through the presentation of evidence. Without a prior investigation 'he who alleges' would not have the full facts at his disposal. A presiding officer will then not be able, on the one hand, to sift through the facts and, on the other hand, apply the substantive law to these proven facts. Proof on a balance of probabilities in effect means that the arbitrator will weigh the respective cases of the two parties and the party whose version is more probable will win. The employer is required to prove on a balance of probabilities that the employee in fact committed the misconduct, or was incapacitated to the degree alleged, as the case may be. The employer must also prove on a balance of probabilities that it had complied with the procedural requirements of the type of dismissal concerned.

The writer submits that if facts have to be established with scientific precision, very few cases would ever be proved. Therefore, it is generally accepted in

⁴² Section 192(1) South African Labour Relations Act.

arbitration proceedings that if the evidence suggests that the fact is more likely than not, then that fact will be accepted as proved. ⁴³ In order for the discipline to be fair the Code of Good Practice: Dismissal⁴⁴ sets out guiding principles when instituting fair and reasonable procedures. The following broad standards should be adhered to when dealing with a fair dismissal⁴⁵.

3.1. Substantive fairness: Item 7 - Schedule 8⁴⁶

Guidelines in cases of dismissal for misconduct:

Any person who is determining whether a dismissal for misconduct is unfair should consider:

- i) Whether or not the employee contravened a rule or standard regulating conduct in, or of relevance to, the work-place; and
- ii) If a rule or standard was contravened, whether or not:
 - a) The rule was a valid or reasonable rule or standard;
 - b) The employee was aware, or could reasonably be expected to have been aware, of the rule or standard;
 - c) The rule or standard has been consistently applied by the employer; and
 - d) Dismissal with an appropriate sanction for the contravention of the rule or standard.

Schwikkard and Van der Merwe⁴⁷ identify two basic principles which could be kept in mind whenever evidence is evaluated, namely:

- i) Evidence must be weighed in its totality
- ii) That probabilities must be distinguished from ‘conjecture or speculation’.

According to the learned writers the difficult mental task of relying on probabilities and of inferring unknown fact from the known is by and large a matter of common sense, logic and experience, rather than strictly following

⁴³ CCMA .T Letsoalo ‘CCmail 2005 December’ page 13.

⁴⁴ Labour Relations Act 1995, s37 (6)(a), s187, s188 (2), 19 (1) (b) (i) , [Schedule 8 amended by s. 57 of Act No. 42 of 1996 and by s. 56 of Act No. 12 of 2002.].

⁴⁵ http://www.ccma.org.za/UploadedMedia/InfoSheets_Misconduct_1_.pdf accessed on the 5 April 2014.

⁴⁶ LRA 66 of 1995: Code of Good Practice – Dismissal.

⁴⁷ Principles of Evidence (2005) at 495.

the legal rules. They further refer to the dictum of Van Heerden J in *S v Van Wyk* that in the process of adjudication, two factors are constant, namely what must be proved and to what degree of persuasion. They further added the third factor; the quantum and quality of the probative material required so as to persuade the court, is subject to variety.

3.2. Procedural fairness: Item 4- Schedule 8⁴⁸

Normally, the employer should conduct an investigation to determine whether there are grounds for dismissal. This does not need to be a formal enquiry. The employer should notify the employee of the allegations using a form and language that the employee can reasonably understand. The employee should be allowed the opportunity to state a case in response to the allegations. The employee should be entitled to a reasonable time to prepare the response and to the assistance of a trade union representative or fellow employee. After the enquiry, the employer should communicate the decision taken, and preferably furnish the employee with written notification of that decision.

If the employee is dismissed, the employee should be given the reason for dismissal and reminded of any rights to refer the matter to a council with jurisdiction or to the Commission or to any dispute resolution procedures established in terms of a collective agreement.

- i) In exceptional circumstances, if the employer cannot reasonably be expected to comply with these guidelines, the employer may dispense with pre-dismissal procedures”.

4. Methodology

Many literary resources, namely legislation, reported cases, books and journals articles are utilized in this research, including a comparative analysis on legislation from the USA. The writer will further do a qualitative interview with Executives in Retail in order to align practice with the literature, so as to draw a Policy and Procedure document and Process flow for Retail in general.

⁴⁸ Labour Relations Act 66 of 1995: Code of Good Practice – Dismissal.

This research consists of six chapters. Following this chapter's general introductory note on the interpretation of constitutional guarantees, burden of proof, the cautionary rule, and how courts arrive at a finding, the second chapter contains an overview on the background, workings, phases and the development in American Jurisprudence. It includes a summary of the approaches and utilisation thereof.

Chapter Three is devoted to the South African case law. Reference is made as to how the courts have interpreted and the weight it places on polygraph evidence. A summary of how the common law application has developed over time and it will show that the emphasis have moved away from the accuracy of the test, to the qualification of the Polygraphist. The different phases of testing will also be discusses.

Chapter Four is devoted to qualitative research done with HR Executive and a staff member in Retail Chains to ascertain how they are practically applying the polygraph test within their workplaces. Chapter three and four will inform Chapter Five that propose and suggest a policy template for retail in general.

The research is concluded in Chapter 6

CHAPTER TWO: INTRODUCTION, BACKGROUND, PHASES, ACCURACY, WORKINGS AND AMERICAN DEVELOPMENT

1. Introduction

In the previous chapter the constitutional guarantees, sections of the Labour Relations Act, two rules of evidence was explained. In this chapter the writer will give a background of polygraph testing development, its workings, techniques employed in doing the test, different phases, the accuracy, practices, qualifications required for an examiner. The writer will further look at the South African Qualifications Authority development of unit standards, the South African Professional Polygraph Association working and the American Jurisprudence applications

2. Background

“The terms polygraph literally means ‘many writings’ and refers to the manner in which selected physiological activities are recorded. Employers in South Africa and all over the world are challenged with dishonest practices in the workplace. In order to eradicate or lessen the blow on their business they have to identify the parties involved and once identified deal with them within the confines and the provisions of the prevailing law. This however is not easy in all circumstances, especially where no-one is co-operating with the investigation. Hence, there has been an investigation and development over the ages to find a foolproof method to ascertain if someone is truthful or not.

The measurement of lie detecting was first introduced by C Lombroso in the year 1895.⁴⁹ Lombroso utilized an instrument called a hydrosphygmograph in which the pulse beat was transmitted to the recorder through a column of water. This measured changes in blood pressure and pulse rate.

⁴⁹ <http://www.cyberx.co.za/polygraph.html>, accessed 10 February 2014.

‘In Ancient China the method utilized was y putting a grain of rice in a person’s mouth. If the grain came out dry, it was accepted that the person was lying, as it was believed that the absence of saliva translates into proof of lies⁵⁰.

In the middle ages the pouring of boiling water over a subject was utilized as it was believed that an honest person would be able to withstand it better than liars. In 1904 Vittrio Bensus used a device that measured breathing. There was also an abandoned project by an American, William Marstons that measured blood pressure of prisoners of war, where the machine indicated a strong positive correlation between systolic blood pressure and lying⁵¹.

The different approaches to polygraph examinations and evidence, taken by several different countries have been summarized by Christianson⁵² who states that the mushrooming of the polygraph industry in South Africa is not unique.

The American lie detection technology found foot internationally in the 1950’s due to its use in the American armed services abroad. In the 1980’s Canada, Japan, Turkey, South Korea and Israel also developed substantial polygraph capabilities. Other countries such as Great Britain, India, Philippines, Poland, Germany and Holland outlawed its use in criminal case and no use in the Industrial sphere. In Australia on the other hand little criminal use of polygraph testing is made by the police due to their countries importance placed on equity and fairness In the employment sphere it is generally unacceptable⁵³.

Employers are often faced with misconduct such as theft, misappropriation without exactly knowing from where and who is responsible. This is in particular the case in retail industry with low gross profit margins.

Polygraph test results are often utilized and relied upon and admitted into evidence in *inter alia*: Disciplinary enquiries, CCMA, Bargaining Councils to

⁵⁰ <http://www.wikipedia.org/wiki/polygraph>, Accessed on the 10th February 2014

⁵¹ Leiken DT. Lie detection in Ancient times and modern times. American Psychologist, 1974: http://en.wikipedia.org/wiki/Lie_detection, accessed 13 October 2014.

⁵² Christianson (4)16.

⁵³ Christianson,(n4)18.

prove the employee's involvement in misconduct. Where employees refuse to undergo these tests or show deception in the reading it is viewed and argued that this is an indication that employee is evasive or has lied, both of which result in a breakdown of the trust relationship from the employer side.

Christianson⁵⁴ states that the scientific, constitutional and legal problems that polygraph testing brings about are essentially the same in all jurisdictions. She indicates two areas or categories:

- The validity, reliability and the extent of reliance of the tests as per its probative value either pre-employment or when testing for a specific incident.
- If the polygraph testing infringe some constitutional or legal right of the subject being tested.

3. The Workings, Techniques

The working of the polygraph is based on the recordings and interpretation of psycho-physiological changes in the body when someone is answering particular questions.⁵⁵ These changes are the result of messages received through the autonomic nervous system. 'Autonomic' means automatic or involuntary, and it deals with those aspects of the body that cannot be controlled voluntarily. It is helpful in the detection of deception because the individual being examined is unable to control these reactions in the body.

There are branches to the automatic nervous system. The first one has to do with growth and development, and the second one is an emergency system. They are operating in opposition to one another. When your life is threatened for example, the emergency system becomes dominant. It registers to the brain and the brain in turn will send a message to the autonomic nervous system to put the nervous system in control. When this happens a series of physiological changes take place that helps a person cope with the emergency. When this happen your heart for example pumps faster, hands perspire and pupils of eyes dilate. The polygraph instruments record the physiological responses through

⁵⁴ Christianson(n4)8.

⁵⁵ <http://www.cyberx.co.za/polygraph.html>, accessed 10 February 2014.

sensors. If you tell the truth, you will function at your normal physiological level. Hence if you are telling an untruth your brain will register a threat because you do not want to be caught out lying and will therefore automatically shift to the emergency system. This is an involuntary response, as you cannot control the physiological changes that will take place. The polygraphist interprets these changes that occur in response to various questions. During a polygraph examination the threat is associated with being caught in a lie because of the possible consequences. The examinee's deceptive responses cause sympathetic arousal or provocation and some of the physiological changes that occur are then recorded once the subject responds and the deception is over and with it the threat. The Parasympathetic Nervous system being the strong dominant system fights to control and there is a sudden return back to the normal state. Because the individual does not have control over physiological responses, the recording of these changes in the body, by the polygraph, remains one of the most effective methods of establishing truthfulness⁵⁶.

4. Different phases

The polygraph examinations are conducted in a structured way with different distinctive phases and vary in length depending on the purpose of the examination and whether or not the subject gives their consent or not. The importance of unpacking the phases is to ensure that the entire process fulfill the constitutional requirements, hence will prevent the polygraphist from failing the common law and the Constitutions of the Polygraph Associations which are aligned with the South African Common Law and the American and other counties Jurisprudence.

For the purpose of this paper reference to the three phase approach will be unpacked only. They are referred to as a pre-test phase, a chart /test phase and a post/test analysis phase.

⁵⁶ <http://www.cyberx.co.za/polygraph.html>, accessed 10 February 2014.

4.1. Pre-Test Phase⁵⁷

This Phase is one of the most important facets if not the most important facets of the polygraph test and is an indispensable component of the test.

The importance is two-fold:

- i) To inform the subject on the formalities of the test as well as their legal rights, and
- ii) To enable to the polygraphist to generate the physiological climate that is necessary to conduct the test.

Before the pre-test procedure at MTN, as an example, the employee first signs the consent form.

The Polygraphist will therefore:

- Complete paper work
- Explain the theory of the polygraph to subject
- The subject need to be given an opportunity to discuss their roles or perceptions regarding the case under investigation and provide relevant information. During this period, the examiner will discuss the questions to be asked and familiarize the examinee with the testing procedure.

Christianson⁵⁸ states that there is a perception amongst polygraphist in South Africa that once an employee has signed a consent form that testing is voluntary and that the subjects have been fully informed of their rights.

Christianson hold the view that it could be argued that the nature of the test involve has the potential to infringe fundamental human rights and this would possibly make the validity of such forms questionable.⁵⁹

⁵⁷ http://www.polygraph.org.za/files/SAPPA_Constitution_2011.pdf ,accessed on the 3 April 2014

⁵⁸ See in this regard a series of articles in a Newsletter for South African banking employees (the SASBO News): 'The Lie of Lie-detectors' (July 1992); 'The Lie of Lie-detectors: Wave Your Rights Goodbye' (August 1992); 'The Polygraph could become a Weapon in Over-zealous Hands' (September 1992); 'More on the Lie Detectors: Forced to Take a Test of His Own Free Will' (August 1992).

⁵⁹ Christianson(n4)31.

The polygraphist will further enquire about the subject medical conditions and medication utilized that will influence their automatic responses.

Example of a template for consent the writer visited a MTN SA at Heron Place:

Consent to the polygraph/lie detection or Voice Stress Analysis was first obtained from the subject. This was done on a pro-forma document that states:	
The subject matter refers.	
Wish to state that on the _____ (date), I have been requested by _____ (name) _____ (position) to undergo polygraph /lie detector examination / voice stress analysis relating to : _____ (<i>incident description</i>).	
I hereby do, of my own volition, free from any duress, coercion, threats, Inducements or promises of any nature or form consent and agree to submit myself to the requested polygraph/lie detector examination/voice stress analysis.	
I understand that my submission of the examination/analysis is not a condition of employment or continued employment.	
I hereby release and hold harmless MTN-SA, its agents, employees and officers from any and all liability arising from or resulting from any personal injuries sustained while placing the necessary apparatus or devices on my person and, further, from any unwarranted or unofficial disclosure of any information/inferences or any opinion as to deception that may be rendered pursuant to the examination.	
I am aware and agree that the result of the examination will be disclosed to the forensic Services officials, and further disclose shall be at their discretion in line with the general criteria applicable to communication forensic investigation results.	
Yours Truly	
_____ (Full name)	_____ (ID
Number)	
_____ (Employee signature)	_____ (Date)
_____ (Witness #1 signature)	_____ (Date)
_____ (Witness #2 signature)	_____ (Date)

Example of Polygraph consent template

4.2. Pre-test Practices⁶⁰

- i) The examiner shall obtain information sufficient to identify the examinee.
- ii) The examiner shall obtain the consent of the examinee prior to testing.
- iii) Sufficient time should be spent to ensure that the examinee has a reasonable understanding of the polygraph process and the requirement for co-operation.
- iv) Sufficient time shall be spent to discuss the issues to be tested and to allow the examinee to fully explain his/her answers.
- v) Sufficient time shall be spent to ensure the examinee recognizes and understands each question. Attempts by the examinee to rationalize should be neutralized by a pre-test discussion in which the examinee demonstrates whether personal understanding of the test questions has the same meaning as the examiner.
- vi) Questions will be asked in a form that would prevent a reasonable person, facing a significant issue, from successfully engaging in a rationalization process to avoid culpability.
- vii) The examiner shall not express bias in any manner regarding the truthfulness of the examinee prior to the completion of testing.

4.3. Test/Chart Phase⁶¹

- i) In the testing phase the substance of the test itself are conducted. During this phase questions are asked and charts are produced using one of different techniques which is not unpack within this paper. During this phase the co-operation of the subject are important and the examiner must be mindful of the countermeasures employed by the subject. Countermeasure are for example where the subject squeeze his toes.

⁶⁰ http://www.polygraph.org.za/files/SAPPA_Constitution_2011.pdf ,accessed on the 3 April 2014

⁶¹ http://www.polygraph.org.za/files/SAPPA_Constitution_2011.pdf ,accessed on the 3 April 2014

- ii) The following are an example of the what an examiner has to employ when doing the testing⁶²
- iii) In the event Polygraphist shall use a validation testing technique they must not deviate from its protocol. Where there is a deviation the examiner shall where it is subject to quality control by a reviewing examiner, be noted and justified in writing
- iv) A stimulation test or acquaintance test shall be required for all evidentiary examinations. A stimulation or acquaintance test is recommended for all initial examinations for any specific issue or investigative examination.
- v) The questions should be asked with distinctiveness and clarity.
- vi) Questions shall be balanced in terms of length and impact for each category of questions utilized. Questions used in the assessment of truth and deception shall be preceded and followed by time intervals of not less than 20 seconds. When approved validated research supports the use of another time interval, that time span shall prevail.
- vii) Examiners shall collect a sufficient number of charts so as to acquire sufficient data for proper evaluation, in conformity with a validated testing technique. Standardized chart markings, recognized and utilized within the polygraph profession should be employed.
- viii) An audio or an audio/video recording of the pre-test and in-test phases shall be made and maintained for evidentiary examinations and if submitted for quality control purposes, post-conviction sex offender examinations, in conformity with governing laws.’

4.4. The Post/Test analysis phase⁶³

During the post/test analysis phase the results of the tests are discussed with the subject. The subject has an opportunity to explain the adverse results and share any other information that he deem necessary.

⁶² http://www.polygraph.org.za/files/SAPPA_Constitution_2011.pdf ,accessed on the 3 April 2014

⁶³ http://www.polygraph.org.za/files/SAPPA_Constitution_2011.pdf ,accessed on the 3 April 2014.

The South African Professional Polygraph Association (hereinafter referred to as SAPP) Constitution sets out the following steps.⁶⁴ A member shall afford each examinee a reasonable opportunity to explain physiological reactions to relevant questions in the recordings. There are three exceptions:

- i) When the examinee is represented by an attorney who requests that no post-test interview be conducted, and that the results of the examination be released only to the attorney.
- ii) When the examination is being conducted by court order, which stipulates that no post-test interview is to be conducted.
- iii) Instances of operational necessity.

5. Restrictions on Rendering Opinions⁶⁵

A member shall not provide any report or opinion regarding the medical or psychological condition of the examinee for which the member is not professionally qualified. This shall not preclude the examiner from describing the appearance or behavior of the examinee. Polygraph outcome decisions shall be restricted to only those based on polygraph test data'

The examiner will analyze the charts and render an opinion as to the truthfulness of the person taking the test. The examiner, when appropriate, offer the examinee an opportunity to explain physiological responses in relation to any questions asked during the examination.

6. The qualifications required by an examiner

Under this heading what will be unpacked are the qualifications of examiners 'It has been submitted that the examiner is the single most important variable in determining the reliability and validity of polygraph test.⁶⁶ The American EPPA⁶⁷ provides that where employers are not prohibited from testing their employee, polygraph testing may only be done by an examiner who is suitable

⁶⁴ http://www.polygraph.org.za/files/SAPP_Constitution_2011.pdf, accessed on the 3 April 2014.

⁶⁵ http://www.polygraph.org.za/files/SAPP_Constitution_2011.pdf, accessed on the 3 April 2014.

⁶⁶ Christianson (n4) 22.

⁶⁷ Employee Polygraph Protection Act of 1998 PB L NO 100-347(28 June 1998).

qualified and who has been granted a license by the state in which the test is to be administered. The examiner is further required to have professional liability cover and to meet the requirements with regard to the issuing and maintaining of the documents and reports required in terms of the administration of a polygraph⁶⁸

With the enactment of Chapter 11 of the Employment Equity Act,⁶⁹ polygraphists in SA came under spotlight. Section 8 of the EEA places a prohibition on psychological and other similar assessments unless the assessments are unbiased, scientifically valid and reliable and can be applied fairly to all employees.

Hence the question can be asked if, for pre-employment purposes:

- The polygraph test be classified as a psychological or similar assessment;
or
- If so classified, whether polygraphy examiners should be registered with the Health Professional Council of South Africa(HPCSA)

On the next page, is an example of the requirements set by the:

- Los Angeles Police Department for pre-employment and
- South African Professional Polygraph Association's constitution.

⁶⁸ S.8 of The EPPA.

⁶⁹ Employment Equity Act 55 of 1998.

Polygraph Guidelines: **LOS ANGELES POLICE DEPARTMENT**⁷⁰

The examiner administering the test on police members are obliged to have graduated from an approved Polygraph school that is accredited by the American Polygraph Association or should have graduated from the United States Government Polygraph Training program. Further to this the graduation requires:

The polygraphist to have completed 60 semester units or 90 quarter units at recognized college or university

A computerized polygraph instrument must be utilized.

Polygraphist will be able to evaluate polygraph charts numerically on a seven point scale.

Must have a minimum 24 Hours polygraph related training during the last two years.

An examiner is required to have a valid license if required by a state in which the test is to be conducted.'

In South Africa the requirements are less strict and not clear cut.

Constitution of the **SOUTH AFRICAN PROFESSIONAL POLYGRAPH ASSOCIATION** stipulates: ⁷¹

Members of this Association are those persons who, upon application for membership in SAPPA and acceptance by the SAPPA Board of Directors, do not meet the requirements for Full Member and are persons who are practicing polygraph examiners that have:

- Graduated from an APA accredited school or in lieu thereof,
- Have graduated from a SAPPA accepted polygraph training program, have successfully completed a SAPPA administered qualifying

⁷⁰ <https://antipolygraph.org/documents/lapd-polygraph-guidelines.pdf>, accessed on the 1 April 2014

⁷¹ http://www.polygraph.org.za/files/SAPPA_Constitution_2011.pdf, accessed on the 2 February 2014

examination attesting to their knowledge of and competence in the administration of polygraph procedures, with said examination consisting of an oral and written assessment of both academic and practical knowledge of polygraph detection of deception procedures and satisfactory review of five complete audio/video recorded polygraph examinations of which at least three resulted in an appropriate no deception indicated opinion, have successfully completed 32 hours of continuing education in topics directly related to polygraph testing during the two years immediately prior to applying for SAPPA membership, and are in attendance at a SAPPA Annual General Membership meeting at the time of consideration of their membership application; and,

- Completed not less than two hundred (200) actual polygraph examinations using a standardized polygraph technique as taught at an APA accredited school; and,
- Received a Baccalaureate Degree or South African National Diploma or equivalent from a college or university accredited by a regional accreditation board or in lieu thereof, have at least five years polygraph experience, and
- A current and valid license to practice polygraph when required and issued by a government entity requiring such’.

The South African Qualifications Authority (SAQA) ⁷²registered a course in the Polygraphy Sector under Unit standards registered SAQA US ID 252158. The unit standard is in the Field 08 - Law, Military Science and Security and it is accredited towards a full qualification.

The SAQA requirement and taking cognizance of the Employment Equity Act when it comes to Pre-employment tests, the writer believes that a company is fouling the Law when these tests are conducted, by polygraphists without a Psychology qualification. This said the writer believes that with South African

⁷² SAQA objectives are advance the objectives of the NQF; oversee the further development and implementation of the NQF; and co-ordinate the sub-frameworks.

Qualification Authority writing and approving unit standards in this field are indicative of acceptance and will bring more professionalism to the industry.

In the absence of South African polygraph legislation, and to start the process of good practice, stakeholders should recommend that the polygraph examiner, complete the SAQA accredited course as a minimum requirement.

7. How accurate is the polygraph test

Under this heading a brief view is given on the accuracy of the tests. The reason for brief view is based on the fact that jurisprudence has placed more weight on the qualification and the corroboratory value of the test.

Fitzpatrick.⁷³ states that ‘if polygraph test results are to form part of the evidence used to discipline or dismiss employee, it is important to know the degree of reliability, validity or accuracy of the test’.⁷⁴ In 1986 both the American Medical Association and the American Psychological Association found that polygraphs were unreliable and inappropriate for use in the workplace, as has the HPCSA as recently as August 1999. He further states⁷⁵ “that there are three significant variables which can affect the accuracy of a polygraph examination: the examiner, the mental and physical state of the subject; and the setting in which the examination takes place. Most authorities agree that the examiner is the single most significant variable, since an examiner is required to interpret the meaning of a complex graphic pattern reflecting oral, behavioral and physiological responses.”

‘Those who object to the polygraph on scientific grounds submit that the instrument itself does not record lies or even the physiological states that accompany lying. Rather the polygraph instrument measures physiological changes generated by emotional stress, which may be caused by a number of factors, including but not limited to lying. There are even evidence that subject

⁷³ RB.Fitzpatrick ‘polygraph Testing of Employees in Private Industry: a Legal overview at 133.(1998)

⁷⁴ Christianson (n4)23.

⁷⁵ Fitzpatrick (n74)132.

of different ethnic groups exhibit different stress reactions which may affect polygraph results'.⁷⁶

8. Can the Test be done against the subjects will

As far as Compelling an employee to undergo the test the writer categorically states that in South Africa there is no Legislation regulating the use of the polygraph however common law have developed over the years that moulded its utilisation. What is clear through the American case law to follow and the South African jurisprudence that will be unpacked in Chapter 3 the employer cannot force any employee to submit to such a test as this will be unconstitutional.⁷⁷ Refusal to do so does not indicate guilt and is also not a ground for dismissal.

9. Polygraph in the United States of America

The next chapter will be exploring South African case law. Before discussing the South African landscape, it is important to get an understanding of the application of Polygraph testing in the United States of America federal courts and different states where it was developed.

In the United States pre-employment testing is entirely outlawed. The American cases covered will show that:

- The admissibility of polygraph evidence is subject to the qualification of the examiner;
- Polygraph is a science that can be relied upon in certain circumstances;
- It cannot be used as evidence as a stand-alone;
- It can only be utilized in the workplace for specific certain incidents;
- That the mere signing of consent to be polygraphed by the subject, must not be taken that consent in the true sense of the word was given.

⁷⁶ Christianson (n4)24

⁷⁷ Section14; section 23(1) of the Constitution; section 188(2) of the LRA.

In *Frey v United States*⁷⁸ the accused was arrested for allegedly killing Dr. Brown. Dr. Marston administered his ‘blood pressure lie test’ and concluded that Frey was innocent. The test was not admitted because the judge did not consider Dr. Marston an expert witness and his evidence was subsequently excluded. Frey was found guilty and given a life sentence. Later he was exonerated and set free proving that the findings made by Dr. Marston had been correct all along.

In *US V Piccinonna*⁷⁹ the circuit declared that there is no question that in recent years polygraph testing has gained increasingly widespread acceptance as a useful and reliable scientific tool’. The Court Furthermore stated the science of polygraphy has progressed to a level of acceptance sufficient to allow the use of polygraph evidence in limited circumstances when the danger of unfair prejudice is minimized.

In *United States V Posado*⁸⁰ the court of Appeal held that a Universal ban on Polygraph evidence is untenable. The court noted the scientific advance made in polygraph examinations and the fact that many employers, as well as government consider it to be a useful tool. The court held that polygraph examinations were sufficiently reliable to be admissible, provided that the qualifications of the examiner and surrounding conditions were reasonably conducive to producing an accurate examination. The test will therefore always be open to scrutiny.⁸¹

In United States of America Employee Polygraph and Protection Act of 1998(EPPA) This Act serves to protect employees from the use of the polygraph in the workplace.

‘The EPPA was enacted to establish guidelines for examination conducted by private commercial employers, with a few exceptions for positions related to state security and positions under government contract. Generally, an employer cannot require a pre-employment polygraph test of an applicant. Even when an

⁷⁸ 54 AAP.D. Circuit (1923).

⁷⁹ 885F.2d 1529(11th Cir.1989).

⁸⁰ WL 368417(5thCir (TX)).

⁸¹ Christianson(n13)4.

employer can request that an employee take a polygraph test, certain criteria must be met. An employer cannot fire an employee for refusing to take a polygraph test.

EPPA amongst others stipulates in US Code Title 29, 2007⁸² (restriction on use of Polygraphs) 2002 Prohibition of lie detection use stipulates that ‘if an employee is disciplined... on the basis of the analysis of a polygraph test chart or the refusal to take a polygraph test, and it is used as the sole basis upon which an adverse employment action... is taken against an employee shall be unlawful.’

In the field of Commerce it is prohibited to use polygraph test but only allow it in specific incident testing, mostly in cases of theft, fraud, misappropriation and related crimes.

In two American Cases⁸³, *Polsky v Radio Shak*⁸⁴ and *State v Community Distributors Inc*⁸⁵ the court recognized that an employee’s willingness to sign a release form should not be automatically accepted as evidence of voluntary consent. The economic compulsion in such a situation is such that the employee has no realistic choice. The courts may in such circumstances investigate the options given to an employee and the consequences of an employee refusing to sign the release form.

EPPA does permit an employer to use polygraph testing in prescribed circumstances, such as in conjunction with and on-going investigation. An employer may however not dismiss, discipline or discriminate against an employee based on the test results alone or for refusal to take the test without additional supporting evidence⁸⁶. Nevertheless, where an employee has failed

⁸² <http://codes.lp.findlaw.com/uscode/29/22/2007>, accessed on the 31 March 2014.

⁸³ Christianson(n4)31.

⁸⁴ *Polsky v Radio Shak* 1981: 825.

⁸⁵ *State v Community Distributors Inc* 1974:669.

⁸⁶ S89(a) of the EPPA.

a polygraph test, the required additional supporting evidence may include evidence of access and reasonable suspicion, as required by the Act.⁸⁷

In a nutshell, therefore, refusal to take or failing the test, a polygraph examination cannot on its own result in dismissal, discipline, or some other adverse action by the employer- the refusal or failure must be accompanied by access to the property and reasonable suspicion by the employer.

As an additional safeguard, the majority of states insist that polygraph examiners qualify for a license to conduct examinations.

Some examples of the variation of state regulation of polygraph testing other than that of the EPPA:⁸⁸

- New York. ‘No employer or his agent shall require, request, suggest or knowingly permit any employee or prospective employee of such employer to submit to a psychological stress evaluator examination and no employer shall administer or utilize the results of such test within or without the state of New York for any reason whatsoever.’⁸⁹
- California. ‘No employer shall demand or require any applicant for employment or prospective employment or any employee to submit to or take a polygraph, lie detector or similar test or examination as a condition of employment or continued employment. The prohibition of this section does not apply to the federal government or any agency thereof or the state government or any agency or local subdivision thereof, including, but not limited to, cities and counties, districts, authorities, and agencies.’⁹⁰

The EPPA therefore prohibits private employers from suggesting, requesting or requiring a job applicant or employee to submit to a lie detector (polygraph).

⁸⁷ S7 (d) of the EPPA.

⁸⁸ <http://epic.org/privacy/polygraph/default.html>, accessed on the 20 March 2014.

⁸⁹ N.Y. Lab. Law § 735.

⁹⁰ Cal. Labor Code § 432.2.

After searching the website it is found only the US having legislation in place governing the use of polygraphs and lie detector in the sphere of employment.⁹¹

10. Polygraphs in the Federal Courts

Citing Prinsloo⁹², *Daubert v Merrel Dow Pharmaceuticals*⁹³ provided an opportunity for the United States courts to consider the scientific basis for expert evidence. The judge listed four considerations that should be applied in determining whether expert evidence should be admitted.

- (1) Testability(or falsifiability),
- (2) Error rate,
- (3) Peer review and publication, and
- (4) General acceptance

In *United States v. Posado*,⁹⁴ the Court also noted that in recent years its view of polygraph evidence had expanded somewhat.

The Court prescribed a three-step inquiry:

- i) The Court determines whether the evidence is relevant and reliable pursuant to Daubert;
- ii) The Court determines whether the evidence will assist the trier of fact in determining a fact at issue; and
- iii) The court must decide if the evidence has an unfairly prejudicial effect that would substantially outweigh its probative value under Rule 403.

In the case of *United States v. Dominguez*,⁹⁵ the Southern District promulgated several factors to consider in making this particular balance:

- That all parties be present to observe the proceedings.

⁹¹ <http://epic.org/privacy/polygraph/default.html>, accessed on the 20 March 2014.

⁹² Prinsloo (n16)75.

⁹³ 13C.Ct.Supp.2789(1993).

⁹⁴ 57 F.3d 428 (5th Cir.1995).

⁹⁵ 902 F.Supp. 737 (S.D. Tex.1995).

- That there be a legal commitment irrevocably allowing the admission of the results by both sides.
- That the subject commits to be examined by any polygraph expert designated by the other side.
- When more than one exam is contemplated, the choice of the first examiner takes place by chance.
- That the pre-test interview be allowed by all sides with all sides present.
- That the post-test interview be allowed by all sides with all sides present.
- That immediately prior the test the subject is examined for any sedative or drugs in his body.
- That the rules that do not admit character evidence for truthfulness be legally waived.
- That no questions be permitted to the mental state of the defendant at the time of the alleged commission of the event.
- The failure of the Defendant to make him/her available to testify in the case should also be a consideration.

11. Summary

It is clear from the American Statutes and Case Law that polygraphs cannot be utilized as a standalone and can be utilized in prescribed circumstances when it is utilized for an ongoing investigation. Pre-employment testing is also not allowed in the American Jurisprudence within the Commerce industry.

What is also clear through the American and SA Labour Practice consent must first be received from the subject before the test can be done. Questions that can be asked must only have to do with the misconduct investigated. Any deviations from this will result in the employee right to privacy being broken. What is also clear is that the fact the employee gave consent doesn't mean that testing is voluntary if his or her rights were not explained.

The question of the qualifications of the Polygraphist also came under scrutiny, hence if the polygraphist wants to testify he must prove his qualifications.

It is clear from the literature reviewed in this chapter that polygraph testing In South Africa is here to stay. The development and borrowing and bending from the American literature on how, when, who, what, and when these test will be conducted has giving us clear guidance for policy and procedure development. The case law development, the exponential use, the fact that the South African Qualification Authority are writing and approving unit standards in the field are all indicative of the common law developments.

CHAPTER THREE: POLYGRAPHS IN SOUTH AFRICAN LABOUR FIELD

After South Africa became a democratic country with the 1994 election, its labour market field was influenced by the widespread polygraph testing use internationally. Polygraph tests started to be used in its workplaces 'to catch the thief'. With the absence of any South African legislation, the courts and dispute resolution bodies borrowed from the American jurisprudence and in so doing, developed common law that is not inconstant with SA constitutional provision and does not fall short of its spirit, purport and objects.

This chapter will look at the application of polygraph testing in the South African Jurisprudence and will show:

- i) Employer should obtain written consent from the employee. Hence the employee should be informed that the examinations are voluntary, the reasons for and type of questions should be explained.
- ii) That employers are allowed to use the polygraph test to investigate specific incidents where employees had access to the property which is subject of the investigation and there is reasonable suspicion that the employee was involved in the incident.
- iii) As a precursor the employer must also have suffered economic loss or injury to the employers business like theft of company property or where the employer is involved in situations such as combating dishonesty in positions of trust, or combating serious alcohol, illegal drugs or narcotics abuse or fraudulent behavior within the company or deliberate falsification of documents and lies regarding the true identity of people involve.
- iv) Polygraphist has been accepted as expert witness whose evidence needs to be tested for reliability. Therefore the polygraphist should be called to testify how the test was performed, his qualifications (by implication he should be qualified), the type of test used and the questions asked.
- v) The Polygraph test may not be interpreted as implying guilt but may be regarded as a corroborating factor especially where there is other evidence of misconduct. Polygraph tests results as a stand-alone are not a basis for finding guilt. It can be used only to corroborate other evidence.

1. Cases at the CCMA and other Conciliatory bodies in South Africa

The Commission for Conciliation Mediation and Arbitration (hereinafter referred to as CCMA), is the most inexpensive labour dispute resolution body. The CCMA aim at ensuring a just administrative process as enshrined in section 33 of the Constitution that provides: that everyone has the right to administrative action that is lawful, reasonable and procedurally fair. In SA private sector polygraph testing are mainly used in theft and fraud cases. In several disputes coming before the CCMA, polygraph evidence has played a major role in leading to the employee's dismissal. Polygraph testing for pre-employment is not reported in the cases below as the reason can be ascribed to the fact the CCMA do not have jurisdiction to adjudicate where an employer and employee relationship do not exist unless unfair discrimination are present. The focus in cases at CCMA are placed on the admissibility based on the polygraphist qualification; the weight placed on the deception test result; words polygraph tests as a stand-alone are not a basis for finding of guilt. It can only be used in support of other evidence if the employer only have circumstantial evidence the polygraph will tip the balance of probabilities in favor of the employer.

The writer will thenceforth give an overview of cases that have appeared before the CCMA:⁹⁶

- Before the year 2000, and
- After the year 2000.

2. CMMA cases before the year 2000⁹⁷

- i) In *Mcube v Cash Paymaster Services (Pty) Ltd*⁹⁸ the employee was dismissed for theft, bribery, fraud, dishonesty, forgery and bring or attempting to bring the company name of the employer in disrepute. The employee submitted to a polygraph test with full

⁹⁶ Prinsloo (n16).

⁹⁷ Prinsloo (n16)48-54.

⁹⁸ (1997)5 BLLR639 (CCMA).

consent. The CCCMA commissioner found that expert evidence could be admitted to assist in assessing the reliability of the polygraph test. He stated that even though the Industrial court rejected polygraph tests in *Mahlangu v CIM Deltak*⁹⁹ he believed there may have been some progress in the reliability of these tests. He found however, that the polygraph experts' evidence was inconclusive and could not be used as corroboration of the other witnesses' evidence. This finding was reached despite the fact that he found the employees evidence to be improbable.

ii) In *Harmse v Rainbow Farms (Pty)ltd*¹⁰⁰ Commissioner Wilson stated that the company's action in conducting voluntary polygraph test was reasonable against the background of a loss of Approximately R2 million. The Commissioner further found that the company was justified in exerting some pressure upon employees to undergo a polygraph test. The Commissioner stated that 'ultimately the employee could still have refused and the company may well have been entitled to draw an inference from such refusal. As such the employee was found to have taken the test voluntary.

iii) In *Govender and Chetty V Cargo and Container Services*¹⁰¹ the two applicants were dismissed for stealing or being party to the theft of, the contents of a container of goods from the premises of the employer. The nature of the employers business is that they collect containers of goods on behalf of clients, and subsequently deliver them to their clients. The employer's clients arrived to collect a container of goods three weeks after the container has been delivered to the premises of the employer, only to find that the container was empty. The employer argued that, while there was no direct evidence linking the applicants to the theft of the

⁹⁹ *Mahlangu v CIM Deltak* 1986(7) ILJ 346.

¹⁰⁰ CCMA WE 1729 dated 1997.

¹⁰¹ *Govender and Chetty v Cargo & Container Services* (1997) KN4881.

goods, they were guilty because surveillance over weekends was lower than during the week (it has been established that theft took place over the weekend), and the applicants had encouraged a fellow employee to absent himself over the said weekend. The two applicants, together with their colleagues, had undergone polygraph tests, and they were the only employees to fail the polygraph tests. The dismissal was upheld.

iv) *Kroutz and Distilliers Corporation LTD*¹⁰²; it was alleged that the applicant created a fraudulent order and conspiring to remove various cases of alcoholic beverages from the company premises. A witness saw the applicant working at this computer terminal in the relevant time period. The applicant apparently admitted to another witness that he created the order. The person under whose code this order was created approached managements and asked to undergo a polygraph test in order to clear his name. He was subsequently found not deceptive. The duty of the commissioner is to determine the admissibility of the evidence. Tests may not be interpreted as implying guilt but may be regarded as an aggravating factor especially where there is other evidence of misconduct. In Other words polygraph tests as a stand-alone are not a basis for finding of guilt. It can only be used in support of other evidence.

v) In *SACCAWU and Solly Kramer*¹⁰³ the commissioner held that he could not take cognizance of the contents of a document containing the results of a polygraph test because the contents had not been properly admitted and, did not form part of the evidence. The commissioner held that the dismissal was unfair and ordered the reinstatement of the employee.

¹⁰² CCMA KN 25613 dated 13 June 1999(unreported).

¹⁰³ CMMA EC7163 DATED 2 JULY 1999.

vi) In *Boonzaier v HICOR Trading Limited*¹⁰⁴ the CCMA provided some guidelines that should be followed if an employer wants to introduce polygraph evidence at arbitration supporting the suggestion made above.

The commissioner added that the emotional state of the subject should also be proven, which means that details of the nervousness and general conduct of the subject should be provided.

3. Cases at CCMA and other Conciliatory bodies in South Africa from the year 2000

i) In *Kleynhans and Tremac Industries*¹⁰⁵ the commissioner dealt with circumstances where the employee was dismissed based on a failed polygraph test as only evidence against him. The employee contract stipulated that the employee have to undergo a polygraph test. The accused throughout the internal hearing persisted that he is innocent. The commissioner held in the absence of oral evidence of the polygraph examiner, he could not assess the accuracy and question the evidence of the examiner. This resulted in the commissioner put credibility to the outcome of the polygraph tests. It is therefore my submission that the commissioner does not distrust the value of polygraph evidence however the weight of evidence was compromised as it could not be tested and place under cross examination.

ii) In *Petusa obo VN Schalkwyk v National Trading Company*¹⁰⁶ three employees worked in the department where cash sales boxes were kept. The applicant was the supervisor of the other two. After three days of absence the one employee found that his box had disappeared. Polygraph test were administered to all staff that had access to the boxes and the applicant test showed indications

¹⁰⁴ (1999) 10 (3) SALLR 1 (CCMA).

¹⁰⁵ (2000) 9CCMA 2.5.1.

¹⁰⁶ (2000) 21 ILJ 2323(CCMA).

of deception. He denied stealing the box but offered to pay the money back. The commissioner endorsed the view that polygraph should not be used without supporting evidence. In this case however there were independent indicators to support an inference of guilt and polygraph test results supported that inference to the extent that the employee's guilt had been proven on a balance of probabilities. The commissioner held that the dismissal was fair.

iii) In the case of *Sosibo & others and CTM* (2001) 10 CMMA 2.5.2¹⁰⁷

it was said that, polygraph testing in the workplace is highly contentious and the admissibility of its results remains moot. The sole reliance by the employer on unspecific polygraph results is insufficient to discharge the onus in terms of Section 192 of the LRA to prove that the dismissal was fair. To discharge this onus, the test of a balance of probabilities is used. To only present polygraph evidence is not enough to show that the dismissal was fair because there is no corroborating evidence.

iv) Citing Prinsloo¹⁰⁸In *Lefophana and Vericon Outsourcing*¹⁰⁹ the commissioner upheld an employee's dismissal after he refused to undergo a polygraph examination while his employment contract had an express clause consenting to undergo a polygraph test. The surprise lies in the fact that the specific reason why the employee refused to undergo the test was because he feared that the test will implicate him in an offence of which he was innocent. The commissioner held, 'that the employee refused to undergo the test'at his own peril'. He continued and stated that the polygraph test, had the employee failed it, would on its own not constitute enough evidence to dismiss the employee and there would have to be other evidence to proof his guilt on a balance of probabilities.

¹⁰⁷ (2001) 22 ILJ 811 (CCMA); [2001] 5 BALR 518 (CCMA).

¹⁰⁸ Prinsloo (n16)40.

¹⁰⁹ (2006) 15 CCMA 7.1.7.

v) In the case of *Mewusa obo Mbonambi and S Bruce CC*¹¹⁰ an employee was dismissed after being found guilty of stealing money and a cell phone. He was the only one of eleven employees polygraph tested whose answers indicated ‘deception’. The arbitrator affirmed the approach taken by previous tribunals: that the outcome of polygraph test may be taken into account when there are also other grounds for believing that the employee has been dishonest. In this case, the other ground was that another witness placed the employee at the scene of the theft at the relevant time; and that the arbitrator found the employees evidence to be both inconsistent and dishonest. In these circumstances, the corroborating evidence of the polygraph test was found to be relevant. On a balance of probabilities, the employee was held responsible for the theft. The commissioner did not analyse the polygraph tests and accepted that the polygraph examiner who testified was an expert in his field. This may have been because the credentials were not challenged nor was the polygraph examiner cross-examined on his background or expertise. The commissioner concluded: It is commonly accepted that an employer who causes polygraph test to be conducted on employees who have been suspected of lying may not rely entirely on the outcome of such polygraph tests. The approach of arbitrators and the courts in this country is that the outcome of polygraph tests may be taken into account when there are other grounds for believing that the employee was dishonest.

vi) Citing Prinsloo¹¹¹In *Meleni & others v Rohloff Administration*¹¹²Meleni’s dismissal due to the refusal to undergo a polygraph tests was held to be unfair. The difference may be due to the fact that in the Meleni-case the employee’s general

¹¹⁰ MEWUSA obo Mbonambi / S Bruce CC t/a Multi Media Signs (2005) 8 BALR 809.

¹¹¹ Prinsloo (n16)40.

¹¹² (2006) 15 CCMA 8.31.1.

conditions of employment did not contain a consent clause and refusal to submit to the polygraph test did not constitute a breach of the employment contract or insubordination.

vii) In *Numsa obo Mkhonza & others and Assmang Chrome*

*Machadorp Works*¹¹³ the facts were the following. Five employees claimed they had been unfairly dismissed after copper pads disappeared from the company stores where they all worked. Sixty five employees were subjected to a polygraph test by a qualified examiner. Only the five aggrieved employees proved to be deceptive, and all five were dismissed. They showed deception relating to the copper pads. The arbitrator emphasized that the dismissal fair as they were suspected of collusion, involvement or even knowledge that some mischief take place and failed to bring this to the management attention and breached their duty to act in the employers best interest. The commissioner further held that the results of such tests are admissible when the tests were conducted by qualified people who testified, and if the results were corroborated by independent evidence. Citing Prinsloo¹¹⁴ “the commissioner distinguished between admissibility and the weight of the polygraph evidence and noted that the admissibility of the polygraph evidence was not in dispute but only the evidentiary weight to be attached to the evidence. He mentioned that that the admissibility will only be in question where :

- a. The examiner qualifications are dubious
- b. The examiner did not present oral evidence
- c. The test was not conducted freely or employees did not know why the examination was conducted

¹¹³ (2005) 9 BALR 930 (MEIBC).

¹¹⁴ Prinsloo (n16)51.

In *Truworths Ltd V Commission for Conciliation, Mediation and Arbitration*¹¹⁵ the value of polygraph tests was summarised as follows: A polygraph test on its own cannot be used to determine the guilt of an employee. However, a polygraph certainly may be taken into account where other supporting evidence is available provided also that there is clear evidence on the qualification of the polygraphist and provided that it is clear from the evidence that the test was done according to acceptable and recognized standards. At the very least, the result of a properly conducted polygraph is evidence in corroboration of the employer's evidence.

In *Kapesi & others v Premier Foods Ltd t/a Blue Ribbon Salt River*¹¹⁶ 'Professor Tredoux, the head of UCT's department of psychology, has provided a detailed report on the reliability of polygraph testing. He gave similar evidence in the *FAWU*¹¹⁷ where that court found him clearly to be an expert in the field of polygraph testing and a 'highly competent and respected expert' with 'extensive and impressive qualifications. (I pause to note that the court in *Khulani*¹¹⁸ did not have the benefit of any expert evidence on polygraph tests.) Tredoux's report shows that polygraph testing has not been scientifically shown to be a reliable, accurate and valid means of detecting deception. It follows that polygraph test results cannot be a 'fair and objective' basis for selecting who should be dismissed. The court held in *FAWU* that in the light of the foregoing cases and findings, and in the light of the controversy that surrounds the accuracy and reliability of polygraph tests, the polygraph is a reasonable or fair alternative to minimize retrenchment. In the context of a disciplinary process the polygraph can be a useful tool in the investigation process but can never substitute the need for a disciplinary hearing. A polygraph test on its own cannot be used to determine the guilt of an employee. I am, as already pointed out, not persuaded that it constitutes a fair and objective selection criteria or a fair and objective method alternative to minimize retrenchment in the context of s189 and s 189A of the LRA.

¹¹⁵ (2009)30ILJ 677 (LC).

¹¹⁶ In *Kapesi & others v Premier Foods Ltd t/a Blue Ribbon Salt River* (2010) 31 ILJ 1654 (LC).

¹¹⁷ *FAWU v Premier Foods Ltd t/a Blue Ribbon Salt River* (C 722/2012) [2012].

¹¹⁸ In *SA Transport & Allied Workers Union v Khulani Fidelity Security Services (Pty) Ltd* (2011) 32 ILJ 130 (LAC).

The respondent has not explained in its pleadings what benefit its 'client' derives from its use of polygraph testing. It has not, on the pleadings, shown that it was either a fair and objective selection criterion or, as was the case in Khulani, an agreed one.

Even if polygraph test results may constitute relevant material in determining a person's integrity, the question remains whether it is fair to rely exclusively on them as a touchstone of integrity in the recruitment context, where the prejudice to an applicant that might follow rejection on account of a polygraph test is not the same as that of an employee facing a dismissal. In this case, there was no other independent evidence that the two employees were previously implicated in some wrongdoing or corruption. It might be said that because the consequence of not being promoted is less serious than being dismissed, an employer is entitled to place greater reliance on polygraph testing as a one method of assessing job applicants, despite its unreliability. However, in this instance, it was the sole reason for not appointing candidates who would otherwise have succeeded, thereby making it not merely one of many factors to weigh up, but a deciding one. In such circumstances, the same concerns about its reliability as an accurate measure of deception which make courts hesitate to accord it a decisive impact in disciplinary cases, ought to raise similar concerns when eliminating candidates who would otherwise be appointed.

4. Private Arbitration

Private arbitration is conducted by a CCMA accredited body, that resolve disputes through conciliation and, arbitration where the disputes remain unresolved after conciliation. The two cases below are examples of polygraph related cases at Private arbitration.

- (i) SACCAWU obo James Moranye / JD Group t/a Bravo Group¹¹⁹ the employee was charged with the unauthorized disposal of company fuel on or about the 22 October 2009, 29 October 2009 and 5 November 2009

¹¹⁹ In P10/075 - SACCAWU obo James Moranye / JD Group t/a Bravo Group 14 June 2010.

while entrusted with vehicle. The second charge was he had knowledge of the unauthorized disposal of company fuel on or about these period whilst entrusted with vehicle. The evidence presented, documentary, video footage and oral evidence of live witness all resulted in circumstantial evidence. The respondent requested the employee to go for a polygraph test because he felt that the employee was not telling the truth (during the investigation) especially his version for what transpired on the 5th and 6th November.

The points raised in dispute by employee were that he was not advised in advance that he would have to undergo a polygraph test and as a result, his rights were violated. However video footage, which was not disputed by the employee and shows the employee agreeing to the fact he was not coerced.

This was all rebutted and accepted through the video footage shown where the applicant agreed to the test and that he had no difficulty in doing so. Consent was further requested to which the employee attached his signature on the statement of release. This is clearly a case where the polygraph test corroborated circumstantial evidence.

In *Saccawu obo Alina Makibinyane and JD Group Trading (Pty) Ltd t/a Russels*¹²⁰ the company alleged that the employee had failed to follow its procedure and this had caused the company the loss of R9800. The employee to this arbitration was dismissed whilst her supervisor was demoted to smaller store however kept her title. In this case a polygraph was also utilized. The commissioner without concentrating on the merits of the case, looked the evidence submitted by the veracity assessor and the validity of this evidence.

The company relying on the testimony of Mr. Smidt found no deception when interviewing Ms. Dreyer. The polygrapher detected no deception when Ms' Dreyer answered 'No' to questions such as 'Did you steal the R9 800?' or 'Were you present on 4 March 2011 when the money was dropped in the safe?' He detected deception when the Employee

¹²⁰ *Saccawu obo Alina Makibinyane and JD Group Trading (Pty) Ltd t/a Russels* 12 January 2012.

answered ‘No’ to questions such as ‘Did you steal the R9 800?’ and ‘Yes’ to ‘Was Wanda present on 4 March 2011 when the money was dropped in the safe?’

The commissioner found, Mr. de Smidt did not impress him as a witness. As an expert witness he was unable to substantiate his qualifications. He described himself as a ‘veracity assessor ‘who conducts ‘lie detector tests’ and stated he is qualified at this because he was trained by a Professor von Damm from University of South Africa_ about twelve years ago. He had undergone ‘initial training and examinations and advance training as well’. He is registered with the ‘International Veracity Assessors Association’. He did not produce any certificate, diploma or degree to support his qualifications. Thus, Mr de Smidt failed to clear the first hurdle to be considered an expert witness, namely, to prove that he is suitably qualified.

Mr. de Smidt also did not explain adequately the grounds upon which he reached his conclusions. His testimony simply assumed that he ought to be believed without any attempt at explaining the process he followed in making his conclusions. The information on which he relied, according to him, was simply too complicated to explain or for most people to understand. For someone specializing in detecting lies, he did not appreciate the need to provide any grounds for his conclusions and simply expects that what he states ought to be accepted at face value. In short, the evidence of Mr de Smidt resembled little more than an exhibition of smoke and mirrors. Mr de Smidt ranks amongst the least impressive witnesses I have heard testify. His testimony cannot be relied upon.

What is clear from the above case is that:

- The questions asked by the polygraphist:
 - Must have a bearing on the case at hand; and
 - Should be the same as per the company procedures, to all employees.

- The qualification of the Polygraphist
 - As an expert must be presented, and
 - Must be proven, the purpose of the polygraph should not be aimed at procedural issues but issues of misconduct relating to theft et.al, and further that the test should corroborate the purpose for it being held.

5. Cases in the Labour Court, Labour Appeal Court and the Constitutional Court

The writer herein will refer to cases not directly linked with polygraph testing only however also evidence received ill-gotten and the evidentiary value the courts have placed on them, here he is going to refer to the criminal procedure act and the exclusionary rule.

- i) In *Mahlangu V CIM Deltak*¹²¹ case it was held that a voice analysis test administered by an unregistered psychologist was unscientific, invalid, unethical and unlawful. This case have set the tone in South Africa for the admissibility of lie detector test results as evidence.
- ii) In *M Shinga v Gilbeys Distillers and Vintners (Pty) Ltd*¹²² the industrial court the judge said; ‘where polygraph test had been performed by a properly trained examiner and the employee has voluntary taken the test, provided of course that the polygraph is considered admissible on the facts of the case, then a negative outcome in the sense that the employee fails the test, is a relevant evidentiary fact and should be taken into account together with the evidence in its totality.
- iii) In *Amalgamated Pharmaceuticals V Grobeler*¹²³ the facts were the following: The respondents were dismissed for misappropriation of company property. A polygraph test showed that they could be responsible for the serious stock losses suffered by the applicant. The

¹²¹ Mahlangu (n 99)

¹²² CASE No. NHN11/2/10237

¹²³ (2004) 13 LC 1.11.3

Labour court agreed with the reasoning of the commissioner who found that, in practice, a polygraph does not serve to prove that someone is actually lying, for the questions are often too broad to exclude that which is neither intended nor sought. And it most definitely does not prove that someone is guilty. It is merely an indication of deception

The presiding officer advocate C.J Munks¹²⁴ stated ‘That in the course of her preliminary argument the respondents Attorneys points out correctly that there is still no uniform approach to the admissibility of polygraph tests’ She referred to Marilyn Christianson: ‘if the examiner is well qualified and trained, the possibility that the results of a polygraph test will be admitted as evidence in a disciplinary enquiry or by the appropriate dispute resolution body will be greatly increased.’

She further stated ‘I agree that where a polygraph test has been performed by a properly trained examiner and the employee has voluntarily taken the test, provided of course that the polygraph is considered admissible on the facts of the case, then a negative outcome in the sense that the employee fails the test, is a relevant evidentiary fact and should be taken into account together with the evidence in its totality.’

In *S v Lwane*¹²⁵ evidence of a self- incriminating statement was excluded on the grounds that the accused had not been warned beforehand of his privilege not to answer questions which might incriminate him.

In *Lansdowne and Campbell*¹²⁶ it is submitted that the test is ‘whether the deception would be unfair to the accused having regard to the nature of the offence charged and the circumstances in which the evidence was procured.

*Schmidt and Zeffert*¹²⁷ states ‘that they would exclude the evidence ‘if it would operate unfairly against the accused, for instance if it were to have been obtained by a trick’.

¹²⁴ Clause 74-75.

¹²⁵ 1996(2) SA 433(A).

¹²⁶ SOUTH AFRICAN CRIMINAL LAW &PROCEDURE, Vol5, page 840.

Hoffman ¹²⁸argues in favor that the discretion to exclude on the basis of public policy ‘Evidence should not be admitted if it is illegally obtained and because the police should be deferred from illegal conduct and the liberties of the citizen should be zealously fostered’

Schmidt further states “vermelding van n diskresie kom daarop neer dat die betrokke ontoelaatbaarheidsgrond nie vir vaslegging n reel vatbaar is nie. Die gevalle moet dan ad hoc beslis word”¹²⁹.

(Translation of the above: ‘mentioning of a discretion implies that the relevant inadmissibility ground for capturing a rule is not susceptible .The cases must be decided ad hoc.)

Taking cognizance of the above the case law it is clear that the method of achieving the consent the qualification, purpose and the polygraphist for a polygraph test became paramount.

6. Summary

The position and inference that can be drawn from pre year 2000 is one where commissioners have taken the view that a polygraph test cannot as a stand-alone prove guilt, however if there is circumstantial evidence the polygraph will corroborate such evidence and can on probability find the subject guilty of the offence. Post year 2000 the jurisprudence created more formality around the weight of the evidence. They start looking at the qualifications of the commissioner, the issue of consent and the form of consent. They further started bringing clarity on what form of evidence can be corroborated by the polygraph test.

It is clear that the approach from commissioners have varied over the years. There are still conflicting awards concerning the admissibility of expert opinion evidence of the polygraph examiners pertaining to whether in the absence of other evidence, the results are conclusive on their own. Some commissioners find that if there is no corroborating evidence supporting the

¹²⁷ Schmidt C.W.H. & Zeffert D.T., ‘Evidence’ in Joubert W.A. (ed.) LAWSA vol 9, para 9.

¹²⁸ F.H. Hoffmann & D. Zeffert’s The South African Law of Evidence (4th ed., 1988) 225.

¹²⁹ CWH Schmidt ‘BEWYSREG(4, ed 2000)347.

results, the evidence is inadmissible on its own. Other commissioners however have accepted the results without any other supporting evidence, but circumstantial evidence. It is however clear that commissioners is approaching polygraph testing with caution, however has generally accepted them as a yardstick against certain criteria. The question and the debate of accuracy and validity of the test seem to become of lesser importance.

It is the writers submission in the absence of legislation on polygraphs in South Africa, the use and or acceptance of it through our courts has grown .What is clear from the above cases a foothold in our jurisprudence are being entrenched.

CHAPTER FOUR: THE CURRENT APPLICATION IN JSE LISTED RETAIL COMPANIES IN RSA

In this chapter the writer investigates how listed companies use polygraph tests in the workplaces and if they comply with constitutional guarantees and common law.

The investigation will take the format of holding face-to-face interviews with:

- Two senior HR Managers at JD Group South Africa,
- Senior Employee Relations Manager at MTN,
- One staff member that undergone these tests, and
- An example of a polygraph test done to completion (names deleted to protect the identity of parties to the test).

The salient points covered in these interviews will be:

- When and where they use polygraph tests
- The effectiveness of the polygraph tool.
- The percentage of success in using polygraph tests in leading to a dismissal.
- The evidentiary value placed on the test.
- If their institution have a policy/working document on the use of these tests.
- Any cases that polygraphs have been used (examples).
- The view of workers on these tests. Question asked included:
 - How did the tests made you feel whilst taking them?
 - How did you feel after taking the test?
- The process that the polygraphist followed before, during and after the test.
- The constitutional argument against these tests-if any?
- Case law that has been used in favor or against these tests that the company uses.

1. Interviews conducted with HR EXECUTIVES AT JD Group Trading Pty Ltd.

Brief background of company:

The JD Group is a mass consumer financier that boasts 4 divisions, 11 brands: Joshua Doore et.al. The company currently employs around 19000 employees and is listed on the JSE. The purpose of these interviews is to ascertain the current application and practice

1.1. Interview conducted with Molefi Makhetha, HR Business Partner

(HR Executive), Bradlows and Price n Pride.

Contact number 011 408 0236.

Interviewed on 16 January 2014 at 2.11pm.

INTERVIEW WITH MR. MAKHETHA	
Interview Questions	Interviewee's reply
What is your understanding of polygraph testing?	‘It is a scientific tool that measures the subjects reactions based on his responses to questions asked. In this way the polygraphist will ascertain if the subject is hiding information or are lying about such’
When do you utilize these tests?	‘In cases of uncertainty where a process elimination are utilised to ascertain who the suspects are, and in order to concentrate the investigation. Utilize this mainly in Dishonesty cases ‘
In your opinion how effective are these tools?	‘The tool is based on a science and is administered by a qualified person. The tools is highly effective. The challenge however is the value and admissibility of this evidence’
What is your success rate in getting an award in your favour in percentage when utilising these test?	‘From an operations perspective we are inundated for approval for these test to be used. However of all requests around only 10% are approved. We have around a 60% success rate where polygraph is being utilized. Hence test used in corroboration’
The evidentiary Value you place on these tests?	‘This evidence is only utilized to corroborate other facts, example evidence like circumstantial. for a

	decision based on balance of probabilities’
Does your company have a policy, procedure flow in place to guide its employees?	‘No we do not have a formal policy in place. However a common process that is followed’
Examples of cases where it was used?	‘We have used in many cases. Employee Relations department will be able to give you info on this. However it is practice that it will not infringe on your constitutional right’.
What do you understand and are your view in terms of constitution (Right to privacy and not to incriminate self)	‘Do not believe it incriminate and transgress the rights of subject. Every constitutional right has limitations. Before doing the polygraph test these right are explained to the individual’.
What case Law does your company reference to use in favor or against the tests?	‘Check with the companies ER department’
Who has authority to authorize the use of the tests?	‘The HR executive (HR Business Partner) give authority for Forensics to go ahead with permission/consent of employee concerned’
What procedure do you follow to get consent for polygraph test?	‘The employee is told about the investigation. They are requested to subject themselves to the test. They are further explained that questions will only be asked pertaining to the case under investigation. Employee then complete and sign consent form. The test will not be done if employee is sick on the day’.

1.2. Interview conducted with Rosita Botha: Employee Relations Partner

Executive Member: JD Group SA.

Interviewed on 17 January 2014 at 3pm.

Contact number 011 408 0736.

INTERVIEW WITH MS. BOTHA	
Interview questions	Interviewee's reply
When do you utilize these tests?	<p>‘This is essentially used where company theft and losses took place. This is the starting point of investigation. This is not done randomly however isolated where other forms of misconduct took place</p> <p>Within the Group at HI FI Co-Operation (Cash Division) have it as a condition of employment that the employee agrees to subject them to a polygraph test. I however have my reservation of having this in our contracts going forward. This is normally utilized where there are cash inconsistencies /shortages and high value stock losses, where stock disappears from high value rooms. An example, was in our Furniture Division where two employees applied for a position and indicated on employee data form that they do not have any criminal records. It was later found through the employee verification service, that they do have previous records. The polygraph are utilized as a guide only to ascertain what must be done next in certain allegedly transgressions. These tests are not done randomly’</p>
In your opinion how effective are these tools?	<p>‘As a stand-alone, it is not effective at all. Hence on individual basis not effective there must be corroboration. In an environment where there are a lot of suspects it is a nice tool to utilize in corroboration. Even if person is shown to be</p>

	deceptive and you have no other evidence, guilt on probability cannot be drawn. The person might have been in a wrong frame of mind and this may have distorted the outcome’.
What is the percentage of success in using polygraph test in leading to dismissal?	‘When we do disciplinary hearing we do not get polygraphist to testify at the hearing, This however placed a huge financial burden on the company when he/she must Testify at arbitration. We currently have around 60% success rate where a polygraph was Used’
The evidentiary Value placed on these tests?	‘It entirely depends on nature of the evidence outside of the polygraph. The polygraph authenticate the other evidence hence cannot be used as a stand-alone. The value of the evidence however stands well at the CCMA. When the evidence of the polygraph must be presented the polygraphist must be present to give the evidence. The JD Group have successfully utilized polygraph and presented expert evidence to support circumstantial evidence’.
Does your company has a policy and process flow in place when these tests will be called for?	‘Must be approved by the HR Business Partner (Executive), Forensics Department cannot authorize .The company do not have a policy in place’.
Who has authority to authorize the use of the tests?	‘Senior Managers make the decision in conjunction with the HR Business Partner. Our forensics department can’t authorize it’.
How and who lead evidence about polygraph examination?	‘The initiator and our Forensics department will introduce evidence into process’

2. Interviews conducted with MTN SA

Background of the company

MTN is global communications partner and world-class cellular network provider. As a major communications company, MTN is focused on the African continent.

MTN is listed on the Johannesburg Stock Exchange (JSE) under the share code MTN and enjoys approximately 37% of market share in South Africa. The company provides voice, data and telemetry offerings and solutions to its 20 million customers in South Africa.

2.1. Interview conducted with Mr. Zakade Salman:

Employee Relations Manager MTN SA

(Contact number available on request)

Interview conducted on the 6 March 2014 at 15h00.

INTERVIEW WITH MR. SALMAN	
Interview questions	Interviewee's reply
How will you define a Polygraph Test?	‘It is a test used to verify a person's truthfulness and is often called a 'Lie Detector Test.'
Can a subject be compelled to undergo a polygraph test?	<p>‘It is against the Constitution of South Africa to compel a person to undergo a polygraph examination, unless she or he consents to it. The consent must be in writing.</p> <ul style="list-style-type: none"> • The individual should be informed that— • the examinations are voluntary; • only questions discussed prior to the examination will be used; • he/she has a right to have an interpreter, if necessary; • should he/she prefer, another person may be present during the examination, • provided that person does not interfere in any way with the proceedings’;

<p>In your knowledge are there any legislation controlling the use of polygraph test in South Africa?</p>	<p>‘Polygraph testing is a fairly new concept in South Africa, especially in disputes relating to employment relationships. There is no legislation at this point to control the use of the test or to protect the employee's right against the abuse of the test’.</p>
<p>When is the employer permitted to use Polygraph test?</p>	<p>‘Generally, employers are permitted to use the polygraph to investigate specific incidents where:</p> <ul style="list-style-type: none"> • Employees had access to the property which is the subject of the investigation; • There is a reasonable suspicion that the employee was involved in the incident; • There has been economic loss or injury to the employer's business like theft of company property; • The employer is combating dishonesty in positions of trust; • The employer is combating serious alcohol, illegal drugs or narcotics abuse and fraudulent behavior within the company; • The employer is combating deliberate falsification of documents and lies regarding true identity of the people involved.’
<p>Who gets the Polygraph test results?</p>	<p>‘Polygraph results cannot be released to any person but to an authorized person. Generally it is the person who has undergone the polygraph test (examinee), or anyone specifically designated in writing by the examinee, firm, that requested the examination’.</p>
<p>What is the status of polygraph test at the CCMA in your view?</p>	<p>‘Polygraphists have been accepted as expert witnesses whose evidence needs to be tested for reliability. The duty of the commissioner is to</p>

	<p>determine the admissibility and reliability of the evidence. Polygraph test may not be interpreted as implying guilt but may be regarded as an aggravating factor especially where there is other evidence of misconduct. In other words, polygraph test results, as a stand-alone are not a basis for a finding of guilt. It can be used only in support of other evidence’.</p>
<p>What is the relevant legislation that you utilize to make a decision?</p>	<p>This answer was e-mailed to the interviewer. –“The Constitution of the Republic of South Africa, Chapter ¹³⁰ and to the Amalgamated Pharmaceuticals Ltd v Grobler NO and others case¹³¹</p> <p>‘A polygraph test showed that they could be responsible for the serious stock losses suffered by the applicant. The Labour Court agreed with the reasoning of the Commissioner who found that, in practice, a polygraph does not serve to prove that someone is actually lying, for the questions are often too broad to exclude that which is neither intended nor sought. And it most definitely does not prove that someone is guilty. It is merely an indication of deception.</p> <p>See also Sosibo & others¹³² this case indicated that polygraph testing is highly contentious and that this case gives clear direction that sole reliance on the test will not discharge the onus of proving that the dismissal was fair.</p> <p>These cases made it clear; the employer cannot force</p>

¹³⁰ <http://www.jrattorneys.co.za/south-african-labour-law-case-articles/disciplinary-hearings/32-entrapment-in-the-workplace.html> accessed on the 15 January 2014.

¹³¹ 2004) 13 LC 1.11.3.

¹³² (2001) 10 CCMA 2.5.2.

	<p>any employee to submit to such a test. Refusal to do so does not indicate guilt and is also not necessarily grounds for dismissal. Permission must first be given by employee and that this consent must be informed consent. His reference in particular to this case is based on the fact that the company must have suffered economic loss. He further stressed the point that this cases made it clear that the polygraph do not prove that someone is actually lying but merely an indication of deception and doesn't prove that someone is guilty'.</p>
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3. Interview conducted with an MTN staff member

On the request of the interviewee, his name is withheld to protect his identity.

- 3.2. For the purpose of a validity check, the name will be disclosed with a confidentiality disclosure. **Interview conducted on the 9 April 2014 at 6pm.**

The purpose of this interview	To ascertain if the practice correspond with the practice as set-out by Mr. Zakade
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Interview question	Interviewee's reply
What triggered the call for a polygraph test to be held?	'What triggered the polygraph was the disappearance of a huge cash amount and to prove or disprove my involvement in the event'
Was permission first received from you if the polygraph may be done? Was a consent form signed?	'I was approached first by the company representative to give statements surrounding the missing cash and given the option to speak to an appointed representative if I so elected. We were than told if nothing is forthcoming than we will have to go for the polygraph. I verbally agreed to undergo the polygraph I have not signed any documentation on this day. However on the day of the polygraph the polygraphist explained that it is a free will that we do the test and we are under no obligation to undergo the test. I than said I am ok with the test and do not need anybody present whilst I undergo the test. This was all recorded'
Did you really want to sign the consent form or give consent?	'Yes I felt I had to do it as I did not wanted to be seen that I was involve in the disappearance of the cash and wanted the company not to investigate me any further hereafter'
Was a Pre-	'The polygraphist explained to us what it is all

<p>Examination/Test interview done?</p>	<p>about the disappearing moneys. He then had test run on the question he is going to ask. I was hooked up this period. He asked my name and settled me in example he asked my name work related issues etc. This was done in order to get a pattern on the reading’</p>
<p>During the testing phase, did the examiner ask you questions pertaining to the purpose of the test?</p> <p>Did he ask questions outside the investigation?</p>	<p>‘Yes he only asked questions pertaining to the missing cash’</p>
<p>Where was the test held?</p>	<p>‘The test was held at the MTN Regional Office. I felt safe in the space where it was held’</p>
<p>How did you feel and think when asked to undergo the test?</p>	<p>‘I was looking forward to it, as I have seen it in movies and always wanted to experience it. I really wanted to see what it was about’</p>
<p>How did you feel when the polygraphist attached the sensors that will collect physiological data to your body?</p>	<p>‘I have not felt anything, not nervous or anything’ As this was my opportunity to prove that I am not guilty’</p>
<p>How did you feel when the test was completed whilst waiting for the results?</p>	<p>‘I was happy that it was over, as this was my main focus to have this done. When the incident under investigation happened I knew I was not at work on those days. If I was at work I might have felt different’</p>
<p>What did you think of your company when the test was</p>	<p>‘It was an experience I won’t forget as for going through this. I did not have bad feelings towards</p>

completed?	the company as this was in the interests of my employer’
Did the polygraphist take cognizance of your past experiences and events that might have an influence your psychological make-up. Did he asks questions about this?	‘No the polygraphist did not ask, however asked if I stole at other places where I worked. I did not feel in any way offended. He also asked if I had any recent traumatic experiences’
Did the Examiner enquire prior the test if you have taken any sedative or drugs?	‘Yes, he did ask if I was on medication or influence of drugs. He checked on my health condition’
What is your understanding from legal point of view of polygraph in general?	‘I do not believe it proves innocent or guilty. The company needs to find other ways of proving that the person has done something wrong. This test is however a violation as it can prove guilty yet you might not be the guilty party. As an emotional person the polygraph test might pick this up. For now I think the polygraph will put a bit of fear in a person when they know that they have to go for one.’

4. Summary

It is the writers humble submission that even though consent are gotten from employee before these tests are conducted one would in all of these cases have to establish whether consent was in fact obtained without duress, coercion, force or promise.

As mentioned above at JDG (Cash Division) where employees consent contractually to undergo polygraphs and even to the scenario where employees have not entered into a contract providing for this, but are still required by the employer to undergo a polygraph must be viewed with circumspection.

The writer agrees with Christianson where she argues convincingly that the nature of the test involved and the potential of the test to infringe fundamental human rights would possibly make the validity of consent to the test to be questionable.

However, what is clear through the interviews conducted, employers are accepting evidentiary value of the polygraph test and are up to date with the changes happening in the common law application. What was alarming though was the fact that the employee was asked questions outside the investigation. This in the writers mind does infringed on the employee right to self-incrimination and privacy. In the absence of a policy the employee might not be aware of his right to remain silent on this type of questions. The other point rose by the employee that he wanted to prove his innocence by subjecting himself to the test. The writer can only derive from this that the onus has shifted in this instance, from the employer to the employee, something contrary to the tenets of the LRA. However this is a choice that the employee ultimately makes. The writer henceforth suggests that polygraphist should ascertain through a question pre-polygraph test phase why the employee consents. If employee gave consent to prove that he is not guilty the consent should not be viewed as consent in the true sense of the word.

CHAPTER FIVE: RATIONALE, POLICY AND PROCEDURE DOCUMENT, PROCESS FLOW

In this chapter the reasons for and what the differences are between policies and procedure are investigated. It will further result in the drawing up of policy, procedure document and a flow chart as a suggestion for retail in general.

1. Why create a policies and procedures system¹³³

The purpose of creating policies and procedures is to locate decision-making authority at the lowest appropriate levels and to ensure that the workplace do not fail the constitution and the common law. Hence policy is informed by these external factors such as International law, Common law and Acts of Parliament

A policy and procedure document will ensure that all employees and business owners can make informed decisions by accessing policies which are easy retrievable for example on-line. Polices and Procedure ensure consistency in application and prevent misunderstanding and interpretation within Business. The policy document must have procedure when the document are for example updated to ensure that everyone is aware of the changes thereto.

2. The difference between policies and procedures

Polices reflects the rules governing the implementation of processes. Hence it describes what needs to be done and why it needs to be done.

Procedures on the other hand, represents an implementation of policy and should evolve over time as new tools and the macro external factors dictate for example change in legislation. As a general rule policies and procedures must appear as

¹³³ http://www.ehow.com/about_6689481_do-companies-write-policies-procedures.html, accessed 23March 2014; and <http://cornwalls.com.au/sharing-knowledge/legal-updates/the-benefit-of-workplace-policies-when-communicated-effectively-and-applied-consistently.aspx> accessed on the 23 march 2014.

separate documents. ‘Hence it is a description of the process or actions that comprise the commonly accepted ways to perform routine or repetitive tasks.’¹³⁴

3. **Checklist: Policies and Procedures**¹³⁵

In order to ensure buy-in and consistent application of the policy and procedure, the following must be kept considered when designing policy and procedure document:

- Define the goal of the policy and procedure. The definition should aim to ensure efficiency in decision making that results in fairness and consistent application.
- The person proposing the policy should not design and implement in isolation. Hence the stakeholders should be consulted on the draft as they are imperative to the sustainable success of the policy and the standard operating procedures.
- The stakeholders of the policy must take cognizance of the current legislation, case law and its link to other policies in the organisation.
- The policy should create space to indicate when it is reviewed and the authority of sign off, adoptees, taking cognizance of the interrelatedness of business units. The policy must have a process flow chart to assist the users on the steps to be followed.
- The final step is the distribution of the policy documents to all employees for acknowledgement. The signature of the employee on the document is to acknowledge that they read and understand the content. A training session involving staff and other departments may be conducted prior to requesting the employees to acknowledge the policy.

¹³⁴ <http://www.policy.unimelb.edu.au/contacts-resources/resources.html> accessed on the 20 March 2014.

¹³⁵ <http://www.safework.sa.gov.au/contentPages/docs/labrWritingPolicy.pdf> accessed the 24 March 2014.

4. Proposal: The polygraph testing policy and procedure

Based on the discussion and issues raised in previous chapters, the following policy and procedure document and flow chart are proposed for the retail sector.

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I. DOCUMENT ADMINISTRATION

¹³⁶ AS A BASIS USED :MTN SA Disciplinary code Doc number 2011-pol-000620 and BREAK THROUGH HUMAN RESOURCES SOLUTIONS CC. POLICY DOC 2013 -02

REFERENCE DOCUMENTS/RELATED POLICIES

Document Name	Document Number	Publication Date	Published by
LRA	X	1995	X
SA Constitution	X	1996	X
CCMA Case Law	X	Various	X
International Law	X		X
Section 252A of the Criminal Procedure Act 51 of 1977	X	1997	X
Body of Andhor Grey Marks thesis	X	June 2014	UCT

II.DISTRIBUTION LIST FOR COMMENT ON DRAFT /CHANGES

This document is to be distributed for comment as set out below

Name and Surname	Designation	Department/Business Unit
X	X	X

III.APPROVAL LIST

Name and Surname	Designation	Date	Signature
X	X	X	X
X	X	X	X
X	X	X	X
X	X	X	X
X	X	X	X

Policy acknowledgement by training

By signing this document training/ learning and development department acknowledges that all training material have been updated accordingly

Name and Surname	Designation	Date	Signature
X	X	X	X

Glossary of Terms

- Polygraph testing:** Polygraph (popularly referred to as a lie detector) measures and records several physiological indices such as blood pressure, pulse, respiration, and skin conductivity while the subject is asked and answers a series of questions. The belief underpinning the use of the polygraph is that deceptive answers will produce physiological responses that can be differentiated from those associated with non-deceptive answers.
- Constitutional rights:** A constitutional right is a legal right of its citizens protected by a sovereignty's constitution.
- Theft in company:** In common usage, theft is the taking of another person's property without that person's permission or consent with the intent to deprive the rightful owner of it. This however will have a wider interpretation in our circumstances where it include theft from a customer/ supplier / company / fellow employee.
- Fraudulent acts:** Are taken with the purpose of deliberately deceiving a person or employer which causes some sort of damage whereby the employee receive direct or indirect benefit from this act.
- Corroborate:** To confirm or support (facts, opinions), especially by providing fresh evidence: the witness corroborated the accused's statement.

Polygraphist: A person skilled in the operation of a polygraph and are have the qualification as set by their professional body
Falsification of documents.

Falsifying Documents: This is a white collar crime that involves altering, changing, or modifying a document in order to hide or to make false or incorrect especially so as to deceive.

IV. INTRODUCTION (PURPOSE)

Fair Treatment, Standards and employer Success

- This policy is adopted in order to ensure fair treatment of employees and the overall success of the company.
- The purpose of the Policy is to ensure consistency and to minimize conflict between the company and employees and employee representatives thereby creating a more harmonious working relationship in the workplace.

Scope of application

The policy is applicable to all permanent, temporary, contract and independent contractors having access to the premises and is aimed to address the end-to-end process at the Retail Company. It includes all entry points identified for handling polygraph testing.

Guiding Principles (Policy Rules)

- The basic guiding principle, should be for anyone who is facilitating any disciplinary process, is that the principles of natural justice in particular the audi alteram partem rule and the presumption of innocence until proven guilty applies.
- Hence the employee must be given the opportunity to state his/her case prior to any action being taken against him/her and that employees must be presumed innocent until they are proven on probabilities to be guilty.

Responsibilities and Accountabilities

- The company is committed to creating a harmonious and stable relationships and trust between employees and management.

- The company strives to build industrial peace through fair human resources policies, and practices.
- The parties responsible for giving permission/authorization for a Polygraph test to be administered take full responsibility and accountability.

The Business Manager: Investigation, and fact finding and delivery of report to HR Manager (executive) for authorization.

HR Executive: Verification of the validity, and that it adds to the quantity of proof he/she place final authorization for the test to be conducted and therefore takes accountability.

Aim

- To provide the necessary guidelines for the effective handling of disciplinary hearings in so far as misconduct is concerned, with the view to adhering to the principles of fairness and encompass the broader constitutional rights of employees while affecting the provisions of labour legislations.
- To ensure and give life to the values, vision and mission of the organization as well as adhering to the ethical conduct. It aims to encourage whistle blowing in order to uproot unscrupulous activities within the organization.
- To ensure that all business units ensure fair employee reactions practices in order to promote harmonious working relationships.

V. RECORDS CONTROL

Any document produced whilst implementing this policy which has relevance to the policy must be recorded and stored as confirmed in the table below:

Record Name	Document Number	Location			Retention Period	Disposal Method
		Hard copy	Soft copy	Scanned copy		

X	X	X <i>(Select one of the three options)</i>	X	X
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VI. DOCUMENT CONTROL

The signed original of this policy is received by

Name and Surname	Designation	Date	Signature
X	X	X	X

The original document has been scanned

Name and Surname	Designation	Date	Signature	File Reference
X	X	X	X	X

The original document has been published

Name and Surname	Designation	Date	Signature
X	X	X	X

VII. RELATED POLICY/ STANDING INSTRUCTION

Document Name	Document Number	Publication Date	Published By
X	X	X	X

VIII. THE PROPOSED POLICY FOR RETAIL INDUSTRY

The Retail Group (hereinafter referred to as Retail Group) through its various systems and procedures **establishes** standards of performance and behavior for its employees. The procedures laid out in this Polygraph Policy will ensure procedural and substantive fairness based on the LRA; Common Law; International Law and SA case Law.

Retail Group recognizes employees Constitutional Rights and the LRA under the following section:

- Section 23 (1) everyone has the right to a fair labour practice;
- Section 14 that provides the right of privacy;
- Section 35(1) (a) the right to remain silent;
- Section 35(1) (c) not be compelled to make and confession or admission that could be used in evidence against him or her.

However taking cognizance of Section 36 the limitations clause, which lays down a test that any Limitations must meet; the two central concepts in these tests are reasonableness and proportionality.

Directives for when Polygraph tests will be used:

- Retail Group must have suffered economic loss or injury e.g. theft of company property
 - Where Retail Group are involved in situations such as combating dishonesty in positions of trust
 - Or fraudulent behavior within the company or deliberate falsification of documents
 - Lies regarding the true identity of people involved in a crime
- Combating serious alcohol, illegal drugs or narcotics abuse, consumption or sale
- There is reasonable suspicion that the employee was involved in an incident
- Where an employee is applying for, transferring to or being considered for promotion to a job in risk/security/cash handling services
- Under no circumstances:
 - Will polygraph testing be done in the pre-screening of prospective employees
 - The letter of employment may not stipulate that the prospective employee agree to undergo a polygraph test post-employment

- The Polygraph test may not be interpreted as implying guilt but may be regarded as an aggravating factor especially where there is other evidence of misconduct. It can be used only to corroborate/support other evidence (grounds above only). Polygraph tests results as a stand-alone are not a basis for finding guilt.

IX. THE PROPOSED PROCEDURE

The investigation:

- Ensure that full investigation is done by line manager.
- If investigation do not point to specific individual, however anyone from group of individual, ensure that through process of elimination only get to possible group or of individual identified

Approval and consent for the polygraph:

- Get approval from HR if polygraph test is required and can be done.
- Line manager explain the rights to the employee pertaining to the polygraph (recorded)
- Get prior permission without threat or favour from employee that they will subject themselves to a test.
- Confirm consent in writing
- If employee refuse to give consent- no force/coercion tactics will be employed

The polygrapher also referred to as the examiner:

- The retail group should enlist a polygrapher that is registered and qualified.
- The examiner shall not express bias in any manner regarding the truthfulness of the examinee prior to the completion of testing.
- The examiner shall obtain information sufficient to identify the examinee.
- The examiner shall obtain the consent of the examinee prior to testing.
- The retail group must agree upfront with polygrapher about the questions he is allowed to ask.

The polygraph examination:

- Questions will be asked in a form that would prevent a reasonable person, facing a significant issue, from successfully engaging in a rationalization process to avoid culpability.
- The examiner shall not express bias in any manner regarding the truthfulness of the examinee prior to the completion of testing.

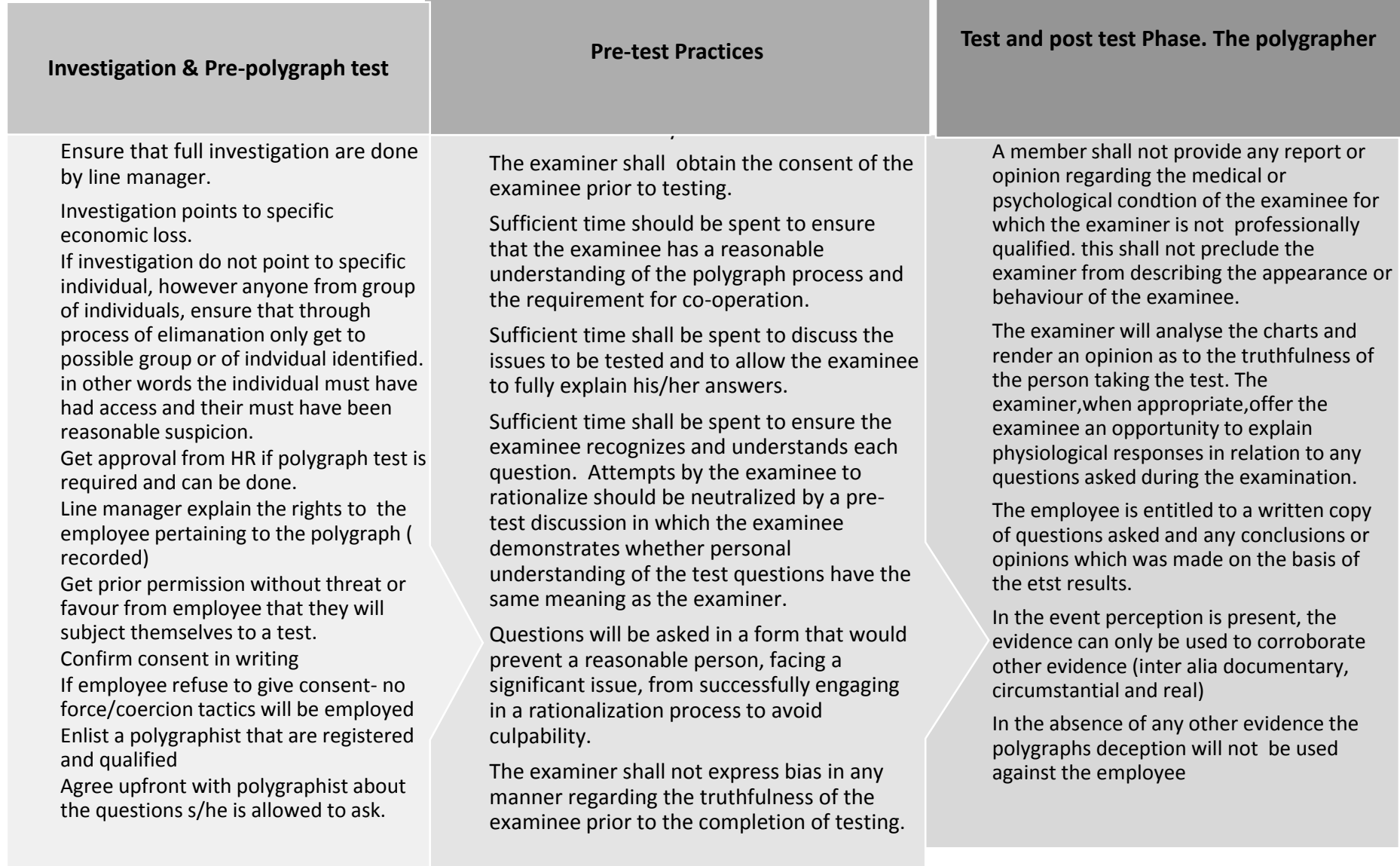
Sufficient time

- Should be spent to ensure that the examinee has a reasonable understanding of the polygraph process and the requirement for co-operation.
- Shall be spent to discuss the issues to be tested and to allow the examinee to fully explain his/her answers.
- Shall be spent to ensure the examinee recognizes and understands each question. Attempts by the examinee to rationalize should be neutralized by a pre-test discussion in which the examinee demonstrates whether personal understanding of the test questions have the same meaning as the examiner.
- Should be spent to ensure that the examinee has a reasonable understanding of the polygraph process and the requirement for co-operation.
- Shall be spent to discuss the issues to be tested and to allow the examinee to fully explain his/her answers.
- Shall be spent to ensure the examinee recognizes and understands each question. Attempts by the examinee to rationalize should be neutralized by a

pre-test discussion in which the examinee demonstrates whether personal understanding of the test questions have the same meaning as the examiner.

Retail Group is committed to using its infrastructure to educate employees and management about polygraph testing and to communicate its polygraph workplace policies, practices and programmes to all employees in a simple, clear and unambiguous manner.

5. The Process Flow



6. Summary

The above policy, procedure and process flow will serve as the organisation operational basis for dealing and deciding on the utilization of polygraph test in the workplace. This policy have taken into account:

- i) The American Jurisprudence, their approach on pre- employment testing, and propose that this practice should not get any foothold in our jurisprudence (to date the writer is not aware where this have come before our courts).
- ii) The South African Constitution.
- iii) The South African Common Law.
- iv) The company's current polices as to ensure that it does polygraph policy is not conflict.

The policy, herein it defines the business protocol and ensures that all employees both management and staff operates according to a consistent pre-arranged formula.

The procedures document, sets out who is responsible for what, the steps are and involved in the process, when each steps are undertaken and how it should be performed to complete the procedure. The procedure document therefore form the basic guide for the consistent completion of responsibilities.

The Process flow chart unpacked the policy in a step by step manner in order to ensure the achievement of its objectives. Chapter five is therefore the outcome of all the theory and practices in previous chapters, hence the purpose of the thesis, to ensure a working tool for retail in general.

CHAPTER 6: CONCLUSION

The South African Constitutional rights: Right to Privacy, search and seizure; the right to remain silent, the right to fair labour practice are all afforded protection as the common law has developed in harmony with the objective normative value system found in the constitution. The SA labour Relations Act and Constitution aims to move away from the historic adversarial system. Hence, it aims to create a fair employment that encourages mutual respect between the employer and employee. The writer in abstract made it clear that he is a proponent of polygraph testing in the workplace as it has developed sufficiently and have been entrenched in South Africa labour law sphere.

With reference to the American Jurisprudence that outlaws pre-employment testing in commerce, consenting to a pre-employment testing in South Africa labour field will be equal to telling a prospective employee in a country with an unemployment rate as high 25.20%,¹³⁷ that you will not get the job if you don't sign on the dotted line. What choice does a prospective employee have in this circumstance, in the writer mind the prospect are left without a choice but to sign. It is for this reason the writer believes that pre-employment polygraph testing should be outlawed and viewed unconstitutional in the South African labour field. . Within the American jurisprudence and the American EPPA mandates that polygraph testing are only allowed during an ongoing investigation where the employee had access to the property during the time the event took place; there is reasonable suspicion that employee was involved and the employer suffered economic loss. Further requirement are that the polygraph examiner must be suitably qualified and granted a license

The fact that a prospective employee agree to a pre-screen test and sign consent for future test are already getting the relationship on the wrong foot as shown in this paper is repugnant to say the least. The writer therefore concur with Rosita Botha from JD Group that the practice of signing into the letter of employment (consent that employee will subject self to a test) may not be enforceable and unconstitutional.

¹³⁷ <http://www.tradingeconomics.com/south-africa/unemployment-rate> accessed on 20 March 2014.

As far as the admissibility of the polygraph evidence is concerned the writer interprets the practice and theory as follows: Although attempts have been made over the years to arrive at the actual truth, the most successful and currently applied test is that of the burden of proof. The party carrying the burden must have a quantity of proof in order to come as close as possible to the actual truth. Probabilities will thus remain the crucial factor at determining the proven facts.

Therefore, it is generally accepted in arbitration proceedings that if the evidence suggests that the fact is more likely than not, then that fact will be accepted as proved. Polygraph testing are accepted in our common law as corroborating the burden, and therefore add to the quantity of proof, therefore bringing it closer to the actual truth.

Polygraph testing results showing deception without any other evidence doesn't carry weight to tilt the scale in favour of the employers' burden of proof.

In the SA case law cited above it is clear that some weight is placed from a corroborative nature on these tests. Polygraph evidence is in fact documentary hearsay evidence. For the evidence to carry weight the polygraph evidence should be presented in a specific manner. Hence the polygraph expert opinion should be supported by his own oral evidence through proving his qualification first (in order to cross the first hurdle), prove the accuracy of the report including presenting the details of the different questions asked. In cases under the chapter three above, where the Polygraphist could not be cross examined and tested it was thrown out.

All the case law visited in this paper dealt with specific incident testing and I did not come across any, dealing with the use in pre-employment screening or periodic testing of employees.

What is clear is that an employee cannot be forced to undergo the test as his consent must first be given, notwithstanding such as in conjunction with an ongoing investigation. This is as already stipulated a contentious point on its own due to the power relations that exist in the workplace. As this is the unfortunate norm, employee generally give permission for incident investigation, as shown in the interview conducted with MTN employee for reason of 'proving their innocence'. A strange phenomenon as it is the employer that has to prove their case on balance of

probability. Clearly the onus of proof is turned when the employee subject himself to a test to prove that he is not guilty.

This said, the writer believes that where a polygraph test are requested by an employer from a subject during an investigation in cases as set-out by the EPPA, the polygraphist are qualified as per the South African Qualifications Authority, and employee gives consent to undergo the test his constitutional rights are not severed.

In the absence of legislation directly directing the usages of polygraph, and taking cognizance of the current material conditions within the labour sphere it will be irresponsible not to agree with Marilyn Christianson.¹³⁸ ‘The reality is that polygraph testing in South Africa workplace is a high growth area. What is urgently needed are procedural guidelines’.¹³⁹ In this way we will ensure that employers utilise the polygraph tests in responsible and sensible way.

The writer believes that the employer has a right to protect his business from unscrupulous employees and with same token employee fundamental constitutional rights must be protected. It is within this context that the policy and procedure document will strike the balance.

This paper successfully resulted in a template with policies, procedures and process flow as a reference guide for retail and companies in general to draw from in dealing with this contentious topic. Hence, the writer recommends the use of the template policy, procedure and flow chart herein, as a point reference for companies in retail, and in general.

¹³⁸ Christianson (n13)38.

¹³⁹ Christianson (n13).38.

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