

CASE LAW

In **Govender and Chetty and Cargo & Container Services KN4881** the Commissioner said that the *failure of the two employees in two polygraph tests lends some support to the finding of the facts that they were involved in theft.*

In **Hotellica Trade Union and San Angelo Spur WE3799** the Commissioner found that *although refusal to take a lie detector test may not be interpreted as implying guilt, it can be regarded as an aggravating factor, especially where there is other evidence of misconduct.*

In **CWIU and Druggist Distributors WE10734** the Commissioner said that it is not necessary to deal with the weight that should be attached to the polygraph test if the company did not rely on the test to establish the employee's guilt, but regarded it merely as *additional evidence that would demonstrate whether the employee's version was truthful and provided an opportunity for the employee to disprove the company's evidence.*

The following is yet another instance in which polygraph testing added value to the investigative process to the point where a favourable outcome was achieved: **Lephuthing / MNT (Pty) Ltd [2012] JOL 29064 (CCMA)**

A thief who had been caught red handed with eight Apple iPhones from the warehouse, in which electronic stock worth billions of rand was stored. Both the applicant and the thief were charged criminally, arrested, but released on bail. The thief subsequently disappeared and the criminal charges against the applicant were withdrawn. The applicant failed the polygraph test, was charged with theft, and dismissed. The applicant denied involvement in the theft, and sought reinstatement.

The commissioner noted that the respondent's predicament was that, after the thief's disappearance, it was left with only hearsay and circumstantial evidence and the results of the polygraph test.

Whether the hearsay evidence concerning the thief's allegation that the applicant was his accomplice should be admitted depended on whether it was in the interest of justice to do so.

A party seeking to deviate from the rule against the admission of hearsay evidence must lay a proper basis for so doing. The commissioner decided, however, that the matter could be decided on the applicant's version. The applicant claimed that the thief had told him that he had implicated him because they were "friends". The applicant had put up the R1 000 bail for the thief's release. The respondent had to prove its case on a balance of probabilities, and the result of the polygraph test tipped the scales against the applicant.

Mnube & Cash Paymaster Services (Pty) KN1583, showed that the Commissioner accepted the polygraphist as an expert witness whose evidence needed to be tested for reliability.

SACCAWU obo Chauke and Mass Discounters (2004) 13 CCMA 2.13.1

Expert Evidence – polygraph tests – procedure followed and technique used was satisfactorily explained so as to make the results admissible as evidence.

*Where a polygraph test had been performed by a properly trained examiner and the employee had voluntarily taken the test, provided of course that the polygraph was considered admissible on the facts of the case, then **the outcome is a relevant evidentiary fact and should be taken into account together with the evidence in its totality.***

Harmse vs. Rainbow Farms is a very important precedent in the South African labor law environment. It is a finding that opens the door for business to utilize the full abilities of polygraph technology within the workplace in a responsible and sensible manner.

In the aforementioned case, there has been a break-in to the offices of the employer and computer equipment to the value of some R200 000 had been stolen. There were no signs of forcible entry and the alarm did not go off. The above mentioned fact lead the police and the employer to conclude that there had been some inside involvement by an employee who had a front door key and knew the alarm code.

The company informed all staff members who were in possession of keys and who knew the alarm code, of the company's intention to let the employees undergo a voluntary polygraph examination. These examinations were to be administered by Mr. Paul van Niekerk, an internationally trained examiner who is currently a member in good standing of the American Polygraph Association.

All the employees to be subjected to polygraph examinations were informed of the employer's decision to do so in writing 48 hours before the examinations were due. Of the 15 key holders Mr. Harmse was the only one to initially refuse to undertake the polygraph examination. He put his initial refusal in writing, stating religious grounds and human rights ground for his refusal. The employer wrote him a letter urging him to submit to the examination. He then decided to take the test as he felt that if he continued to refuse he would be prejudiced in the eyes of the company. All 15 of the key holders were then subjected to polygraph examinations. All the employees passed the examination except for Mr. Harmse.

Mr. Harmse was employed in the position of buyer in the Stores Department, a position in which trustworthiness is of the utmost importance, as well as being critical to the employer's conducting of its business. Mr. Harmse indicated that he found the test an acceptable procedure and he also signed a statement that he understood all the questions asked during the test and that those questions were explained by the polygraph examiner before the examination. He also signed a statement that the polygraph examiner treated him in a fair and respectable manner.

The employer held a disciplinary hearing and consulted with the employee, urging him to give a reasonable explanation for his deceptive responses during the examination. After a disciplinary hearing the employee was dismissed. The employee appealed to the CCMA stating that his dismissal was procedurally correct by substantially unfair.

The following aspects of the finding of CCMA Commissioner Wilson (Case no We1728, 09 July 1997) needs to be mentioned:

- An employer is entitled to dismiss an employee whom it can no longer trust, providing that the employer has reasonable ground for losing trust in the employee.
- “The actions of the employee must have been as such as to have reasonably caused the employer, on a balance of probabilities to feel that the employee is no longer trustworthy”
- The company's action in conducting voluntary polygraph tests were reasonable in the light of the circumstances of the substantial financial loss.
- The fact that the employer wrote the employee a letter urging him to undergo the polygraph examination was not construed as putting undue pressure on the employee to undergo the examination against his will. To quote directly. “I believe that in the circumstances the company was justified in exerting some pressure, which they clearly did.”
- The dismissal of Mr. Harmse was judged substantially fair and was confirmed.