

## Current legal application:

The general rule is that a polygraph examination can only be conducted with the consent of the examinee. A refusal to undergo a polygraph test would not enable one to draw any inference of guilt. Would this be the case if the reason for refusal - or absence of a valid reason for refusal - to assist the investigation by undergoing a polygraph test is deemed to be unreasonable/invalid? There are exceptions to this general rule which compel a person to undergo a polygraph test.

## Decided cases

- **NUMSA obo Sodien & another / Duro Pressings** [\[2010\] JOL 25823 \(MEIBC\)](#)

While employees are generally entitled to refuse to undergo polygraph testing, they are bound to take such tests when they have signed contracts obliging them to do so when requested, and when such tests form part of an investigation into, for example, theft. Dismissal in these circumstances was warranted.

Essentially, refusal under these circumstances places one in breach of contract.

## **Admissibility:**

In terms of the Law of Criminal Procedure and Evidence, the only test as to admissibility of any form of evidence into any given judicial forum, is relevance. Once admitted, it is up to the presiding officer to attach weight and value to such evidence.

As such, polygraph testing and the results of such tests, as well as the evidence gathered during such processes is acceptable and admitted into evidence at disciplinary hearings, the CCMA, labour court and in some circumstances, our criminal courts.

Of primary importance in all such instances is the ability of your examiner to have himself/herself declared both a specialist and reliable witness. This will require sound credentials and references as well as very detailed knowledge of the processes, procedures, ethics and application of polygraph testing. The ability to testify with authority and competence as to the evidence gathered by way of such interventions is crucial.

## How much *weight* does the trier of fact attach to polygraph evidence?

Burden of proof:

Balance of probabilities : Applicable in labour matters and civil courts

Beyond reasonable doubt : Criminal matters

The methodology considered to be **best practice** is to ensure that there is another form of **evidence which corroborates the finding made/result of the polygraph examination.**

Such evidence, amongst others, could be:

*Viva voce* evidence

Documentary evidence

Circumstantial evidence

Hearsay evidence

However, exceptions may be admissible and carry weight, such as when a paired testing protocol is followed which, mathematically, enhances the overall reliability of the results.

**Current legal application:** (Labour related matters: Internal disciplinary and CCMA)

## Decided cases

### **Lephuthing / MNT (Pty) Ltd** [\[2012\] JOL 29064 \(CCMA\)](#)

A thief 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.**

## Current legal application:

### WHEN IS THE EMPLOYER PERMITTED TO USE POLYGRAPH?

Generally, employers are permitted to use the polygraph to investigate specific incidents where:

- 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, such as 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 behaviour within the company;
- The employer is combating deliberate falsification of documents and lies regarding true identity of the people involved.

**Current legal application:** (Labour related matters: Internal disciplinary and CCMA)

### Decided cases

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

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 was 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.

Decided cases continues

**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 has been performed by a properly trained Examiner and the employee has 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.***

*Please feel free to contact our office for more detailed information regarding the above cases.*