O P I N I O N

INTRODUCTION.

1 I have been instructed by the firm Van Gaalen Attorneys to render a brief opinion with regards to the current position of the polygraph in South Africa, particularly the application in the labour law arena which will include disciplinary hearings, probably CCMA or Bargaining Council arbitrations and / or subsequent Labour Court proceedings.

2 I have also been asked to briefly consider the possible impact of the comments made by Commissioner Lucky Moloi recently at the Johannesburg Polygraph Test CCMA User Forum at 127 Fox Street on the corner of Eloff on 29 May 2009.

3 My consultants are the Polygraph Association of South Africa (PASA) and the South African Professional Polygraph Association (SAPPA) who represents various members of the American Polygraph Association (APA). I am to provide my opinion mainly insofar as the admissibility of the polygraph in particular at arbitration

proceedings and the relevant test that a commissioner will have to apply when confronted with expert polygraph evidence.

THE LEGAL QUESTIONS.

4 Is the polygraph an admissible forensic tool when introduced at arbitration proceedings?

5 Is a polygraph examiner to be included or excluded irrespectively at the time of arbitration proceedings and what test will apply?

6 How does the Constitution broadly impact on the previous two questions?

BACKGROUND.

7 My instructions are that on or about 29 May 2009 at a User Forum for the Commission for Conciliation, Mediation and Arbitration (CCMA) held at the Johannesburg office, Commissioner Lucky Moloi presented a lecture on the use and / or exclusion of polygraph

examinations particularly at the time when such examination results / polygraph expert witnesses are to be introduced at the CCMA proceedings.

8 In support of his lecture, Commissioner Moloi made reference to a number of provisions found in the International Labour Organisation Manifests as well as certain lower forum case law and various academic articles on the topic. The notes of Commissioner Moloi particularly referred to:

8.1 ILO and Prohibition of Polygraph tests.

8.2 Code of Practice on the Protection of Workers' Personal Data.

8.3 Justification for Polygraph Testing.

8.4 Polygraph Testing in South African Context – Is it Justifiable or Not?

8.5 The Constitution Act 108 of 1996.

8.6 Polygraph Test Health Professional Council of South Africa and Unregulation.

8.7 Whether Polygraph Testing or Not.

9 Ultimately Commissioner Moloi reached a conclusion seemingly being anti-polygraph.

10 My instructions are not to second guess the various issues raised by Commissioner Moloi, but rather to present an opinion thereof based on the above questions. However, for obvious reasons the comments made by Commissioner Moloi have a direct bearing on the clients of the various polygraph entities.

11 This opinion will therefore not seek to overly criticise his views, *which are very subjective*, alternatively the CCMA's views, but to rather provide my consultant with an opinion as to whether or not the days of the polygraph are numbered or whether or not there is a progressive measure of admissibility in terms of South African law.

12 My consultant serves a large client base and in particular corporate clients who have an interest in the sound managing of their business, particularly from the point of view of reducing crime, alternatively preventing crime at the workplace.

13 It is also not the intention of this opinion to debate the dire insecure economical position of South Africa and even less the growing field of criminal activities at the workplace in the circumstances that must be controlled.

THE LAW PRIOR TO THE LRA.

14 The dispensation prior to the LRA in the context of lie detectors largely revolved around two particular facets:

14.1 The imposition of what was called the lie detector tests;

14.2 Whether or not an employee may be dismissed on the basis of a reasonable suspicion of misconduct.

15 In this respect reliance has been placed on the following case: **Mahlangu v CIM Deltak; Gallant v CIM Deltak (1986) 7 ILJ 346 (IC).**

16 **Mahlangu** *supra* dealt with the following:

16.1 That the use of voice analysis tests for lie detection purposes by persons not registered as psychologists were unscientific, unethical, invalid and illegal. This case was also authority for the proposition that foreign decisions in the absence of relevant local case law ought to have strong persuasive influence on the Industrial Court's decision and service guidelines on the use of lie detectors.

16.2 **Mahlangu** also held that the information upon which the employer proceeded to effect the dismissal of the employees was largely founded on suspicion and little else.

16.3 The remedy which the court considered in this instance

07038

was reinstatement. The significance of this case was that expert witnesses testified in respect of the lie detection techniques. In this matter the Mark II analyser lie detector and the validity of the test conducted in relation to the two applicants were directly in issue and accordingly the court found that it was necessary to have regard to all forms of evidence from experts to reach a proper conclusion.

16.4 The significance of this case was that one Mr C P Holden, who was the expert witness on behalf of the employer, was introduced due to his expertise in the area of this type of investigation using lie detector tests and was acknowledged as being excellent. This witness was not a trained psychologist.

17 What is significant about this case is that one Professor Robbertze testified that the use of voice analysers as lie detectors are regarded by the Professional Board as C-level testing which means that a trained and registered psychologist is required to carry out and control

these tests which fall within the practice of psychology as defined by Act 26 of 1974.

18 The **Mahlangu** case set the benchmark as various cases followed thereafter and were dealt with and decided along the guidelines of **Mahlangu.**

19 It is for this reason that I will spend more time in this opinion on the issues raised in **Mahlangu**. Insofar as the question whether or not an employer may regard the question of suspicion, alternatively reasonable suspicion as grounds for dismissal the following case provides guidance.

20 In the matter of **Census Tseko Moletsane v Ascot Diamonds (Pty) Ltd (1993) 4 (a) SALLR 15 (IC)** it was held as follows:

20.1 That even where the court is unable to conclude that, on a balance of probabilities, it has been shown that a dismissed employee is guilty of certain misconduct, the court may nevertheless conclude that the dismissal was

substantively fair where the employer had a valid economic rationale where, for instance, the employee occupied a position of trust and the employer had a strong suspicion, based on valid reasoning, that the employee had breached that position of trust through the commission of misconduct involving dishonesty.

20.2 It is for this very reason where employers often only have a strong suspicion, alternatively reasonable suspicion that the polygraph is employed as a tool to assist in the pre-dismissal elimination of suspects, or in the case where employees indeed have failed the polygraph examination to ensure further investigations in that respect.

21 In the matter of **Algorax (Pty) Ltd v CWIU and Another (1995) NBLLR 1 (LAC)** it was held at follows:

21.1 That good grounds existed for the employer in respect of the fact that it was justified and reasonable to allow for a suspicion of the alleged misconduct of the dismissed

employee. The court further found that it was necessary that sufficient proof needed to be presented in order to sustain a finding of guilt on a preponderance of probability prior to dismissing the employee.

21.2 The court however reconfirmed that sufficient evidence may exist to justify suspicion and on that basis if the evidence confirms the suspicion then it may be inferred that the trust relationship has been destroyed.

22 The above cases set the scene and the tone by which many subsequent cases even into the dispensation of the LRA were dealt with.

THE DISPENSATION OF THE LABOUR RELATIONS ACT 66 OF 1995 AS AMENDED.

23 The provisions of the LRA provides how disputes are to be dealt with in terms of the LRA and the rich history of case law that flows from the LRA must be read against the backdrop of the Constitution - Act 108 of 1996.

24 It is on this basis that one needs to consider exactly how a polygraph examination may or may not assist the employer at the time of a pre-dismissal investigation but more particularly as a question of this opinion whether or not such a polygraphist may, should, could or will testify at an arbitration proceeding and secondly whether or not the evidence would be admissible on the basis that usually polygraph expert witness is not a trained psychologist.

25 The latter comment is a question of evidence. Evidence in dispute must be tested orally.

CURRENT PREVAILING CASE LAW.

26 It is trite law that arbitration awards issued by commissioners of either the CCMA or Bargaining Councils merely carry persuasive effect at such forums, alternatively in the High Courts and in this instance the Labour Court and Labour Appeal Court.

27 At this stage I consider the case law that would apply insofar as the

LRA dispensation and in particular how the courts have recently considered pivotal cases on the use of polygraph / polygraphy in the labour sphere.

28 I also need to point out that the mentioning of the word "*polygraph*" is rife at various instances of the case law that I have considered in this opinion. What is important for me is that the three main questions in this opinion are answered. On that basis I will focus on the questions raised insofar as admissibility. At the outset it is necessary to mention that there is no outright blanket prohibition on the admissibility of a polygraph expert or a person who reconciles himself with the field of polygraphy when testifying at an internal disciplinary hearing and even less at an arbitration proceeding.

29 It certainly seems from the case law that polygraph experts have been largely allowed to testify in various courts and forums.

30 This opinion will move from the presumption that at the time when a commissioner at either the CCMA or Bargaining Council is called upon to decide a question / case where the polygraph has raised its

07038

head, it is assumed for the purposes and remainder of this opinion that the polygraph examination result has not been inconclusive but has shown by virtue of whatever technique that has been used that the particular examinee has showed a deceptive indication on the result.

31 I also need to indicate that various articles have been written by distinguished scholars and jurists alike. In this opinion I will not aim to either criticise or condone what the various authors have said but will restrict myself to whether or not as indicated and as will probably be indicated a number of times in this opinion when an employer arrives at the CCMA or Bargaining Council armed with the evidence of a polygraphist:

31.1 The commissioner may refuse to allow such a witness; and;

31.2 If the Commissioner refuses the expert, does he or she commit an irregularity subject to review.

32 I commence with the following that has now become settled law

07038

insofar as what a commissioner's task is when considering arbitration evidence.

"*(78) In approaching the dismissal dispute impartially, a commissioner will take into account the totality of circumstances. He or she will necessarily take into account the importance of the rule that has been breached. The commissioner must of course consider the rules and the employer imposed the sanction of dismissal, as he or she must take into account the basis of the employee's challenge to the dismissal. There are other factors that will require consideration. For example, the harm caused by the employee's conduct, whether additional training and instruction may result in the employee not repeating the misconduct the effect of dismissal on the employee and his or her long service record. This is not an exhaustive list.*

(79) To sum up. In terms of the LRA, a commissioner has to

determine whether dismissal is fair or not. A commissioner is not given the power to consider afresh what he or she would do, but simply to decide whether what the employer did was fair in arriving at a decision a commissioner is not required to defer to the decision of the employer. What is required is that he or she must consider all relevant circumstances."

Sidumo and Another v Rustenburg Platinum Mines Ltd and Others 2008 (2) SA 24.* Also reported at (2007) 28 ILJ 2405 (CC) and (2007) 12 BLLR 1087 (CC)

33 The LRA provides as follows:

"*128* ***General provision for arbitration proceedings***

(1) The commissioner may conduct the arbitration in a manner that the commissioner considers appropriate in order to determine the dispute fairly and quickly, but must deal with the

substantial merits of the dispute with a minimum of legal formalities."

34 Although a commissioner at the CCMA is given a wide latitude to determine a particular dispute, such a commissioner does not have any discretion to altogether waive the *audi alterem et partem* principle and even less the application of the rules of natural justice. A commissioner may also not in any hard handed manner outright dismiss the evidence to be presented by any witness, in particular that of a polygraph expert.

35 One of the significant cases to be considered, although in its unreported form, is the matter of **M Shinga and Gilbey's Distillers and Vintners (Pty) Ltd** which is a matter that was decided in the Industrial Court. The date of the proceedings commenced in 1998 but the order was only made on 21 October 1999, well into the current LRA dispensation. The case number is NHN 11/2/10237.

36 The facts of this case is briefly as follows:

36.1 On 23 August 1996 the applicant M Shinga was

suspended pending the outcome of a disciplinary enquiry into two counts of misconduct. He was charged with theft of company property and deliberate action against the company's interests. Following the disciplinary hearing in which evidence was presented he was found guilty and dismissed. The date of his dismissal was 29 August 1996.

36.2 The significance of this case was that the facts largely related to circumstantial evidence.

36.3 In order to substantiate the company's view, the employer who I shall refer to as Gilbey's made use of polygraph examinations to ultimately secure a finding of guilty.

36.4 At the time of the disciplinary hearing, the evidence insofar as the facts that led to the issuing to a notice to attend a hearing was duly presented. The chairperson reached a conclusion that included *inter alia*:

"*So I am saying that on the balance of probability that*

07038

Mandla is guilty of the charges against him. I realise that there is no absolute proof that the bottles themselves were put across at a specific time but we do know that the time frame was sometime on the Sunday." (Where the presiding officer refers to "*Mandla*" it is in actual fact Shinga.)

37 At the time when the appeal was raised, namely 6 September 1996 the attorneys for Shinga raised two particular points in their appeal grounds which were:

37.1 No direct or circumstantial evidence to link the applicant to the alleged theft and that the hearing was both procedurally and substantively unfair.

37.2 For obvious reasons this opinion will not focus on whether or not the finding of the chairperson was correct but rather the consideration of circumstantial evidence in the circumstances. This is so submitted as at the time when this particular matter was heard by Adv C J Munks,

07038

he as the presiding officer had to consider the issue of circumstantial evidence.

38 What is significant is how Munks J went about determining and evaluating the question of the polygraph.

38.1 He deals with the issue of the polygraph at paragraph 47 on page 39 of the judgment.

38.2 He found that circumstantial evidence and the polygraph tests when read together indicated that the applicant and others were the most likely culprits.

38.3 A trained polygraphist, Mr H Roberts testified as to his background and training and his experience in the field of polygraphy.

38.4 He testified to the various documents / consent form used, the particular technique used, the hardware used, the process of the polygraph and relevant issues.

39 What is significant is that Roberts introduced an affidavit setting out the facts as well as his credentials as a polygraph expert.

40 Correctly so Munks J found that a polygraph report standing on its own has no evidentiary value. This the correct proposition in our law. What is important is that two issues arise from the latter statement:

40.1 The first is that there is a report.

40.2 The second issue is that of evidence.

41 These issues will be enumerated on later in this opinion.

42 Munks J went further to find at paragraph 60 *inter alia*:

> "*In my view the test tends to simplistic. And it is clear that the examiners have only a superficial knowledge of psychology and cardiology. They will certainly not satisfy the test beyond*

reasonable doubt and even in civil cases, evidence aliunde is necessary to bolster conclusions based on a preponderance of probabilities."

43 It was further held in the latter judgment as follows:

"*I agree that were 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 in 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."*

44 The judgment considers the matter of **Mncube v Cash Pay Master Services (Pty) Ltd** an unreported case being **CCMA KN 11583 (1997) 5 BLLR 639 (CCMA)**. I will refer to this case later in this opinion.

45 The significance of this case attaches itself to paragraph 86 found at

07038

page 69 where Munks J find the following:

> "*In my view provided the test is administered by a properly trained examiner for a specific incidence such as theft, a negative polygraph result prima facie suggest deception and may be used as a supporting fact together with all the evidence. If no other evidence exists obviously the polygraph result would be grossly inadequate."*

46 At paragraph 89 of the judgment the Munks J carries on and states:

> "*The outcome of a polygraph examination standing on its own is unreliable and even the American law recognises this. This is not to say however that a polygraph result should be completely excluded. However, the probative value of such a report is limited in the case such as the present one. Where a number of failings were highlighted and the accuracy of the outcome was not scientifically reliable. On the probabilities however I am prepared to accept that prima facie two of the employees were dishonest when they were asked about the theft*

07038

incident."

47 This judgment also proceeded to consider the issue of reasonable suspicion which was considered above and in particular the **Algorax** matter was referred to. It is not the purpose of this opinion to indicate whether or not the reasonable suspicion doctrine has any place in law.

48 The significance of this judgment is that ultimately the polygraph was considered and based on the conclusions of the polygraph the dismissal of Shinga was found not to have been an unfair labour practice.

49 In returning to the comments made by Commissioner Lucky Moloi at the time of the User Forum, it is important to note that the commissioner did not properly and objectively apply his mind to whether or not he has any discretion to disallow a polygraph examination, alternatively a polygraph witness. On that basis the following case law would be of great significance in this regard.

50 In a more recent judgment Basson J had the opportunity to fully deal

07038

with the question on the admissibility of a polygraph. This matter has been reported in the instance as **Truworths Ltd v CCMA and Others (2008) JOL 22565 (LC)** case number JR 789/07 and the judgment date is 01/08/2008.

51 In a nutshell this case dealt with the fact that arbitrator completely ignored relevant facts placed before him insofar as the outcome of a polygraph test in the circumstances where a trained polygraph examiner testified at the arbitration and explained the results of the polygraph and the manner in which the test was conducted. The court found that the conduct of the commissioner constituted a reviewable irregularity.

52 Basson J dealt with the particular issue as highlighted previously in this opinion, namely that **Sidumo** requires a commissioner to consider all relevant facts if those facts are placed before him or her and in particular:

"in determining whether or not a commissioner has

07038

> *committed a reviewable irregularity the court will consider whether or not the award is one that a reasonable decision maker could not reach."*

53 Basson J found that it cannot be said that a decision in this instance was reasonable if the commissioner disregarded material or relevant facts or factors placed before him in coming to a particular decision.

54 The court went on to consider a variety of cases particularly determined at the CCMA.

55 Basson J reaches the conclusion at paragraph 37 of the judgment which reads as follows:

> "*However a polygraph certainly may be taken into account where other supporting evidence is available provided also that there is clear evidence on the qualifications of the polygraphist and provided that it is clear form the evidence that the test was done according to acceptable and recognisable standards. At the very least the result of a*

properly conducted polygraph is evidence in corroboration of the employer's evidence and may be taken into account as a factor in assessing the credibility of a witness and in assessing the probabilities. The mere fact that an employee, however, refuses to undergo a polygraph is not in itself sufficient to substantiate an employee's guilt."

56 The court went on to find that indeed the commissioner committed an irregularity and that indeed the dismissal that was effected on the basis of a polygraph was fair.

ADMISSIBILITY OF THE POLYGRAPH.

57 I pause to consider the comments made by Commissioner Lucky Moloi and in particular I consider the slides on power point that were introduced at the User Forum.

58 I particularly refer to the slide that reads as follows:

"*CCMA as the custodian of labour legislation should refrain*

07038

from admitting polygraph test results as CCMA commissioners are not experts in the field of a polygraph, let alone the fact that polygraph is not regulated in South Africa, and examiners are not registered with the Professional Board of Psychology."

59 Commissioner Moloi goes on to state that until such time as the polygraph testing is regulated the CCMA should prohibit its admission as it has been proved in some cases that the polygraph test results are a tiebreaker between an employee and employer and thereafter the commissioner referred to the matter of **PETUSA obo van Schalkwyk v National Trading Co (2000) 21 ILJ 2323 (CCMA).**

60 I am of the opinion that any commissioner - who is faced with a particular case where an employer seeks to introduce the evidence of an expert witness in the field of polygraphy - has no discretion to refuse the introduction of such evidence.

61 The mere fact that a commissioner probably would not be a trained

07038

polygraphist otherwise have extensive experience in the field of polygraphy does not disqualify the evidence of such a polygraphist to be introduced.

62 I would even go so far as to state that such a submission would be ridiculous and make a mockery of our law as no judge hearing any case would then be qualified to hear the matter, i.e a judge that is not a pilot would then be disqualified from listening to an aviation dispute. A judge who is not a miner would be disqualified from hearing a mining dispute. A judge who is not a stockbroker would be disqualified from hearing a matter dealing with an irregularity at the JSE. A judge who is not a motor mechanic would be disqualified from hearing expert evidence on the basis of a mechanic's view on a motor vehicle accident etc. I respectfully submit that it is not sound to automatically take the view that the CCMA would exclude a polygraphist as well as the mere fact that the field of polygraphy has not been regulated in no manner excludes the admission of such evidence.

63 It is trite law that any person who possesses a special skill or

07038

knowledge that would place a presiding officer in a better position to determine a case, must be allowed to testify.

64 On that basis it has been held as follows:

The prime function of an expert seems to me to guide the court to a correct decision on questions falling within his specialised field. His own decisions should not, however, displace that of the tribunal which has to determine the issue to be tried.

S v Gouws 1967 (4) SA 427 (E) at 528 D

65 At the same time, the above has been held to be the position in our courts as is reflected in the following judgments.

Van Wyk v Lewis 1924 AD 447;

Rickert and Coleman (Pty) Ltd v S C Johnson and SA (Pty) Ltd 1993 (2) SA 307 (A);

S v Mngomezulu 1972 (1) SA 797 (A)

66 There can therefore be little doubt that a person who through his

07038

special skill and / or knowledge is better qualified to draw an inference on a subject as opposed to that of a judicial officer is allowed to testify in the circumstances.

COMPUTER EVIDENCE ACT NO 57 OF 1983.

67 This legislation was drafted following certain facts that were presented during a high court trial.

68 The intention of this Act was to provide for the possibility in civil proceedings of evidence generated by computers and for matters connected therewith.

69 In particular the Computer Evidence Act sought to identify what exactly was meant by :

69.1 authenticated computer printouts;

69.2 authenticating affidavit; and

69.3 a supplementary affidavit.

70 This Act required, whenever computer printouts were sought to be introduced in trial or for whatever purposes, such computer printouts or evidence had to be authenticated by way of affidavit.

71 Paragraph 3 of the Computer Evidence Act provided for the admissibility of authenticating computer printouts and read as follows:

> "*In any civil proceedings an authenticated computer printout shall be admissible on its production as evidence of any fact recorded in it of which direct oral evidence would be admissible."*

72 The Act further provides as follows at Section 4:

> "*An authenticating computer printout shall have the evidential weight which the court in all circumstances of the case attaches to it.*"

73 I have previously indicated in this opinion that I would return to the

07038

matter of **Mncube v Cash Paymaster Services** which I hereby do.

74 I do not intend to exhaust the issues raised in this arbitration but the significance of this arbitration attaches itself to the following:

74.1 After the dismissal of the applicant on 22 January 1997 to which she pleaded not guilty in relation to charges of theft, bribery, fraud, dishonesty, forgery or defalcation and bringing or attempting to bring the company name in disrepute, the applicant referred the matter to the CCMA.

74.2 At the time of the arbitration, the employer Cash Paymaster Serviced introduced an expert witness, namely Mr Henry Roberts.

75 After an extensive consideration of the case law that I have previously alluded to namely **Mahlangu v Kim Deltak; Gallant v Kim Deltak**, *supra* the commissioner ultimately reached the following conclusion:

75.1 A final aspect warranting attention is that of the computer

07038

results for the testing. Mr Roberts testified that he used software developed by the John Hopkins Applied Physics Laboratory to generate a separate charge analysis which indicated that the probability of deception was greater than 99% in this case. It was submitted that the computer results would be regarded as corroboration of the expert testimony.

75.2 The computer evidence was not authenticated in terms of the Computer Evidence Act No 57 of 1983. Moreover, the Act provided in Section 4(1) that an:

> "*authenticated computer printout shall have the evidential weight which the court in all circumstances of the case attaches to it.*"

75.3 As there could be several reasons for the physiological manifestations the computer results are unreliable as Mr Roberts' testimony.

75.4 However, the commissioner proceeded to find that the

07038

dismissal was irrespectively substantively and procedurally fair.

ELECTRONIC COMMUNICATIONS AND TRANSACTIONS ACT NO 25 OF 2002.

76 The above Act (ECTA) has now replaced the Computer Evidence Act.

77 The purpose and intention of this Act was to provide for the facilitation and regulation of electronic communications and transactions to provide for the development of a national e-strategy for the Republic to promote universal access to electronic communications and transactions and the use of electronic communications by SMMEs to provide for human resource development, electronic transactions to prevent abuse of information systems to encourage the use of e-government services and to provide for matters connected therewith.

78 The significance of this Act is as follows, namely:

"(a) A polygraph examiner usually provides a report at the conclusion of the examination.

(b) The polygraph examiner also produces poly charts during the course of the examination."

79 ECTA therefore stands to make provision for the introduction of these documents at the time of legal proceedings being dealt with.

80 ECTA at Section 15 provides as follows:

"*15* ***Admissibility and evidential weight of data messages***

15.1 In any legal proceedings the rules of evidence must not be applied so as to deny the admissibility of a data message, in evidence -

(a) on the mere grounds that it is constituted

07038

by a data message; or

(b) if it is the best evidence that the person adducing it could reasonably expected to obtain on the grounds that it is not in its original form."

81 ECTA defines a data message as follows:

"'*Data message' means data generated, sent, received or stored by electronic means and includes:*

(a) Voice, where the voice is used in an automated transaction and a stored record;"

82 I am of the opinion that for obvious reasons the data generated at the time of the polygraph examination can constitute two precise forms:

82.1 That which I have already indicated to be examination

07038

result which probably would be typed out on an ordinary computer;

82.2 The polyscore.

83 However, there is also at this instance (c) which is the information that is gathered at the time of the polygraph examination which would usually be stored on the hard drive of the relevant laptop, which is ordinarily used by polygraph examiners when conducting the examination.

84 I am of the opinion irrespectively that when a polygraphist is called upon to testify at arbitration, he or she must necessarily be able to provide all manner of information to the arbitrator to be in compliance with ECTA.

CONCLUSION ON THE ADMISSIBILITY OF POLYGRAPH

07038

EVIDENCE.

85 I am therefore of the opinion that at the time when a polygraph expert witness is to be introduced at arbitration proceedings, and the polygraph witness presents himself as a trained person in the field of polygraphy and the representative of the party seeking to introduce such an expert is able to provide:

85.1 Proof of the qualifications of the expert witness;

85.2 Membership of a professional body;

85.3 Is able to lead evidence as to the competency of the polygraph expert;

85.4 Is able to introduce a polygraph examination result probably in typed form and the printed polyscore together with the relevant computerised system (and is faced with a commissioner who outright refuses to admit such a person to testify in the proceedings would have grounds

07038

for review).

86 I have also been asked, as part of this opinion to suggest some form of guideline which clients of my consultant may make use of when a client identifies the need to have employees make themselves subject to a polygraph examination.

87 In this respect I will only make my views known on how, from a practical point of view, an employer should proceed in this respect and eventually conclude with my views on the presentation of such evidence at the time of arbitration proceedings. This will follow at the conclusion hereof.

88 I now turn to the second question of the above opinion and in this instance I will also deal with legislation in the United States, the Constitution and the voluntary waiver of rights as found in the Bill of Rights, Chapter 2 of the Constitution. Ultimately the question is, can a party expect that their expert witness will be included / excluded when they arrive to argue a matter.

89 I will finally answer this crisp question at the conclusion and

07038

recommendation part of this opinion.

EMPLOYEE POLYGRAPH PROTECTION ACT OF 1988.

90 There is currently no act or any other form of regulation that applies to the polygraph or otherwise regulates the use of the polygraph or any matter associated thereto.

91 What however has taken place is that many writers have often referred to the above legislation. The Employee Polygraph Protection Act to which I refer to as "*EPPA*" is an Act that was assented to on 27 June 1988 in the United States of America.

92 The purpose of the Act is to prevent the denial of employment opportunities by prohibiting the use of lie detectors by employers involved in or affecting interstate commerce. This is a peculiar Act and has been designed for a particular purpose rather than for a broad purpose in the United States.

93 This Act may then also be used as a guideline at the time when

07038

employers in the USA desire or consider to impose polygraph testing on particularly prospective employees.

94 Section 7(d) of the EPPA provides "*limited exemption for ongoing investigations"* and essentially provides that subject to certain prohibitions in the EPPA this Act shall not prohibit an employer from requesting an employee to submit to a polygraph test if:

94.1 The test is administered in connection with an ongoing investigation involving economic loss or injury to the employer's business such as theft, embezzlement, misappropriation or an act of unlawful industrial espionage or sabotage.

94.2 The employee had access to the property that is the subject of investigation.

94.3 The employer has a reasonable suspicion that the employee was involved in the incident or activity under investigation.

07038

94.4 The employer executes a statement provided to the examinee before the test that:

(i) set forth with particularity the specific incident or activity being investigated and the basis for testing particular employees;

(ii) is signed by a person other than the polygraph examiner authorised to legally bind the employer;

(iii) is retained by the employer for at least three years;

(iv) contains at a minimum an identification of the specific economic loss or injury to the business of the employer;

(v) a statement indicating that the employee had

07038

access to the property that is the subject of the investigation; and

(vi) a statement describing the basis of the employer's reasonable suspicion that the employee was involved in the incident or activity under investigation.

95 The EPPA also provides for certain rights of the person who is being made subject to a polygraph examination and provides amongst others that the examinee shall be permitted to terminate the test at any time.

96 The rights of the examinee are protected and provides for certain regulatory requirements that the polygraph examiner needs to adhere to in order to give credence to the examination.

97 It is common cause that in South Africa no such regulation exists.

98 It is therefore quite clear that there is no absolute ban on the use of

07038

polygraphs in the United States of America and many other countries for that matter.

99 In terms of the EPPA an employer may only consider taking disciplinary action including dismissal against an employee who has failed an examination if there is supporting evidence in respect of the test results. South African courts have in a number of cases dealt with the same principle. One can but only read a variety of arbitration awards on the CCMA to realise that many commissioners indeed without being prompted to, have applied the regulations in such a manner as is envisaged by the EPPA.

100 There can be no doubt that indeed this legislation provides a very good background regulatory authority for the use of polygraph examinations in the United States and what flows from this is that many of the learned authors in South Africa as well as arbitrators have with authority referred to the provisions of the EPPA to try and make some sense of the lack of regulatory authority in South Africa concerning the polygraphs. This opinion will not delve much into the EPPA save that it is indeed a guideline which should be used at

this stage in the absence of a proper legislative instrument in the country.

THE CONSTITUTION ACT 108 OF 1996.

101 The opinion will focus on only a number of rights as contained in Chapter 2 of the Bill of Rights. Of importance are the following rights which are the limitations clause found at Section 36, the interpretation clause found at Section 39, Section 9 which is the equality clause and Section 12 which is the freedom and security of a person.

LIMITATION OF RIGHTS, SECTION 36(1).

102 This right reads as follows:

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,

07038

including :

"*1(a) the nature of the right,*

(b) the importance of the purpose of the limitation;

(c) the nature and extent of the limitation;

(d) the relation between the limitation and its purpose, and

(e) less restrictive means to achieve the purpose.

2 Except as provided in sub-section (1) or in any other provision of the Constitution no law may limit the right entrenched in the Bill of Rights."

103 The question is thus – may an examinee voluntarily limit his rights and make himself subject to a polygraph examination, alternatively by virtue of the fact that an examinee irrespectively undergoes an examination, does the limitation clause apply?

104 The significance of this provision is that where there is reliance often in arbitration awards on the EPPA and very little, if any, mention of the limitations clause the United States' Constitution does not contain a limitation clause at all.

105 A limitation must be authorised by law and the law must be of a general application. From this flows the question whether or not an examinee may out of his own accord after having been properly notified of the manner and possible consequences of a polygraph examination, waive his rights as previously mentioned herein and make himself subject to a polygraph examination.

106 An interesting phenomena arises from this limitation and one merely has to look at Section 22 of the Constitution which deals with freedom of trade, occupation and profession. This particular right reads that every citizen has a right to choose their trade occupation or profession freely the practice of a trade, occupation or profession may be regulated by law.

107 The question of the imposition or otherwise validity of a restraint of

trade is a prime example of this limitation. A restraint of trade commonly applies where a person waives a right in one or the manner usually to do some form of similar trading as where he is currently employed in respect of possibly competing with his employer.

108 I do not intend to expand on the rich history of application of the restraint of trade in South Africa, but on a daily basis in the High Courts restraint of trades are successfully imposed by way of interdict proceedings and in general the courts recognised that particularly employees falling within this bracket or category may choose to waive certain rights and impose upon themselves a limitation contractually codified in respect of their trade or profession.

109 A simple reason then follows that two forms of the application of the limitations clause may apply;

109.1 The first is where an employee indeed may at the time of commencing employment limit his rights voluntarily and consensually by agreeing at the time and signing the contract of employment that he or she, when called upon

by the employer, would make him / herself subject to a voluntary polygraph examination.

109.2 When such an employee is then called upon to undergo such an examination and he or she refuses, the employer may terminate the contract of employment by virtue of a material breach.

109.3 Alternatively an employee who is invited to undergo a polygraph examination and even where in broad terms such an invitation complies with the provisions of EPPA and an employee voluntarily agrees to make himself subject to such an examination, there can be little doubt that this right has not been violated.

109.4 Where an employer under usual circumstances and flow of a polygraph examination invites an employee to undergo an examination even where such an employee does not have a contractual provision I am of the opinion that an employer does not infringe any right particularly

07038

that found in the Constitution if he requests an employee to undergo an examination and the employee indeed voluntarily agrees at the time the invitation to undergo an examination and if properly provided for by the trained polygraphist also confirms that waiver of his right and then allows himself to be made subject to an examination and in particular:

(a) allows any form of invasive questioning or probing;

(b) allows the application of certain equipment to be attached on his or her body.

110 I am of the opinion that the law of general application does not infringe the right protected by the Bill of Rights and if a trained polygraphist indeed has explained thoroughly and in detail what the examination encompasses from both a physical and emotional point of view and such examinee consents voluntarily, this right has not been infringed.

07038

INTERPRETATION OF THE BILL OF RIGHTS.

111 This right reads as follows:

"*39(1) When interpreting the Bill of Rights, a court, tribunal or forum –*

(a) must promote the values that underlie an open and democratic society based on human dignity, equality and freedom;

(b) must consider international law, and

(c) may consider foreign law. Own emphasis.

(2) Where interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, rapport and objects of the Bill of Rights.

(3) The Bill of Rights does not deny the existence of any other rights or freedoms that are recognised or conferred by common law, customary law or legislation, to the extent that they are consistent with the Bill."

112 In the absence of pertinent case law that has dealt crisply with the issue of the polygraph such as **Shinga** and **Truworths** *supra* the commissioners at the CCMA have on occasion turned to international jurisprudence insofar as considering how a particular matter should be decided.

113 In this instance the Constitution allows - as indicated - that a forum of which the CCMA in particular and certainly the Labour Appeal Court when deciding a matter involving a polygraph may consider foreign law. This discretion is ultimately conferred upon the decider or trier of facts of which the Constitution then aptly bestows such discretion.

114 There can therefore be little doubt that in particular as earlier referred

07038

to that all learned authors, writers, jurists and the triers of fact in tribunals or courts have then on occasion considered as a guideline the EPPA and certain foreign jurisprudence. The conclusion on this issue is crisp namely that there is a discretion that is and may be exercised at the time when a particular set of facts presents a unique description and determination of those facts and the trier of those facts is not armed with crisp to the point jurisprudence.

115 On that basis then certainly international cases and foreign jurisprudence may be considered.

HUMAN DIGNITY.

116 This right reads as follows:

Everyone has inherent dignity and the right to have their dignity respected and protected.

116.1 This right requires no elaboration save that at the time when an examinee is exposed to a polygraph examination this right

07038

needs to be protected at all costs. This right is therefore then protected at the time when a polygraph examination is done and the manner by which the polygraphist attends to the physical attachment of the measuring equipment when the examination is conducted as well as the actual conducting of the examination, collecting of charts and at the time of the pre-test interview. This right is of significance when read with the right which will be discussed hereunder.

PRIVACY.

117 This right reads as follows:

"*(14) Everyone has the right to privacy, which shall include the right not to have –*

(a) a person or home search;

(b) a property search;

(c) their possessions searched; or

(d) the privacy of their communications infringed."

118 I am of the opinion that at the time when the polygraph examination is conducted, the rights found in (a), (b) and (c) are not effected. The communications and the infringement thereof do not take place as envisaged in respect of polygraph examinations, namely that communications in this respect refer to the interception of communication by way of electronic, commerce, telephone, interceptions and the like.

119 Although the user forum at the CCMA refer to this right there can be little doubt that the right to privacy is not affected if a person volunteers to give up certain information and certainly in that stage I am of the opinion that the right to privacy is not infringed by a virtue of a polygraph examination being conducted.

FREEDOM AND SECURITY OF PERSON.

120 This right reads as follows:

"12(1) Everyone has the right to freedom and security of the person, which includes the right –

(a) not to be deprived of freedom arbitrarily or without just cause;

(b) not to be detained without trial;

(c) to be free from all forms of violence from either public or private sources;

(d) not to be tortured in any way; and

(e) not to be treated or punished in a cruel, inhumane and degrading way.

(2) Everyone has the right to bodily and physical

07038

integrity, which includes the right –

(a) to make decisions concerning re production;

(b) to security in and control of their body; and

(c) not to be subjected to medical or scientific experiments without their informed consent."

121 The only right that might come into play at the time when a polygraph examination takes place is Section 12(2)(c) which consists of the right not to be subjected to medical or scientific experiments without their informed consent.

122 I will dispose of this particular possible violation as follows, namely the words "*informed consent*" denotes that a person has been properly made aware of what is about to take place and in this case a

polygraph examination and therefore I am of the view that if a person, the examinee voluntarily consents to:

(a) the attachment of certain instruments to his body;

(b) volunteers to give up information; and

(c) is prepared to answer questions that may incriminate him or her.

then his right is also not infringed.

EQUALITY.

123 This right reads as follows:

"*9(1) Everyone is equal before the law and has the right to equal protection and benefit of the law.*

(2) Equality includes the full and equal enjoyment of all

07038

rights and freedoms."

124 To promote the achievement of equality, legislative and other measures designed to protect or advance persons or categories of persons, disadvantaged by unfair discrimination may be taken.

> "*(3) The State may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.*
>
> *(4) No person may unfairly discriminate directly or indirectly against anyone on one or more grounds in terms of sub-section (3), national registration must be enacted to protect or prohibit unfair discrimination."*

125 The question is how would the polygraph or alternatively a polygraph

07038

examination breach the right of equality?

126 I am of the view that if ten employees are offered a polygraph and eight consent to the polygraph and two do not consent to the polygraph, this can hardly constitute discrimination. Discrimination would find itself on the basis that the employer properly evaluate or consider the investigation or facts emanating from an investigation and haphazardly imposes polygraph examination to kerb or limit the potential suspects in a matter.

127 On this basis this right would only be infringed if an employer does not properly apply its mind in terms of allocating employees to undergo an examination.

128 I will not labour the point where an employee who refused to undergo a polygraph examination is then made subject to a disciplinary hearing for refusal to undergo such an examination. The law is clear and trite and properly decided that such refusal cannot constitute a disciplinary offence. The proper context of such a refusal must be understood.

07038

129 I again return to the example of the ten employees that may have been employed as an analogy at a department where a particular item may have been misappropriated, alternatively stolen. If all ten employees had access to or handled the particular item, they would for obvious reason be suspects and if an employer in that case requests all employees to undergo an examination and the eight of the ten undergo an examination and pass the examination, the result would mean that a suspicion could be cast on the remaining two employees.

130 It is now for the employer to establish its case on perhaps circumstantial evidence to try and prove that the two employees indeed were involved in the allegation of theft, but for the reason that they refused to undergo the test it is trite that it would not be sound to make the employees subject to any disciplinary process.

131 There can be hardly any question that there was an infringement of the right to equality on that basis.

THE POLYGRAPH AND THE ILO (INTERNATIONAL LABOUR

07038

ORGANISATION).

132 It is not the aim of this opinion to discuss in detail the relevant conventions that may or may not apply to the polygraph. However, it is necessary to consider in the context of my instructions and for the practical purpose of this opinion the views of the CCMA and in particular Commissioner Lucky Moloi when presenting the use of the CCMA or alternatively his own personal views insofar as the use of the polygraph the employment context as well as the introduction of polygraph evidence at the CCMA.

133 The ILO does not impose an absolute ban or even a prohibition on the use of polygraph examinations. This is to be understood in the clearest of language when read against the backdrop of two comments made in the user forum meeting.

134 As indicated by Commissioner Lucky Moloi at p 7, paragraph 2:

> "*As indicated earlier, this paper is not aimed at a dwelling on an entire debate about the validity and reliability of polygraph*

07038

tests as these tests have been proved to be unreliable and inconclusive."

135 I am at odds with the views of the commissioner for the very reasons that I have submitted above. These reasons are crisply that the Labour Court has found in comparing and considering the question of the polygraph, in particular **Truworths** and **Shinga** that indeed under certain circumstances the polygraph examination results are not only admissible but can be used to corroborate and substantiate especially circumstantial evidence.

136 I will however concede that in the absence of a proper test case dealing specifically and precisely with the question of whether or not the polygraph examination as a forensic tool, alternatively an acceptable tool assisting the introduction of certain evidence may be used or not, alternatively may be regarded as not being valid or reliable the whole issue becomes debatable.

137 I am of the opinion that there is insufficient evidence, alternatively

case law that will prove that polygraph results are unreliable and inconclusive period. I am also of the view that the statement that was issued quite some time ago by the Health Professional Council of South Africa, Professional Board of Psychology to the effect that polygraph examinations are not accepted by this Board and are deemed to be unreliable, is nothing more than an opinion of that Board.

138 What will govern a CCMA commissioner is jurisprudence from the Labour / Labour Appeal Court. Where such jurisprudence is lacking, as I indicated earlier, **Sidumo** requires a commissioner to consider all the facts and therefore make a proper finding – this may include foreign law / jurisprudence. It is therefore the duty of the commissioner to consider these facts and hear the facts presented before and in the absence of being able to make a proper ruling, discover and investigate research and study case law or foreign jurisprudence that will assist him or her to reach a proper conclusion and therefore so give effect to the constitutional values enshrined in the LRA.

APPLICATION & RECOMMENDATION:

07038

139 As indicated in this opinion, my instructions are that besides giving a brief opinion on the issue and my view on the polygraph and the admissibility thereof, this document also needs to comply with the requirements of my consultant insofar as being able to be used as a practical guideline when clients and designated members are confronted with the questions posed herein.

140 In terms of the above, I will firstly deal with the overall question of admissibility. I have dealt with the question of an expert witness and that which is associated with an expert witness and how it would apply in the admissibility of a polygraph examination at a labour forum. I have essentially expressed my view that the polygraph is admissible at the time of arbitration proceedings.

141 I am of the view that certain issues cannot be decided without the introduction of an expert, alternatively without the assistance or expert guidance before a tribunal. On this basis I am of the view that a commissioner commits a gross irregularity by not allowing an opinion by a person such as a polygraphist to assist him or her in

07038

deciding the matter properly. However, the sentiments as held by our courts that such assistance by an expert is deemed appreciable assistance or help by the witness on the issue.

142 It therefore can hardly be argued that the opinion of an expert should be received because that person's opinion and expertise is greater than that of the presiding officer in a court or forum and the relevant science and skill can only be testified to by such an expert witness. Thus, what to do when the representative of an employer arrives at a CCMA arbitration and the commissioner flatly refuses to allow this witness to present his or her evidence. I am of the opinion that a number of things can take place.

142.1 Firstly, at the conclusion of the arbitration proceedings in line with the **Truworths** judgment by Basson J, there is no doubt that the commission whoever he or she may be would have committed an irregularity envisaged by the Act at Section 145.

142.2 A request may be made by the representative at the time

07038

> that the matter may stand down, alternatively be postponed so that proceedings may be launched on an urgent basis at the Labour Court, requesting the court to order the admission of the evidence on that basis. There can be no question that the consideration of the evidence and the determination of its reliability or otherwise would then be in the hands of the commissioner.

143 A commissioner can only make a proper determination of the facts on the basis that expert witnesses are in principle required to support the opinions with valid reasons. What better way than for an expert being a polygraphist to come and support his findings by virtue of testifying to the equipment that he used, the training he or she acquired and the relevant factors associated therewith.

144 It is therefore trite that if proper reasons are advanced in support of the opinion of a polygraph expert, the probative value of such an opinion would of necessity be strengthened and lend credence to the consideration of such evidence.

145 In the above respect, it has been held as follows:

07038

"*An expert's opinion represents his reasoned conclusion based on certain facts or data, which are either common cause, or established by his own evidence or that of some other competent witness, except possibly where it is not controverted, an expert's bold statement of his opinion is not of any real assistance. Proper evaluation of the opinion can only be undertaken if the process of reasoning which led to the conclusion, including the premises from which the reason proceeds, are disclosed by the expert."*

Coopers (South Africa) (Pty) Ltd v Deutsche Gesellschaff Für Schäblingsbekämpfung Mbh 1976 (3) SA 352 (A) 371 F – H;

S v Mokgiba 1999 (1) SACR 534 (O)

146 It has further been held that:

"*A court should not blindly accept an act upon which the evidence of an expert witness even of a fingerprint expert but*

07038

must decide for itself whether it can safely accept the expert's opinion but once it is satisfied that it can so accept that the court gives effect to that conclusion even if its own observation does not positively confirm it."

R v Nksatlala 1960 (3) SA 543 (A) at 546 D

147 I will conclude with that submitted above being that I am of the opinion that a polygraph expert who has conducted an examination on an individual may testify at CCMA proceedings and certainly should testify at disciplinary hearings. I am of the opinion that a commissioner at the CCMA has absolutely no discretion to refuse a witness who deems himself an expert witness, being a polygraphist and who is invited by whichever party is arguing the matter to come and act as an expert and testify to a particular result in the circumstances.

148 This leads me then to my final but respectful conclusion that it is a concern that a commissioner at the CCMA propagates a view out of hand that no witness will be allowed to testify and that the CCMA

07038

should guard against the admission of any such witness. I am of the opinion that this is an unsavoury view and the right of an expert to testify should be jealously guarded.

149 In returning to the equality clause of the Constitution, one needs to be cautious as to how this equality clause would be applied when refusing to allow the evidence to be presented and I am of the opinion that argument may be made out that should a blatant refusal to consider the evidence take place, this may even constitute a right of equality violation. Insofar as that, it may be deemed that if a person is a polygraphist such a person is automatically discriminated against on the basis of his or her vocation which clearly is unconstitutional and if presented at the CCMA as argument may constitute a reviewable irregularity.

150 I now turn to consider the brief question of reliability of the polygraph test results. Differently put, when the polygraphist eventually testifies, what reliance may be placed on his version.

151 There are a variety of factors which should be considered in this

07038

respect and I consider the assumption that a polygraphist has been duly sworn in and has testified to the following:

151.1 his qualifications;

151.2 the proper operative functioning and calibration of the equipment that he uses;

151.3 *In this respect* I am in agreement with the view expressed by Marylyn Christianson in the Contemporary Labour Law, Vol 8, No 1 August 1998, titled Truth, Lies and Polygraphs : Detecting Dishonesty in the Workplace at p 10 where she states:

"*The employee may have grounds to challenge the admissibility of the polygraph test if for example the test was not scientifically and internationally verified and accepted. Equally a careful choice of polygraph examiner who go a long way towards ensuring that the procedural requirements are adhered to, and that an*

07038

employee does not feel unnecessarily threatened by issues such as voluntary consent and self-incrimination and privacy."

152 This is where the credibility issue arises. A polygraph examiner who is properly trained, has properly functioning equipment has rendered a proper result and is able to show that his result was corroborated by an independent person reaching the same conclusion will indeed go a long way in establishing the reliability of the evidence.

153 It is at this stage that I consider that contrary to the polygraph test user forum of 29 May 2009 the CCMA has on a previous occasion actually introduced guidelines for the admissibility of a polygraph examiner. In this respect various guidelines have been set out which if complied with, not only ensures the admissibility of the evidence but allows for the inference on how exactly such evidence should be determined.

154 Christianson is correct where she states in the same article:

07038

> "*An adherence to these guidelines and to our well developed rules of evidence may make it possible for an employer to use the results of a polygraph test to assist in and prove the consequent disciplinary action or dismissal. A failure to adhere, on the other hand, may result in the employee having a cause of action against the employer or even the examiner.*"

155 It is at this stage that I would attempt to proceed to offer a number of guidelines that would be handy insofar as ensuring that when a commissioner is indeed been faces with this vexed question of the admissibility of a polygraph, he or she would have an easier job if the following is complied with.

155.1 The polygraphist must have received training from a recognised institution where the training program was presented is at least credited by some international body.

155.2 A polygraph examiner needs to ensure that the equipment that he uses is at least up to date, consists of the latest technology and has some form of calibration assurance

07038

built into it.

155.3 The results of the polygraph are comprehensive and if called upon the polygraph examiner can provide the following:

155.3.1 the availability for inspection of his equipment which would be most probably a laptop; the relevant technology; the blood pressure cuff; skin indicator; and the relevant pneumo tubes;

155.3.2 the examiner must be able to provide the documentary proof which I referred to under the ECTA heading being the report which is ultimately provided to the employer or the client of the polygraphist, alternatively an employee or individual;

155.3.3 the polygraph examiner must be able to provide

07038

the relevant documentary evidence in the form of the poly chart;

155.3.4 the issue of qualifications is further edified when at the time of evidence being led the polygraph examiner can actually provide documentary proof in the form of copies of his qualifications;

155.3.5 the polygraph examiner is a member in good standing with the bodies which govern polygraphs;

155.3.6 the polygraph examiner is even able to provide an affidavit setting forth certain facts as previously required in the Computer Evidence Act.

156 I have expressed myself in terms of the fact that the Computer

07038

Evidence Act is no longer in existence but certain guidelines, particularly insofar as the admission of certain facts by way of affidavit still remains a crucial issue.

157 It is appropriate to at this stage consider an important case in the form of a new Mexico Supreme Court opinion which is cited as follows:

Kevin Lee et al (Petitioners) v Hon. Lourdes Martinez (Respondents) case number CS 2003-00026 (Supreme Court NO. 27,915)

158 This was a matter that was decided in 2005 by Her Honourable Justice Pamela B Mitzner & other members. I considered this case insofar as what was previously indicated at Section 39 of the Constitution in relation to foreign law:

158.1 In this matter the court had taken upon itself to provide an introductory section that includes an overview of the status of the law on polygraph examinations nationwide

07038

in both state and federal courts and the description of the polygraph examination process and in the court's own views (with the hope that it will assist the review in court).

158.2 The opinion provided by the court is significant insofar as the following:

158.2.1 In this matter the petitioners, being Kevin Lee, William Vance Langley, Terry Bogey, Theodoro Jose Galligos and one Erlinda Saiz were defendants in several pending criminal matters. These defendants then sought to have their polygraph examination results admitted into evidence by virtue of a rule in law.

158.2.2 This rule stated as follows:

"*The opinion of a polygraph examination may in the discretion of the trial judge be admitted as*

07038

evidence as to the truthfulness of any person called as a witness." - provided certain conditions are met.

158.2.3 It is interesting that in these instances the state opposed the admission of the polygraph evidence on the ground that it fail to satisfy the standard for the admissibility of expert testimony set forth in the rule.

158.3 The court submitted that it had to consider whether or not to repeal the rule and hold that polygraph results should *per se* be excluded. The court ultimately decided not to repeal the rule excluding polygraph results in the instance. What the court did find is that polygraph examination results are sufficiently reliable to be admitted in terms of the rule, provided the expert:

158.3.1 is qualified; and

158.3.2 the examination was conducted in accordance

07038

with the rule.

158.4 The Supreme Court essentially ordered a lesser court to comply with the rule and allow the admissibility of polygraph results on that basis.

159 What is significant in the above matter is that the court resorted to the old rule that each case should be decided on its own merits.

160 This case also confirmed the fact that a trial judge or alternatively commissioner has a discretion and this discretion needs to be exercised judicially.

161 Insofar as admissibility of the Martinez opinion sheds some light as to how in this case a commissioner should proceed to interpret the Constitution and the Bill of Rights. Firstly, a commissioner should give effect to the values of the Labour Relations Act and so give effect to the underlying principles of the Constitution in order to interpret the Act and accordingly determine cases before him or her in a manner which gives effect to the Constitution.

162 What is imperative is that I am of the view that the Constitution advocates a purposive interpretation.

163 In realigning this opinion with the two questions of admissibility and reliability the Martinez opinion deals with what has become known in the United States of America as the Daubert; Alberico analysis and in the opinion and excerpt from this test or analysis is placed for consideration before the court. It reads:

> "*Since a polygraph examiner renders an opinion about a subject that involves a scientific device that is purported to measure and record a number of involuntary body responses to stress produced by knowing deception.*"

164 Rule 11-702 clearly has some bearing on the admissibility of polygraph evidence. I am of the opinion that by the mere fact that **Truworths** and **Shinga** confirm the test for admissibility it certainly appears that there is a measure of reliability that automatically attaches itself thereto.

165 Differently put, if the polygraph was then so absurd, bizarre and ultimately incompatible with the provisions of the Constitution and did not fall within the parameters of a science, why even allow the entire profession in the country?

166 The Martinez opinion goes on to quote the rules which the court considered itself bound to and how it should interpret those rules. It refers amongst others to a Rule 11-702 which governs the admissibility of scientific evidence which read as follows:

> "*If scientific, technical or other specialised knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training or education may testify thereto in the form of an opinion or otherwise."*

167 From the above definition three particular prerequisites are found. They are:

07038

167.1 That the expert must be qualified.

167.2 That the testimony must assist the trier of fact.

167.3 That the expert may only testify as to the scientific technical or other specialised knowledge.

168 Clearly a polygraph examiner falls within the ambit of this interpretation and in so far as applicable to South African jurisprudence, these requisites are merely echoed in the rich case law already referred to herein.

169 The court then refers to the hypothesis that is generated on the basis of the science of a polygraph. It stated with reference to the authorative NAS report as follows:

169.1 The hypothesis of the polygraph examination was thoroughly discussed in the NAS report which notes that a well supported theory can provide confidence. The polygraph can be accurate when used in novel situations

07038

and with different examinees.

169.2 What is most impressive in the Martinez opinion is the court's consideration of maintenance of standards controlling the technique. The court referred to legislation namely the Private Investigators and Polygraphists Act, NMSA 1978 61-27A-3(E) (1993) where qualifications to practice polygraphy is stipulated as well as the prerequisite to the admission of polygraph results.

170 For obvious reasons the regulation aspect comes into play, but until such time as polygraph practitioners are regulated by statute in South Africa, this case can be nothing more than a guideline as to how the field of polygraphy should develop in South Africa.

171 Finally, the court concluded that in the field of polygraphy the control question of polygraph examination is sufficiently reliable to establish the requirement of the rule applicable to that case. The court correctly, in my view, found that the remedy for the opponent of

07038

polygraph evidence is not the exclusion thereof.

172 The remedy is cross-examination, presentation of rebuttal evidence and argument on that issue. I am of the opinion that this view taken by the court should echo precisely the process that is to be followed by a commission in particular hearing a matter at the CCMA and for that reason the representative should be vigilant to guard against the absolute exclusion.

173 It is trite in our law that where a difference of opinion arises alternatively a dispute of fact, such dispute of fact is resolved not by way of papers but by way of hearing oral evidence and therefore in terms of the *audi alterem partem* rule a party therefore in my view has a right to introduce such an expert witness and thereafter argue the reliability of the result.

174 In returning to the test in **Sidumo** and particularly paragraph 78 where it is required of a commissioner to consider all the facts. It has recently been decided in the matter of **Komape v Spoornet (Pty) Ltd and Others (2008) 29 ILJ 2967 (LC)** that where the arbitrator had

07038

determined the matter on the basis of circumstantial evidence the question for determination on review was not whether the decision of the arbitrator was correct, but rather whether the inference drawn from the facts before the arbitrator was the one which a reasonable decision-maker could not have drawn.

175 Particularly in the field of polygraphy, circumstantial evidence plays an important role and one merely needs to read through a number of cases that have been decided by the CCMA to realise that circumstantial evidence ultimately confirmed by way of the suspicion of misconduct and affirmed by the polygraph results if it is shown to be deceptive indicated has been generally accepted by arbitrators.

176 The **Komape** judgment further confirms that as early held by the Labour Court, when one is faced with having to evaluate circumstantial evidence and in particular a commissioner that decider or trier of facts should always consider the accumulative effect of all the items placed before him or her. These sentiments were echoed in the matter of **Aluminium v Metal Engineering Industries Bargaining Council and Others** (unreported JR1877/04).

07038

177 This then further gives credence to the requirement of paragraph 78 of the **Sidumo** judgment.

178 I have expounded on the additional issues that may arise and when confronted may rather cause a Commissioner to dismiss a polygraph expert rather than allow this expert witness to testify.

179 **Martinez** in that sense gives a very good guideline on how the Commissioner may need to expound the law and give effect to Section 39 of the Constitution.

180 I pause also to remark that Human Resources employees should ensure that polygraph experts are allowed to testify at disciplinary hearings as eventually the entire record of the hearing will be placed before a Commissioner.

181 I also recommend that at the time when the charge sheet is issued to an employee that the notice contain reference to the polygraphist and relevant evidence that will be introduced at the hearing and that the

07038

employee be warned to prepare accordingly.

182 I also suggest that at both the internal hearing and especially the level of arbitration that the polygraphist provides certified copies of his qualifications and proof of membership of representative bodies.

183 Where a polygraphist has the time to prepare some form of expert affidavit this would go a long way to ensure credibility.

184 Even though at arbitration this is not always possible, the representatives of the employer in particular should seek to conclude a pre-arbitration conference and attempt to agree on the status of the polygraph. This is particularly useful when the other side is legally represented.

185 In reaching a final conclusion:

185.1 I am of the opinion that any commissioner in particular who outright refuses to allow a trained polygraph expert to testify at an arbitration commits a gross irregularity.

07038

185.2 From the case law it certainly can hardly be disputed that a person who possesses a skill greater in an area than that of the presiding officer should testify.

185.3 For this reason the polygraph cannot be excluded at the time of arbitration proceedings and certainly not at internal hearings.

185.4 The Constitution allows for certain rights. The polygraph if properly administered does not infringe on those rights.

185.5 A Commissioner when faced with whether or not he / she should or should not allow the admission of a polygraph, ought to be reminded of his / her interpretation role in terms of Section 39 of the Constitution and it should be argued that certainly it seems as if in international circles, even to the point of criminal proceedings, the polygraph has been accepted to play a pivotal part in such proceedings.

07038

185.6 The latter read with the latest jurisprudence – **Truworths** & **Sidumo** – ought to leave little guesswork for a Commissioner insofar as that it is required that he / she must consider all facts and then reach a particular conclusion.

Ferdi Venter

The Chambers

Sandown, Sandton

31st July 2009