What is the status of polygraph testing at CCMA

Polygraph testing in disputes relating to employment relationships is growing in South Africa. There is *no legislation* at this point to control the use of the test nor to protect the employee's right against the abuse of the test. The main concern is that *constitutional, legal and ethical standards in the treatment of employees should be guarded, while at the same time not losing sight that employers also have the right to protect their property.*

The issue of polygraph evidence has been brought into the spotlight in a number of cases at the CCMA, and the following few are only mentioned to clarify its status: -

The case of **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.*

While polygraph test was totally rejected by the Industrial in Mahlangu v Cim Deltak (1986) 7 ILJ346, it was accepted that the relevance of the case may have diminished.

In **Mbele & Payment Services (Pty) Ltd KN4084**, the *evidence of the polygraphist was dismissed as it was found that he had intimidated the employee during the pre-test interview.*

In **Zoned & one other & Floccotan (Pty) Ltd KN2845** it was stated that the court went too far when rejecting the lie detector evidence in the case of Mahlangu v Clim Deltak and further stated that *the duty of the Commissioner was to determine the admissibility and reliability of the evidence.* A similar finding was made in the instance of SACCAWU & Sterns Jewellery NP144.

In **De Bruin & Abrahams & Green Cross Manufacturers (Pty) Ltd WE2982** it was found that the *Commissioner was impressed by the evidence of the polygraphist but the questions posed to the examinees were not sufficiently clear to establish guilt in the specific misconduct that was under investigation.*

The Commissioner accepted that the Mahlangu case is at least different from the present one in that *what was used was* ***voice stress analysis*** *and* ***not a polygraph****.*

In **SAACCAWU and Sterns Jewellery NP144** the Commissioner *attached no weight whatsoever to the polygraph report drawn up by a polygraphist whose qualifications were unknown to the Commissioner and who was not called to give evidence*.

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 **Chauke and Jacobs and Gray Security GA23984** the Commissioner found that it was not procedurally unfair for the chairperson of the initial disciplinary hearing to call for polygraph tests to be undertaken on both applicants and the complainant prior to his giving a finding as to the merits of the case, but went further to say that ***the results of polygraph tests are generally accepted to be inadmissible under South African law.***

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.*

COMMENTS ON THE CCMA FINDING IN THE CASE OF HARMSE AND RAINBOW FARMS (PTY) LTD: Wouter Grove

Case Facts

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.

CCMA Finding

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 who 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.

Some implications of this CCMA finding for the implementation of the polygraph employers;

A the polygraph result (that showed deception with regards to the answering of certain specific questions by the employee) as well as the employee's behavior before, during and after the polygraph examination can be an influencing factor in breaking down of the trust relationship between the employer and employee.

B the employee's experience of the procedures implemented by the employer to investigate the particular case, as well as of the disciplinary actions that followed from the investigation, was as such that the employee never brought the integrity of the process into dispute.

C the polygraph examinations were a crucial part of this investigative process. It is important to note that the integrity of the polygraph examiner, the results of the examination or accuracy of the reports of the examination were never doubted by any of the parties. The dispute of the employee was about whether the employer had sufficient grounds for dismissal.

D it can be deducted from the case that the notice period of 48 hours before the conducting of an examination was not unfair.

E the procedure to inform an employee of the employers intent to conduct polygraph examinations in writing could also be seen as fair. It is important that the fact be mentioned during these communications that the polygraph examination is a voluntary procedure.

F it is also implied by the case finding that a polygraph examination, conducted according to the same principles and procedures used during the examination of Mr. Harmse are not an infringement of the Fundamental Rights of the employee, nor is it unfair labour practice.

G the finding also indicated that the granting of the option of a re-examination by the employer could be seen as proving the good intent of the employer in solving the matter in a fair manner.

H if a person signed a statement before a polygraph examination and a statement of release after a polygraph examination it could be considered that the employee voluntarily agreed to the taking of the examination.

The following is the interpretation of this Arbitration Award by Michael Baghraim, a Cape Town-based Labour Lawyer and Management Specialist:

“It is quite clear that en employer is entitled to dismiss an employee who it can no longer trust, provided that the employer has reasonable ground (on an objective basis) for losing that trust. It is quite obvious that an employer can not use some subjective reason to legitimize the dismissal. If however the employer has a reasonable suspicion as to the culpability of that employee and that reasonable suspicion can be tested, then the arbitrator would side with the employer.

In the instance at the referred to Arbitration, the company had a theft and all fifteen key holders were requested to take a polygraph test. Initially the applicant in that case refused to take the test, but when he eventually did consent, he was the only one to fail the test. The Arbitrator said that these were circumstances taken together could reasonably arouse a suspicion of culpability. When the employee refused to take a second test, this suspicion was aroused even further. On the strength of these three factors Commissioner Wilson, quite rightly in our opinion, decided that there was a breakdown of the trust relationship and the dismissal was fair with one month's notice.”

The following aspects can be deduced from the opinion of Mr. Bahraim:

1. The importance of the fact that all persons who had reasonable opportunity had access must be asked to submit to polygraph examination, are clear.

2. Failure of a polygraph examination, administered by a professional examiner could arouse a suspicion of culpability.

3. **Failure to submit to a re-examination could also be construed as a contributing factor in the strengthening of a suspicion.**

4. The usage of internationally trained and accredited polygraph examiners employing scientifically validated techniques can lead to an accurate finding with regards to a person's truthfulness. It is important however, that these decisions must be taken in an objective manner and that the polygraph findings must always be utilized as a basis for decision making within the context and specific dynamics of a specific case.

5. If the polygraph is not employed in a correct manner within an organization and if the results are not utilized in a responsible manner by management, there is enormous scope for the misusing of the polygraph. The wrongful application of polygraph technology can have devastating effects on the lives of the persons involved.

6. It is therefore of utmost importance that management must not develop “polygraph myopia.”

7. In order for the polygraph to be applied in a sensible and ethical manner, it must always be bear in mind that the polygraph is only a means to an end and not an end in itself. It is an investigative tool that is best utilized as part of a broader investigative process.

8. It must be emphasized that the polygraph does not always reveal the whole truth, as it sometimes only deals with a small dispute point in a broader issue. Proper investigations combined with the polygraph still remains the only way of obtaining the complete truth in most investigations.

If a company considers the introducing of polygraph findings as evidence in disciplinary proceedings there are certain very important prerequisites:

a. The polygraph examiner utilized must be a person that received international training and the examiner must be a member of the American Polygraph Association.

b. Every employee who had reasonable access and opportunity to commit the offence under investigation must have been offered the opportunity of a polygraph examination.

c. It must have been proven that there was at least some inside involvement in the incident under investigation.

d. It is important that the process with regards to the implementation of the polygraph must be seen as fair, reasonable and without any discrimination or bias.

e. An impartial and independent polygraph examiner must be utilized.

f. Scientifically validated techniques must be utilized on a distraction free environment.

g. The examiner must have acted within the constraints of the American Polygraph Association's Code of Ethics and Standards and Principles of Practice.

Conclusion

The case of 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. Unfortunately, like with all good decisions it may also have certain negative consequences. The door has been opened a little bit wider for untrained and unaccredited persons to conduct business into using their results as the basis of decision making. This may result in serious violations of the fundamental rights of employees and it may also put organizations at a definite risk of litigation. We, however must not be discouraged by the negative and we must rather focus on the positive impact the polygraph can bring in your organization.

ARBITRATION AWARD

Commissioner	:	Mr. Wilson
Case No	:	WE1728
Date of award	:	9 July 1997

IN THE ARBITRATION BETWEEN :

Union/Employee Party

and

Employer Party

Employee's representative : Mr. J White (Chennels Albertyn)
P O Box 1022
Stellenbosch
7599

Telephone : (021) 883 3189 Fax : (021) 883 8910

Employee's address : P O Box 21
Kalbaskraal
7304

Telephone : (0224) 3789

Employer's representative : Mr. M Msoso (Shepstone & Wylie)
P O Box 205
Durban
4000

Telephone : (031) 302 0111 fax : (031) 302 3289

Employer's address : Route 44
Agter Paarl Road
Klapmuts
7626

Telephone : (0224) 77551 fax : (0224) 77441

DETAILS OF HEARING AND REPRESENTATION:

The arbitration hearing was held at Stellenbosch Library on the 4th of July 1997 at 11:00. The employee was represented by Mr. J White of Chennels Albertyn, and the employer was represented by Mr. M Msoso of attorneys Shepstone & Wylie. The parties agreed that legal representation would be permitted.

ISSUE TO BE DECIDED:

The issue is one of the alleged unfair dismissal of Mr. Harmse. The employee alleged that his dismissal was substantively unfair.

BACKGROUND TO THE ISSUE:

Mr. White presented a summary of the facts leading up to the dismissal, which was common cause between the parties. Early in December 1996 there had been a break-in to the office of the company, and computer equipment to the value of some R200 000-00 had been stolen. The police investigation revealed that there had been some inside involvement, since there were no signs of forcible entry, and the alarm had not gone of. It was therefore apparent that an employee who had a front door key and knew the alarm code had been involved.

The company sent a memorandum to all staff members who were in possession of keys and knew the alarm code, asking them to take a polygraph test. Mr. Harmse initially refused to take the test, but subsequently agreed. He then failed the test.

Of the 15 key holders, Mr. Harmse was the only one to refuse to take the test initially. He was also the only one who failed the test.

The company held a disciplinary hearing at which the employee was charged with “conduct which has caused the employment relationship to become intolerable.” During the disciplinary hearing this was clarified as “behavior which resulted in the working relationship and trust between employer and employee being broken.” The employee was found guilty and dismissed. The employee does not question the fairness of the procedures followed by the company, but disputes that the company had any substantive grounds on which to dismiss him.

Mr. White handed in a bundle of documents with page references from 1 to 23. Subsequent references to page numbers refer to this bundle. The contents of the documents are not in dispute.

SURVEY OF EVIDENCE AND ARGUMENT:

Mr. Harmse testified that he was employed as a buyer in the Stores Department. He had worked for the company for some four years in this position. At the time of his dismissal he was earning R2 500-00 per month.

After the break-in, employees were told that the company intended conducting lie detector tests. They were not certain who would be asked to take the tests. He had taken legal advice on the issue. He and others at work had decided they would not take the test. He had then received a letter from the company dated 17 December (page 1) advising him that his appointment to take the test was in two days time. the same day he had written a letter to the company (page 2) advising them that he would not take the test. This was because the company had advised employees that the test was voluntary. His decision was based on his Christian values and on principles of human rights.

In response the company sent him a letter pressuring him to take the test (page 3). He had 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.

Mr. Harmse stated that he believed his dismissal was the result of a conspiracy to get rid of him. He had problems with Mr. Beerpark (who presented the company's case at the disciplinary hearing) and believe that he wanted to get rid of him.

At the hearing the whole issue was about the theft, and not about his behaviour, which is what the charge related to.

He had been questioned by the police the day after the lie detector test, but no charges were ever laid against him.

Mr. Harmse stated that he had been very happy in his job, and that he wished to be reinstated in his previous position.

Under cross-examination, Mr. Harmse agreed that the company had the right to protect its business. He agreed that he had been told that the test was voluntary, and that all the people who had keys and know the alarm code were to be tested. He agreed that he was the only one in the group who initially refused to take the test. He and a group of other employees had decided not to take the tests, but the other in that group were not requested to.

He stated that prior to writing his letter on 17 December, he had consulted with Capt. Koegelenberg of the SAPS, and with an attorney friend of his. He did not immediately advise the company of his feelings, only after he received their letter (page 1).

Mr. Harmse stated that when the test was done, Mr. van Niekerk had explained how the machine worked and discussed the questions with him beforehand. he had no problem with the questions asked. The four questions reflected on page 5 (the test results) were amongst those asked.

Mr. Harmse conceded that the company had offered him an opportunity to take a second test on the understanding that if he passed it, all charges would be dropped. He had not taken the second test, as he had not been able to attend the appointment made. He had decided rather to go ahead with the hearing. Mr. Harmse was not able to say why he had been unable to attend the second test.

Mr. Harmse accepted that there needed to be a good working relationship between an employer and employee, and that here had to be trust. He did not believe that the trust relationship had broke down, and felt that it was only Mr. Beerpark who caused all the problems. Other people at work did not have a problem with him and wanted him back.

For the company, Mr. N Beerpark testified that his relationship with Mr. Harmse was not the best, but did not cause major problems. He did not like Mr. Harmse and told him so; he had also pressurized the buyers to perform better. He had not fabricated any charges against Mr. Harmse. Mr. Harmse was not a subordinate of his. The disciplinary charges were formulated by higher management and he was merely appointed to represent the company in the hearing.

Mr. E Roberts, the chairman of the disciplinary hearing, testified that after hearing the evidence he believed that dismissal was an appropriate sanction. His understanding was that anyone in the position of a buyer, who dealt with company money had to be someone the company would trust. The polygraph tests had shown that Mr. Harmse was not a truthful person, and therefore could not be trusted. He could not give any reasonable explanation of why he had failed the test. His initial refusal to take the test was also suspicious, and indicated that he had something to hide. He did not believe that Mr. Harmse should be reinstated.

Under cross-examination, Mr. Roberts said that he did not necessarily believe that Mr. Harmse was involved in the robbery, and he had not been found guilty of this. However, the result of the polygraph test made it clear that Mr. Harmse knew something about the theft which he was not disclosing to the company, and this is what had given rise to the loss of trust. The issue was Mr. Harmse's truthfulness, and Mr. Roberts had based his decision on that.

In closing, Mr. White argued that it was important to look at who caused a relationship of trust to break down in deciding whether a dismissal for loss of trust is fair. In this case he felt the breakdown had been caused by the company rather that Mr. Harmse id not have to prove his innocence, as there was no evidence against him. The company had forced him to take the test against his will and his principles. As a result of his failing the test, the company was suspicious of him, but suspicion was not sufficient reason to terminate the contract of employment.

Mr. White asked for reinstatement with retrospective effect. He also felt a written apology from the company would go a long way towards repairing the relationship.

Mr. Msoso argued that it was common cause that the theft had been an “inside job”. Mr. Harmse had conceded that the company had the right to protect its assets. The company had acted in good faith and had employed an objective outside the company to conduct the polygraph tests. The test was voluntary, which Mr. Harmse underwent (although he felt he had been pressurized to take the test). When he was asked to take the test Mr. Harmse had responded in an aggressive and confrontational manner, which was not consistent with his evidence that had refused on religious manner, which was not consistent with his evidence that he had refused on religious and human rights grounds.

Mr. Harmse had, despite his initial resistance, undergone the test voluntarily and had signed a statement to this effect. He had stated that he had not problem with the manner in which the test was conducted.

Mr. Harmse's claim of a vendetta against him was not credible and was not backed up by any evidence.

Mr. Harmse had stated that he had no problem in returning to work, and that the relationship was still intact.

With regard to dismissals for suspicion, Mr. Msoso referred to case law which supported the view that a dismissal for suspicion was possible where a reasonable suspicion affected the trust relationship.

Mr. Msoso did not feel that reinstatement was reasonable, in view of the company's continued loss of trust in the employee. He felt that, as an alternative argument, Mr. Harmse's dismissal could be regarded as being for operational requirements, and that at most, severance pay should be awarded at one week per year of service.

Mr. White replied that the company, if it felt is had sufficient evidence, should have charged Mr. Harmse with theft. He noted that Mr. Harmse had not know that he was the only one who refused to take the test, he had expected a whole group of employees to refuse.

ANALYSIS OF EVIDENCE AND ARGUMENT:

There is little if any dispute on the facts of this matter. the whole dispute on whether an employer is entitled to dismiss an employee on the grounds that it feels that the trust relationship has broken down: and if so, whether the employer in this case was justified in finding that the trust relationship had broken down and that the employee's conduct or behavior was responsible for that breakdown.
I don't believe there is any doubt that en employer is entitled to dismiss an employee whom it can no longer trust, provided that the employer has reasonable grounds for losing trust in the employee. An employer cannot simply declare, out of the blue, that it has lost trust and in so doing, legitimize and

otherwise unfair dismissal. The actions of the employee must have been such as to have reasonably caused the employer, on a balance of probabilities, to feel that the employee is no longer trustworthy. Mr. White is correct in his argument that bare suspicion is not sufficient to justify dismissal, but so is Mr. Msoso in his argument that a reasonable suspicion leading to a justifiable loss of trust is a good cause for dismissal.

It falls then to determine whether the company was reasonable in its suspicion of Mr. Harmse, and whether this suspicion should reasonably have give rise to a loss of trust.

The circumstances on which the company relies is that, Mr. Harmse was the only one out of 15 key holders who initially refused to take the polygraph test. All the other took the test without argument, and passed it. Secondly, when Mr. Harmse did consent to take the test, he failed it, or rather he failed specifically on three questions related to the robbery. If he failed on all questions, this could perhaps have been put down to the fact that he was taking the test against his will. This was not the case however.

These two circumstances, taken together, are indeed sufficient. I believe, to arouse a reasonable suspicion of Mr. Harmse in the company. Certainly, the subsequent failure of the test gives rise to the suspicion that Mr. Harmse know or suspected that he would fail the test, giving rise to the earlier refusal.

A further damning factor, I believe is Mr. Harmse's failure to take a second test when offered it. It was made clear to him that if he passed the second test, all charges against him would be dropped. An appointment was made, however Mr. Harmse failed to keep his appointment, stating that “it was impossible for him to attend”. He could not remember what had been so important that he was unable to attend the second test. At the hearing he was again offered an opportunity to take a test, and again rather than jumping at an opportunity to escape from the charges against him, Mr. Harmse threw up obstacles, stating that he would not like to be tested by the same firm of person, and that the test must be sent elsewhere for the report. This was despite the fact that Mr. Harmse stated more than once that he was happy with the test, the questions and the way it was conducted. He was only not happy that after the test Mr. van Niekerk had called him a “skelm”.

Much was made by Mr. Harmse's representative of the fact that Mr. Harmse was pressurized into taking the tests, Mr. Harmse did concede that he was told on several occasions that the test were voluntary, but still felt that the company put undue pressure on him to take the test.

Mr. White also made the point that the loss of trust had been brought about by the company's actions rather than Mr. Harmse's and that Mr. Harmse should therefor not be penalized. I find that the company's actions in conducting voluntary polygraph test was reasonable in the circumstances of a R200 000-00 loss. The company's actions were therefore not directly responsible for the loss of trust, but rather Mr. Harmse's reactions to the company's actions.

I believe that in the circumstances, the company was justified in asserting some pressure, which they clearly did. Ultimately the employee could still have refused, and the company may well have been entitled to draw an inference from such a refusal. I do not believe that the pressure exerted by the company was unfair pressure in the circumstances.

I believe that in this case, the company was reasonable in its suspicion that Mr. Harmse knew more about the robbery than he was prepared to disclose. that this reasonable suspicion justified the company's loss of trust in the employee to serve the company faithfully and honestly, and therefor that the dismissal of Mr. Harmse was substantively fair.

AWARD :

I confirm the dismissal of Mr. Harmse with one month's pay in line of notice.

CCMA Commissioner: D I K Wilson

SACCAWU obo Chauke and Mass Discounters

(2004) 13 CCMA 2.13.1

Case No.	GA3414-03
Award Date	26 March 2004
Jurisdiction	Johannesburg
Commissioner	Myhill ELE
Subject	Evidence Expert Evidence

Evidence – Expert Evidence – polygraph tests – procedure followed and technique used was satisfactorily explained so as to make the results admissible as evidence – the respondents refusal to allow the applicant sight of the polygraph test report was unfair because the report was a form of expert evidence to which he should have been given access – a basic principle of fairness is to allow an accused person the opportunity to prepare a response to the allegations against him – dismissal procedurally unfair

Award

Details of hearing and representation

The matter started on 01 October 2003 but could not be completed so it was postponed to 17 November 2003 when it again had to be postponed because Mr. Chauke was ill. The evidence was completed on 17 March 2004.

Issues to be decided

Whether Mr. Chauke's dismissal was procedurally and substantively fair.

Mr. Chauke seeks reinstatement.

Respondent's submissions

Marthinus Johannes Vermaak Jordaan stated that he is a polygraph examiner employed by Polygraph Proactive. He received training at the Maryland Institute

of Criminal Justice in Washington DC in 1999. He is a member of SA Professional Polygraph Association and the Maryland Polygraph Association.

He has done about 4000 polygraph tests. He stated that a recent study by the Maryland Polygraph Association showed that such tests has accuracy in the high 90s.

He did a polygraph test on Clinton Ndaba on 19 November 2002 (pages 2 – 5 of the bundle). He identified this as his report and explained the phases he went through in the test. After doing an analysis of the physiological responses of Mr. Ndaba he came to the conclusion that he was not honest in his denial of being involved in the relevant incident. He said he was requested to do another test for Clinton on 06 December 2002 (pages 10 – 12 of the bundle). He identified this as his report and explained the procedure he followed. After his first test he had been questioned and had then made a statement in which he admitted to having been involved in the incident. The issue was whether this statement (page 12a of bundle) was true or not. After analyzing the responses of Clinton to the questions asked concerning the statement he concluded that Clinton was honest when he answered the questions.

During cross examination it was put to the witness that polygraph test results were not admissible in SA courts, as they were unreliable. The witness referred to the recent study done by the Maryland Polygraph Association that showed such to be more than 90% accurate. He said that his partner recently gave evidence on polygraph test results in the Regional Court. He was then asked why the two different tests he conducted gave different results. He explained that the questions asked were different because the purpose of the first test was to see if he was involved in the incident and after he later made a statement admitting his involvement the purpose was to see if this statement was true. Ms. Takalo complained that it was the first time she had seen the statement at 12a of the bundle, it was explained that it had been attached to this original report and the respondent did not have it. The witness had brought it that day. Clinton's employer (TSS) had asked him to write this statement after he had failed the first polygraph test. The witness said he tested Clinton on this statement in the second test on 6 December 2002. When asked how he came to his conclusions he said that different questions were asked and his physiological responses to these were recorded. He asked relevant issue questions (page 4 of bundle) irrelevant questions and technical questions (ie. Questions that were broad in scope). If there was a greater physiological reaction to the technical comparative questions than to the relevant issue questions that meant he was answering the relevant questions truthfully. If the opposite occurred that meant he was being deceptive on the relevant questions. When asked whether he took into account that the employee may have been nervous about an unfamiliar situation, the witness said that general nervous tension was factored into the procedure in that he established the employees physiological base line before commencing with

the test. He said Mr. Chauke had not been retested because he did not change his version like Clinton did. It was a different scenario.

Stephanus Francois Voges stated that he was a Forensic Psycho Physiologist who has been doing polygraph testing for 14 years. He had done courses through the Backster School of Lie Detection (local), the Miami National Institute and the American National Institute. He was President of the SA Professional Polygraph Association, which is a division of the American Polygraph Association. Recent research in the USA showed that the accuracy of polygraph tests was in the high 90's. He had recently given evidence on such tests in the Johannesburg Regional Court.

He had been requested to do a test on Mr. Chauke on 27 November 2002. He identified his report at pages 19 – 21 of the bundle. The issue was an incident that had occurred on 6 November 2002. He explained the different phases he went through as are recorded in his report. The general nervous tension of the employee is taken into account when analyzing the results. He explained the technique used, as did the previous witness. He found that Mr. Chauke had not been honest in his response to the relevant issue questions (page 21 of the bundle). As technical comparison questions are wide in scope they naturally cause physiological changes in the employee, as they constitute a degree of threat to his well being e.g. uncertainty as to the answer. An example of the latter is – "Did you steal anything before the age of 34?" if the response to relevant issue questions is greater than it is to technical comparison questions it indicates deception. This is because a person naturally pays more attention to something that threatens him. Even a psychopath will respond typically because he fears being caught out.

During cross-examination the witness said he asked Mr. Chauke a total of 10 questions – 4 technical comparison questions, 4 relevant issue questions, 1 irrelevant question and 1 icebreaker question to relax the employee. He denied that there might have been a problem with the language during the test because he made sure he understood him by asking questions to test his understanding. He used checks and balances to make sure that the results were not upset by unexpected changes in the employee's circumstances while taking the test. This is why he did the test 3 times and asked the questions in different sequences each time. The witness insisted that he had treated Mr. Chauke respectfully. He discussed the results with him immediately. There was no need to give him a second test, as he did not make a statement contradicting his initial position.

Duane Lionel Clarke stated that he was the Loss Control Manager o the respondent at the Johannesburg City. He was called in to finalize the investigation and to initiate the disciplinary hearing. Mr. Chauke's Notice of Suspension is at page 34A of the bundle and the charges against him are at page 34 of the bundle. He refused to sign for the latter. The case was about 7 units of major appliances found in a dispatch cage with no documentation. They

had not been paid for so they should not have been dispatched. He identified a polygraph report of Clinton Ndaba (pages 2-5 of bundle) who was employed by Timoc Security Services (TSS) at the Randburg Warehouse of the respondent. The outcome of this test was that it was found that his answers were deceptive. The questions were whether he had been involved in the attempted theft of the said appliances. Following this he made a statement in which he confessed to being involved in the attempted theft (pages 6-8 of bundle). He was then given another polygraph test to see if his confession was honest. The outcome of the test was that he was honest about his involvement. Mr. Chauke had bee given a polygraph test (pages 19-21 of bundle) and it was found that he was deceptive in denying his involvement in the attempted theft. The witness said that he was satisfied that Mr. Chauke was involved.

During cross-examination the witness stated that 4 questions were asked during the first test and 2 questions during the second one. Mr. Ndaba failed the first test because he was dishonest about his involvement and passed the second one because he was honest. The second test thus confirmed the result of the first test. The witnesses that confirmed that the appliances had been placed in the cage without paperwork had not been required to take polygraph tests, because it was not necessary. It was not the respondent's policy that all witnesses had to be subjected to such tests. The witness denied that the IR Manual of the respondent required all witnesses to be polygraphed. The initiator decides whether or not to ask witnesses to take the polygraph test, which is voluntary. Walter Hamisi had undergone a test while other witnesses had not.

Walter Hamisi stated that he was employed by the respondent at the warehouse branch of the respondent in Randburg. He was training to be a Loss Control Coordinator at the time of the incident. He identified the statement he made at the time (page 13 of bundle). On 6 November 2002 he was working at dispatch. He went into the warehouse and when he returned he found that one of the cages had been opened on the outside and there was stock inside that cage that had no CDD papers as required. He asked on of the contractors, who the owner of the stock was and one of them by the name of Eugene told him that it belonged to Stanley who was also a contractor. The witness said that he called Stanley and asked him for the papers for the stock. He said he did not have any papers. After that the security guard, Clinton, closed the outside gate of the cage. The witness said he moved on to check the other cages. Then Roland, a fellow employee, came to him and asked him what was happening. The witness told him that he had found a cage with the outside gate opened but without any papers. The witness said that he did not look at the boxes in the cage. He did not see the stock being taken back onto the shop floor. The person who had the keys to open the outside gates was Clinton.

During the cross-examination the witness said that was the first time he had been the stock without papers. The dispatch clerk in the office usually arranges these papers. He said that stock was usually left in the cages without papers with

the papers to follow, but the problem in this case was that the outside gate was opened without the papers being there. That was the first time he had seen stock in the cage without papers and the outside gate being open. When asked if he told the security guard when he was leaving, he said he did not tell the security that day because it was not compulsory and the senior security guard was still there. He said he saw Clinton open the outside gate of the cage.

Clinton Ndaba stated that he was based at the warehouse branch of the resident at the time of the incident. He worked for TSS as a security guard. He identified statements he had made in this regard at pages 6-8 of the bundle. When asked what had happened on 6 November 2002 he said it was a long time ago and he had forgotten. He read his statement to refresh his memory. He said that Mr. Chauke had approached him about items that were going to be dispatched without paper work. If items are dispatched they must have paper work. As the security officer he had to double-check the paper work of the stock inside the cages. He went to the cage number 7 and Mr. Chauke told him to open the cage. Stanley was supposed to take stock in the cage as the contractor for delivery. The outside gate of the cage could only be opened once someone on the inside pushed a button. He saw Mr. Chauke push the inside button and he (witness) pulled the outside gate open as he had already unlocked the padlock. He did this because Mr. Chauke had offered to give him one of the items in the cage. Stanley then arrived to take the items and the loss control supervisor saw him and asked him where the papers were. Stanley said there were no papers so he (witness) locked the outside gate of the cage again. The witness said he was not forced to make his statements.

During cross-examination the witness said that he was still employed by TSS. When asked when the attempted theft had been planned he said it was about 09h00. When asked to explain the inconsistency between his statement at page 6 of the bundle and the one at page 7 of the bundle he said the incident happened at about 10h00. These were approximate times. He said he had only made two statements. There was referred to another document (page 68 of bundle) which was apparently another statement he had made. He denied that he had made this statement. He said he had taken two polygraph tests because he failed the first one and they asked him to take a second one because of the statement he had made. The witness said that nobody else was present during the planning of the attempted theft. He said he agreed to assist because he wanted to get the item promised to him. He did not realize then that it was illegal but now did. When it was put to him that he was a security guard he said he was earning less money then and was not satisfied with this. He saw the error of his ways when he was going to be arrested. He did not count the number of items in the cage. He said that he had the keys to open the cages from the outside. He said Mr. Chauke had not said anything when Walter arrived. Mr. Chauke had picked the stock from the cage and he (witness) had locked it again. He was referred to a diagram of the cages (page 63 of bundle) and indicated that Mr. Chauke was standing between the “dispatch Office” and the cages (numbered 1-

9). He said there were also security officers stationed on the inside. When asked why these security guards would have allowed Mr. Chauke to place the items in the cage without papers the witness said he did not know but maybe Mr. Chauke also approached them.

The respondent's representative then put it to the witness that there was something wrong with his as he kept smiling. He denied that there was anything wrong with him.

Roland Naicker stated that he was Deputy Administration Manager at the Warehouse branch of the respondent in Randburg. He identified his statement at pages 16-18 of the bundle. On 6 November 2002 he was in his office between 09h30 and 10h00 when he was approached by Eugene Bodington who is a contractor. He said that things in the cages looked strange. The witness went to the Loss Control Coordinator, Walter, and asked him about this. He said there was stock inside one of the cages without paper work, ie. Customer Delivery Documents (CDD's) and no Inter Branch Transfer Documents (ITB's). While the witness was there Walter asked Mr. Chauke of the stock had any documents. He said he was not sure and checked. The witness then went tot the office of the Warehouse Manager, Mr. Naidu, and explained the situation to him. They both returned to the cages by which time the stock had been pulled out of the cage. There had been 7 units in the cage and one of them had Mr. Chauke's name on it. Mr. Naidu then took over. The stock had to have paper work before the items could be dispatched. The gate on the outside was not supposed to be open while the required paper work was missing. The items in the cage are listed in his statement at page 18 of the bundle. There were 3 items in E, the witness said he drew the diagram at page 63 of the bundle. Cage 7 was where Eugene's stock was usually placed. The outside gate was opened when the contractor signed a delivery Schedule. From there the stock was taken to the main gate where the papers where checked again. The buttons to open the gates were on the inside ie. in the "dispatch office". The outside gates of the cages cannot be opened without pressing these buttons. He said he did not authorize the stock to be placed back into the shop after the irregularity had been discovered. It should have bee left in the cage until the Manager came to investigate the situation.

During cross-examination the witness said that sometimes stock is out in cages without papers while the papers are processed. Jack and Elwyn informed him that they had removed the stock on the instructions of Mr. Chauke. It was put to him that Mr. Chauke would say that it was not the first time that he saw stock in the cage without the required papers. The witness said that stock could not be dispatched without the papers.

During re-examination the witness said that the outside gates of the cages were not allowed to be opened without the required papers being with the stock.

Alan Naidu stated that he was the Warehouse Manager at Randburg. On 6 November 2002 he was in his office when Roland approached him and told him that 7 units of appliances were about to leave the warehouse without paper work. The witness then went to the dispatch area and found that the units had already been removed. He asked Mr. Chauke what had happened and he told him that he had not seen how the stock got into the cage. He identified a polygraph report on Stanley Matlejoana (pages 23-25 of bundle) who was one of the contractors working at the warehouse. The outcome of the test done on him was that he was not honest when he said that he was not involved in the attempted theft. At the time of the disciplinary hearing they could not get hold of him and his boss said he did not know where he was. The witness identified the document at pages 22 of the bundle as a job description of a “Dispatch Clerk”. One of his main tasks was to check that the goods dispatched had the correct documentation. On 6 November 2002 the goods in the cage did not have the necessary documentation to be dispatched. He said there were two security guards, David and Gabriel, on duty that day outside the warehouse. They were also supposed to check that the goods had such documentation. One of these had absconded and the other one had failed the polygraph test.

During cross-examination the witness said he did not know if the employees were given the job description (page 22 of bundle) because it was already there when he arrived. It was put to him that Mr. Chauke would say that he never received such document. The witness said he did not know, as he had not checked his file. He said that the security guards who had failed the polygraph tests were Clinton and Gabriel.

Dominic Cantin stated that he was the Chairman of the Disciplinary Hearing held for Mr. Chauke. He was satisfied that the charges against Mr. Chauke were proved. Dismissal was appropriate, as theft cannot be tolerated in the business. This also applied to attempted theft. He identified the minutes of the Disciplinary Hearing at pages 27-29 and 39-58 of the bundle. Mr. Chauke appealed against the dismissal and the minutes of the appeal hearing are at pages 59-62 of the bundle.

During cross-examination the witness said he had experience in the procedure followed at warehouses eg. what was done when goods were dispatched? He was also experienced at chairing disciplinary hearings having done between 30 and 40 per year for 7 years. He denied that the IR Manual of the respondent required all witnesses to take a polygraph test. Whether a witness was asked to take such a test depended on the circumstances of the case. Clinton was asked to take such a test because he was in charge of the outside gates of the cages at the time of the incident. He initially denied that he was involved but later confessed that Mr. Chauke had offered to give him one of the items in the cage if he assisted him. The second polygraph test confirmed that his confession was true. The two security guards on the outside gate were also asked to take a polygraph test. One of them absconded and the other, Gabriel, was found to be

dishonest in his denial of his involvement in the incident. When asked why he had not allowed Mr. Chauke to be represented by Mr. Maseko the witness said that he was informed by the IR Manager that he had to be represented by someone from his own constituency ie. from his own store / warehouse (p.33 of bundle). Mr. Maseko worked at Dion, which was a different entity. The witness conceded that Mr. Linda had indicated to him that he did not have the skills to represent Mr. Chauke but he was of the view that he did have the necessary skills as he had represented fellow employees before and he was a shop steward. If he needed assistance he could have asked but he did not. He was in a position to place Mr. Chauke's case on the table. The witness conceded that the representative had not lost anything as a result of the incident but said that there was a very good chance that it would have lost the goods if Walter had not intervened. The witness denied that he had prejudged the outcome. He said he told Mr. Chauke that if the matter went on appeal he could use Mr. Maseko.

Applicant's Submissions:

Mr. Chauke stated that he started working for the respondent in 1990 and earned R3429 per month when he was dismissed. He was a dispatch clerk at the warehouse in Randburg for 6 years. He denied receiving the job description at pages 22 of the bundle. He only received the one in the Induction Booklet (pages 67 of bundle). On 5 November 2002 Eugene was supposed to take the stock called Inter Branch Transfer (ITB). He did not take his stock at cage 5. On 6 November 2002 they took Eugene's stock to cage 5. This stock was then taken from cage 5 to cage 7 by the people who were responsible for distributing stock to cages. Mr. Chauke then said he checked the stock in cages 7 to 9. When he was at cage 9 Walter came to him and told him that the stock in cage 7 had no papers. He told Walter that he did not know whose stock it was but he would go and check in the office. He did not find the papers in the office and reported this to Walter who ordered the outside gate of the cage to be closed, as it was open. He did not know who had opened it. Mr. Chauke then told Jack to take the stock and pack it where the other stock was kept. Mr. Naidu then came to him and asked him what was happening. He told him what he had found in cage 7 and showed the stock to him. Thereafter Mr. Chauke said he continued with hi normal duties.

He denied that he had any discussions with Clinton on 6 November 2002. Clinton worked far from where he worked. He did not discuss with any other security guards that day. Clinton was telling lies to try and defend him as he had failed to do what he planned. Mr. Chauke said he was responsible for checking so he tried to implicate him. He did not know why he would do this, as he had never had conflict with him before. He was surprised that Clinton involved him. He said he, Linda Zwane and Joe Mtohoeng were supposed to do the papers. Everyday stock was placed in the cages without papers while the gates of the cages were closed. When asked who was responsible for opening the cages he

said that the security guards outside have to request that he should open them. They cannot be opened by the security guard acting on his own.

Mr. Chauke complained that when he asked for a printout of his polygraph tests this was refused. He was just told the outcome verbally but believed he should have been given a printout. The language used in the test was English and he did not understand all the questions. There was no interpreter.

During cross-examination the applicant identified his statement at pages 21(a) of the bundle. Concerning his job description he was referred to page 67 of the bundle, which is an extract from the Induction Booklet. It was put to him that paragraph 2.9 stated that merchandise may only be dispatched if the correct documentation is produced. Mr. Chauke said that at the time of the incident he was not stationed at one place only but was moving around. He was being trained as a supervisor. When asked why Clinton would falsely implicate him he said that he knew that he was in charge so if he used his name it would suit him. When asked how it would suit him he said that he was the one checking cage 7. Mr. Chauke said that if they had planned this Clinton would not have been satisfied with only one item. It was put to him that Stanley was also involved. Mr. Chauke said that Stanley was packing vas outside on that day. He conceded that it was Stanley's job to load stock for delivery. Mr. Chauke The subject denied that he had pressed the button on the inside for Clinton to be able to open the gate of the cage on the outside. He did not know who had pressed the button as he was inside the cage.

Linda Goodman Zwane stated that he had been a dispatch clerk at the respondent for 4 years. He had not received any training in this regard. He denied that he had been given the job description at pages 22 of the bundle. He said that stock was put onto the cages and the documentation only came later. He agreed that the outside gate was not allowed to be opened until the valid documents are there. He said that he had represented Mr. Chauke but he did not have experience as a shop steward and no training. He had asked a shop steward at Dion, France Maselo, to help with the case but the Chairman of the hearing would not let him represent Mr. Chauke. The Chairman said Mr. Maselo could become involved after the dismissal ie. at the appeal. He said he had informed the Chairman that he did not know how to handle the case. He had only represented employees on two previous occasions and they were both dismissed. The one had been charged with theft and the other with bribery. The Chairman insisted that the witness continue so he proceeded.

During cross-examination the witness was referred to page 33 of the bundle where 3.2.2 of the Disciplinary Code of the respondent stated that a team member may be assisted by any other team member of his choice from within the store / division. When asked if there were any other shop stewards there, he said there was one but he also did not have training. He did not know if it was the duty of the trade union to train them. He did not report his lack of training to the

National Coordinator of shop stewards of the respondent. When asked to show where in the minutes the Chairman had said that Mr. Maselo could become involved after the dismissal he said it was not on the record. It was put to him that the Chairman had explained the procedures that if the matter went on appeal then he was allowed to use Mr. Maseko. This was denied. The witness was referred to pages 32 of IR Management Guidelines (page 69 of bundle). Paragraph 2.10 thereof states that National Coordinating shop stewards shall assist at all stages of the disciplinary appeal and grievance procedures whenever they are asked by the workers or in store shop stewards. The witness said he did not know this book.

Fanie Maseko stated that he was employed at Dion in Sandton and had been a shop steward for 18 years. He said Linda Zwane had asked him to represent Mr. Chauke at his disciplinary hearing, as he did not feel he was able to handle such a big case. He agreed and asked Mr. Zwane to go to management and get all the relevant documents. Mr. Zwane phoned him later and told him that management had not given him all the relevant documents. At a meeting he asked Mr. Clarke for the documents but he refused to give them to him. Mr. Clarke asked him who he was and he told him that he was a Regional Coordinating shop steward and that Mr. Chauke wanted him to represent him at the hearing. He said he was not going to allow him to represent Mr. Chauke. He said Mr. Zwane must do it. He explained that Mr. Zwane was not qualified but insisted. He asked him for a copy of Clinton's polygraph report but he said it was up to them to get a copy. When the witness suggested that they should ask Clinton if he had a copy for them Mr. Clarke objected and said he would not let them intimidate the respondent's witnesses. The minutes of this hearing are recorded at pages 28-29 of the bundle. Mr. Clarke said the witness was not welcome at the disciplinary hearing but would have to come after the dismissal. The witness said he understood this as meaning that he was going to dismiss Mr. Chauke at the hearing. He said nothing about an appeal.

During cross-examination it was put to the witness that he was lying about what Mr. Clarke said at the meeting and referred him to page 29 of the bundle. The witness denied that he had lied. He said they held a caucus and Mr. Clarke told then to prepare for dismissal. The witness said further that other shop stewards did appeals and gave examples in this regard. This was denied. It was put to the witness that company policy was followed. The witness said that the respondent could not tell employees who can represent them.

Analysis of Evidence and Argument:

The respondent argued that Mr. Chauke's dismissal was fair. The excuse that Mr. Zwane was not trained to represent him was not accurate. He had represented employees in two previous cases. He did not object to being a representative on those occasions. It was not logical for him to object to representing Mr. Chauke. The company policy in this regard was clear. Why

have shop stewards if they cannot represent employees at disciplinary hearings? Mr. Chauke was misquoting what Mr. Clarke said at the meeting (pages 29 of bundle). This did not prove that he had prejudged the matter. He had no reason to do such. It had not been put to the initiator that he had refused to give Clinton's polygraph test to Mr. Chauke. That test was not available to Mr. Clarke when they asked for it. All documents were available during the hearing. Concerning substance it was argued that there was plenty of evidence to prove that the respondent had good reason to dismiss him. After Clinton initially lied in his polygraph test he decided to come clean and tell the truth which was confirmed in his second polygraph test. Stanley had also failed his polygraph test and had disappeared. The respondent could not get hold of him to testify. Mr. Naidu saw that one of the items in the cage had Mr. Chauke's name on it. Mr. Chauke denied knowing his job description but he had done it for 7 years. The Induction Book also made this clear. Mr. Chauke had also acted without authorization when he had the items removed from the cage and put back in the warehouse. There was no reason for Clinton to have falsely implicated Mr. Chauke. There were 3 other dispatch clerks so why not accuse one of those? If Walter had not intervened the goods would have been lost to the respondent.

The applicant argued that the respondent was inconsistent because only its witnesses had bee re-tested on the polygraph. All witnesses should have been tested on the polygraph. I could not rely on the evidence of Clinton because he had lied before. Roland had not been given a polygraph test. Mr. Chauke was also entitled to a representative of his choice. Mr. Zwane lacked the necessary skills and asked for a senior shop steward to take his place but this was refused. Mr. Chauke also asked for a printout of his polygraph results but these were not provided. The accuracy of this report was disputed. Only English was used at his test and he was not fairly treated. Reinstatement plus back pay is sought.

I first have to decide whether or not the respondent followed a fair procedure in dismissing the applicant.

Mr. Chauke's first complaint is that he was not permitted to have Mr. Maseko as his representative at the disciplinary hearing. Despite Mr. Zwane informing the management of the respondent that he did not feel qualified to represent him it was insisted that Mr. Zwane represent him. The respondent's defense is that it was in keeping with company policy for a shop steward from the place where Mr. Chauke worked to represent him. This is what the Disciplinary Code of the respondent provides for (page 33 of bundle). Schedule 8 to the Labour Relations Act 66 of 1995 ("The Act") provides that an employee should be allowed to have the assistance of a trade union representative or a fellow employee in stating his case. Mr. Zwane had represented fellow employees before so this was not alien to him. His experience as a fellow dispatch clerk was, in fact, an advantage to Mr. Chauke at the hearing as he had inside knowledge of the procedures that were followed in the work place. Having examined the record it seems to me that he conducted an adequate defense on behalf of Mr. Chauke. I thus do not

believe that it was unfair for the respondent to not allow Mr. Maseko to represent him.

His second complaint it that he requested the polygraph report of Clinton in order to prepare for the hearing but this was refused. One of the basic principles of fairness is to allow an accused person the opportunity to prepare a response to the allegations against him. Clinton had implicated Mr. Chauke in attempted theft after initially denying any knowledge of the incident. The respondent relied partly on polygraph evidence in its investigation of the incident and the Chairman also relied partly on polygraph evidence in concluding that he was guilty as charged. Polygraph reports is a form of expert evidence so Mr. Chauke was entitled to a copy of such report in order to prepare a response. He may have decided to take it to another polygraph expert for his opinion and may have decided to call such expert in his defense. By denying him access to the report in advance of the hearing the respondent breached his fundamental rights and for this reason alone the hearing was procedurally unfair. During the session of the Disciplinary Hearing that took place on 4 December 2002 (page 29 of bundle) it was not the respondent's case that they did not have the report but, rather, that they were entitled to withhold it.

I do not see any irregularity in the manner in which the management of the respondent requested witnesses to take polygraph tests. There was a good reason for asking Clinton to do a second test as he had made a statement that was inconsistent with his earlier position of non-involvement.

Another procedural defect in the Disciplinary Hearing was that the polygraph test reports were simply admitted into evidence and relied upon without the persons who administered the test being called to confirm these and to explain the procedures they followed in administering the test. The reports thus constituted hearsay evidence, which is inadmissible, unless section 3 of the Law of Evidence Amendment Act 45 of 1988 applied. There was no evidence that such applied.

I now have decided whether there was sufficient evidence to find, on a balance of probabilities, that Mr. Chauke was guilty of attempted theft.

The main evidence relied upon by the respondent is that of Clinton Ndaba who claims that Mr. Chauke promised to give him one of the items if he assisted him in getting the goods out without the necessary documentation. The main criticism of his evidence is that he is not a reliable witness because he lied previously. He initially denied any involvement in the attempted theft but after he was informed that he failed a polygraph test in this regard he made a statement in which he admitted that Mr. Chauke had approached him to assist him in the attempted theft (page 6 of bundle). While I must approach his evidence with great caution, the fact that he lied earlier does not necessarily mean that his confession cannot be true. Faced with the negative results of the polygraph test it is not improbable that he would decide to tell the truth in the hope that he may suffer a lesser

sanction. Another criticism is that he was inconsistent about the times he gave for when Mr. Chauke approached him. In his statement dated 20 November 2002 he said this occurred at approximately 10h00 and in his statement dated 28 November 2002 he said this occurred at approximately 09h00. Seeing that the times given are approximate times and only about an hour apart, I do not believe that the inconsistency is sufficiently great to cause me to reject his evidence. It is also clear that he could not have done this on his own. Someone inside the warehouse had to push the button to enable him to open the outside gate of the cage that contained the goods that did not have the required documentation. When Mr. Chauke was asked why Clinton would have falsely implicated him he said that as he (Chauke) was responsible for checking, he tried to implicate him. I do not believe this is a satisfactory explanation as there were other employees there who had the same function as Mr. Chauke. Mr. Chauke admitted that there had been conflict between himself and Clinton. During the disciplinary hearing, Clinton said they were friends and this was not denied. It is thus highly improbable that Clinton would have falsely implicated Mr. Chauke.

In addition to all this the outcome of the various polygraph test gave some support to the contentions of the respondent that both Mr. Chauke and Clinton were involved in the attempted theft of the goods. I am aware of the dangers of polygraph tests as discussed by Marylyn Chritianson in her article “Truth, lies and Polygraphs” in contemporary Labour Law (Vol 8 no 1 August 1998) ie that the instrument – “measures physiological changes generated by emotional stress, which may be caused by a number of factors, including but not limited to, lying.” For this reason a number of CCMA Commissioners have not found dishonesty to have been proved when the employer relied entirely on the outcome of a polygraph test. They have, however, agreed that the outcome of a polygraph test may be taken into account when there are other grounds fro believing that the employee has been dishonest. See Govender and Chetty v Cargo & Container Services unreported case no KN 4881 CCMA and Harmse v Rainbow Farms (Pty) Ltd unreported case no WE 1728 (9 July 1997) CCMA. In M Shinga v Gilbeys Distillers and Vinters (Pty) Ltd unreported case no NHN 11/2.10237 (IC) (21 October 1999) the issue was whether or not the polygraph report, supplemented by the circumstantial evidence, constituted sufficient proof of an attempt to steal liquor. The commissioner agreed that where a polygraph test had been performed by a property 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. See also Zulu v Morkels Stores (Pty) Ltd unreported case no KN 4/022 (22 September 2000).

I am satisfied for the evidence by Mr. Jordaan and Mr. Voges that they were qualified to do the tests, that they were taken voluntarily, and that the procedure followed and technique used was satisfactorily explained so as to make the

results admissible as evidence. The outcomes of these tests are thus relevant facts and I have taken them into account together with the rest of the evidence.

In addition to this Mr. Chauke was unable to explain why his name appeared on one of the items placed in the cage. It is reasonable to infer from this that he was involved in the plan to remove the items without the required documentation. No other interference was suggested by Mr. Chauke.

I agree with the Chairman of the hearing that Mr. Chauke, by being dishonest in this way, destroyed the relationship of trust irreparably and that summary dismissal was an appropriate sanction.

Award:

I therefore resolve this dispute by finding that the dismissal of Mr. Chauke was unfair because the respondent failed to prove that it followed a fair procedure although it did prove that it had good reasons to dismiss him.

I order the respondent to pay compensation to Mr. Chauke in the amount of R10 287 which is the equivalent of 3 months of the salary he earned at the time of his dismissal ie R3459 per month. This must be paid to him within 1 week of the respondent receiving this award. I believe this is just and equitable in all the circumstances.

IN THE METAL AND ENGINEERING INDUSTRIES BARGAINING COUNCIL

In the arbitration between:

MEWUSA obo J.E. MBONAMBI	Applicant
And	
S. Bruce t/a MULI MEDIA SIGNS	Respondent

Arbitration Award

Case No	:	MEKN 855
Arbitrator	:	R. Lyster
Venue	:	MBIBC, Durban
Date of Arbitration	:	9 December 2004, 14 February 2005 6 April 2005
Date of Award	:	13 April 2005
Issue	:	ALLEGED UNFAIR DISMISSAL, SUSPICION OF THEFT, INSUBORDINATION, DISMISSAL JUSTIFIED.

VENUE AND REPRESENTATION

The arbitration took place at the Durban offices of the MEIBC on three half-days 9 December 2004, 14 February 2005 and 6 April 2005.

Mr. A. Van der Merwe of a registered employer's organization represented the Respondent and Mr. S. Ngwenya for MEWUSA represented the Applicant.

ISSUE

Applicant was dismissed on 6 October for suspicion of involvement of theft as well as for insubordination. The issue which I am obliged to consider and rule upon is whether the dismissal of the Applicant was procedurally and substantially fair.

EVIDENCE

In his opening statement Mr. Van der Merwe said that from a procedural point of view the Applicant and his representative had walked out of the hearing because they had objected to the presence of the chairman who external to the company and because the union official was not permitted to represent the Applicant. He said that the incident which had given rise to the charge of suspicion of involvement of theft had taken place on 18 September 2004 and prior to the enquiry a SAPS Investigation had taken place as well as a private polygraph testing. The Applicant was the only person out of eleven who took it who failed the polygraph test. With regard to the second charge i.e. Insubordination, he said that the Applicant had refused a lawful order.

Mr. Ngwenya in reply said that the Applicant had not been involved in theft and had not refused instruction.

The first witness called by the Respondent was a technician from the polygraph company (LieTech), Mr. R. Lombaard. He established his credentials as an expert in the field of polygraphy which were not challenged.

He then explained the process which he followed in detail. I shall not summarize the process here suffice to say that it is the standard process which is used by the professional polygraph companies, which includes obtaining the consent from the subject to polygraph, the asking of irrelevant questions intermingled with relevant questions relating to the incident giving rise to the polygraph. He said with reference to a large bundle of documents which his company had produced indicating that 11 employees had been subjected the test concerning the same incident. i.e. which had taken place on 18 September he said that of the 11, the Applicant was the only one that had not passed i.e. who's answers had indicated "deception". He said that he bee accompanied during the testing of the Applicant, which had taken place on 22 September, by an interpreter but the Applicant had agreed to speak English. He said the tests were done on different days on the other people. He said that it makes no difference whatsoever when the tests were done.

The respondent's next witness was the assistant productions manager Mr. Joubert. He said that he was aware on Monday 20 September 2004 that a theft had taken place on the previous Saturday, when this was announced at a meeting by the owner of the company Mr. S Bruce. He referred to notice in Respondents bundle which indicated that employees were not allowed into the kitchen area near the offices.

He testified on the second charge i.e. the insubordination incident. He said that he had been in charge that day. i.e. 23 September and he had asked Naresh Lutchman to do a rigging job. Naresh asked which rigger he should take with him and Joubert indicated that he should take the Applicant. He said the Applicant was a rigger and that his job was to accompany and assist the sign manufacturer. (Lutchman) He said a short while later Lutchman came back to him and said that the Applicant had refused to go with him. Joubert then went to the owner of the company (Bruce) to find out what was happening and another rigger was sent out with Lutchman to do the job. He said that he was aware that the staff had been told that provided they finished all their work on 23rd, they could leave early because the 24th was a public holiday. However he was adamant that the rule in the company was that before people left all work should be completed. He said that in any event Lutchman got back from this particular job at 3pm which was before closing time. He said that Mr. Bruce had called the Applicant in and asked him why he had refused to go out with Lutchman and that the Applicant had refused to answer.

In cross examination it was put to him that the Applicant had not refused to work and furthermore that he did not know about prior warnings against her (Joubert testified that he had issued a warning to the Applicant in 2003 for negligence leading to damage of company property.)

The next witness was the sign manufacturer M. Lutchman. He said that Mr. Bruce had asked him to complete a job at lunchtime on 23 September. He said that he spoke to the Assistant Production Manager Ernest Joubert and Joubert said that he should take the Applicant. Lutchman then went to the Applicant and told him that he should accompany him on the job and the Applicant refused to go. Lutchman said that he reported this t Joubert who then told Lutchman to take another rigger with him. He said that he was also aware of the rule relating to the prohibition around the kitchen area. He said that he had been called as a witness at the disciplinary enquiry. It was put to him in cross examination that the Applicant had not refused to do the job and Lutchman replied that he had refused twice and that in fact he believed that the Applicant had been joking the first time he refused.

The next witness was W. Pretorius who runs the Respondents sheet metal department. He said that he was at work on 18 September 2004. He said that he got permission from the manager, Mr. P Gibson on the day to go to the kitchen at 10.30 to make coffee. He said that at the time he was coming out of the kitchen he saw the Applicant in the passage area near the kitchen, near the room where the money had been stolen. He said that later that day the Applicant had obtained permission to collect some speakers from Pinetown and he had asked and he had asked Pretorius to take him t the shop. Pretorius took him in a vehicle and when they arrived there the shop was closed and they went back to work. In cross examination he said he said that when he saw the Applicant standing in the passage, he was standing there with his back to the area where he, Pretorius, was. He said that he had not seen anyone else there at the time. It was put to him that Mr. Gibson, his wife and family were there in the office and he replied that he had not seen them. He said that at the time he had not been concerned as to why the Applicant was in the passage but on Monday when he heard that the money was gone it occurred to him that it had been strange. He said that he had not been called to give evidence at the disciplinary enquiry.

The Production Manager then testified saying that he had been at work on 18 September. He also explained the rule about not being in the kitchen area and that permission had to be obtained for people being there. He confirmed that W. Pretorius had asked him permission to be there at about 10.30 and no one else had asked for permission. He said that on the morning his wife and two sons had been in the sales office near the kitchen but they left at 9.15am.

He said that he had given the Applicant the notice to attend the disciplinary enquiry and said that the Applicant had objected an outsider chairing the enquiry and that he had wanted a union official, rather than a union shop steward present. He said that the chairman of the enquiry had given the Applicant an opportunity to make a phone call to arrange for someone to represent him. He said that he had never met the chairman Mr. J Dicks. He referred in Respondents bundle to two documents, one dated 25 July 2004, being a letter of concern relating to Applicants unsatisfactory work performance, as well as to a final written warning dated 18 August 2004 for negligence concerning the installation of a sign. He said that he had been present when the warnings were issued and that the Applicant had refused to sign the warning. He said that it was common practice in the company to have an outside chairman. It was put to him that the Applicant would say in his evidence that he had asked Mr. Gibson for permission to go to Pinetown to collect his speakers, when Gibson was in the office. Gibson firmly denied this.
It was put to him that the Applicant would say that he knew nothing about the letter of concern and nothing about the disciplinary enquiry.

The hearing adjourned on 14 February 2005 when Mr. Stephan Bruce gave evidence. He said that he had been present at the disciplinary hearing on 1 October 2004 and that the chairman Mr. Dicks had explained the procedure to be followed. He said that the Applicant objected to the presence of the chairman and was not prepared to continue. He said that the Applicant was given an opportunity to make a phone call which he did and when he came back he said that the union had told him not to attend the enquiry. He said that the chairman had told the Applicant that he would be giving up his rights at the disciplinary enquiry if he refused to attend.

He said that on Monday 21 September 2004 he had come to work and had been told by his wife that there was R5000-00 missing from petty cash as well as a cell phone. He said that he asked the manager Mr. Gibson to call a meeting with all employees to talk to them about the incident and when the meeting was held he told them that the matter would be reported to the police and the employees would have to undergo a polygraph test. He said that he was informed by the polygraph examiner that the Applicant was the only person who had showed deception. He said that thereafter he sat down with the Applicant and asked him if he had been in the passage area on 18 September. He said that the Applicant had replied in the negative. He said that the police were called in and they spoke to the Applicant and during the period that they were questioning him the Applicant conceded that he had been in the passage and gone to the kitchen. He said that because the Applicant had not admitted this before the police took him for finger printing.

With regard to the second charge he said that on Thursday 23 September 2004, shop steward Christopher Mthiyane had come to him and asked him if staff could go home early i.e. at 3pm because the following day was a holiday. He said that if all work was finished by then, the staff could go home early. He said that at about 2pm he received a call from a client asking for some panels to be installed. He instructed the Fabrication Manager, Lutchman, that he should do it. He said that as he understood it the Fabrication Manager had gone to the Production Manager Joubert and asked for an assistant and that the only qualified rigger at the time available was the Applicant. He said as he understood it Lutchman had gone to the Applicant and the Applicant had refused to come and Lutchman reported this to Joubert. He said this was reported to him and he had called the Applicant in and asked him why he had refused to go. He said that the Applicant had said that he had not refused. He said that he then called the shop steward Christopher Mthiyane and he asked the Applicant again why he had refused. He said that the Applicant did not answer. He said that it was part of the Applicants job description to undertake such work. He then made reference to the letter of concern and the final written warning. He said that it was a well known rule in the company that any dishonesty or theft would be dealt with by dismissal. He referred to a written notice to this effect which had been issued in October 2003. With regard to the possibility of the Applicant being reinstated he said that he could not re-employ someone he could not trust.

With regard to the door to the office from which the goods had been stolen he said that Peter Gibson who was the manager on the day must have left the office open after he had gone in there to do some photocopying on Sat 18th. In response to a question as to whether Gibson had been disciplined, he replied that he had not because Gibson was his brother and he was a part time owner of the company, a member of the cc and he trusted him totally. He said that as far as he understood the chairman had found against him on the suspected theft issue because of the polygraph and because of the fact that he was seen in the area on the day as well as his denial to him and to the police that he had been in the kitchen area to fetch water. At this stage Mr. Ngwenya for the Applicant introduced a copy of a letter which appeared to be from the police saying that certain fingerprints were not identical to the fingerprints of J. Mbonambi. I explained to the Applicant that the introduction of such a document was not permissible in the sense that it was a copy and had not been proved by anybody and no details as to what it meant and no evidence had been given as to what the document meant.

The Applicant then gave evidence. He denied the theft on 18 September.

With regard to the issue on 23 September, he said that he had not refused but had told Lutchman that he was to go and speak to Joubert. He said that he was then called by Mr. Bruce for questioning. He denied that he had been walking in the passage on18 September. He said that Mr. Gibson and his wife and children were in the office area and they left at about 1pm.

He said that at the disciplinary enquiry he had asked who Mr. Dicks was and when he was told that he was an outsider he said that he wanted an outside representative as well.

With regard to the rule about the office area that he was aware that employees were not allowed to go anywhere near the offices. With regard to the polygraph he said that nothing related to the polygraph was ever explained to him. He denied that he had ever been anywhere near the kitchen. It was put to him in cross examination as to haw he then could have seen Mr. Gibson and his family in the office area. He then said that he saw them when he went to ask Mr. Gibson for permission to go and get his speakers. He conceded that Christopher Mthiyane, the shop steward was present at the disciplinary enquiry but said that he had wanted an outside person. He said that he was aware that the company used outsiders in the past to…….. He conceded that it was his job to go out on rigging jobs with people like Lutchman.

The matter was then adjourned to 5 April 2005 when the shop steward gave evidence. (C. Mthiyane) He said that he had been present at the enquiry but on the advice of the trade union he and the Applicant had not taken part because of the presence of an outside chairman. He said regarding the incident on 18th that on the following Monday he had heard that money had been stolen. With regard to the second charge he said that he had been called by Mr. Bruce who questioned him about the job with Lutchman. He said that he had asked the Applicant why he had refused to go with Lutchman. He said that the Applicant had replied that he not refused but had merely asked Lutchman to tell Joubert that they were going out. He said that this was because Peter Gibson who was the manager was not present and the person in charge was Joubert. ***He said that he had taken the polygraph test and had passed but had only taken the test after the Applicants dismissal on 1 October. However it was pointed out to him that the date on the polygraph document indicated 30 September. He then indicated that the polygraph test had only been taken after the matter had been referred to the conciliation at the Bargaining Council on 11 October. It was again indicated to him that the polygraph test had been taken on 30 September.*** He said that when he left the enquiry Lutchman and Pretorius were not there but he could not say whether they had come to the enquiry after he had left. He conceded that the company regularly used an outside chairman but he says that he was instructed by the union not to take part because of the presence of this outside chairman. He conceded that he had discussed the evidence that he was going to give together with the union official and with the Applicant and the two other witnesses who testified after him (Selepe and Mhlongo). It was put to him that the Applicant testified that he was able to see Gibson and his family in the office from the workshop where he was working. He said that he was not sure whether this was possible. When asked more directly whether the office could be seen from the workshop where the Applicant normally worked, he replied in the negative.

Applicants next witness Shorty Mhlongo then gave evidence. He said that he had also been at work on 18 September. He was asked whether the Applicant had at any stage during the course of the day left his workplace. He answered that the Applicant had left his workplace in order to obtain permission from Peter Gibson whether he could be taken to the shop to pick up his speakers. He said this was about 10am. He said that when the Applicant went to get permission from Peter Gibson, he was in the office with his family and children.

He was then asked whether he had done the polygraph test. Without being prompted he answered in the affirmative but stated that it was after Jeffrey had been dismissed.

It was then pointed out to him that the date on his polygraph was 30 September. He said that he could not dispute this. He was then asked whether he knew when the Applicant had been dismissed. He said that he did not know.

He was shown a diagram as to where he had seen Gibson and his family. He indicated that he had seen them in the reception area. He also conceded that he had prepared for his evidence that day.

Applicant's final witness was B. Selepe who had also been working with the Applicant on 18 September. He said that he had taken the polygraph test after the dismissal of the Applicant. This was confirmed by reference to the polygraph documents.

He said that Peter Gibson and his family had left the offices after he had left on Saturday 18 September i.e. after 3 or 3.30 pm. By reference to the diagram he indicated that Gibson's family had been playing in the workshop area and the fact that it had been involved in an accident.

ANALYSIS OF EVIDENCE AND ARGUMENT.

I shall deal briefly with the allegations of procedural unfairness. It is common cause that Mr. Ngwenya refused to take part in a disciplinary enquiry because he objected to an outsider being the chairman of the enquiry. When he gave his closing argument he had the good grace to concede that there are Labour Court judgments which confirm the right of the employer to have anybody they wish acting as chairman at the disciplinary enquiry. However, inexplicably, he still went on to argue that it was unfair of the employer to have had a representative of an employer's organization chairing the enquiry.

There is absolutely no substance whatsoever to what Mr. Ngwenya says in this regard. It is the employer's prerogative to discipline and the employer may appoint anyone to chair the enquiry except the complainant in the matter e.g. Mr. Gibson would have been a highly unsuitable chairman. In this case the Respondent brought in an outsider i.e. member of an independent third party organization, who knew nothing whatsoever about the incident and did not know the people involved. The respondent was perfectly entitled to do this and as a result of the union's misinterpretation of the law, the union deprived the Applicant of an opportunity to be defended at his disciplinary hearing. Accordingly there was no procedural unfairness whatsoever.

I shall now deal with the substantive issues and shall start with the evidence relating to the polygraph test. Mr. Lombaard from LieTech satisfactorily established his credentials as an expert witness and this was never challenged by the Applicants representative. He gave detailed evidence as to the manner in which he had conducted the polygraph tests and that the Applicant was the only one of the numerous people he had tested who had failed the test. During cross examination Mr. Ngwenya made much of the fact that the tests were taken on different days. Mr. Lombaard testified that it did not make any difference when the tests were conducted. I am also aware that it is common practice that the people, who are suspected of issues such as theft and fraud, are often subjected to lie detector tests many months and even years after the incident took place. Accordingly there is nothing before me that the polygraph tests were carried out in anything but a proper and professional manner. I am accordingly permitted to admit the results of the test into evidence.

It is commonly accepted that an employer who has polygraph tests conducted on an employee who has been suspected of lying may not rely entirely on the outcome of such a polygraph test. 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 has been dishonest (see Govender and Chetty vs. Cargo and Container services Unreported KN4881 CCMA, Harmse vs. Rainbow Chicken Farms Ltd unreported WE1728 1997 CCMA, Shines vs. Gilbey Distillers and vintners Ltd unreported NHN112 Industrial court 1998.) In the last mentioned case the issue was whether or not the polygraph report supplemented by circumstantial evidence, constitutes sufficient proof of an attempt to steal liquor. The presiding officer agreed where a polygraph test had been performed by a properly trained examiner and the employee had voluntarily taken the test then the test is a relevant evidentiary fact and should be taken into account together with the evidence in its totality. In the Govender and Chetty case mentioned above the absence of direct evidence pertaining to theft did not preclude the tribunal finding that there was overwhelming circumstantial evidence against the employees and that the polygraph test served to strengthen the weight of the evidence against them.

It is common cause that the Applicant was subjected to the same test and was asked the same questions as all the other participants in the polygraph testing and that he was the only one in respect of whom deception was indicated.

Accordingly the only basis on which I can place reliance upon the evidence produced by the polygraph test must be if there are other grounds for believing that the Applicant has been dishonest.

The Applicants version is that he was never in the area of the office on 18 September. However at no stage was there any challenge to the evidence which was given to the effect that the applicant had admitted to the South African Police when they questioned him, that he had been in that area on that morning to get a glass of water. Applicants' version is accordingly inconsistent in this regard. Secondly the witness Pretorius testified that he saw the Applicant in the area when he was fetching his tea at about 10.30am. He said that he saw the Applicant in the passage area near the room where the money had been stolen from. When he was cross examined by the Applicants representative, the

Applicants' representative put it to him that the Applicant would deny that he was in the area, he merely asked Pretorius what the Applicant had been doing in the passage and Pretorius replied that the Applicant was standing with his back to him in the passage. When the Applicant later testified, he denied that he had been in the passage. It could be that Mr. Ngwenya's inexperience was the reason for him failing to put the Applicants version to Pretorius. However his failure to do so leaves a worrying question mark over the Applicants version. I have no reason to disbelieve the evidence of Pretorius. He gave evidence in an open, straightforward way and I have not at any stage felt that he was not being truthful. He also seems to have had a reasonably close relationship with the Applicant. He testified as did the Applicant, that he had done the Applicant a favor during lunch hour on 18th September by taking the Applicant in a vehicle to the shop to collect some speakers. He also testified that the Applicant usually got a lift with him at the close of business. Pretorius was never challenged on any aspect of his evidence and I cannot think of any reason whatsoever as to why he should lie about seeing the Applicant in the passage and nor was any reason ever put to him, or even mentioned in argument by the Applicants representative. Accordingly I find that, aside from being an innocent witness, in that he lied about his presence in the passage on the morning of 18th September.

In concluding, I should add that there were also other aspects of the Applicants evidence which were unsatisfactory. For example he said that he had never seen Peter Gibson's family in Desmond's office. When it was put to him that he could not have seen them there unless he was in the area himself, he said that he had seen them from upstairs in the workshop. When this was put to the shop steward, Christopher, in cross examination i.e. as to whether it was possible to see Desmond's office from where the Applicant was working upstairs, he said that it was not. In any event it was never put to Mr. Gibson that possible suspects in the theft of the money and the cell phone were his own children. This is the only reason why I as to why the Applicant persisted in mentioning that Gibson's children were in the office. There was also contradictory evidence from the Applicants last witness, Mr. Selepe who said contrary to the evidence of the other witness that Gibson and his children were still at the factory after 3.30pm on 18 September when he left work.

In these circumstances the evidence of the polygraph test of the Applicant becomes relevant. As I have said, the Applicant, of all the participants failed the polygraph test. I can place reliance on the evidence produced by the polygraph test if there are other grounds for believing that the Applicant had been dishonest. Accordingly the results of the polygraph test together with my findings that the Applicant was an inconsistent and lying witness, leads me to find that the Respondent has proved on a balance of probability that the Applicant was guilty of the first charge i.e. involvement in theft 18September 2004.

With regard to fact that the Respondent called a witness who had not been called at the disciplinary enquiry, the Applicants representative in his argument said in evidence that the respondents evidence should not be relied on because of this. However, an arbitration is a hearing de novo i.e. a new hearing and the Respondent is not limited to witnesses which it called at the disciplinary hearing.

With regard to the second charge i.e. Insubordination on 23 September, I believe that the Respondent has also discharged the onus that rested on it to prove that the Applicant was guilty of this charge. The evidence by Lutchman was very straightforward. He is the Applicants senior. He was asked to do a job by Mr. Gibson and he in turn spoke to Earnest Joubert and Joubert told him to take the

Applicant. When he approached the Applicant the Applicant refused to come. He said that he asked the Applicant on three separate occasions to come with him and he refused. Lutchman said that he thought the Applicant was joking when he first refused but he persisted in asking him and he continued to refuse. The Applicants representative's only response to this evidence was as follows: "He didn't refuse."

He never challenged Lutchman when Lutchman testified that after the Applicants refusal, Lutchman had gone to Steve Bruce and told him that the Applicant had refused. Gibson also confirmed this. No attempt was made to explain with Lutchman in argument as to why Lutchman should have lied:

a) about his interaction with the Applicant
b) about reporting the Applicant's behavior to Gibson.

Furthermore the Applicants version is not far off from that of Lutchman in any event. He testified that he was told to go with Lutchman to do the job. He says that he told Lutchman to go and speak to Earnest Joubert about it i.e. okay it with Joubert. He said that instead Lutchman went and reported him to Bruce. He then confirmed that Bruce called him and asked him why he had refused to go. It seems to be overwhelmingly probable that in fact what happened was that the Applicant believed that he and the other workers were going to be leaving early because the following day was a public holiday and when he received a last minute instruction to carry out a job he refused to do so. If the Applicant had merely said to Lutchman "Go and ask Joubert" then the most rational and logical response of Lutchman would have been to have said to the Applicant that he in fact had been told by Joubert to take the Applicant. Instead and if I might add improbably, the Applicant would have me believe that Lutchman's response to this question was to march off and report him to Bruce for refusing to come. On a balance of probabilities I find it overwhelmingly more probable that the Applicant simply refused to go with Lutchman because he wanted to go home, and accordingly the Applicant is guilty of the second charge as well.

Applicants' representatives introduced a document which related to the question as to whether the Applicant was guilty or not in the first charge. I made it clear to him during the course of cross examination that I could not accept this document. It was a photocopy of a document appearing to emanate from the office of the South African Police which said that the Applicants fingerprints were not found on site. For me to be able to admit this document into evidence I would have to have the author of the document appear in front of me i.e. the investigating officer and the fingerprint expert. These officers would then have to have given evidence as to what they did and more importantly, when they carried out the investigation. They would then have to have been subjected to cross examination and only thereafter would I have admitted this into evidence. Documents cannot be cross examined and I would be setting a very dangerous precedent if I simply allowed this meaningless document to be entered into evidence. It seems as though the Applicant in this matter may have made the mistake that many other applicants who challenge their dismissals at arbitration, have made. They believe that because they were not charged, or were acquitted in criminal proceedings, then it follows that they should also be found not guilty of misconduct at arbitration.

With regard to the Question of sanction I do not intend to interfere with the sanction imposed upon the Applicant. If he had only been found guilty of insubordination I may possibly have interfered with the employers' decision to dismiss the Applicant. However the Applicant was also found guilty on a far more serious first charge and in these circumstances the cumulative effect on both these charges inclines me to this view that dismissal is a perfectly appropriate action.

AWARD

Applicants claim is dismissed.

Richard Lyster.
Arbitrator
14 May 2005