

**THE APPLICATION OF CRIMINAL INVESTIGATIONS METHODOLOGY AND GUIDELINES
IN MODERN DAY LABOUR RELATED INVESTIGATIONS**

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LIST OF ABBREVIATIONS

APA	American Polygraph Association
CCMA	Commission for Conciliation, Mediation and Arbitration
ILO	International Labour Organisation
LRA	Labour Relations Act
RICA	Regulation of Interception of Communications and Provision of Communication-Related Information Act
SAPS	South African Police Services
SCA	Supreme Court of Appeal

1 Introduction

The internal disciplinary procedures of companies are not always in place or up to standard. Employers may find it easy to dismiss employees especially for misconduct in the early stages of the internal enquiry, but as soon as these cases are referred to the Commission for Conciliation, Mediation and Arbitration (hereafter referred to as CCMA) and the labour courts, these apparently straightforward cases suddenly are not that easy to prove as previously perceived to be.

It is often the case that due to a poorly executed investigation, lack of evidence, ill understanding of legal principles and half-hearted charge sheets employers do not succeed with successful action against their employees. It is therefore very important that a proper investigation is conducted to produce gathered evidence in a justifiable manner in order to prove the case. Whenever the initial ground work, including the investigation and gathering of evidence, have not been done in a proper manner, the chances of success at a later stage are jeopardised. As disciplinary enquiries are progressing towards formal criminal litigation, more emphasis is placed on the actual internal process, the procedural fairness of such a process, as well as on the evidence produced at the internal enquiries.

1.1 Labour legislation after 1995

The intention of the legislator, by introducing the *Labour Relations Act*¹ (hereafter referred to as LRA) read in conjunction with schedule 8, which was published under the title “Code of Good Practice – Dismissal” was to simplify the disciplinary processes when a breach of the employer’s disciplinary code would arise between employee and employer.

Schedule 8 merely requires the employer to:

- a) notify the employee of the allegations;
- b) provide a notice in a form or language that the employee can reasonably understand;
- c) provide the employee with reasonable time to prepare him- or herself;
- d) allow the employee to be represented by a trade union representative or fellow employee; and

1 66 of 1995.

- e) inform the employee of decision taken and inform the employee of the right to refer a dispute to the CCMA or a bargaining council.

In terms of section 138(6) as well as section 203(3) of the LRA, commissioners are required to determine if a dismissal was procedurally fair and are compelled to take schedule 8 into consideration. Commissioners and arbitrators alike have ignored the Code of Good Practice and continue to apply rigid rules of procedure, making punitive awards of compensation for even relatively minor lapses.²

Schedule 8 would appear to be very flexible, and non-prescriptive, precisely therefore the argument is held that it is not as straightforward as suggested by case law and academics. The interpretation, as is general in our law, has therefore also revealed the multiple interpretations and applications by commissioners and subsequent courts. It is common practice in labour contexts that reference is made to criminal procedure and the application thereof in labour cases.³

The LRA stipulates that a dismissal is unfair if it is not effected for a fair reason and in accordance with a fair procedure. Section 188 of the LRA stipulates that a dismissal is unfair if the employer fails to prove that the reason for the dismissal is a fair reason based on the misconduct or incapacity of the employee, or is based on the employer's operational requirements, and that the dismissal was effected in accordance with a fair procedure. Furthermore, any person considering whether or not the reason for dismissal is a fair reason or whether or not the dismissal was effected in accordance with a fair procedure, must take into account any relevant Code of Good Practice issued in terms of the LRA, and specifically schedule 8.

The right not to be unfairly dismissed is considered one of the most basic workers' rights in South Africa and is also contained in Convention C158 of the International Labour Organisation⁴ (hereafter referred to as ILO) which is applicable as South Africa is a member state of the ILO. In *NEHAWU v University of Cape Town*⁵ and *Others* the Constitutional Court held that the right not to be unfairly dismissed is a core right protected under the right to fair labour practices.

Section 185(a) of the LRA further states that:

2 Borat 2007 www.labour.gov.za.

3 Borat 2010 www.labour.gov.za.

4 Geneva Conference: Termination of Employment Convention C 158 of 1982 at <http://www.workinfo.com>.

5 2002 (4) BLLR 311 (LAC).

[e]very employee has the right not to be unfairly dismissed.

Section 188(1) (a) – (b) expands on this protection against unfair dismissal by providing that a dismissal will be unfair:

... if the employer fails to prove that the dismissal was effected in accordance with a fair procedure.

The LRA states that an employee may not be reinstated if the dismissal was substantively fair, but procedurally unfair.⁶ The only relief such an employee has is that of compensation which may also be denied if the flagrancy of the employee's misconduct allows for it.⁷

It is therefore essential that at least the substantive evidence has to be produced by the investigation officer at the initial disciplinary hearing. If the process has progressed to such a drastic step in proceedings that a disciplinary hearing would be unavoidable, the trust might well have already been irretrievably broken down.

1.2 The Constitution of the Republic of South Africa

In section 23(1) of the *Constitution of the Republic of South Africa, 1996*⁸ (hereafter referred to as the Constitution) it is stated that "everyone has the right to fair Labour Practices." The word "right" in this legal provision is useful because infringing the rights of an employee is likely to be regarded as unfair under labour law.

However, in dealing with all constitutional rights section 36(1) of the Constitution must be applied upon deciding the interpretation and limitation of such a right, and states:

[o]nly in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including:

- (a) the nature of the right;
- (b) the importance of the purpose of the limitation;
- (c) the nature and extent of the limitation;
- (d) the relation between the limitation and its purpose; and
- (e) less restrictive means to achieve the purpose.

6 S 193(2)(d) of the LRA.

7 S 194(1) of the LRA.

8 *Constitution of the Republic of South Africa, 1996.*

1.3 *The internal disciplinary process*

The argument is also raised that, if the internal process that had been followed was adequate and up to standard, the multiple issues raised at the later CCMA hearing will be minimized.

Draft suggestions on changing the formal and lengthy process were submitted to the Labour Minister by Cheadle, who stated:⁹

Despite the clear direction given in the code, employers, consultants, lawyers, arbitrators and judges have continued to over-emphasize pre-dismissal procedures and in so doing have imposed an unnecessary burden on employers without advancing the protection of workers. There are various reasons for this. Firstly, the Industrial Court had developed a jurisprudence that imposed strict procedural requirements on pre-dismissal hearings. Secondly, employers had established complex disciplinary procedures under the old LRA but did not alter those procedures with the introduction of the 1995 Act. Thirdly, arbitrators and judges, schooled under the old LRA, continued to apply the technical and exacting jurisprudence developed under that tradition.

Case law would also suggest that formal criminal-like disciplinary processes are not prescribed by the LRA. In the case of *Avril Elizabeth Home for the Handicapped v CCMA*,¹⁰ Judge Van Niekerk stated that the rules relating to procedural fairness introduced in 1995 do not replicate the criminal justice model.

Levy¹¹ had the following to say with regard to the procedural requirements of a disciplinary hearing; this after the judgment in the *Avril Elizabeth Home for the Handicapped v CCMA* case:

[b]usiness owners must stop believing that they need to meet as high a standard of absolute justice in their (disciplinary) procedure as the High Court of South Africa. When there's a problem with discipline, you don't have hearings, you have a meeting. You don't read people their rights, you don't have cross-examination, you don't have prosecutors and defences. You have a disciplinary meeting at which you need to say to the guy this is the nature of the complaint, what have you got to say for yourself?

It is therefore suggested by Levy¹² that the disciplinary process is not a formalised criminal process but merely an opportunity for the employee to state a case in terms of the requirement of schedule 8 of the LRA.

9 Cheadle 2006 *Industrial Law Journal* 8-12.

10 2006 27ILJ 1644 (LC).

11 Levy 2007 *Espresso newsletter, Standard Bank Business Banking* 1-2.

12 Levy 2007 *Espresso newsletter, Standard Bank Business Banking* 1-2.

In *Rand Water Board v the CCMA*¹³ the court ruled that even where the employer has failed to comply with minor technical requirements of its own disciplinary code, the enquiry can still be procedurally fair in the absence of loss or prejudice to the employee.

Employers have since established their own disciplinary processes, which are mainly formal criminal-like approaches. In *Denel v Vorster*¹⁴ the Supreme Court of appeals agreed that employers are compelled to follow their own disciplinary codes, which include rights to call and cross-examine witnesses, which, according to the author, relate to formal court-like principles.

Formal criminal-like disciplinary processes remain to be followed by employers in South Africa. These procedures of formal character still remain acceptable, as to be realised in various CCMA cases in which commissioners (judges and attorneys) related back to criminal law principles upon deciding cases.¹⁵

The reasons why the rigid procedures are still followed are, according to Borhat,¹⁶ the following: firstly, the Industrial Court had developed jurisprudence under the old LRA that imposed strict procedural requirements on pre-dismissal hearings, and despite the endeavour in the new LRA to break away from this approach, lawyers, arbitrators and judges, schooled under the old LRA, continued to apply the technical and exacting jurisprudence in developing the new. Secondly, employers had established complex disciplinary procedures under the old LRA but did not alter those procedures with the introduction of the 1995 Act. Thirdly, faced with the arbitrators' and judges' decisions, continuing the old jurisprudence, lawyers and consultants gave advice that protected the interests of their clients, which luckily coincided with their own. Finally, the model of disciplinary hearings developed under the 1956 Act, premised as it was on the analogy with criminal proceedings, did not die and gave way to the model advanced under the Labour Relations Act 28 of 1956, which is more analogous to procedures under administrative law, that are more flexible and based on the Code of Good Practice.

The argument that the CCMA will later on be proved as problematic for the employer, if the initial disciplinary hearing was found not to be procedurally and substantively fair, is highlighted

13 (2005) 26 ILJ 2028 (LC).

14 2004 ZASCA 4.

15 *Sidumo & Another v Rustenburg Platinum Mines Limited and Others and Cape Town City Council v SAMWU* (2000) 12 ILJ 2409 (LC).

16 Bhorat 2007 www.labour.gov.za.

with the proposed Labour Relations Amendment Bill.¹⁷ This is a fifth amendment since the promulgation of the LRA.

The amendment of subsection 2A(k) of the LRA seeks to empower the CCMA to make rules regarding representation, whether to allow or prohibit representation in any conciliation or arbitration proceedings. This new amendment wants to provide the CCMA with discretion whether to allow or prohibit representation considering the complexity of the matter.

Although phrases such as “a disciplinary enquiry” are not to be compared to or take the shape of a formal criminal process it is commonly used by academics and judges. In *Moropane v Gilbeys Distillers & Vintners (Pty) Ltd & Another*¹⁸ the court held that less stringent and formalised compliance is applicable, as had been the case under the unfair labour practices jurisdiction of the Industrial Court.

The argument therefore is that the abovementioned factors may be applicable to all misconduct cases. When an employee is faced with dishonesty charges, he may argue that the facts contained are of a complex nature, or that he has not got the ability to argue the case. Then it would normally be regarded as in the public interest to allow for sought after representation.

It is also common practice that organised unions will appoint employees with a strong legal background. These types of employees may even find their way to represent the union’s employee at an internal disciplinary enquiry.

Suggestions that companies need to move away from phrases such as charge sheets rather to a list of allegations and not a disciplinary hearing but a disciplinary enquiry, is a valid reasoning, but the disciplinary codes of companies refer to such phrases and it will be difficult to change the mindset towards not using these phrases as it have already been part and parcel of the labour context.

The Constitutional Court accepted that, in determining whether the sanction was fair, a commissioner may not give any preference to the views of either party to a dispute. In this regard, judge Navsa stated the following:¹⁹

17 LRA as amended by the *Labour Relations Amendment Bill* B12 of 2010.

18 1998 19 ILJ 635 (LC).

19 *Sidumo & Another v Rustenburg Platinum Mines Limited and Others* par 62.

[n]either the Constitution nor the LRA affords any preferential status to the employer's view in the fairness of a dismissal. It is against constitutional norms and against the right to fair labour practices to give pre-eminence to the views of either party to a dispute.

In Judge Ngcobo's judgement,²⁰ dealing with the assumption that an employer's reason for dismissal at arbitration had been irrelevant, he explicitly dispelled this assumption by saying the following:

... what is required of a commissioner is to take seriously the reasons for the employer establishing the rule and prescribing the penalty of dismissal for breach of it. Where an employer has developed and implemented a disciplinary system, it is not for the commissioner to set aside the system merely because the commissioner prefers different standards.

The abovementioned case is a clear suggestion that more emphasis is placed on both procedural and substantive fairness, but this case ranked the viewpoint of the employer equal to the thoughts and rules of the employer. Judge Navsa,²¹ by stating that the employee's view of fairness is not to be a preferential argument, suggests that the courts will also have to investigate in depth *in casu* the initial disciplinary enquiry, and evidence produced at that enquiry to establish fairness and evaluation of a fair process.

The CCMA regularly makes use of criminal principles that will be discussed in detail below as guidelines and also as measuring instruments when fairness issues are decided upon. The author is therefore of the opinion that the precedent set with regards to applying criminal principles in the labour contexts is acceptable and admissible and may therefore possibly be followed in disciplinary investigations and proceedings.

In *Cape Town City Council v SAMWU*²² the court held that entrapment of an employee is to be used in extreme circumstances and only when all other conventional investigation methods have failed, as the courts treat evidence obtained from traps with caution.²³ Both the criminal and labour courts recognise section 252A of the *Criminal Procedure Act*²⁴ as binding legislation when making use of traps.²⁵ It is thus clear that the CCMA, by mouth of its commissioners, does apply criminal law principles.

It is also interesting to realise that large corporations, retailers and banking institutions enforcing policies and procedures on the conducting of investigations, are referring back to criminal

20 *Sidumo & Another v Rustenburg Platinum Mines Limited and Others* para 181-182.

21 *Sidumo & Another v Rustenburg Platinum Mines Limited and Others* par 202.

22 2000 12 ILJ 2409 (LC).

23 *Grogan Dismissal, Discrimination & Unfair Labour practices* 327-328.

24 51 of 1977.

25 *Grogan Dismissal, Discrimination & Unfair Labour practices* 327-328.

guidelines in gathering evidence. It is therefore not uncommon for investigators to use criminal case law principles, as no labour law guidelines or legislation have for that matter been available during their investigation. The author is of the opinion that, should these criminal principles be used in the absence of guidance in terms of labour legislation to justify an action or to simplify the process, no objection should be raised as it will benefit both parties as these are established guidelines to measure fairness and admissibility. Trade unions are becoming increasingly aware of the decrease in employment and the increase in unemployment. Taking this fact into consideration the process of pre-dismissal will become even worse with regard to the following of more formal processes. It is fair to say if criminal law principles are followed as guidelines during investigations in relation to cases, substantial concerns will also decrease in later stages of proceedings. Although following a formal process had not been the intention of the legislator, this process was set as the benchmark in labour litigation and employers are adhering to these guidelines.

Procedural fairness in disciplinary enquiries was rigid and non-flexible to start off with, and **is** becoming more complex and rigid court-like procedures as a result of changes in legislation, trade union representatives and case law, as mentioned above. According to Grogan²⁶

... courts and arbitrators continue to apply most of the guidelines developed under the 1956 Labour law when evaluating the procedural fairness of dismissals, subject only to the overriding consideration that the legislature intended to simplify procedures and render them less technical.

Stricter standards are applied to large employers than that expected of smaller employers. The code²⁷ is a tool to assist line management to apply consistency when dealing with disciplinary matters and states that:

... the form and content of disciplinary rules will obviously vary according to the size and nature of the employers business and that larger enterprises should follow a more formal approach of discipline.

This paper will focus on the role of the investigating officer and the manner in which he prepares and gathers evidence to be produced at disciplinary hearings. Criminal principles will be investigated and discussed to determine if they are in fact deemed part and parcel of the labour law for purposes of misconduct.

26 Grogan *Dismissal, discrimination & unfair labour practice* 326.

27 Code of Good Practice – Dismissal Schedule 8 item 3(1).

The arguments raised in favour of formalising the investigation process will normally apply to high level investigations against senior managers or very serious misconduct by employees. These cases will also normally expand to multiple misconduct charges and criminal prosecution. Corporate companies will therefore rather prefer a proper formal investigation as these types of cases may damage the reputation of the company, not to mention the financial costs should damages be awarded. It is therefore not suggested that less serious cases be treated on an equal basis.

2 Investigation process and role of the investigation officer

The code²⁸ in the first sentence of item 4(1) states:

[n]ormally, the employer should conduct an investigation to determine whether there are grounds for dismissal.

Although the legislator did not prescribe that an investigation must be done under all circumstances, it has already been stated above that this paper will focus on high-level misconduct by senior employees. An investigation into serious misconduct by senior employees and multiple misconduct allegations must be investigated.

The standard of proof in disciplinary proceedings like civil proceedings is “proof on a balance of probabilities according to the LRA”.²⁹ This is less strict than the criminal standard of proof, which requires “proof beyond reasonable doubt according the *Criminal Procedure Act*”.³⁰

The position with regard to civil cases, as formulated by Judge Viljoen,³¹ is as follows:

[d]it is, na my oordeel, nie nodig dat ‘n eiser wat hom op omstandigheidsgetuienis in ‘n siviele saak beroep, moet bewys dat die afleiding wat hy die hof vra om te maak die enigste redelike afleiding moet wees nie. Hy sal die bewyslas wat op hom rus kwyf indien hy die hof kan oortuig dat die afleiding wat hy voorstaan die mees voor die hand liggende en aanvaarbare afleiding is van ‘n aantal moontlike afleidings.

The judgement in *Sidumo & Another v Rustenburg Platinum Mines Limited and Others*³² as mentioned above reveals indications that the standard of proof in disciplinary enquiries might have shifted dramatically from a balance of probability to that of beyond reasonable doubt.

28 Code of Good Practice – Dismissal Schedule 8 item 3(1).

29 66 of 1995.

30 51 of 1977.

31 *AA onderling (AA Onderlinge – AA Onderlinge Assuransie-Assosiasie Bpk v De Beer* 1982 2 SA 603 (A).

32 (2007) 12 BLLR 1097 (CC).

This topic is however a controversially debated topic amongst academics, law practitioners and labour law experts.

To succeed in proving that a dismissal for misconduct was fair, all an employer is required to do, is to indicate that it is more likely that the dismissal was substantively and procedurally fair than not. The *audi alteram partem* principle needs always to be shown in determining fairness when dealing with initial disciplinary proceedings.

Section 188 of the LRA makes it clear that a dismissal has to be found to be unfair if the employer cannot prove two things: the reason for the dismissal related to the employee's conduct, capacity or the employer's operational requirements, and the dismissal took place in terms of a fair procedure. In such cases the onus of proof falls on the employer. If the employer fails to prove this, the employee will succeed.

The first step the employer normally follows, if allegations of breach of company policy arise, is to conduct an investigation as the onus of proving any wrongdoing rests with the employer.

Various methods can be used for investigations. Methods that are legitimate and potentially effective include:³³

- a) carrying out a thorough investigation so as to gather relevant facts;
- b) using documents as proof;
- c) backing up the documentary proof with video footage, audio evidence and polygraph test results;
- d) calling witnesses to give truthful and relevant testimonies; and
- e) trapping the suspected employee.

Methods that are illegitimate and dangerous include:

- a) falsifying documents and taped evidence;
- b) getting witnesses to lie;
- c) coercing the accused employee into confessing; and
- e) entrapping the suspected employee illegally.

All complaints deemed serious need to be investigated. The purpose of disciplinary action is not to punish, but rather to correct the employee's behaviour and that can be done with little effort. When formal disciplinary action is inevitable, a detailed and carefully recorded

33 Israelstam 2010 www.labourguide.co.za.

investigation is compulsory. The investigation should commence as soon as the misconduct has been detected, to ensure fairness towards the alleged offender and to ensure that witnesses' recollections of the incident are still fresh in their memories.

The employee needs not to be heard or represented³⁴ during an investigation process preceding the disciplinary hearing. The investigation is therefore deemed to be a process of gathering of evidence in order to in fact determine if a rule was contravened or not.

3 Investigation process: sequence of events

The investigation process and methodology that will be discussed are in use by AngloGold Ashanti, a mining company operating in the North-West Province.

The initial steps to ensure a thorough investigation need to at least consist of the following steps:³⁵

Phase 1 – Initiation

In this phase the allegations of the breach of the employer's disciplinary code will be examined in order to determine the objectives of the investigation. A disciplinary docket/file will also be prepared during this phase.

Phase 2 – Planning

During this phase the investigation planning will be done in order to determine relevant understanding of the system, to determine the potential witnesses to be interviewed, and, very important, to obtain the employer's disciplinary code in order to come to an understanding of what needs to be investigated and which potential rule was contravened.

Phase 3 – Investigation process

This phase will include the gathering of evidence, taking of statements and obtaining of documentary proof to substantiate evidence contained in witnesses' statements. The

34 *NUM 8 Others v RSA Geological Services* (2003) 24 ILJ 2040 LLC.

35 *Audit Methodology AngloGold Ashanti Group Internal Audit* 33-35.

disciplinary code will be revisited to establish if the misconduct relates back to the disciplinary code of the employer, to establish if the rule exists. All evidence then need to be re-analysed to detect if any shortfalls exist in order to rectify the shortfalls in terms of proving the case. The employee who is accused of wrongdoing then needs to be interviewed to obtain a statement, if the employee is willing to supply such a statement on a voluntary basis.

Phase 4 – Litigation

The disciplinary process will then be initiated in terms of the employer's disciplinary process, only after consultation with Management. The complaint form will be drawn up. From a practical point of view it is a good arrangement that the investigating officers act as complainant as they will have first hand knowledge of facts obtained during the investigation process.

The investigation layout as mentioned *supra* does not consist of hard and fast rules, however a structured investigation process will result in that shortcomings in terms of evidence will be identified and rectified prior to a decision to discipline an employee. This is the author's personal view of the process.

4 Statements/Affidavits

Generally evidence for either party must be given orally by the witnesses in the presence of the parties. There are certain exceptions such as receiving of evidence by way of commission, interrogation, or affidavit.³⁶

The reason for this practice is that parties should have the opportunity to challenge the evidence of the witnesses who testify against them by means of questioning. In *Ngcobo v Durban Transport Management Board*³⁷ it was found that an enquiry could be held without oral evidence, but that it constituted an exception to the rule that the accused has a right to face and cross-examine the accuser. Departure from the rule can only be justified if there are very good reasons for. Since witnesses are to give evidence *viva voce*, the reading of a statement in trial proceedings will only be allowed in certain situations and then the reading of statements are not irregular *per se*, but the commissioner is not to attach too much importance to such a statement. The reason for it is that, by making an irresistible inference, the witness does not have an independent recollection of the incident. The reading of a statement cannot be allowed without

³⁶ See for example the provisions of s 22 of the *Civil Proceedings Evidence Act* 25 of 1965 (hereafter the CPEA).

³⁷ 1991 12 ILJ 1094 (IC).

laying the basis for refreshing the memory of the witness. Under the circumstances the cross-examining party may question the witness on the reliability of his/her observations.³⁸

In the unfair labour practice proceedings in the Industrial Court it was held that it was the only entity with discretion to dispense with adducing oral evidence. Even if there are no facts in dispute the parties must apply to the court to dispense with oral evidence.³⁹

According to Grogan⁴⁰

... statements may play an important role during disciplinary inquiries. It would also be sensible precaution to require witnesses to depose their statements in affidavit form.

Written statements done voluntarily are very reasonable sources of evidence. It is advisable to obtain statements from all potential witnesses during the investigation of alleged misconduct. The risk of not obtaining statements from all potential witnesses is that witnesses may later be influenced to change their original versions, and if that happens the investigation officer will have no remedy to counter the then hostile witness.

It is essential when obtaining a statement from a witness, that facts contained therein is applicable and that the deponent is comfortable with the contents thereof and fully agrees with the contents. As a practical guideline and where possible, it is advisable that the witness supplies the statement in his own handwriting; that will later defuse claims that the investigating officer dictated the facts by writing the statement himself.

All additional evidence supplied by witnesses such as photo's, e-mails and documents, should be incorporated in these witness statements. The investigating officer, after completion of the investigation, should supply a comprehensive statement which should at least contain *inter alia* the following:

- a) detailed investigation findings in terms of the mandate supplied;
- b) details of all evidence gathered (statements, photo's and other documentary evidence;
- c) transgressions committed by the employee in terms of the disciplinary code of the employer;

38 *Serenite Wellness Centre (Pty) Ltd v Commission for Conciliation, Mediation & Arbitration & Others* (2003) 24 ILJ 236 (LC).

39 *SA Cleaners Security & Allied Workers Union v Masonic Haven (Pretoria)* (1996) 17 ILJ 193 (IC).

40 *Grogan Dismissal, discrimination & unfair labour practice* 327.

- d) whether the employee made a statement and if he/she was honest in supplying these statements or can it be contradicted with evidence; and
- e) if the trust relationship has been broken and why this is argued.

The *Criminal Procedure Act*⁴¹ makes provision for a range of statements that can be used and some of the principles of these statements may save time and money if utilised. Although very rare it is not unacceptable to produce a statement (only if agreed upon by all parties) in accordance with the principles of section 212 of the *Criminal Procedure Act*.⁴² Section 212 statements entail the following:

[p]roof of certain facts by affidavit or certificate

- (1) Whenever in criminal proceedings the question arises whether any particular act, transaction or occurrence did or did not take place in any particular department or sub-department of the State or of a provincial administration or in any branch or office of such department or sub-department or in any particular court of law or in any particular bank, or the question arises in such proceedings whether any particular functionary in any such department, sub-department, branch of office did or did not perform any particular act or did or did not take part in any particular transaction, a document purporting to be an affidavit made by a person who in that affidavit alleges.

It is further the opinion of the author that section 213 of the *Criminal Procedure Act*⁴³ with reference to statements (with consent of all parties) may be utilised. Section 213 statements entail the following:

Proof of written statement by consent:

- (1) In criminal proceedings a written statement by any person, other than an accused at such proceedings, shall, subject to the provisions of subsection,
- (2) be admissible as evidence to the same extent as oral evidence to the same effect by such person.

Although both these provisions are related to criminal proceedings, the author does not find any reason why these principles may not be used in disciplinary hearings. These principles can save a lot of time and expenses. It has to be kept in mind that, should negotiations take place allowing these statements, or making use of these principles, it should be done with consent and knowledge of both parties involved. At this stage no case law could be found where these principles were applied and it therefore remains an opinion by the author.

41 51 of 1977.

42 51 of 1977.

43 51 of 1977.

It is not suggested that a formal process has to be followed in this regard, it is argued that the application of these principals might save time and prevent unnecessary witnesses or/and unrelated evidence.

5 Computer printouts

Computer printouts are frequently used as evidence in hearings, although there are prescribed methods to produce these documents into evidence so that it may be admissible. The *Computer Evidence Act*⁴⁴ which was later repealed contained ed guidelines to be followed to produce such documentation into evidence.

Section 2 of the abovementioned act provides for the authentication of computer printouts (which includes printouts of e-mail messages, website communication sessions and records and file downloads). Such a computer printout may be authenticated by means of an affidavit which must include the following:

- a) identification of the computer printout in question;
- b) confirmation that such copy/reproduction/transcription is a true copy, reproduction, transcription, translation or interpretation of such information;
- c) description in general terms of the nature, extent and sources of the data and instruction supplied to the computer and the purpose and effect of the processing of the data by the computer;
- d) correctly and completely supplied with data and instructions appropriate to and sufficient for the purpose for which information recorded in the computer printout was produced;
- e) unaffected in this operation by any malfunction interference, disturbance or interruption which might have had a bearing on such information for its reliability;
- f) clarification that no reason exists to doubt or suspect the truth or reliability of any information recorded in or result reflected by the computer printout.⁴⁵

It is important to keep in mind that the accused must be afforded his representative whenever interviewed or questioned if requested; it is however unclear if this option should be offered if not requested. It is the author's opinion that if the representative was not present and any form

44 57 of 1983.

45 Deneysreitz 2001 <http://deneysreitz.co.za>.

of statement has been made, the statement's admissibility won't be jeopardized due to the fact that the representative was not present.

6 Testing the reliability of evidence

The witness's evidence is then assessed on its own for anything that might shed light on its reliability, such as:

- a) Internal contradictions in the testimony of the witness, which would affect the reliability of that witness's testimony (this may be questions relating to the witness's ability to have heard, seen or accurately remember an incident).
- b) Supporting evidence for what the witness said, either in the form of direct or circumstantial evidence from other evidence.
- c) Inherent improbabilities in what the witness said.
- d) Objective reasons why the witness might be biased, for example the witness had been charged for the same offence, the witness is an informer who is paid to find evidence implicating others in misconduct, et cetera.
- e) Lastly, the credibility of a witness based on a judgement of how he/she behaved under oath, which amounts to an assessment of the character of the witness. This is a last resort and should not be preferred as a method of assessing a witness's evidence above an assessment of the probabilities of the testimony itself.⁴⁶

7 Entrapment

When employers uncover misconduct but cannot after proper investigation identify the culprits, they may be tempted to resort to "trapping". According to Grogan⁴⁷

... this entails appointing people, often outside 'agents' whose job is to try to conclude 'deals with employees, usually as purported receivers of stolen goods'.

46 *Body Corporate of Dumbarton Oaks v Faiga* 1999 1 SA 975 (SCA) at 979B-980A.

47 *Grogan Dismissal, discrimination & unfair labour practice* 327.

In *Cape Town City Council v SAMWU*⁴⁸ the courts held that entrapment of an employee is to be used in extreme circumstances and only when all other conventional investigation methods have failed, as the courts treat evidence obtained from traps with caution. Both the criminal and labour courts recognise section 252A of the *Criminal Procedure Act*⁴⁹ as binding legislation when making use of traps. The Labour Court developed a two-step inquiry in line with the *Criminal Procedure Act*⁵⁰ to address this issue.⁵¹ Firstly it has to be determined if the conduct went beyond the mere providing of an opportunity to commit an offence. If it did, the evidence may be admitted provided that public and private interests are weighed up against each other.⁵²

In the *Cape Town City Council* case⁵³ the court mentioned that two safeguards have been developed to guard against the abuse of trapping. The first is to disregard evidence obtained by trapping when deciding whether or not the accused committed the offence, and the second is to treat entrapment as an absolute defence to a criminal case. The court however concluded that it is acceptable throughout the world that trapping is justifiable under certain circumstances.⁵⁴ The question is how to establish when accused persons cannot be allowed to rely on the fact that they were trapped either to escape conviction or to exclude evidence relating to the trap.

The judge in the *Cape Town City Council*-case was faced with the employee's contention that all entrapment procedures in employment contexts could not be justified. The judge stated that⁵⁵:

... law enforcement and the pursuit of justice would be impeded if evidence obtained in a trapping situation were excluded, provided the use of entrapment is properly scrutinized and constrained.

It is interesting that the judge in this case referred to law enforcement, as if it was suggested that private investigators and forensic investigators are deemed law enforcement authorities.⁵⁶ In *Lawrence v I Kuper & Co (Pty) Ltd t/a Kupers*⁵⁷ the court was of the opinion that it was not unfair or improper for an employer to arrange for the entrapment of an employee in order to obtain evidence.

48 (2000) 12 ILJ 2409 (LC).

49 51 of 1977.

50 51 of 1977.

51 Grogan *Dismissal, discrimination & unfair labour practices* (2007) 327-328.

52 Grogan *Dismissal, discrimination & unfair labour practices* (2007) 327-328.

53 *Cape Town City Council* par 59.

54 Grogan *Dismissal, discrimination & unfair labour practice* 327.

55 Par 60.

56 *Cape Town City Council* par 60.

57 1994 7 BLLR 85 (IC).

Where a third party makes a recording of a telephone conversation between the employee and a third party implicating the employee in receipt of a bribe, and such a recording is not aimed at entrapping the employee into committing crime, the evidence so obtained will be admitted as evidence in arbitration proceedings.⁵⁸

When one ventures on the issue of fairness of entrapment in the employment relationship, the rationale for allowing evidence of a trap as being admissible may be found in the fact that the employer is entitled to secure his financial integrity by subjecting employees to honesty tests. These tests must however not be inappropriate.⁵⁹ It was held in *Cape Town City Council v SA Municipal Workers Union & Others*⁶⁰ that it is probably not unfair and unacceptable in context of employment relationship but the court should in exercising its discretion exclude such evidence on grounds of possible prejudice.

In *SACCAWU obo Libi & Another v Weirs Cash & Carry*⁶¹ the provisions of section 252A of the *Criminal Procedure Act*⁶² were also applied. The commissioner in this case was of the opinion that the undercover agents went too far and in fact they went beyond the safeguard of merely creating an opportunity to commit an offence. The commissioner applied the criminal guidelines of section 252A of the *Criminal Procedure Act*⁶³ to determine if the entrapment was fair and just.⁶⁴

According to an arbitrator in *SATAWU obo Radebe v Metrorail Wits*⁶⁵ money that was marked by the employer prior to an entrapment procedure has been found in possession of the employee. The arbitrator held that the dismissal was fair and applied section 252A of the *Criminal Procedure Act*⁶⁶:

Investigators are not to go beyond the boundaries of providing an opportunity for the employee to commit an offence. Enticement of employees and misrepresentation are methods that are to be avoided, as the case would then be procedurally and substantially unfair.⁶⁷ Criminal courts

58 *Sugreen v Standard Bank of SA* (2002) 23 ILJ 1319 (CCMA).

59 *SATAWU on behalf of Radebe v Metrorail Wits* (2001) 22 ILJ 2372 (ARB).

60 2000 21 ILJ 2409 (LC).

61 2002 7 BALR 759 (CCMA).

62 51 of 1977.

63 51 of 1977.

64 *Grogan Dismissal, discrimination & unfair labour practice* (2007) 329.

65 2001 8 BALR 518 (CCMA).

66 51 of 1977.

67 *Grogan Dismissal, discrimination & unfair labour practice* (2007) 329.

will not allow evidence to be admitted if such evidence was obtained beyond providing the opportunity to commit an offence. It is however believed that the strict rules may not be applied in the labour law contexts. Although private investigators must also uphold the constitutional rights of the public, their actions are not as restricted as those of government officials like the SAPS.

The use of entrapment is further only to be considered when reasonable grounds exist, the offence in question is serious in nature, and all other methods of preventing the offence have been exhausted, as well as the fact that the offence was committed frequently. Investigators have to stay within the boundaries of section 36 of the Constitution which states:

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

The Constitution states in section 14 that "everyone has the right to privacy." This would surely include not to be entrapped. Section 252A of the *Criminal Procedure Act*⁶⁸ has never been tested against section 36 of the Constitution.

The following practical guidelines should however be followed whenever an investigator embarks on an entrapment process:⁶⁹

- a) money involved should be photographed; the serial numbers written down and if possible, marked with invisible ink specially designed for this purpose.
- b) money is not to be photocopied.
- c) the person performing the trap should be searched before and after the trap; a sworn statement should include these facts.
- d) a record of the event is to be kept and later captured in a detailed statement.
- e) two witnesses are to be present when tape recorders, money or any objects that will be used in the trap are handed over to the person conducting the trap (informer or agent). This handing over of objects to the agent or informer as well as the search that is conducted on the agent or informer have to be recorded on video camera.
- f) the statement from the informer or agent prior to the entrapment must include the fact that the rule regarding enticement is known and also the fact that should enticement take place it might constitute a criminal offence.

68 51 of 1977.

69 Pieters and Pretorius *Anglo Gold Ashanti Policy on Entrapment* 2008 4-8.

The abovementioned guidelines are based on personal experience and inputs from Group Forensics Anglo Gold Ashanti.

It again becomes clear that the LRA does not provide any legislative guidelines to be followed when faced with entrapment in the labour context, but rather opt to refer to well established criminal procedure law applications. Commissioners, arbitrators and labour court judges alike, continue to refer to criminal case law as guidance when faced with labour disputes involving entrapment.

8 Lie detectors tests

According to the American Polygraph Association (hereafter referred to as APA),⁷⁰ more than 250 studies have over the past 30 years been conducted on the reliability of polygraph testing. Independent research results of reputable universities and academic institutions worldwide indicate that, depending on the polygraph testing and question format used, the sophistication of the polygraph testing instrumentation, and the expertise of the polygraph officer, results ranging between 85% and 98% can be achieved. This implies that, for every 100 people examined by means of the most reliable question technique and instrument of high quality by an examiner such as the person used by AngloGold Ashanti, the outcome will be that at least 98 of every 100 examinees will yield a 100% reliability result.⁷¹

In spite of the abovementioned polygraph testing has been criticised. According to Richardson, FBI Laboratory Division:

[Polygraph screening] is completely without any theoretical foundation and has absolutely no validity. The diagnostic value of this type of testing is no more than that of astrology or tea-leaf reading⁷²

The United States of America has enacted the *Employee Polygraph Protection Act*⁷³ to prevent the exploitation of employees by means of polygraph testing. No such dedicated legislative protection exists in South Africa. Section 12 of the Constitution safeguards the bodily and psychological integrity of a person, which includes protection against involuntary polygraph

70 Polygraph Inquiries of South Africa 2010 www.polygraph.co.za.

71 Polygraph Inquiries of South Africa 2010 www.polygraph.co.za.

72 Richardson 2007 www.policetest.net.

73 Publ no 100-347 (28 June 1988).

testing. Polygraph testing can also infringe the right to privacy, and the right not to be compelled to give self-incriminating evidence.⁷⁴

Where polygraph testing is used as a form of corroborative evidence it would be used to support other, often highly suspect evidence. The grave danger is that this may result in situations where employers submit two or more unreliable pieces of evidence and combine them to make a “reliable” conclusion against an unfortunate employee. This is of particular concern in cases in which it appears that polygraph evidence has been used to tip the balance of probabilities.⁷⁵

Until 2001 polygraph testing has been treated highly inconsistently in terms of admissibility, and commissioners’ understanding of the scientific status, validity, and reliability thereof; and research findings regarding polygraph tests of deception are, with due respect, often confused.⁷⁶

This option is often used by employers in South Africa. As this test is not approved by SA criminal courts, the admissibility is questionable. It will accordingly only be helpful in order to corroborate evidence and not as the only evidence in an attempt to prove a case.

In *PETUSA obo Van Schalkwyk v National Trading C*⁷⁷ the arbitrator allowed polygraph results after an employee had failed his test. The arbitrator also confirmed that polygraph test results should always be regarded as corroboratory evidence. This position was also highlighted by *MEWUSA obo Mbonambi and S Bruce CC t/a Multi Media Signs*⁷⁸ where the commissioner stated that:

[t]he approach of arbitrators and the courts in this country is that the outcome of polygraph tests may be taken into account when there are other grounds for believing that the employee was dishonest.

In *NUMSA obo Mkhonza & Others and Assmang Chrome Machadodorp Works*⁷⁹ the commissioner also argued that admissibility of polygraph tests will only be in question if:

- (a) the examiner’s qualifications are dubious;
- (b) the examiner did not present oral evidence; and if

74 Dekker 2004 *SA Mercantile Law Journal* 622.

75 Tredoux and Pooley 2001 *ILJ* 819.

76 Tredoux and Pooley 2001 *ILJ* 821.

77 2000 21 *ILJ* 2323 (CCMA).

78 2005 14 *MEIBC* 6.10.2.

79 2005 14 *MEIBC* 2.11.1.

- (c) the test was not conducted freely or employees did not know why the examination was conducted.

Employers often include compulsory polygraph testing under certain circumstances in their employment contracts. In *Lefophana v Vericon Outsourcing*⁸⁰ the commissioner of the CCMA upheld a dismissal after an employee refused to undergo a polygraph examination while it was compulsory according to his employment contract.

The moment when it is argued that a compulsory clause to allow for incriminating evidence against oneself may be permissible, various constitutional issues come to mind. The “choice” or “no choice” debates were discussed by Landman⁸¹ who argued as follows:

[v]arious forms of so-called choice can be tantamount to no choice. The loss of ones livelihood, pension and other benefits must surely rank as a type of compulsion. To ignore it would mean that one gives precedence to the formal letter of the law at the expense of substance. The threat of the loss of employment may be more powerful than a legal compulsion to give incriminating evidence.

The right to privacy, is not an absolute right. This was clearly highlighted in the Constitutional Court case of *Bernstein and Another v Bester and Others*⁸² where it was stated that privacy is acknowledged in the truly personal realm, but as a person moves into communal relations and activities such as business and social interaction, the scope of personal space shrinks accordingly.

Would it therefore be fair for an employer to argue that, if the employment contract contains a compulsory clause to undergo polygraph tests or not, that the failure to comply is in itself a breach of trust? The argument has been raised that employers may institute action, in terms of section 189 of the LRA relating to operational requirement, **which** will create not only questions in terms of the LRA, but also constitutional concerns. The CCMA has at times agreed that the irretrievable breakdown of trust between an employer and employee provides enough reason for dismissal of the employee⁸³ whilst in other instances that argument was found not to be a fair reason for dismissal.⁸⁴

80 2006 15 CCMA 7.1.7.

81 Landman 1996 *Contemporary Labour Law* 29.

82 1996 2 SA 751 (CC).

83 *National Union of Mineworkers & Others and RSA Geological Services (A Division of De Beers Consolidated Mines LTD)* (2004) 25 ILJ 410 (ARB).

84 *NUM obo B Monageng and Anglo Platinum Mines* (2003) 12 CCMA 8.8.9; *Meleni & others and Rohloff Administration* (2006) 15 CCMA 8.31.1; *Mahlo and Bolt & Engineering Distributors* (2006) 15 CCMA 8.8.8; and *Van Wyk and Mnderi Meats & Another* (2003) 24 ILJ 1033 (CCMA).

Commissioners and arbitrators have to interpret the relationship of trust in each case based on its own merits. In *Standard Bank v CCMA & Others*⁸⁵ the relationship between a banking official and a bank was described as follows by the commissioner:

[i]t is one of the fundamentals of the employment relationship that an employer should be able to place trust in an employee. A breach of this trust in the form of conduct involving dishonesty is one that goes to the heart of the relationship and is destructive of it. The existence of the duty upon an employee to act with good faith towards his or her employer and to serve honestly and faithfully is one of long standing in the common law.

Accordingto the abovementioned, case law pointed out whereby commissioners allowed polygraph tests. It would however appear from *Steen vs Wetherlys (Pty) Ltd*⁸⁶ and *Simani vs Coca-Cola Fortune*⁸⁷ that not all are convinced that polygraph tests are reliable, as both these commissioners suggested that polygraph tests are in general not admissible.

The investigating officer is therefore faced with all sorts of permutations and depending on the commissioner's interpretation of polygraph admissibility will determine if such a test is found to be admissible or not. The investigating officer is also faced with rigid guidelines and, as illustrated by the case law discussed above, with different opinions.

9 Interception: Communication

The protection of the right to privacy in the workplace has been the topic of a number of judgments, especially at a time when technology and devices are becoming an increasing threat to privacy. A distinction can be drawn between monitoring and surveillance. Monitoring occurs when an employer merely observes the activities of an employee to observe conduct or measure performance. Surveillance, by contrast, is where the employer engages in the observation of the conduct or communication of employees without their consent or knowledge.⁸⁸

In terms of the limitation clause in the Constitution, section 36, the infringement of the right to privacy can sometimes be justifiable in the context of the employment relationship. To determine justifiability, it is necessary to balance the competing interests of the employer (the

85 1998 7 LC 8.23.2.

86 2005 15 CCMA 7.1.6.

87 2006 15 CCMA 8.8.7.

88 Van Niekerk 1994 *Contemporary Labour Law* 3.

right to economic activity) and the employee (the right to privacy) as contained in the Constitution.

The South African Constitutional Court in *Bernstein v Bester*⁸⁹ acknowledged that:

... as a person moves into communal relations and activities such as business and social interaction the scope of personal space shrinks accordingly

A person's privacy⁹⁰ extends only to those aspects in relation to which a legitimate expectation of privacy exists. Whether it exists requires a subjective expectation of privacy, which society recognises as objectively reasonable.⁹¹

Employers argue that they need to monitor electronic communication in the employee-employer relationship for purposes of *inter alia*:

- a) for security reasons;
- b) controlling the flow of information;
- c) protecting and securing of assets;
- d) protection against civil and criminal liability; and for
- e) operational reasons.

The Constitution states in section 14 that "everyone has the right to privacy which includes the right not to have our communications be infringed upon."

The ubiquitous nature of computers in our workplace, in comparison to the right to privacy entrenched in the Constitution,⁹² created a fine dividing line regarding the application of the right by employers to monitor and intercept electronic communication.

In the *Protea Technology*-case the court held that a constitutional right to privacy should be seen against the background of section 36, which is a balancing act against the employer's right of uncovering the truth, which was found to be in the public interest in opposition to the right to privacy.

89 1996 2 SA 751 (CC) at 789.

90 Collier *Workplace Privacy* 1743–1759

91 *Protea Technology Ltd & another v Wainer & others* 1997 (9) BCLR 1225 (W).

92 *Protea Technology Ltd & another v Wainer & others* 1997 (9) BCLR 1225 (W).

In *Investigative Directorate: Serious Economic Affairs v Hyundai Motor Distributors (Pty) Ltd*⁹³ the court held that, if a person should have control of the “inner sanctum” he or she should then logically also have control of the “flow of information” about them.

It is therefore important for an investigating officer to understand legislation applicable to the interception and monitoring of communication, as it is regularly used and produced as evidence in disciplinary processes.

In terms of the *Electronic Communications and Transactions Act*,⁹⁴ which allows for all actions with the exception of two (contracts of sale of property and contracts of marriage) a report compiled as a result of evidence obtained from interception will be equivalent to and will carry the same weight in law as another relevant document and can be presented with similar evidentiary value as any other document.

The *Regulation of Interception of Communications and Provision of Communication–Related Information Act*⁹⁵ (hereafter RICA) is very important legislation when dealing with interception of communication (telephonic, e-mails, sms’s, radio *etcetera*).

A general prohibition of the interception of communications is stipulated in section 2 of the RICA and stipulates:

... no person may intentionally intercept or attempt to intercept, or authorize or procure any other person to intercept or attempt to intercept, at any place in the Republic, any communication in the course of its occurrence or transmission.

Exceptions to section 2 of RICA are contained in sections 4-6 of RICA which state that interception is permitted, but with the following guidelines:

Section 4(1) of RICA provides that:

[a]ny person, other than a law enforcement officer, may intercept any communication if he or she is a party to the communication, unless such communication is intercepted by such person for purposes of committing an offence.

"Intercept" is defined in section 1 of RICA as meaning:

... the aural or other acquisition of the contents of any communication through the use of any means, including an interception device, so as to make some or all of the contents of a communication available to a person other than the sender or recipient or intended recipient of that communication, and includes (a) the monitoring of any such communication by means

93 2001 1 SA 545 (CC).

94 25 of 2002.

95 70 of 2002.

of a monitoring device."Communication" is defined in section 1 of RICA as including "both a direct communication and an indirect communication" the latter type of communication not being relevant here.

"Direct communication" is defined in section 1 of RICA as meaning one of two things, the first of which is relevant, being an:

...oral communication, other than an indirect communication, between two or more persons which occurs in the immediate presence of all the persons participating in that communication.

"Party to the communication" for the purposes of section 4, is defined in section of RICA as meaning, in the case of a direct communication:

...any person (aa) participating in such direct communication or to whom such direct communication is directed; or (bb) in whose immediate presence such direct communication occurs and is audible to the person concerned, regardless of whether or not the direct communication is specifically directed to him or her.

It is clear that private investigators as well as internal investigators would be included in this section and will thus be able to make use of this act and its provisions.

The court in *S v Kidson*⁹⁶ also considered whether in such circumstances it could be said that the monitoring was to gather "confidential information." It concluded that confidentiality implies that the information in question is "confided" to another person and that some burden or duty rests on the person to whom the information is communicated. On the facts of that case, the court held that information imparted in a two-way conversation about the communicator's own criminal conduct is not "confidential information" in relation to the other party, and the monitoring of the participant was for that reason also not prohibited.⁹⁷ Therefore the court ruled that any communication may be intercepted by one of the parties of that communication, provided such communication is not intercepted for the purpose of committing an offence.

In *Tap Wine Trading CC and Another v Cape Classic Wines (Western Cape) CC and Another*,⁹⁸ telephonic conversations had been recorded "at the instance of" one of the parties. The court held this constituted participant's electronic surveillance, which was not in contravention with the *Monitoring Act*⁹⁹ and also did not breach any constitutional right to privacy.¹⁰⁰ In *Waste Products Utilization (Pty) Ltd v Wilkes and Another*¹⁰¹ it was the decision of the court that if interception (lawfully and unlawfully) has taken place, the onus of proof will lie with the person benefiting

96 1999 1 SACR 338 (W).

97 *Kidson*-case at 347e-348d.

98 1999 4 SA 194 (C).

99 127 of 1992.

100 In *Tap Wine Trading CC* at (197A-G).

101 2003 2 SA 515 (W).

from the evidence, to prove that the admission of the evidence should remain the discretion of the courts.

This decision would implicate that, should an employer infringe on this right, the onus lies with the employer to explain why this evidence should be admissible as evidence. It is important to realize that no hard and fast rules exist when deciding when to conduct interceptions; this once again emphasizes the fact that employers have to make use of well-trained investigation officers. The use of well-trained and qualified investigators will ensure a successful outcome and a case ready for further litigation.

In *S v Dube*¹⁰² the private investigator acting on behalf of Toyota SA arranged a meeting between himself and the accused at which the accused made certain statements related to stolen vehicles. The investigator arranged for a photographer to take pictures of the meeting and recorded the conversation. The court decided that the making of the recording and the taking of pictures were admissible as evidence. The court decided that the admissibility of such evidence would fall within the ambit of public interest.

Section 252 A of the *Criminal Procedure Act*,¹⁰³ as well as the provisions of the act, had never, except for in the *Dube*-case, been tested against section 36 of the Constitution by a higher court.

It has in this regard been said that a person can hardly be said to have a subjective expectation of privacy *vis-à-vis* a party to a conversation.¹⁰⁴

Section 5¹⁰⁵ of RICA states:

[i]f the prior written consent of one of the parties to the communication has been obtained, even a third party to the conversation may intercept. In circumstances if one of the parties to the communication has provided its prior written consent, a third party may intercept that party's communications with any other person without the other person's or persons' knowledge or consent. For example, if a trader on the Johannesburg stock exchange consents in writing, his employer may record all such communications.

102 2000 2 SA 583 (N).

103 51 of 1977.

104 De Waal *et al* *The Bill of Rights Handbook* 287.

105 S5 of RICA.

Where communications have been intercepted in violation of the Act the court may, in addition, consider whether a person's right to privacy has been infringed which will, of course, include a constitutional assessment in accordance with section 36 of the Constitution.

RICA also allows for business exception, which will be applicable to company investigators. This exception does allow the interception of communication by employers without prior permission of employees. The act makes provision for interception of communication to be lawfully obtained; it must be in compliance with:

- a) Section 6(1) of RICA¹⁰⁶ allows for indirect communication to be intercepted if:
 - i. It relates to transaction being entered into in the normal course of the business;
 - ii. it otherwise relates to the business; and if
 - iii. it otherwise takes place in the course of that business.
- b) Section 6(2)¹⁰⁷ makes the interception of the indirect communication "lawful" if the system controller gave his consent or his implied consent:
 - i. The communication is intercepted for a legitimate purpose;
 - ii. establishing existing facts;
 - iii. investigating the unauthorized uses of the telecommunication system;
 - iv. securing effective operation of the system.
- c) The use of the concerned telecommunication system is provided for wholly or partly in connection with that business.¹⁰⁸
- d) If the system controller made reasonable efforts to inform individuals in advance that their indirect communications may be intercepted or if such indirect communications are intercepted with the expressed or implied consent of the person who uses the system.¹⁰⁹

In *Sugreen v Standard Bank of SA*¹¹⁰ the commissioner found that the employee's conversations could be recorded and did not infringe her right to privacy. The commissioner stated that it was sufficient to recognise that the use of the employer's telephone and e-mail by the employee involved legitimate areas of interest to the employer, should it be suspected that

106 S6(1)(a)-(c) of RICA.

107 S6(2) of RICA.

108 S6(2)(c) of RICA.

109 S6(2)(d) of RICA.

110 2002 11 CCMA 8.23.1.

the employee had been guilty of misconduct. In making this decision the commissioner authorised the following factors to be relevant¹¹¹:

- (a) the recording was not aimed at entrapping the applicant to commit a crime;
- (b) because the alleged crime had already been committed, there were few other methods of securing evidence against the employee;
- (c) the recording was not part of an ongoing monitoring of all the applicant's calls;
- (d) the recording was not undertaken by the employer himself; and
- (e) the recording was made in the course of the applicant's business.

It would be advisable for the employer to inform his employees on a regular basis of the fact that all communication may be audited at all times, which may include the interception thereof. The informing of employees of the possibility in the form of a written policy or even via an automatically generated message appearing before a company's computer may be accessed, have been found adequate.

The proper investigation of misconduct can lead to successes for companies in later CCMA cases, but these investigations need to be done properly by well-trained investigators. The company or employer must be confident that the investigating officer can represent all evidence in the initial disciplinary hearing and, very important, in the CCMA or other tribunals where experienced lawyers and advocates may be encountered.

It is noteworthy that the LRA does not provide legislative guidance for investigators when dealing with the interception of communication. The only guidance in relation to the application of the interception of communication are relevant criminal case law and statutory regulations.

11 Conclusion

The labour law and especially the initial disciplinary processes are increasingly creating difficulties for employers. If the initial investigation had not been conducted thoroughly, the employer more than often is faced with difficulties in convincing commissioners, arbitrators and labour law judges that the dismissal was both procedurally and substantively fair.

¹¹¹ Par 53, at 773 A-B.

The evidence gathered during the initial investigation and the presenting of this evidence chiefly at disciplinary hearings, are as important as the presentation at a later stage.

The complexity of the labour law and the contradictions by the different authorities with regard to recent cases will force employers to be absolutely sure of facts presented to them by investigation officers, due to the budgetary implications involved in litigation to follow.

The investigator has various tools to assist him in his quest to prove a case. It is often found that these offered investigation tools are not utilized, due to a lack of experience and a lack of knowledge regarding relevant legislation on offer.

The Constitution and especially the Bill of Rights must be used to benchmark investigation methods to ensure fairness, and to prevent unjustified methods. It is very important for investigators to be well-informed about the latest case law for both criminal and civil actions, as these principles may be applicable to the labour context, as illustrated in this paper.

The fact still remains that a well prepared case; a proper, thorough investigation, will more than often lead to a successful litigation outcome.

The argument that the disciplinary process needs not to be a formal court-like process is to a certain extent doubted by the author. The paper illustrated that the submission of criminal case law, and criminal procedures and statutory regulations in the labour context would suggest a formal approach by authorities in applying labour law. When commissioners, arbitrators, and labour law judges, in making decisions in labour disputes, measure the investigation officer's actions against formalised guidelines established by criminal courts and statutory legislation, it is impossible to argue that the process remains flexible and not court-like. The presentation of such evidence during a disciplinary process may be found less formalised and prescriptive, yet the end result of findings is tested against criminal law applications to determine fairness.

It is therefore in conclusion argued that the investigation officer, referring to labour investigations, is measured against the formalised principles mentioned above; the disciplinary process can never be deemed a flexible simplistic informal proceeding.

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