



The right to privacy and polygraph tests in the South African workplace

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DEDICATION

I AM DEDICATING ALL THIS TO MYSELF, AS A SYMBOL OF ACHIEVEMENT IN MY ACADEMIC JOURNEY AGAINST ALL ODDS. IT IS MY CONTRIBUTION TO THE ACADEMIC WORLD AND TO HISTORY.

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ABSTRACT

In South Africa, employers use polygraph tests on their employees and the results are often regarded admissible as evidence in labour disputes. However, polygraph testing in the workplace is not adequately regulated by any labour legislation. The lack of adequate regulation creates a *lacuna* in South African labour law, which in turn has the potential to infringe upon an employee's right to privacy. Moreover, the absence of legislation on polygraph testing can be attributed to the fact that most of the South African legal principles in this regard are founded on common law. The common law does not provide a comprehensive legal framework for polygraph testing in the workplace. This study investigates the adequacy, or lack thereof, of specific provisions in the *Employment Equity Act 55 of 1998* (hereafter the *EEA*); the South African Labour Law Guide, namely the *Labour Law and Employment Manual*; the *CCMA Polygraph testing info Sheet 2002*; and other sources of South African labour law. This study also analyses the extent to which the labour courts and the Commission for Conciliation, Mediation and Arbitration (hereafter the CCMA) have been able to develop their own guidelines where unique situations occur in relation to polygraph testing. In this study, it is argued that legal reform for polygraph testing is required to address the gap created by the lack or inadequate regulation of polygraph testing in the workplace. It is argued that because there are no clear guidelines to regulate polygraph testing in the workplace, there is a risk that the employers would abuse the provisions of the current legislative framework, particularly the *EEA*. Also, employers may seek to use the default provision for medical testing provided for in section 8(a) of the *EEA*. The South African labour courts have on several occasions illustrated that polygraph testing is inconsistent and that it may not have scientific basis. This study will also evaluate the extent to which South Africa complies with the obligations placed by the International Labour Organisation (hereafter the ILO) Labour standards in relation to polygraph testing and employees' right to privacy in the workplace.

KEYWORDS: Employees' rights, medical testing in the workplace, Lie-detector test, Polygraph test, Psychometric testing, Polygraph examination, Right to privacy.

LIST OF ABBREVIATIONS

APA	American Polygraph Association
AU	African Union
BPS	British Psychological Society
CCMA	Commission for Conciliation, Mediation and Arbitration
CEA	Computer Evidence Act 57 of 1983
DPA	Data Protection Act 2018
EEA	Employment Equity Act 55 of 1998
ECTA	Electronic Communications and Transactions Act 25 of 2002
EEOC	Equal Employment Opportunity Commission
EPPA	Employee Polygraph Protection Act of 1988
FPDD	Federal Psychological Detection of Deception
GIWUSA	General Industrial Workers' Union
HIV/AIDS	Human Immunodeficiency Virus/ Acquired Immunodeficiency Syndrome
HPA	Health Professions Act 56 of 1974
HPCSA	Health Professions Council of South Africa
ILO	International Labour Organisation
ISA	Intelligence Services Act 65 of 2002
LRA	Labour Relations Act 66 of 1995
NSIA	National Strategic Intelligence Act 39 of 1994
PASA	Polygraph Association of South Africa

PCR	Polymerase Chain Reaction
PCPBP	Psychometrics Committee of the Professional Board for Psychology
POPIA	Protection of Personal Information Act 4 of 2013
SANDF	South African National Defence Force
SA	South Africa
SAPPA	South African Professional Polygraph Association
SCA	Supreme Court of Appeal
UK	United Kingdom
UN	United Nations
USA	United States of America

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Chapter 1 Introduction

There is no precise definition in either South African legislation and/or common law for a polygraph test. However, for the purposes of this study, a polygraph test can be described as a process;

“in which a person is hooked up to an electronic device that monitors and measures physiological factors such as blood pressure, pulse breathing patterns, perspiration and cardiac responses to a series of questions”¹

Polygraph testing is regarded as a reliable means of testing and has been in use in several jurisdictions to test the veracity of a person’s statement. This practice is, however, not entrenched in South African law and its efficacy has not been sufficiently tested. South African courts have also not tested its implications on the rights of individuals to privacy. In this study, the role, the impact, and possible consequences of the use of polygraph testing in the workplace will be investigated.

This chapter of the study will provide a problem statement that will outline the problems and/or legal challenges posed using polygraph testing in the workplace, with specific reference to the use of polygraph testing and the right to privacy in the workplace. A research question will be provided, and the aims of this study will also be outlined. This chapter has a literature review that will provide the reader with a summary of information that was gathered from various sources. The methodology, rationality and limitations, and the framework of this study, will be outlined in this chapter.

1.1 Problem Statement

The main purpose of a polygraph test is to determine if one is honest or dishonest about a certain action and/or omission; in the context of this study, within the scope of an employer-employee relationship. In the matter of *GIWUSA obo Malemone and Others v Mashaba NO and Others*,² the Labour Court held that polygraph testing was not adequately regulated by any South African legislation. Consequently, this creates

¹ LAWFORALL 2020 <https://www.lawforall.co.za/work/lie-detector-tests-in-the-workplace/>.

² *GIWUSA obo Malemone and Others v Mashaba NO and Others* (JR1124/19) [2021] ZALCJHB 356 (13 October 2021) para 8, 9 & 19.

a gap in South African labour law that may negatively impact on the employee's right to privacy.³ Due to the absence of legislation on polygraph testing, South African legal principles on this subject are founded on common law principles, which in turn do not provide a legal framework for polygraph testing in the workplace.

The *Constitution of the Republic of South Africa, 1996 (hereafter the Constitution)*⁴ provides several provisions that will be evaluated regarding the use of polygraph testing in the South African workplace. The clauses that will be evaluated in this study include, the constitutional supremacy clause in section 1, the right to equality in section 9, the right to privacy in section 14, the right to fair labour practices in section 23, the limitation of rights in section 36, and the interpretation clauses in sections 39 and the aspect(s) is regulated by section 231-233 of the *Constitution*.⁵ In addition, this study will unpack the impact of each provision and its challenges.

Notably, section 14(a) of the *Constitution* states that "everyone has the right to privacy and to not have their person searched".⁶ In the context of polygraph testing, it is argued that every person has a right to not have their person (including their physiological responses) analysed/searched without their consent.

Furthermore, the right of employees to fair labour practice is regulated in section 23 of the *Constitution*.⁷ It is argued that in the context of polygraph testing, this implies that an employee has a right to be treated fairly before, during and after a polygraph test.⁸ The absence of legislation that regulates polygraph testing leaves a vacuum in South African labour law. The South African labour courts, and tribunals such as the Commission for Conciliation, Mediation and Arbitration (hereafter the CCMA) and bargaining councils will have to rely on the common law regulations which are not

³ *GIWUSA obo Malemone and Others v Mashaba NO and Others* (JR1124/19) [2021] ZALCJHB 356 (13 October 2021) para 8, 9 & 19.

⁴ *The Constitution of the Republic of South Africa, 1996*.

⁵ Section 1,9,14,23,36,39, 231-233 of the *Constitution*.

⁶ Section 14(a) of the *Constitution*.

⁷ Section 23 of the *Constitution*.

⁸ Section 23(1) of the *Constitution*.

elaborative on the subject.⁹ This is yet another problem area that will be further investigated in this study.

Another challenge is that the polygraph test potentially violates the rights provided for in the *Constitution*; namely, the right not to self-incriminate in terms of section 35(3) of the *Constitution*.¹⁰ Calaca¹¹ contends that the balance of power remains being tipped on the employer's favour. This is because during a polygraph-test examination, the employer determines the questions to be posed to the employee and such questions are not given to the employee beforehand. It is therefore argued that this practice may negatively affect the *audi alteram partem* rule. When the employee is not granted sufficient opportunity to defend himself as he/she is expected to provide only closed responses. This then poses the question whether employees are subjected to unfair polygraph-examination processes. Another question is whether an employee has informed choice when consenting to polygraph testing. Do employees know their rights – and can such consent be regarded as voluntary, as required by the guidelines? This study seeks to provide some insights on these issues. Furthermore, this study will argue that these questions indicate that there is a need to develop legislation that will deal with complexities that are posed by polygraph testing.

This study will also investigate if the *Employment Equity Act* 55 of 1998 (hereafter the *EEA*) can be applied to polygraph testing. Section 8(a) of the *EEA* provides three requirements that have to be fulfilled for the employer to legally be permitted to subject employees to any psychometric testing.¹² First, the test must be scientifically valid, and reliable.¹³ Second, the test should be applied objectively to all employees.¹⁴ Third, the test should not be biased.¹⁵ Christianson¹⁶ correctly argues that the aforementioned

⁹ Marks *Polygraph testing in the South African workplace* 12-15.

¹⁰ Marks *Polygraph testing in the South African workplace* 12-15.

¹¹ Calaca *The use of Polygraph Test and related evidentiary aspects in labour disputes* 22.

¹² *Employment Equity Act* 55 of 1998 (hereafter the *EEA*).

¹³ Section 8(a) of the *EEA*.

¹⁴ Section 8(a) of the *EEA*.

¹⁵ Section 8(a) of the *EEA*.

¹⁶ Christianson *The testing of employees: The selective prohibition of medical, psychological and other testing in terms of the Employment Equity Act*, [1999] 9: 2 CLL 11 at 16.
Christianson, [2000] 21 ILJ 16 at 37.

requirements do not provide sufficient legislative guidance to facilitate the application of polygraph testing in a South African workplace.

Although there is no legislative regulation on the use of polygraph testing in the workplace, the CCMA has made significant progress on this topic. The CCMA has issued guidelines on how to use polygraph testing, based on the American Polygraph Association (hereafter the APA) *Code of Practise and Code of Ethics* and the South African Labour Law Guide, namely the *Labour Law and Employment Manual*.¹⁷ It is, however, argued that these guidelines are not comprehensive. This is because the regulations do not address instances whereby an employee refuses to undergo the test, the weight or probative value attached to the results of the test and the implications for failing the test. These are some of the shortcomings posed by using polygraph testing in the workplace that will be further investigated in this study.

The *American Polygraph Association By-Law* (hereafter *the APA By-Law*) will also be investigated because it provides guidelines on how polygraph industry operates in South Africa. The *APA By-Law* provides guidelines on the roles of participants and the requirements of a standard polygraph examination.

1.2 Research Question

Does the use of a polygraph test in the workplace violate an employee's right to privacy? Is there a need for legislative framework for polygraph testing in South Africa?

1.3 Aims

This study aims to investigate, narrate, and track the legal development of polygraph testing in the South African workplace and to analyse their impact on vested rights of employees. The local polygraph industry must ensure that it provides a system in which polygraph practitioners can always be updated on the latest research and trends. In

¹⁷ Watson *An examination of the operational application and utilisation of polygraph testing: a case study in the Limpopo Province* 36.

addition, the current legal system in relation to polygraph testing in South Africa ought to be modernised, strengthened, and directly regulated.

This study aims to interrogate if the current legal framework does provide for polygraph testing, or not. Furthermore, it aims to analyse the extent to which the right to privacy is affected by polygraph testing in the workplace and, in addition, to comparatively determine the progress made in regulating polygraph testing at a domestic and international level. This is because the United States of America (hereafter the USA) and South Africa are both members of the ILO, and South Africa can draw valuable lessons from the USA where its legislation falls short.

1.4 Literature Review

According to Watson,¹⁸ in South Africa polygraph testing has been used for over 34 years in the private sector and over 30 years in government institutions. It is argued that this indicates the extent to which various institutions are applying polygraph testing on a frequent and continuous basis.

Voluntary independent bodies regulate polygraph testing in South Africa. This includes the South African Professional Polygraph Association (hereafter the SAPPA) and the Polygraph Association of South Africa (hereafter the PASA).¹⁹ They subscribe to the APA which has more than 2,500 members and is responsible for establishing standards for ethical practices, techniques, instrumentation, and research. The two South African associations offer their members publications and conferences about polygraph testing. They further provide training and model best practices for testing and offer professional resources for their members. The South African Qualifications Authority recognises accreditations by the APA.²⁰ Other countries have their own

¹⁸ Watson *An examination of the operational application and utilisation of polygraph testing: a case study in the Limpopo Province* 30.

¹⁹ Watson *An examination of the operational application and utilisation of polygraph testing: a case study in the Limpopo Province* 35.

²⁰ Polygraph Institute of South Africa <https://polysa.co.za/the-science-behind-polygraph/>.

regulatory bodies, like the British Polygraph Association in the United Kingdom and the Horowitz Institute in Israel.²¹

It is submitted that the *Constitution* may be considered as a central source because of its supremacy clause in chapter 2 of the *Constitution*.²² This study argues that there is no legislation that provides comprehensive guidance on polygraph testing. The codes of associations like the *APA Code of Practise and Code of Ethics* and the South African Labour Law Guide (namely the *Labour Law and Employment Manual*) are often used as reference.

Marks²³ concurs with Christianson²⁴ where she argues that scientific evidence in the form of polygraph testing has the potential of infringing upon fundamental human rights because of the issues relating to the validity of consent. She suggests that employees should be asked during the pre-test interview why they consented to polygraph testing. If they indicate that they wanted to prove their innocence, then their consent should not be viewed “as a consent in the true sense of the word”.²⁵ It is argued that this view is correct because employees should be able to consent to polygraph testing primarily on the basis that they do not have an objection to a potential invasion of their privacy, as a matter of preference. However, each case must be determined according to its own merits.²⁶

It is important to highlight that, in some instances, there is no uniformity and consistency on the application of the process relating to polygraph testing. This contributes to the uncertainties concerning the reliability of a polygraph test and employees do not get to exercise their rights accordingly under the circumstances. A case in point is the matter of *Harmse v Rainbow (Pty) Ltd*²⁷ where the court considered the CCMA's decision on the employer's right to dismiss employees for refusing to

²¹ Polygraph Institute of South Africa <https://polysa.co.za/the-science-behind-polygraph/>.

²² Section 2 of the *Constitution*.

²³ Marks *Polygraph Testing in the South African Workplace* 72.

²⁴ Christianson *The testing of employees: The selective prohibition of medical, psychological and other testing in terms of the Employment Equity Act*, [1999] 9: 2 CLL 11 at 16. Christianson, [2000] 21 ILJ 16 at 37.

²⁵ Marks *Polygraph Testing in the South African Workplace* 72.

²⁶ *Zurug v Parvathie* NO 1962 (3) SA 872 (D) para 37.

²⁷ *Harmse v Rainbow Farms (Pty) Ltd* 1728, 1997 para 1.

undergo polygraph testing. At first instance the employee who is the applicant in this case failed the test and he was given an opportunity to take the test again which he refused.²⁸ Consequently, the employer dismissed the applicant for being in breach of his employment contract.²⁹ Similarly, in *CEPPAWU obo Modjadji & Others v Altech Namitech (Pty) Ltd*,³⁰ the Labour Court held that a refusal to undergo polygraph testing where there is a contractual obligation to do so is not a sufficient ground for dismissing an employee. Whereas, in the cases of *Magnum Shield Security vs Commissioner Diale Ntsoane N.O*³¹ and *Others* as well as *Truworths Ltd vs CCMA & Others*,³² the presiding officers had ignored polygraph evidence despite the evidence being led by a properly trained polygraph expert. These are apparent contradictions that occur in the absence of proper regulation of polygraph testing in the workplace. It is argued that there is a need for the legislature to protect employees' rights when it comes to polygraph testing.

The *APA By-Law* plays a significant role in ensuring that a complete polygraph examination is carried out. In terms of paragraph 3 of the *APA By-Law*, the employer has to ensure that different stages of the test are applied.³³ According to paragraphs 3.8.1 to 3.8.6 of the *APA By-Law* the "pre-test, in-test, and post-test" phases are the required steps for a complete polygraph test.³⁴ Different circumstances and settings may call for additional stages to be included.³⁵ It is argued that a polygraph test is a complicated process that places a huge administrative burden on the employer because he/she is in most cases the one who requires the employees to undergo it.

1.5 Research Methodology

This study will make use of a qualitative method with a comparative approach. The aim is to evaluate the uses of polygraph testing in the workplace in South Africa in terms

²⁸ *Harmse v Rainbow Farms (Pty) Ltd* 1728, 1997 para 1.

²⁹ *Harmse v Rainbow Farms (Pty) Ltd* 1728, 1997 para 1.

³⁰ *CEPPAWU obo Modjadji & Others v Altech Namitech (Pty) Ltd* (2008) 11 BALR 1013 (SCPNPI).

³¹ *Magnum Shield Security vs Commissioner Diale Ntsoane N.O and Others* case number JR2799/0 and *Truworths Ltd vs CCMA & Others* case number JR789/07.

³² *Magnum Shield Security vs Commissioner Diale Ntsoane N.O and Others* case number JR2799/0 and *Truworths Ltd vs CCMA & Others* case number JR789/07.

³³ The *APA By-Law*.

³⁴ The *APA By-Law*.

³⁵ Marks *Polygraph Testing in the South African Workplace* 72.

of the *Constitution*. The *Constitution* is the main source because there is no legislation that provides direct guidance on this matter. Moreover, there are only codes of association like the *APA Code of Practise and Code of Ethics* and the South African Labour Law Guide (namely the *Labour Law and Employment Manual*) which are used as reference. Lastly, this study will make recommendations and provide guidelines on the measures that can be taken to address challenges posed by polygraph testing in the future. Polygraph testing is being used in the USA where it is regulated by law, with provisions that are similar to the limited guidelines provided by the CCMA in South Africa. Furthermore, a comparative study will be undertaken between South Africa and the USA looking at the polygraph legislation from the USA such as the *Employee Polygraph Protection Act 83 of 1988*, among others. Finally, recommendations will be made on provisions that can be relevant and applicable in South Africa's polygraph-testing legislation in future.

1.6 Rationale and limitations of the study

This study will highlight the extent to which the workers' rights are directly/indirectly affected by polygraph testing in the workplace in South Africa. This study will also provide guidelines to employers, employees and all other stakeholders concerned to help them understand their rights and responsibilities when it comes to polygraph testing in the workplace. This study, in addition provides a reader with a detailed analysis of the legal framework, the impact on the right to privacy, comparative analysis, and the activities and operations of polygraph testing. This study does not intend comparing USA laws in general, but only polygraph testing laws and regulations.

1.7 Framework

- 1) Chapter 1 is an introductory chapter. This chapter will introduce the topic to be discussed, the problem statement, research question, aims and objectives, literature review, methodology, and limitations of the study.
- 2) Chapter 2 discusses the use of polygraph testing in South African labour law. Furthermore, this chapter will evaluate the relevant provisions of the South African *Constitution* as well as *the EEA* that may have direct and/or indirect impact on the

protection of employees against the use of polygraph tests - with the view to reflecting on the inadequacies of polygraph tests.

- 3) Chapter 3 examines and analyses the general approach followed by the South African labour courts and other tribunals such as the CCMA. This should include a case-by-case analysis on what can be drawn from the court's approaches in dealing with these matters.
- 4) Chapter 4 is a comparative study. In this chapter, the relevant international instruments as well as jurisprudence of foreign countries such as the USA will be discussed. It is hoped that international instruments and foreign jurisprudence will provide valuable lessons for future legislative reform on polygraph testing in South Africa.
- 5) Chapter 5 summarises the observations made throughout the study. This includes recommendations as to what measures can be taken to ensure adequate regulation of polygraph testing in the South African workplace. This is to ensure that the employees concerned are adequately protected.

In conclusion, this chapter should be viewed as an introductory chapter to the world of polygraph testing. It introduced the subject of polygraph testing and its implications regarding the right to privacy considering the *Constitution*. It should be noted that the *EEA* has not been specific on the issue of whether polygraph testing can be regarded as a form of medical examination. This is crucial when it comes to labour laws. The next chapter will outline the importance of the *Constitution* and any other available legislative framework that affects polygraph testing in the workplace. This will assist to outline the relevant constitutional and legislative provisions that are directly and/or indirectly applicable regarding polygraph testing in the workplace.

Chapter 2 The use of Polygraph Testing in South African Labour law

2.1 Introduction

This chapter aims to evaluate the relevant provisions of the *Constitution of the Republic of South Africa, 1996* (hereafter the *Constitution*),³⁶ the *Labour Relations Act 66 of 1995* (hereafter the *LRA*)³⁷ and the *Employment Equity Act 55 of 1998* (hereafter the *EEA*)³⁸ that may directly and/or indirectly impact on the protection of employees against the use of a polygraph test. The aim of this chapter is to critically analyse the inadequacies of the *Constitution* and these two pieces of legislation. There are several constitutional provisions that apply when polygraph testing is conducted in the workplace. Section 1 of the *Constitution* is the ultimate authority for all law making and lawful conduct.³⁹ Section 9 of the *Constitution* provides that the right to equality is provided to everyone, and it also provides the grounds on which one may not be discriminated against⁴⁰ This study will argue that the right to privacy in section 14 of the *Constitution* is not limited to the physical environment; it may include also the physiological and psychological sphere.⁴¹ This study will furthermore review instances that may amount to an unfair labour practice in terms of section 23 of the *Constitution*.⁴² The right to privacy in the *Constitution* and the right to fair labour practice in the *LRA* provide basis on how employees' rights can be infringed in light of polygraph testing. It will also be highlighted that the rights enshrined in the *Constitution* are not absolute and the different factors to be considered under section 36 of the *Constitution* will be analysed.⁴³ The constitutional interpretation will be considered in terms of section 39 and section 231-233 of the *Constitution*.⁴⁴ Lastly, the provisions of the *LRA* and the *EEA* that are relevant to polygraph testing will be evaluated with the aim to reveal their shortcomings,

³⁶ The *Constitution*.

³⁷ The *LRA*.

³⁸ The *EEA*.

³⁹ Section 1 of the *Constitution*.

⁴⁰ Section 9 of the *Constitution*.

⁴¹ Section 14 of the *Constitution*.

⁴² Section 23 of the *Constitution*.

⁴³ Section 36 of the *Constitution*.

⁴⁴ Section 39 and section 231 – 233 of the *Constitution*.

and a conclusion will be provided. The main focus will be on employees' fundamental rights that could be potentially infringed upon during polygraph testing.

2.2 Polygraph testing within the context of the Constitution

The rules and regulations on polygraph testing are subject to the *Constitution* as the supreme law. Any deviation and/or inconsistency is invalid.

2.2.1 Equality (Section 9(1))

It is contended that the reason why the right to equality was included in the *Constitution* is to prevent and/or deal with unfair discrimination. The phrase 'unfair discrimination', when it is used in the context of labour law, refers to discrimination in the workplace against employees and/or job applicants based on unfair grounds.⁴⁵ Section 9 of the *Constitution* states that every person has the right to be treated equally before the law, and be provided with equal treatment and benefits without being unfairly discriminated against.⁴⁶ Section 9(2) of the *Constitution* provides that equality should include full and equal enjoyment of all rights and freedoms.⁴⁷ According to section 9(3) of the *Constitution*, no one should be unfairly discriminated against on the basis of religion, belief, culture, sexual orientation, race, gender, *etcetera*.⁴⁸ It is submitted that in terms of section 9(3) of the *Constitution*, the phrase 'unfair discrimination' ought to be understood to imply that a polygraph examination should not be used as a weapon to unfairly discriminate on the grounds listed in section 9 of the *Constitution*.

2.2.2 Section 14 of the Constitution

The South African legal system provides for the right to privacy in both the *Constitution*⁴⁹ and the common law.⁵⁰ There is no single definition of what privacy entails, its definition varies widely according to context and environment.⁵¹ However,

⁴⁵ Schedule 7 of the *LRA*.

⁴⁶ Section 9 of the *Constitution*.

⁴⁷ Section 9 (3) of the *Constitution*.

⁴⁸ Section 9 (3) of the *Constitution*.

⁴⁹ Section 14 of the *Constitution*.

⁵⁰ Neethling et al *Neethling's Law of Personality* ch 8.

⁵¹ EPIC and Privacy International Privacy and Human Rights Report 2002 2.

when looking at the foreign jurisprudence for assistance, the Calcutt Committee in the United Kingdom proceeded to formulate a definition and adopted it in their first report on privacy.⁵² The committee was satisfied that privacy can be defined as a right of an individual to be provided with protection against any form of infringement.⁵³ An infringement that includes but is not limited to one's personal life or affairs, which may include family affairs.⁵⁴ The form of infringement discussed in this context may include a direct physical invasion of private space or a publication of private information.⁵⁵ This study contends that, this may include publication of an employee's data obtained during a polygraph examination.⁵⁶ Furthermore, the collection and publication of polygraph data irrelevant to the investigation.⁵⁷

Section 14 of the *Constitution* provides that each person has a right not have to their person including their physiological responses analysed/searched without their consent. In the case of *National Media Ltd and others v Jooste*,⁵⁸ the court attempted to define what is meant by privacy.⁵⁹ The Supreme Court of Appeal (hereafter the SCA) opined that the right to privacy is the right to exclude the public and publicity from one's private life.⁶⁰ Gondwe⁶¹ gives another perspective on this issue and draws some points from the Constitutional Court where the court gave guidance on what would be regarded as a violation of a person's privacy. The court said that the common law right to privacy prohibits the following types of actions:⁶² an unauthorised entry into a private space, eavesdropping on private discussions, observing another human undressing, and revealing facts that are privately obtained by illegal entry.⁶³ These grounds illustrate the extent to which the right to privacy can be extended.

⁵² EPIC and Privacy International Privacy and Human Rights Report 2002 2; *Swanepoel v Minister van Veiligheid en Sekuriteit* 1999 (4) SA 549 (T) 553.

⁵³ EPIC and Privacy International Privacy and Human Rights Report 2002 2; *Swanepoel v Minister van Veiligheid en Sekuriteit* 1999 (4) SA 549 (T) 553.

⁵⁴ Calcutt DQC Report of the Committee on Privacy and Related Matters 7.

⁵⁵ Calcutt DQC Report of the Committee on Privacy and Related Matters 7.

⁵⁶ Gondwe *The Protection of Privacy in the Workplace: A Comparative Study* 145.

⁵⁷ Gondwe *The Protection of Privacy in the Workplace: A Comparative Study* 145.

⁵⁸ *National Media Ltd and others v Jooste* 1996 (3) SA 262 (A).

⁵⁹ *National Media Ltd and others v Jooste* 1996 (3) SA 262 (A).

⁶⁰ *National Media Ltd and others v Jooste* 1996 (3) SA 262 (A).

⁶¹ Gondwe *The Protection of Privacy in the Workplace: A Comparative Study* 145.

⁶² Gondwe *The Protection of Privacy in the Workplace: A Comparative Study* 145.

⁶³ Gondwe *The Protection of Privacy in the Workplace: A Comparative Study* 145.

Venter⁶⁴ opines that polygraph testing is an attempt to enter the central domain of an employee's belief, a breach of an individual's autonomy, and an increase in the psychological power towards employees or prospective employees.⁶⁵ Christianson⁶⁶ and Prinsloo⁶⁷ also agree that polygraph testing has the potential to invade an employee's right to privacy. It is for this reason that it is argued that the use of polygraph tests does not guarantee that an employee's inner being will not be violated.

What about the situation where the employee "consents" to polygraph testing? Would the above arguments still hold? In the matter of *NUMSA obo Nqukwe & Others v Lowveld Implement & Farm Equipment (Life)*,⁶⁸ the court held that once consent is provided, one should not raise privacy concerns.⁶⁹ However, it is submitted that consent in such instances is fictional as it is not voluntary. The employee may be compelled by contract to consent to being tested but that does not take away from the fact that the constitutional right to privacy remains at risk of being violated.

It is further submitted that the ILO encourages member states to adopt legislation to ensure adherence to minimum standards on the use of polygraph tests and to put in place measures where there is less reliance on and/or measures on the validation of polygraph testing. In addition, member states ought to ensure that polygraph examiners are duly qualified, that the results of the test are kept confidential, and that the test is used to determine only the suitability of a candidate for the job.⁷⁰ Even though the ILO instruments serve as a guide to member states, they are not enforceable. The member states have a discretion whether to adopt legislation in line

⁶⁴ Vanter *Opinion-Polygraph* 55.

⁶⁵ Christianson *The testing of employees: The selective prohibition of medical, psychological and other testing in terms of the Employment Equity Act*, [1999] 9: 2 CLL 11 at 16; Christianson, [2000] 21 ILJ 16 at 29.

⁶⁶ Christianson *The testing of employees: The selective prohibition of medical, psychological and other testing in terms of the Employment Equity Act*, [1999] 9: 2 CLL 11 at 16; Christianson, [2000] 21 ILJ 16 at 29.

⁶⁷ Prinsloo *Exploring the use of the polygraph examination in the workplace and as evidence in labour Disputes* 65.

⁶⁸ Prinsloo *Exploring the use of the polygraph examination in the workplace and as evidence in labour Disputes* 65.

⁶⁹ Prinsloo *Exploring the use of the polygraph examination in the workplace and as evidence in labour Disputes* 65.

⁷⁰ Report of the Meeting of Experts of Workers Privacy (MEWP/1996/5), Geneva, 1-7 October 1996 pg 36.

with the guidelines. What is notable with the guidelines is that in terms of the *Code of Practice of Workers' Data*, the committee of the ILO experts on workers privacy states that the use of lie-detection equipment is invasive.⁷¹

2.2.3 Section 23 of the Constitution

Section 23(1) of the *Constitution* affords everyone the right to fair labour practices.⁷² This right includes a right to not be subjected to arbitrary conduct or treatment in the workplace. The question of how the right to fair labour practices should be defined remains a vexed one, as there are divergent views including that of the courts. In the matter of *National Education Health and Allied Workers Union v University of Cape Town*,⁷³ the court confirmed that 'fair labour practice' has no specific definition and that what is a fair labour practice will have to be determined on a case-by-case basis.

Calaca⁷⁴ argues that compelling an employee to a polygraph examination constitutes an unfair labour practice in terms of section 23(1) of the *Constitution*.⁷⁵ The scholar argues further that what compounds the issue is that there is no scientific basis nor proof of the accuracy of polygraph tests.⁷⁶ Calaca argues further that polygraph testing shifts the burden of proof from the employer to the employee, which is against the principles of labour law.⁷⁷ The balancing of interests can be done by calling witness/experts and such can come at a costly price.⁷⁸

Calaca⁷⁹ further questions another practice where the employee completes a consent form to take the test.⁸⁰ The scholar opines that the balance of power remains with the employer because in an event of a refusal to take the test, the employer is more likely

⁷¹ Report of the Meeting of Experts of Workers Privacy (MEWP/1996/5), Geneva, 1-7 October 1996 pg 36.

⁷² Section 23(1) of the *Constitution*.

⁷³ *National Education Health and Allied Workers Union v University of Cape Town* (2003) 24 ILJ 95 (CC) 33 – 35.

⁷⁴ Calaca *The use of Polygraph Test and Related Evidentiary Aspects in Labour Disputes* 36.

⁷⁵ Calaca *The use of Polygraph Test and Related Evidentiary Aspects in Labour Disputes* 36.

⁷⁶ Calaca *The use of Polygraph Test and Related Evidentiary Aspects in Labour Disputes* 36.

⁷⁷ Calaca *The use of Polygraph Test and Related Evidentiary Aspects in Labour Disputes* 36.

⁷⁸ Calaca *The use of Polygraph Test and Related Evidentiary Aspects in Labour Disputes* 36.

⁷⁹ Calaca *The use of Polygraph Test and Related Evidentiary Aspects in Labour Disputes* 36.

⁸⁰ Calaca *The use of Polygraph Test and Related Evidentiary Aspects in Labour Disputes* 36.

to assume that the affected employee is guilty.⁸¹ Venter⁸² also contends that if an employee refuses to undergo the test, the employer will more likely be allowed to subject the employee to a disciplinary hearing. The use of polygraph tests can amount to a violation of section 23 of the *Constitution* in the absence of credible regulation.⁸³

The interests of both the employer and employee must be regarded on the same standard.⁸⁴ Fair labour practice means there must be a balance of interests between the parties, both the employer and employee.⁸⁵ The employer will have a right to protect his business and the employee the right to not be subjected to unfair labour practice and/or unfairly dismissed. Where the balancing of interests is being decided, that is where section 36 of the *Constitution* is going to be used to see if the interests are not encroaching on the rights of the other.⁸⁶

2.2.4 Limitation of Rights (Section 36(1))

Section 36(1) of the *Constitution* provides that the rights in the Bill of Rights are not absolute and that they may be limited by law of general application.⁸⁷ There is a three-fold test that must be considered to apply a limitation of a right. In order for a limitation to be considered valid and justifiable, it must be authorised by law and apply generally.⁸⁸ A limitation is another name for “infringement” or “justifiable infringement”.⁸⁹ De Waal⁹⁰ argues that an infringement will only be valid if it takes place for a reason that is “recognised as a justification for infringing rights in an open and democratic society based on human dignity, equality and freedom”.⁹¹

In the matter of *S v Makawane*,⁹² the president of the Constitutional Court at the time Justice Chaskalson confirmed the position that there are a number of factors that have

⁸¹ Calaca *The use of Polygraph Test and Related Evidentiary Aspects in Labour Disputes* 36.

⁸² Vanter *Opinion-Polygraph* 47.

⁸³ Calaca *The use of Polygraph Test and Related Evidentiary Aspects in Labour Disputes* 36.

⁸⁴ Vanter *Opinion-Polygraph* 47.

⁸⁵ Vanter *Opinion-Polygraph* 47.

⁸⁶ Vanter *Opinion-Polygraph* 47.

⁸⁷ Section 36(1) of the *Constitution*.

⁸⁸ Section 36(1) of the *Constitution*.

⁸⁹ De Waal at al *The Bill of Rights Handbook* 133.

⁹⁰ De Waal at al *The Bill of Rights Handbook* 133.

⁹¹ De Waal at al *The Bill of Rights Handbook* 133.

⁹² *S v Makawane* 1995 3 SA 391 (CC).

to be considered before a limitation may be considered to be valid and justifiable in law according to the *Constitution*.⁹³ The factors to be considered include the nature of right, the significance of the limitation and the nature and extent of limiting the right.⁹⁴ Additional factors to be considered include the connection between the restriction and its purpose, and if there are less-prohibiting measures available to achieve the goal or not.⁹⁵ The exception to this provision is if the limitation is provided for by the *Constitution*.⁹⁶

There are two cases where polygraph testing was in question and the limitation clause was applied. In the case of *Algorax (Pty) Ltd v CWIU and Another*,⁹⁷ the court held that there needed to be enough proof of misconduct except the existence of polygraph evidence before an employee could be dismissed.⁹⁸ Secondly, in the matter of *Census Tseko Moletsane v Ascot Diamonds (Pty) Ltd*,⁹⁹ it was contended that a dismissal can be justified where the employer has lost some form of economic value. Furthermore, there is on a balance of probabilities that an employee who holds a position of trust has committed a misconduct.¹⁰⁰ In such a case, the employer will be justified to suggest the use of polygraph examination.¹⁰¹ However, it is contended that if an employee voluntarily consents and the correct procedures are followed. The use of a polygraph examination should not be considered to have violated the provisions of section 36 of the *Constitution* unless it is proven otherwise.

Furthermore, the employer has a right to protect his business interests. However, if that is to the detriment of the employee, that poses a challenge. Whatever reasons the employer has for requiring polygraph testing, must be in line with the *Constitution*.

⁹³ Section 36 of the *Constitution*; *S v Makawane* 1995 3 SA 391 (CC).

⁹⁴ Section 36(1) (a) – (c) of the *Constitution*; *S v Makawane* 1995 3 SA 391 (CC).

⁹⁵ Section 36(1) (d) – (e) of the *Constitution*; *S v Makawane* 1995 3 SA 391 (CC).

⁹⁶ Section 36 of the *Constitution*; *S v Makawane* 1995 3 SA 391 (CC).

⁹⁷ *Algorax (Pty) Ltd v CWIU and Another* (1995) NBLLR 1 (LAC).

⁹⁸ *Algorax (Pty) Ltd v CWIU and Another* (1995) NBLLR 1 (LAC).

⁹⁹ *Census Tseko Moletsane v Ascot Diamonds (Pty) Ltd* (1993) 4 (a) SALLR 15 (IC).

¹⁰⁰ *Census Tseko Moletsane v Ascot Diamonds (Pty) Ltd* (1993) 4 (a) SALLR 15 (IC).

¹⁰¹ *Census Tseko Moletsane v Ascot Diamonds (Pty) Ltd* (1993) 4 (a) SALLR 15 (IC).

2.2.5 Section 39(1) and 231 -233 of the Constitution

Section 9, 14, 23 and 36 of the *Constitution* must be interpreted in line with the values underlying the *Constitution*. If polygraph testing is not consistent with any of the rights, it automatically fails the test. There are methods and/or factors that must and/or may need to be considered when interpreting the *Constitution*.

According to section 39(1) of the *Constitution*, when interpreting the *Bill of Rights* the courts must promote the principles that underline an open and democratic nation where human dignity, equality and freedom are embraced.¹⁰² In terms of section 39(1) (a), (b), and (c) of the *Constitution*, dispute resolution bodies such as the CCMA and courts ought to take into consideration the applicable international law and may consider foreign jurisprudence.¹⁰³ During the interpretation of any law, the spirit and purport that underlines the *Bill of Rights* has to be promoted and other sources of law have to be given recognition as long as they are not in contravention of the *Bill of Rights*.¹⁰⁴

Sections 231-233 of the *Constitution* are in this regard founding provisions.¹⁰⁵ They provide that international agreements and customary international laws are binding and should be used to interpret the law of the Republic.¹⁰⁶ It is contended that, when interpreting polygraph laws and regulations, sections 231-233 of the *Constitution* should be considered.

A case in point is in the matters of *M Shinga and Gilbey's Distillers and Vintners (Pty) Ltd and Truworths Ltd v CCMA and Others*¹⁰⁷ in which the commissioners have on several occasions made reference to international law, international agreements, and customary international law in reaching their decisions.¹⁰⁸ Furthermore, in the matter of

¹⁰² Section 39(1) of the *Constitution*.

¹⁰³ Section 39(1) of the *Constitution*.

¹⁰⁴ Section 39(2) of the *Constitution*.

¹⁰⁵ Section 39(3) of the *Constitution*.

¹⁰⁶ Section 231 – 233 of the *Constitution*.

¹⁰⁷ *M Shinga and Gilbey's Distillers and Vintners (Pty) Ltd* Unreported case (Case number NHN 11/2/10237) 21 October 1999 and *Truworths Ltd v CCMA and Others* (2008) JOL 22565 (LC) case number JR 789/07.

¹⁰⁸ *M Shinga and Gilbey's Distillers and Vintners (Pty) Ltd* Unreported case (Case number NHN 11/2/10237) 21 October 1999 and *Truworths Ltd v CCMA and Others* (2008) JOL 22565 (LC) case

Mahlangu v CIM Deltak; *Gallant v CIM Deltak*,¹⁰⁹ the court held that due to a lack of detailed information in the domestic legal system about polygraph testing,¹¹⁰ it is acceptable and a norm to refer to foreign laws when dealing with polygraph-test evidence.¹¹¹

2.3 The Legislative Framework

2.3.1 Labour Relations Act 66 of 1995

An employer who only relies on unspecific polygraph test results has not discharged the onus in terms of section 192 of the LRA to prove that a dismissal is fair.¹¹² In order to discharge the onus, the test of a balance of probabilities ought to be applied.¹¹³ In its application polygraph evidence ought to have corroborating evidence in order to be valid.¹¹⁴ Du Toit¹¹⁵ is of the view that the primary aim of the *LRA* is to achieve the following goals: the *LRA* ensures that the rights in section 23 of the *Constitution* are correctly effected and properly regulated.¹¹⁶ It further ensures that South Africa as a member of the ILO fulfils its obligations.¹¹⁷ In South Africa there is a conducive environment where there is a framework for collective bargaining and a formulation of industrial policy by all parties involved.¹¹⁸ It is argued that this helps to ensure that the use of polygraph testing is in line with the *Constitution* and international labour law.

2.3.2 Employment Equity Act 55 of 1998

The *EEA* is equally relevant when polygraph testing is involved. According to section 2 of the *EEA*, the primary objective of this legislation is to obtain fairness in the work

number JR 789/07.

¹⁰⁹ *Mahlangu v CIM Deltak*; *Gallant v CIM Deltak* (1986) 7 ILJ 346 (IC), Vanter *Opinion-Polygraph* 47.

¹¹⁰ *Mahlangu v CIM Deltak*; *Gallant v CIM Deltak* (1986) 7 ILJ 346 (IC), Vanter *Opinion-Polygraph* 47.

¹¹¹ *Mahlangu v CIM Deltak*; *Gallant v CIM Deltak* (1986) 7 ILJ 346 (IC), Vanter *Opinion-Polygraph* 47.

¹¹² *Sosibo & others and CTM* (2001) 22 ILJ 811 (CCMA); [2001] 5 BALR 518 (CCMA) para 3.

¹¹³ *Sosibo & others and CTM* (2001) 22 ILJ 811 (CCMA); [2001] 5 BALR 518 (CCMA) para 3.

¹¹⁴ *Sosibo & others and CTM* (2001) 22 ILJ 811 (CCMA); [2001] 5 BALR 518 (CCMA) para 3.

¹¹⁵ Du Toit et al *Labour Relations Law* 62.

¹¹⁶ Du Toit et al *Labour Relations Law* 62.

¹¹⁷ Du Toit et al *Labour Relations Law* 62.

¹¹⁸ Du Toit et al *Labour Relations Law* 62.

environment through the following mechanisms:¹¹⁹ Ensuring that everyone in the workplace is provided with the same treatment and presented with equal opportunities; and eradicating any form of unfair discrimination and implementing affirmative action.¹²⁰ Section 5 of the *EEA* provides the employer with the burden of ensuring that workplace policies and/or practices promote equality.¹²¹ In the context of polygraph testing, this should imply that the employer has the duty to ensure that polygraph testing policies and/or practices are effected and regulated in the spirit of promoting equality. The *EEA* does not refer to polygraph testing, however, it refers to psychological testing and it provides that.

Psychological testing and other forms of similar assessments towards employees are prohibited unless certain conditions have been fulfilled.¹²² Section 8(a) - (c) of the *EEA* provides three requirements that must be fulfilled for the employer to be legally permitted to subject employees to any psychometric testing. Firstly, the test must be valid scientifically, and reliable; secondly, be fairly applied to everyone; and, finally, the test should not be biased.¹²³ A shortcoming is that the three requirements do not provide sufficient legislative guidance to facilitate the application of polygraph testing in the workplace. Psychometric testing in the context of employment law may include polygraph testing amongst other types of tests.¹²⁴ These reasons and requirements will be briefly discussed below:

Section 1 of the *EEA* provides no definition of what psychological testing entails. The word “psychometric testing” was changed by the legislature to “psychological testing”; the purpose was to limit the uncertainty that may arise.¹²⁵ The legislature cast the net wider because according to the *Health Professions Act (hereafter the HPA)*¹²⁶ the word “psychology” is a broad term that is often associated with mental process and human

¹¹⁹ Section 2 of the *EEA*; Lebepe *Inherent Requirements of the Job as a Defence to a Claim of Unfair Discrimination: Comparison between South Africa and the United States of America* 11-12.

¹²⁰ Section 2 of the *EEA*; Lebepe *Inherent Requirements of the Job as a Defence to a Claim of Unfair Discrimination: Comparison between South Africa and the United States of America* 11-12.

¹²¹ Section 5 of the *EEA*.

¹²² Chapter II of the *EEA*, section 8 of the *EEA*.

¹²³ Section 8 (a) – (c) of the *EEA*.

¹²⁴ Scheithauer and Kalula *Employee Polygraph Testing in the South African Workplace* 21.

¹²⁵ Scheithauer and Kalula *Employee Polygraph Testing in the South African Workplace* 21.

¹²⁶ *Health Professions Act* 56 of 1974 (hereafter the “*HPA*”) section 37(2).

behaviour. The wording “similar assessments” was used by the legislature to accommodate any other methods of assessments that may be applied to employees.¹²⁷

The view of the Health Professions Council of South Africa’s (hereafter the HPCSA) was dealt with on two occasions by the courts: first, in *Professional Employees Trade Union of South Africa obo Van Schalkwyk v National Trading Co*.¹²⁸ The CCMA held that polygraph testing does not fall under the *EEA* and/or the *Health Professions Act*.¹²⁹ This meant that polygraph testing does not fall within the meaning of psychometric testing referred to in the *EEA*. Furthermore, that the legislature has to create new legislation that will determine under which law polygraph testing must be controlled.¹³⁰ The CCMA held the view of Christianson¹³¹ where the author submitted that polygraph testing was not the same as psychological testing and that section 8 of the *EEA* was most probably not applicable to polygraph tests due to the wording “other similar tests”.¹³² Furthermore, Christianson¹³³ suggested that the legal position of polygraph testing has still to be properly established.¹³⁴

In the matter of *Mvemve & Another v Evertrade 77 (Pty) Ltd*,¹³⁵ the Court held that a polygraph test had no scientific basis due to its imperfections and due to the wording of the provision of the *EEA* dealing with the validity of psychometric testing.¹³⁶ It is

¹²⁷ Scheithauer and Kalula *Employee Polygraph Testing in the South African Workplace* 21.

¹²⁸ *Professional Employees Trade Union of South Africa obo Van Schalkwyk v National Trading Co* [2000] 21 ILJ 2323 at 2331 - 2332 (CCMA).

¹²⁹ *Professional Employees Trade Union of South Africa obo Van Schalkwyk v National Trading Co* [2000] 21 ILJ 2323 at 2331 - 2332 (CCMA).

¹³⁰ *Professional Employees Trade Union of South Africa obo Van Schalkwyk v National Trading Co* [2000] 21 ILJ 2323 at 2331 - 2332 (CCMA).

¹³¹ Christianson *The testing of employees: The selective prohibition of medical, psychological and other testing in terms of the Employment Equity Act*, [1999] 9: 2 CLL 11 at 16; Christianson, [2000] 21 ILJ 16 at 37

¹³² Christianson *The testing of employees: The selective prohibition of medical, psychological and other testing in terms of the Employment Equity Act*, [1999] 9: 2 CLL 11 at 16; Christianson, [2000] 21 ILJ 16 at 37.

¹³³ Christianson *The testing of employees: The selective prohibition of medical, psychological and other testing in terms of the Employment Equity Act*, [1999] 9: 2 CLL 11 at 16; Christianson, [2000] 21 ILJ 16 at 37.

¹³⁴ Christianson *The testing of employees: The selective prohibition of medical, psychological and other testing in terms of the Employment Equity Act*, [1999] 9: 2 CLL 11 at 16; Christianson, [2000] 21 ILJ 16 at 37.

¹³⁵ *Mvemve & Another v Evertrade 77 (Pty) Ltd* [2003] 7 BALR 766 (BCI).

¹³⁶ *Mvemve & Another v Evertrade 77 (Pty) Ltd* [2003] 7 BALR 766 (BCI).

contended that a polygraph test has no scientific basis and may possibly not be regulated by the *EEA*. In addition, it is for these reasons that there is a need for legal reform when it comes to the use of polygraph testing in the workplace. Another shortcoming is that evidence that involves polygraph results has been allowed at the Labour Court and CCMA regardless of the decision by the HPCSA to consider polygraph testing as invalid and unreliable.

2.4 Conclusion

In conclusion, when it comes to polygraph testing the supremacy clause is clear and unambiguous. All rules and actions including polygraph testing must be consistent with the *Constitution* as it is the supreme law of the Republic. Polygraph testing should not be used as a method to unfairly discriminate against employees but rather as a method to protect the employer's business. All employees ought to be treated fairly in the workplace unless the factors permitting limitation of rights are applicable. Laws pertaining to polygraph testing ought to be interpreted in line with the *Constitution*. It is contended that the provisions of the *EEA* have attempted to address polygraph testing; however, their attempts were insufficient, and they caused more confusion.

The *Constitution* provides several guarantees to the protection of employee's rights and the legal framework is also there to ensure that employees are protected. However, the main challenge is that *the EEA, LRA* and other policies and regulations are not comprehensive, and the courts have not been consistent in dealing with different scenarios. This study contends that international law has provided sufficient guidelines on the use of polygraph testing in the workplace. However, several conventions and codes are not mandatory as they are mere recommendations. The next chapter will focus on the right to privacy and polygraph testing in the South African workplace. The *Constitution* and the *EEA* are not the only authoritative sources of law that indirectly deal with polygraph testing. Other sources of law and the admissibility and the role players will be investigated in the next chapter.

Chapter 3 The Right to Privacy and polygraph testing in the South African Workplace

3.1 Introduction

This chapter will examine and critically analyse the approach followed by the South African labour courts, tribunals such as the CCMA, as well as criminal and civil courts regarding polygraph testing. This will include an assessment of how polygraph evidence can be considered as admissible forensic evidence in court and/or other dispute resolution bodies. Lastly, it will further analyse how the courts have dealt with disputes emanating from polygraph testing and whether the South African courts adequately address the need to protect employees in this regard.

3.2 The approach followed by South African Courts and/or Dispute Resolution Bodies

3.2.1 The position before the Labour Relations Act 66 of 1995 (hereafter the LRA)

Venter¹³⁷ argues that before the *LRA* came into effect, labour laws were mainly concerned with two issues when polygraph testing is involved. The first is, the definition of what qualifies as a lie-detector test or polygraph test or polygraph examination.¹³⁸ The second is the question of whether an employee can be dismissed due to an inference of a misconduct by a polygraph test.¹³⁹ This study contends that the matter of *Mahlangu v CIM Deltak; Gallant v CIM Deltak* (hereafter the *Mahlangu* case)¹⁴⁰ plays a critical role when it comes to polygraph testing in the workplace.

The case dealt with the two issues: the application of polygraph testing by a person who is not a registered psychologist, and the use of foreign authority.¹⁴¹ The

¹³⁷ Vanter *Opinion-Polygraph* 7.

¹³⁸ Vanter *Opinion-Polygraph* 7.

¹³⁹ Vanter *Opinion-Polygraph* 7.

¹⁴⁰ *Mahlangu v CIM Deltak; Gallant v CIM Deltak* (1986) 7 ILJ 346 (IC).

¹⁴¹ *Mahlangu v CIM Deltak; Gallant v CIM Deltak* (1986) 7 ILJ 346 (IC).

background to the case is as follows: There were multiple unresolved theft cases at the respondent's (also the employer in this case) organisation. As a result, the respondent decided to summon an investigator who would utilise a voice-analysis test.¹⁴² The tests were conducted with the consent of the applicants and they were found guilty on two occasions.¹⁴³ The applicants brought their expert evidence that alleged that unregistered psychologists conducted the use of voice-analysis tests to detect lies.¹⁴⁴ The applicants further contended that the voice analysis test was administered by an unregistered psychiatrist. They argued that this rendered both the analysis and the outcomes unscientific, invalid, unethical, and unlawful.¹⁴⁵

The industrial court held that in the absence of relevant case law particularly on polygraph testing, the decisions by foreign jurisdictions must be more persuasive and serve as guidelines.¹⁴⁶ The industrial court highlighted that the respondent had to follow the guidelines provided in the *ILO Recommendation 119* of 1963 and *Termination of Employment Convention 158* of 1982 (to be discussed later in this study).¹⁴⁷

Following the *Mahlangu* case,¹⁴⁸ evidence in the form of a polygraph test has been interpreted and accepted based on the following arguments. First, the general consensus is that the Labour Courts do not regard results from polygraph tests as reliable and admissible evidence.¹⁴⁹ As a result, it is submitted that no inferences should be drawn if an employee refuses to take the test.¹⁵⁰

Furthermore, in the *Mahlangu* case,¹⁵¹ the Industrial Court stated that before any polygraph test evidence can be regarded as admissible, the examiner must be

¹⁴² The *Mahlangu* case.

¹⁴³ The *Mahlangu* case.

¹⁴⁴ The *Mahlangu* case.

¹⁴⁵ The *Mahlangu* case.

¹⁴⁶ The *Mahlangu* case.

¹⁴⁷ *ILO Recommendation 119* of 1963 and *Termination of Employment Convention 158* of 1982.

¹⁴⁸ The *Mahlangu* case.

¹⁴⁹ The *Mahlangu* case.

¹⁵⁰ The *Mahlangu* case.

¹⁵¹ The *Mahlangu* case.

qualified and must be called to give testimony as an expert witness.¹⁵² This approach is similar to the common law practice of summoning an expert in a civil dispute to explain the assessment that they have conducted. Polygraph test results alone cannot be used to prove if an employee is guilty or not.¹⁵³ It is contended that this approach is correct because polygraph examination has never been proved to be completely accurate. It should be considered only if there is other supporting evidence.

In the case of *Census Tseko Moletsane v Ascot Diamonds (Pty) Ltd*,¹⁵⁴ the Industrial Court held that in a situation in which the employer has lost some form of economic value and there is, on a balance of probabilities, evidence that a certain employee in a position of trust has committed a misconduct,¹⁵⁵ the employer will be justified to suggest the use of polygraph examination.¹⁵⁶ In the case of *Algorax (Pty) Ltd v CWIU and Another*,¹⁵⁷ the court held that there needed to be enough proof of misconduct in addition to polygraph evidence before an employee could be justifiably and reasonably dismissed.¹⁵⁸

3.2.2 The Position after the LRA

The *LRA* does not have direct provisions dealing with polygraph testing. However, in 2002 the *CCMA Polygraph testing info Sheet 2002* was published. The information sheet dealt with the information such as what constitute a polygraph test, if there are any regulations in South Africa, if it is voluntary or not, its status at the CCMA etcetera.¹⁵⁹ It is contended that the information sheet has limited guidelines and it is not an *Act* of parliament. The *LRA* furthermore contains provisions that provide guidance on how the Labour Courts and other Tribunals such as the CCMA should deal with disputes against the backdrop of the *Constitution*.¹⁶⁰ Disputes relating to polygraph test

¹⁵² The *Mahlangu* case.

¹⁵³ The *Mahlangu* case.

¹⁵⁴ *Census Tseko Moletsane v Ascot Diamonds (Pty) Ltd* (1993) 4 (a) SALLR 15 (IC) 16.

¹⁵⁵ *Census Tseko Moletsane v Ascot Diamonds (Pty) Ltd* (1993) 4 (a) SALLR 15 (IC) 16.

¹⁵⁶ *Census Tseko Moletsane v Ascot Diamonds (Pty) Ltd* (1993) 4 (a) SALLR 15 (IC) 16.

¹⁵⁷ *Algorax (Pty) Ltd v CWIU and Another* (1995) NBLLR 1 (LAC) 5.

¹⁵⁸ *Algorax (Pty) Ltd v CWIU and Another* (1995) NBLLR 1 (LAC) 5.

¹⁵⁹ *CCMA Polygraph testing info Sheet 2002*.

¹⁶⁰ *Constitution of the Republic of South Africa, 1996* (hereafter the *Constitution*).

may be dealt with in line with schedule 8 of the *Code of good practice* of the LRA.¹⁶¹ Section 185 of the *LRA* provides that every employee has the right not to be unfairly dismissed and/or subjected to unfair labour practices.¹⁶² The use of polygraph testing, and an employee's consent thereto, may be included in employment contracts which would entitle employers the right to use the test as part of the disciplinary hearing process and/or the employers investigation into the employee's alleged misconduct prior to conducting a disciplinary hearing. It remains unlawful to compel an employee to undergo a polygraph test without the employee's express consent.

3.2.3 *Specific incidents of misconduct*

It is contended that, although polygraph testing may be invasive there are specific incidents of misconduct where employers are allowed to use the test in the workplace. According to Pillay¹⁶³, these may include but are not limited to instances where the employee had gained access to a particular property which was the subject of the investigation. In this case there was reasonable suspicion that the employee was involved in a form of misconduct and there was economic loss or injury to the employer's business.¹⁶⁴ Furthermore, where the purpose is to combat dishonesty, serious alcohol abuse, illegal drugs, and possibly fraudulent behaviour of a person in a position of trust,¹⁶⁵ it is argued that there are specific incidents of misconduct that may prompt the use of a polygraph test.

3.2.4 *Refusal to take the test*

In certain circumstances an employer may be permitted to terminate an employee's contract if an employee refuses to take a polygraph test. In the matter of *Nyathi v Special Investigating Unit*,¹⁶⁶ the Labour Court agreed with the employer that the refusal

¹⁶¹ Schedule 8 of the *Code of Good Practice* of the LRA.

¹⁶² Section 185 of the *LRA*.

¹⁶³ Pillay *When can employees be asked to take a polygraph test?*

¹⁶⁴ *Census Tseko Moletsane v Ascot Diamonds (Pty) Ltd* (1993) 4 (a) SALLR 15 (IC); *Algorax (Pty) Ltd v CWIU and Another* (1995) NBLLR 1 (LAC).

¹⁶⁵ Pillay *When can employees be asked to take a polygraph test?*

¹⁶⁶ *Nyathi v Special Investigating Unit* 2011 JOL 27537 LC.

by the employee to take a polygraph test was a material breach of her employment contract.¹⁶⁷ In this case, the employee was contractually obligated to do a polygraph test.¹⁶⁸ The Labour Court found that such a contractual clause was reasonable considering the nature of the working environment which is to investigate corruption.¹⁶⁹ This study agrees although the right to privacy ought to be protected, all rights are limited in terms of section 36 the *Constitution*.¹⁷⁰ The contractual obligation will take precedence over vested rights due to the nature of the work involved.

3.2.5 Inference drawn from a refusal to take a polygraph test

A refusal to take the polygraph test may raise a suspicion and can lead to a negative inference being drawn. A case in point is the matter of *Truworthis v Commission for Conciliation, Mediation, and Arbitration*,¹⁷¹ in which the Commissioner found that the dismissal of an employee was substantively unfair.¹⁷² The facts of the matter are as follows: An employee was employed as a supervisor of four departments, in which she had to provide oversight duties.¹⁷³ Approximately eight watches were stolen at one of the departments in which the employee was in charge and responsible at the time.¹⁷⁴ The Applicant argued that the watches went missing at the time the employee was on duty and the Respondent argued that the watches were stolen and/or after her time on duty.¹⁷⁵ The CCMA found that the dismissal of the employee was substantively fair. The Commissioner had noted that the employee was nervous during the arbitration hearing, and she refused to undergo a polygraph test.¹⁷⁶ As a result, the Commissioner concluded that the employee knew something about the missing property.¹⁷⁷ However, it is contended that such an inference is unfair and under the dictates of justice it should not be allowed.

¹⁶⁷ *Nyathi v Special Investigating Unit* 2011 JOL 27537 LC.

¹⁶⁸ *Nyathi v Special Investigating Unit* 2011 JOL 27537 LC.

¹⁶⁹ *Nyathi v Special Investigating Unit* 2011 JOL 27537 LC.

¹⁷⁰ Section 36 of the *Constitution*.

¹⁷¹ *Truworthis Ltd v CCMA* (2009) 30 ILJ 677 (LC) para 5.

¹⁷² *Truworthis Ltd v CCMA* (2009) 30 ILJ 677 (LC) para 5.

¹⁷³ *Truworthis Ltd v CCMA* (2009) 30 ILJ 677 (LC) para 5.

¹⁷⁴ *Truworthis Ltd v CCMA* (2009) 30 ILJ 677 (LC) para 5.

¹⁷⁵ *Truworthis Ltd v CCMA* (2009) 30 ILJ 677 (LC) para 48.

¹⁷⁶ *Truworthis Ltd v CCMA* (2009) 30 ILJ 677 (LC) para 48.

¹⁷⁷ *Truworthis Ltd v CCMA* (2009) 30 ILJ 677 (LC) para 48.

A refusal to take the test can be interpreted as an act of insubordination. In *Gemalto South Africa (Pty)(Ltd) V CEPPWAWU obo Louw and others*,¹⁷⁸ a trade union representing its employees concluded that it will not allow its members to subject themselves to a polygraph test.¹⁷⁹ This was with regard to an investigation into the loss of approximately R50 million which had been lost by the employer's client.¹⁸⁰ The employer had requested that all the employees subject themselves to a polygraph test.¹⁸¹ The challenge was that some employees' contracts had included a clause compelling them to test, while other employees' contracts did not.¹⁸² At the CCMA it was found that there is no justifiable reason to treat the employees differently even if their contracts were not the same.¹⁸³ On Appeal, the Labour Court held that the refusal to submit to polygraph testing amounted to an act of insubordination.¹⁸⁴

As a result, in the period before the *LRA* came into effect, there was a lack of certainty in relation to how the use of polygraph should be interpreted in the workplace. However, after the *LRA* came into effect, polygraph evidence must be given similar treatment to any other evidence in terms of criminal and civil procedure in South Africa.

3.3 Other pieces of legislation that regulate polygraph testing

The coming into effect of the *LRA* provided methods of resolving disputes in line with the provisions of the *Constitution* and various case laws arose. However, there are other pieces of legislation that directly/indirectly affect the admissibility of polygraph

¹⁷⁸ *Gemalto South Africa (Pty)(Ltd) V CEPPWAWU obo Louw and others* (JA54/14,27 August 2015) LAC para 1- 15.

¹⁷⁹ *Gemalto South Africa (Pty)(Ltd) V CEPPWAWU obo Louw and others* (JA54/14,27 August 2015) LAC para 1- 15.

¹⁸⁰ *Gemalto South Africa (Pty)(Ltd) V CEPPWAWU obo Louw and others* (JA54/14,27 August 2015) LAC para 1- 15.

¹⁸¹ *Gemalto South Africa (Pty)(Ltd) V CEPPWAWU obo Louw and others* (JA54/14,27 August 2015) LAC para 1- 15.

¹⁸² *Gemalto South Africa (Pty)(Ltd) V CEPPWAWU obo Louw and others* (JA54/14,27 August 2015) LAC para 1- 15.

¹⁸³ *Gemalto South Africa (Pty)(Ltd) V CEPPWAWU obo Louw and others* (JA54/14,27 August 2015) LAC para 1- 15.

¹⁸⁴ *Gemalto South Africa (Pty)(Ltd) V CEPPWAWU obo Louw and others* (JA54/14,27 August 2015) LAC para 1- 15.

test evidence at courts and dispute resolution bodies. These legislative instruments will be discussed in greater detail below.

3.3.1 *Electronic Communications and Transactions Act 25 of 2002* (hereafter the *ECTA*)

Notably, the *ECTA* replaced the abovementioned *Computer Evidence Act*. It is the submission of this study that the *ECTA* is also applicable to polygraph testing. This is because the Polygraph Examiners provide a report at the conclusion of the examination.¹⁸⁵ Polygraph examiners also produce polygraph charts during the polygraph examination.¹⁸⁶ Polygraph testing analysis/results would be typed out and converted into a polyscore and stored in a computer.¹⁸⁷ Section 15 of the *ECTA* ensures that such evidence is acceptable/admissible in formal and legal proceedings.¹⁸⁸

It is submitted that the analysis of the two above-stated pieces of legislation demonstrate that polygraph can find its application indirectly when interpreting other legislations. However, the legislature must consider legislating the use and application of the device in the workplace.

3.4. The role of a Polygraph Examiner

It is contended that a polygraph test is dependent on the credibility and experience of a Polygraph Examiner (also referred to as a polygraphist). Gabela¹⁸⁹ argues that during a polygraph examination, the polygraphist's training and experience is considered.¹⁹⁰ It is important to ensure that a polygraph examiner is legally "fit and proper" for the purpose of carrying out these tests. It is argued that the challenge is that there is no

¹⁸⁵ Vanter *Opinion-Polygraph* 37.

¹⁸⁶ Vanter *Opinion-Polygraph* 37.

¹⁸⁷ Vanter *Opinion-Polygraph* 37.

¹⁸⁸ *Electronic Communications and Transactions Act 25 of 2002*.

¹⁸⁹ Gabela *Evaluation of the Questions Used in Polygraph* 29.

¹⁹⁰ Gabela *Evaluation of the Questions Used in Polygraph* 29.

regulatory body that controls the fitness of polygraphists. In addition, the Psychometrics Committee of the Professional Board for Psychology, a statutory body under the Health Professions Council of South Africa (hereafter the HPCSA), has rejected the validity and use of a polygraph test.¹⁹¹ The constitution of the South African Professional Polygraph Association (hereafter SAPPa) does not allow the association to discipline unfit and improper polygraphists except cancelling their membership.¹⁹² This makes the use, reliability, and validity of polygraph test results to be questionable.

In the matter of *Steen v Wetherlys*,¹⁹³ the Tribunal remarked on comments about polygraphists as expert witness and held that there is no evidence and/or research to prove that polygraphists qualify to be regarded as an expert witness.¹⁹⁴ It is contended that this is because there are no objective standards and regulations. This allows anyone to self-appoint himself or herself as an expert.¹⁹⁵ Therefore, the results of the test are largely dependent on the manner they are carried out and the person who conducted the test. Considering this argument, it is submitted that there are no rules, no clear standards, and ethical behaviours that regulate the role of a polygraph examiner. In the South African polygraph and/or labour law context, this opens polygraph testing to several discrepancies and abuse.

In addition to the issues of qualification, regulation, experience, bias, and capability on the part of the examiner, some factors can influence the validity of results. Fourie¹⁹⁶ sets out some of these factors and argues as follows:

- Lack of fear, if the employee who is to be tested does not fear being detected or identified, the polygraph test will record that no deception is indicated. The test is partly based on the employee's beliefs.¹⁹⁷

¹⁹¹ Media statement by the Professional Board for Psychology on 2 July 1999: 'Legal and illegal use of psychometric tests including the polygraph'.

¹⁹² Article XII of *SAPPa Constitution* 2011.

¹⁹³ *Steen v Wetherlys* 2006 2 BALR CCMA 227

¹⁹⁴ *Steen v Wetherlys* 2006 2 BALR CCMA 227.

¹⁹⁵ *Steen v Wetherlys* 2006 2 BALR CCMA 227.

¹⁹⁶ Fourie *The Admissibility and Evaluation of Scientific Evidence in Court* 72.

¹⁹⁷ Fourie *The Admissibility and Evaluation of Scientific Evidence in Court* 72.

- Presence of fear, that is, if the employee who is to be tested fears that he or she might be falsely accused, such feelings may also affect the results.¹⁹⁸
- Physical disability, a person who has abnormal physical health comorbidities such as high blood pressure or respiratory disorders may also produce physiological responses that infer inaccurate results.¹⁹⁹
- Mental disability, neurosis, and psychosis may lead to an inaccurate inference that the employee being tested is deceptive.²⁰⁰
- Brady and Ainsworth are of the opinion that “the intake of alcohol during the commission of the crime reduced a detectability of deception”.²⁰¹
- Emotional tensions or simple nervousness, if one shows fear it may cause distinct physiological changes which may incorrectly suggest deception.²⁰²

It is argued that several factors can affect the validity and accuracy of polygraph test results. Most appear to rely on the interpretation of the polygraph examiner. It is contended that it appears that more power rests on the discretion of the polygraph examiner. There is no guarantee that a polygraph examiner will not misuse his or her discretion to disadvantage an employee who is being tested. It is contended that there is no guarantee of the protection of workers’ rights during the use of polygraph tests.

In order to ensure that employees' rights are safeguarded and guaranteed against misuse by the polygraph examiner and/or employer, Tarantino²⁰³ suggests that there must be a review in which the employee to be examined is assessed for whether they are suitable for testing or not.²⁰⁴ A preliminary and pre-test interview on the questions to be asked and the procedures to be followed ought to have been undertaken, to ensure that appropriate questions are asked during the test.²⁰⁵ The use of relevant and irrelevant questions during the test, a correct interpretation of polygraph charts, detection of attempts to cheat the test, and an appropriate post-test interview are some

¹⁹⁸ Fourie *The Admissibility and Evaluation of Scientific Evidence in Court* 72.

¹⁹⁹ Fourie *The Admissibility and Evaluation of Scientific Evidence in Court* 72.

²⁰⁰ Fourie *The Admissibility and Evaluation of Scientific Evidence in Court* 72.

²⁰¹ Brady and Ainsworth *Alcohol and Psychophysiological Detection of Deception* 63.

²⁰² Fourie *The Admissibility and Evaluation of Scientific Evidence in Court* 72.

²⁰³ Tarantino *Strategic Use of Scientific Evidence* 207-208.

²⁰⁴ Tarantino *Strategic Use of Scientific Evidence* 207-208.

²⁰⁵ Tarantino *Strategic Use of Scientific Evidence* 207-208.

of the additional factors that can negatively affect the outcomes of the test²⁰⁶ The shortcoming in this is that there is no one who will be able to conduct and/or ensure compliance in that instance.

3.5 The Admissibility of Polygraph Tests

In *Sosibo and Others and CTM*,²⁰⁷ the Arbitrator held that polygraph testing in the workplace is a highly controversial issue and the admissibility of its results has not been resolved.²⁰⁸ It further held that the sole reliance by the employer on unspecific polygraph results is insufficient to discharge the onus in terms of section 192 of the *LRA* to prove that the dismissal was fair.²⁰⁹ To discharge this onus, the test of a balance of probabilities is used. Polygraph evidence alone is not enough to show that the dismissal was fair unless there is corroborating evidence.

Furthermore, Pillay²¹⁰ suggests that to obtain an admissibility of polygraph test results at the CCMA and in court, the onus rests on the employer to show that they have complied with the rules.²¹¹ In addition, the employer must ensure that the employee's written consent is sought before the test is conducted and that the examiner is properly qualified. The employer must also ensure that the examinee is mentally and physically fit to undertake the test.²¹² Furthermore, that the examinee is provided with sufficient information regarding the test and that an expert must testify regarding the results after the test.²¹³

²⁰⁶ Tarantino *Strategic Use of Scientific Evidence* 207-208.

²⁰⁷ *Sosibo & others and CTM* (2001) 22 ILJ 811 (CCMA); [2001] 5 BALR 518 (CCMA).

²⁰⁸ *Sosibo & others and CTM* (2001) 22 ILJ 811 (CCMA); [2001] 5 BALR 518 (CCMA).

²⁰⁹ *Sosibo & others and CTM* (2001) 22 ILJ 811 (CCMA); [2001] 5 BALR 518 (CCMA), Section 192 of the *LRA*.

²¹⁰ Pillay *When can employees be asked to take a polygraph test?*

²¹¹ Pillay *When can employees be asked to take a polygraph test?*

²¹² Pillay *When can employees be asked to take a polygraph test?*

²¹³ Pillay *When can employees be asked to take a polygraph test?*

3.6 Conclusion

As illustrated in the *Mahlangu* case,²¹⁴ before the *LRA* was enacted the general approach to polygraph examination was focused on two factors: The definition of the test and if one can be dismissed due to its outcomes.²¹⁵ In the *Mahlangu* case,²¹⁶ it was held that the test is unreliable and inadmissible.²¹⁷ In order to become admissible there must be clear qualification on the side of the examiner.²¹⁸ The employer is justified in using the test in an event where there is a loss of economic value.²¹⁹ After the *LRA* was enacted, it is argued that more focus was placed on the role of the test at the courts and other dispute resolution bodies. The duties and powers of the commissioners and polygraph experts at the CCMA were also defined. The admissibility, reliability and accuracy of the test were also addressed, particularly in terms of the *Constitution*. It should be highlighted that the *LRA* is not the only source of law that can be used to address issues posed by polygraph testing. There are other sources that are indirectly relevant such as the *ECTA*. They assist to determine the role and the manner in which polygraph evidence should be treated at court and at the CCMA. Moreover, it should further be reaffirmed that there is a need to have legislation that will directly address polygraph testing in line with the *Constitution* and international law in the 21st century.

Considering the above cases, it can be inferred that courts are moving towards a progressive approach in allowing the use of polygraph test results. This is because the courts are moving in a direction in which they will not simply take it that one is deceptive or honest based on polygraph test results. Generally, at the CCMA and Labour Courts, polygraph test results will be allowed based on several factors: The polygraph examiner is an expert witness and his/her evidence must be tested for reliability. The Commissioner must determine admissibility and reliability of evidence and the examiner's testimony must be treated with circumspection. The Commissioner may

²¹⁴ *Mahlangu v CIM Deltak* 1986 (7) ILJ 346

²¹⁵ *Mahlangu v CIM Deltak* 1986 (7) ILJ 346

²¹⁶ *Mahlangu v CIM Deltak* 1986 (7) ILJ 346.

²¹⁷ *Mahlangu v CIM Deltak* 1986 (7) ILJ 346

²¹⁸ *Mahlangu v CIM Deltak* 1986 (7) ILJ 346

²¹⁹ *Mahlangu v CIM Deltak* 1986 (7) ILJ 346

use the test results as an aggravating factor, as they can be used only in support of or to corroborate other evidence.

It is further contended that the approach adopted by the Courts is correct based on several reasons. Firstly, it will be unfair to rely on the evidence where credibility is questionable. Secondly, it is argued that polygraph testing poses an invasion of privacy. Thirdly, if the employee should undergo polygraph testing, they should not be fearful of being dismissed for a breach of contract. If an inference is drawn upon a refusal to undergo the test, then the consent could not have been obtained involuntarily. It is submitted that, in the instance where consent was in writing prior to commencement of employment, that consent must be presumed to have been obtained involuntarily.

Chapter 4 The Comparative Study

4.1 Introduction

This part of the study will discuss the relevant international instruments as well as jurisprudence of foreign countries. This will be done with the view of providing valuable lessons for future legislative reform on the right to privacy and polygraph testing in the South African workplace. A comparative study will be carried in this chapter between the USA and South Africa. The USA is a country which extensively uses and regulates polygraph testing. Organisations and/or agencies in the USA provide accreditations to local polygraph associations, on which South African courts mostly rely on for judicial precedents. The reasons for comparing the two countries are that. Firstly, South Africa (hereafter SA) and the USA are members of the ILO. Therefore, they should comply with the ILO standards in their domestic legislation. Secondly, a critical analysis on polygraph testing in the US will be carried out, particularly its use in the workplace. It is hoped that SA can draw lessons from the US where its legislation falls short. When conducting the comparisons, this study will also highlight how the US adequately provides protection for employees when using a polygraph test. The applicable ILO standards will first be discussed, starting with a brief background of the ILO, then the applicable standards when conducting polygraph tests will follow. This chapter of the study will provide an insight into the required ILO standards, an overview of whether SA complies with the standards or not. A breakdown of the countries' position on polygraph testing will be made, the legal framework and the case law will be discussed.

4.2 International Labour Law

4.2.1 The International Labour Organisation

The International Labour Organisation is a United Nations' agency that was formed in 1919.²²⁰ The organisation unites the workers, employers and governments, and it

²²⁰ International Labour Organization <https://www.ilo.org/global/about-the-ilo/lang--en/index.htm>.

consists of about 187 member states.²²¹ Its primary goals are to set standards of labour, evolve employment policies, and devise programmes that will ensure decent working environment for all.²²² The organisation has its own guidelines that might affect the use of polygraph testing domestically.²²³ Some international laws are binding while others are mere recommendations. However, the ILO Convention and recommendations are regarded as the main sources of international labour law because of their comprehensive character, broad scope, and numbers.²²⁴ South Africa was allowed to re-join the ILO in 1994 after its membership was suspended due to the apartheid policy. It joined the United Nations (hereafter the UN) in 1945 and it has a membership of the African Union (hereafter the AU). There are two most relevant and important ILO Conventions dealing with polygraph testing. These are the *Discrimination (Employment and Occupation) Convention* and the *Termination of Employment Convention*.²²⁵ The former assists in determining whether the use of polygraph testing in the workplace amounts to unfair discrimination under the *Discrimination Convention* (this convention was ratified by SA in 1997). The latter assists in determining if it is considered fair to dismiss an employee who has failed a polygraph test or who has refused to undergo a polygraph examination under the *Termination of Employment Convention*. The ILO Code of Practice on the *Protection of Workers' Personal Data of 1997* also contains provisions that deal with polygraph testing.

4.2.2 The Discrimination Convention 111 of 1958

This Convention aims to ensure fairness and combat any form of discrimination in the workplace; in article 1(1) (a) discrimination is defined as

²²¹ International Labour Organization <https://www.ilo.org/global/about-the-ilo/lang--en/index.htm>.

²²² International Labour Organisation <https://www.ilo.org/global/about-the-ilo/lang--en/index.htm>.

²²³ International Labour Organisation <https://www.ilo.org/global/about-the-ilo/lang--en/index.htm>.

²²⁴ Section 39(1) of the *Constitution*, sections 1 and 3 of the *LRA* & section 3(d) of the *EEA*.

²²⁵ *Discrimination (Employment and Occupation) Convention* 11 of 1958 and the *Termination of Employment Convention* 158 of 1982.

any distinction, exclusion or preference made based on race, colour, sex, religion, political opinion, national extraction, or social origin, which has the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation.²²⁶

This provision is in line with section 9(4) of the *Constitution*.²²⁷ There is no section on this convention that directly mentions polygraph testing. However, it does indirectly mention its application in employment or occupational environment. It is also the interpretation of this study that whenever section 9(4) of the *Constitution* is read within the context of labour rights, the spirit of Article 1(1) (a) of the *Discrimination Convention* must be borne in mind. In addition, not every action by the employer that seems at face value to amount to discrimination, is discrimination. This view was reaffirmed in the matter of *Harksen v Lane*,²²⁸ as discussed above.

4.2.3 The Termination of Employment Convention 158 of 1982

The *Termination of Employment Convention* is similar to the *LRA* in that it requires certain procedures to be followed before employment may be terminated. According to section 186 of the *LRA*, an employee may be dismissed for one or more of the following reasons: misconduct, incapacity, and/or operational requirements.²²⁹ This study contends that although SA has not ratified this Convention, it has adopted several provisions similar to the ones found in section 23(1) of the *Constitution*, and section 187 and 188 (1) (a) of the *LRA* (the list is not exhaustive). In the *Termination of Employment Convention*, these are similar to articles 5 and 6. The primary aim of the *Termination of Employment Convention* is to ensure that fair procedures are followed at courts, forums, and/or tribunals before employment is terminated.²³⁰ In light of the *Termination of Employment Convention*, the dismissal of an employee due to deceptive results of a polygraph test might constitute a valid reason; however, correct procedures must have been followed.²³¹

²²⁶ *Discrimination Convention* 111 of 1958.

²²⁷ Section 9(4) of the *Constitution*.

²²⁸ *Harksen v Lane*, 1998 (1) SA 300 at 322 (CC); *Ntai & Others v SA Breweries Ltd*, [2001] 22 ILJ 214 at 227 (LC).

²²⁹ Section 186 of the *LRA*.

²³⁰ *Termination of Employment Convention* 158 of 1982.

²³¹ *Termination of Employment Convention* 158 of 1982.

According to the ILO General Survey by the Committee of Experts in 1995,²³² refusal to take a polygraph test can amount to an invalid reason for termination of employment. It is argued that in South Africa, there are divergent CCMA judgments. This is because in some cases, the Commissioners held that a refusal could not be used as an indication of guilt. The ILO General Survey further indicates that member states have a choice when it comes to polygraph testing and to create laws that will best match the intention of their legislatures.²³³ This study contends that the reason why courts may tend to differ on this aspect is that every situation must be determined on its own merits and within its context. This is one of the factors that the ILO General Survey may have failed to highlight and instead it imposed a blanket approach.

4.2.4 The Code of Practice on the Protection of Worker's Personal Data of 1997

According to Clause 5.5 of the *Code of Practice on the Protection of Worker's Personal Data of 1997*,²³⁴ "decisions concerning a worker should not be based solely on the automated processing of that worker's data". It is submitted that, in the context of polygraph testing, this implies that an employee should not be dismissed solely on the outcomes of a polygraph-test result. In the South African context, labour courts have emphasized that polygraph results only serve as corroborative evidence.²³⁵ It is argued that the *Code of Practice on the Protection of Worker's Personal Data of 1997* is the only ILO instrument that deals directly with the use of polygraph testing in the workplace. The *Code of Practice on the Protection of Worker's Personal Data of 1997* applies to employees former, current, and prospective (job applicants) both in the public and in the private sector.²³⁶ This study argues that the *Code of Practice on the Protection of Worker's Personal Data of 1997* is the most fundamental ILO convention on the use of polygraph testing in the workplace.

²³² ILO, General Survey by the Committee of Experts (1995).

²³³ ILO, General Survey by the Committee of Experts (1995).

²³⁴ *Code of Practice on the Protection of Worker's Personal Data of 1997*.

²³⁵ *GIWUSA obo Malemone and Others v Mashaba NO and Others* (JR1124/19) [2021] ZALCJHB 356 (13 October 2021), *Goosen v Caroline's Frozen Yoghurt Parlour (Pty) Ltd* (1995) 4 LCD 152 (IC) & *Harmse v Rainbow Farms (Pty) Ltd* CCMA WE 1728, 1997

²³⁶ Clause 3.4 and 4.1(a) of the *Code of Practice on the Protection of Worker's Personal Data of 1997*.

In South African courts, tribunals, and forums there has been differing interpretations on the admissibility of polygraph at courts and other dispute resolution bodies. According to Clause 6.10 of the *Code of Practice on the Protection of Worker's Personal Data of 1997*

polygraphs, truth-verification equipment, or any other similar testing procedure should not be used.²³⁷

This clause prohibits the use of polygraph testing in the workplace. The *Code of Practice on the Protection of Worker's Personal Data of 1997* protects workers' data in the case of any medical or drug testing, except for polygraph testing or any other similar equipment, as stated in Clause 6.10 of the *Code of Practice on the Protection of Worker's Personal Data of 1997*.²³⁸ There is no instance where the admissibility of the polygraph test is provided in terms of national legislation. Clause 5.5 of the *Code of Practice on the Protection of Worker's Personal Data of 1997* provides that employees and applicants have a right to refuse to take a polygraph test.²³⁹ Considering the *Mahlangu* judgment discussed in chapter 2, it is argued that the court did not consider Clause 6.5 and 6.10 of the *Code of Practice on the Protection of Worker's Personal Data of 1997*.

4.3 The United States of America

There are several government laws that regulate polygraph testing in the USA, but the highly comprehensive polygraph testing legislation is the *Employee Polygraph Protection Act of 1988* (Hereafter the *EPPA*). The reason that the *EPPA* was enacted was to resolve disputes relating to the validity and reliability, admissibility and abuses linked to polygraph testing in the private sector employment.²⁴⁰ The *EPPA* generally does not allow employers to use polygraph testing prior or during the course of

²³⁷ *Code of Practice on the Protection of Worker's Personal Data of 1997*.

²³⁸ Clause 6.10 of the *Code of Practice on the Protection of Worker's Personal Data of 1997*.

²³⁹ Clause 5.5 of the *Code of Practice on the Protection of Worker's Personal Data of 1997*.

²⁴⁰ Gondwe *The Protection of Privacy in the Workplace: A Comparative Study* 212.

employment.²⁴¹ Where the employer is convinced that an employee has committed a misconduct and such employee is under investigation, the employer may in terms of the *EPPA* request the employee to undergo the polygraph test.²⁴² A case in point, is where an employee is involved in acts of economic loss, theft, fraud, sabotage, *etcetera*.²⁴³

4.3.1 Legal Instruments

According to the *EPPA*, an employer in the private sector cannot in any manner urge or suggest that an employee or prospective employee undergo polygraph testing either voluntary or by mandate.²⁴⁴ This study contends that in this manner, the *EPPA* prohibits against a potential exposure and abuse of polygraph examination by employers in the private sector. In the matter of *Blackwell v 53rd – Ellis Currency Exchange*,²⁴⁵ the Court indicated that a voluntary action by an employee to undergo polygraph testing should not be interpreted as a waiver of the employees' rights. The *EPPA* prevents the employer from enquiring or taking any action against the employee based on the outcomes of a polygraph test.²⁴⁶ However, the USA courts have been able to rule in favour of employers who subject their employees to polygraph testing. This is only applicable in the private sector where safety and security vacancies are concerned. This was the case in point in the matter of *Stehney v Perry*.²⁴⁷

In the public sector, the *EPPA* has no prohibitions where the state or its organs/entities require an individual to undergo polygraph testing.²⁴⁸ Questions which the employee is required to answer must be related to the ability of the employee to perform duties in the course of employment and not violate the right to privacy.²⁴⁹ A case in point, in the matter of *Thorne v City of El Segundo*, a job applicant for the position of police officer

²⁴¹ *EPPA* 2002 (1) – (4).

²⁴² *EPPA* 2002 (1) – (4).

²⁴³ *EPPA* 2002 (1) – (4).

²⁴⁴ *EPPA* 2002 (1) – (4).

²⁴⁵ *Blackwell v 53rd – Ellis Currency Exchange* 852 F. Supp. 646.

²⁴⁶ Gondwe *The Protection of Privacy in the Workplace: A Comparative Study* 212.

²⁴⁷ *Stehney v Perry* 101 F. 3d 925 (3d Cir. 1996).

²⁴⁸ *Stehney v Perry* 101 F. 3d 925 (3d Cir. 1996).

²⁴⁹ *Stehney v Perry* 101 F. 3d 925 (3d Cir. 1996).

underwent a polygraph examination.²⁵⁰ The court found that the test was a violation of her right to privacy as she was asked questions which were focused on her sexual life and previous relationships.²⁵¹ It should be highlighted that this is an indication that polygraph testing if used in the workplace has the potential to violate an employee's rights.

The *EPPA* further permits federal government to require polygraph testing of experts, consultants, or employees of contractors with government agencies concerned with national security, intelligence, and counterintelligence such as the National Security Agency, Federal Bureau of Investigation, Central Intelligence Agency and the Departments of Energy and Defence.²⁵²

Different states have their own laws that regulate polygraph testing. A case in point, at the State of Connecticut employers are not allowed to request polygraph testing on employees²⁵³ unless it is for security positions such as the police and correctional services.²⁵⁴ The State of Alabama provides polygraph licensing services but it does not regulate the use of polygraph testing.²⁵⁵ *Iowa Statute* allows polygraph testing only for reasons that will not lead to termination of employment and the *title 7* of the *Iowa Statute* provides that an employer may not use polygraph testing as a measure of discrimination.²⁵⁶ It should be submitted that an important lesson is that the different states in the USA do not allow polygraph testing unless it is for security reasons in certain jobs. In addition, a polygraph examination is not regarded as a medical examination. According to the *Equal Employment Opportunity Commission's Enforcement ("EEOC")* on Pre-employment Inquiries under the *American with Disabilities Act*, polygraph tests are excluded from the *Act's* definition of "medical examinations".²⁵⁷

²⁵⁰ *Thorne v City of El Segundo* 726 F. 2d 459 (1983).

²⁵¹ *Thorne v City of El Segundo* 726 F. 2d 459 (1983).

²⁵² Hebert *Employment Privacy Law* (2009) § 6:21.

²⁵³ Hebert *Employment Privacy Law* (2009) § 6:21.

²⁵⁴ Hebert *Employment Privacy Law* (2009) § 6:21.

²⁵⁵ Hebert *Employment Privacy Law* (2009) 27.

²⁵⁶ Gondwe *The Protection of Privacy in the Workplace: A Comparative Study* 212.

²⁵⁷ Gondwe *The Protection of Privacy in the Workplace: A Comparative Study* 205.

4.3.2 Case Law

In the matter of *Hester v City of Milledgeville*,²⁵⁸ the City of Milledgeville's use of polygraph was put under scrutiny. It occurred when employees who work at the fire department alleged that the policy of the city subjecting them to undergo polygraph testing was a violation of their right to privacy.²⁵⁹ The City of Milledgeville argued that it used a series of control questions that aimed at targeting drug abuse at the department.²⁶⁰ The court held that it would consider a combination of questions aimed at evoking deceptive or nervous response from the employees as a violation of their constitutional right to privacy.²⁶¹ Although the questions in the City of Milledgeville's employment questionnaire did not focus on personal questions such as family and family relations that could have infringed the constitutional right to privacy,²⁶² this study argues that the case of *Hester v City of Milledgeville* illustrates the importance of the right to privacy in relation to polygraph testing.

In the matter of *Thorne v City of El Segundo*,²⁶³ an employee who was employed as a typist applied to be a Police Officer.²⁶⁴ Her employment was subject to her answering questions that relate to her sex life.²⁶⁵ The court indicated that her off-duty activities had no effect in her performing her duties as a Police Officer and such was protected by the constitutional right to privacy and should not be violated.²⁶⁶ In separate matters of *Polsky v Radio Shack* and *State v Community Distributors Inc*,²⁶⁷ the courts held that any consent by an employee to undergo polygraph testing should not be seen as a voluntary consent because in that situation the employee is forced by economic

²⁵⁸ *Hester v City of Milledgeville* 777 F. 2d 1492 (11th Cir. 1985).

²⁵⁹ *Hester v City of Milledgeville* 777 F. 2d 1492 (11th Cir. 1985).

²⁶⁰ *Hester v City of Milledgeville* 777 F. 2d 1492 (11th Cir. 1985).

²⁶¹ *Hester v City of Milledgeville* 777 F. 2d 1492 (11th Cir. 1985).

²⁶² *Hester v City of Milledgeville* 777 F. 2d 1492 (11th Cir. 1985).

²⁶³ Gondwe *The Protection of Privacy in the Workplace: A Comparative Study* 212.

²⁶⁴ Gondwe *The Protection of Privacy in the Workplace: A Comparative Study* 212.

²⁶⁵ Gondwe *The Protection of Privacy in the Workplace: A Comparative Study* 212.

²⁶⁶ Gondwe *The Protection of Privacy in the Workplace: A Comparative Study* 212.

²⁶⁷ *Polsky v Radio Shack and State v Community Distributors Inc* 123 NJ Super.589, 304 A.2d,213 N.J. Co. 1973.

circumstances and as such it is not voluntary.²⁶⁸ It is submitted that this is an indication that consent by an employee in the context of polygraph can be involuntary.

In the matter of *Chesna v United States Department of Defense*,²⁶⁹ the court held that it cannot presume that the employee was compelled to provide consent to undergo polygraph testing.²⁷⁰ This is because the employee had not argued that he was 'deceived, ordered, harassed or intimidated against his will to waive his rights'.²⁷¹ In light of the decision by the court in the matter of *Thorne v City of El Segundo*,²⁷² it is contended that consent should be presumed only if the employee does not allege that it was provided under circumstances of intimidation and/or harassment.²⁷³

4.4 Conclusion

The *Code of Practice on the Protection of Worker's Personal Data of 1997* expressly prohibits the use of polygraph testing in the workplace. The challenge is that, in practice, polygraph continues to be utilized particularly in SA and the USA. However, from the legal framework and case laws stated in this chapter, this study is of the view that the USA has done more in ensuring that while they allow the use of polygraph testing, employees' rights are constantly protected. In the matter of *Long Beach City Employees Association v City of Long Beach*,²⁷⁴ the court in the USA held that polygraph testing has the potential to violate the right to privacy of an individual by compelling communication of thoughts, sentiments, and emotions which the examinee may have chosen not to communicate.²⁷⁵ In the USA there is an *EPPA* that prohibits the use of polygraph only in the private sector labour environment. It is submitted that this leaves employees in the public sector more vulnerable to potential violations of

²⁶⁸ *Polsky v Radio Shack and State v Community Distributors Inc* 123 NJ Super.589, 304 A.2d,213 N.J. Co. 1973.

²⁶⁹ *Chesna v United States Department of Defense* 850 F. Supp 110 (D. Conn. 1994) 116.

²⁷⁰ *Chesna v United States Department of Defense* 850 F. Supp 110 (D. Conn. 1994) 116.

²⁷¹ *Chesna v United States Department of Defense* 850 F. Supp 110 (D. Conn. 1994) 116.

²⁷² Gondwe *The Protection of Privacy in the Workplace: A Comparative Study* 212.

²⁷³ Gondwe *The Protection of Privacy in the Workplace: A Comparative Study* 212.

²⁷⁴ *Long Beach City Employees Association v City of Long Beach* 41 Cal.3d 937, 227 Cal.Rptr. 90 Cal. 198, 944.

²⁷⁵ *Long Beach City Employees Association v City of Long Beach* 41 Cal.3d 937, 227 Cal.Rptr. 90 Cal. 198, 944.

their rights to privacy. However, any potential violation is protected by the presence of the *EPPA* and courts that are more willing to defend employees' rights over employer's interests. The courts appear to agree on the use of polygraph in the public sector and/or where sensitive and safety concerns are present. Important lessons that can be learned are that, when polygraph is used, there is an undisputed potential to invade right to privacy. This comparative study further highlights that there is primarily no legislation that regulates the use of polygraph testing in the SA employment context. As a result, the courts have the responsibility to address the complexities relating to employees right to privacy.

Chapter 5 Conclusion and Recommendation

In conclusion, this study addressed the misconceptions and uninformed opinions around polygraph testing and record its findings regarding the use of polygraph testing in the workplace. This chapter of the study will also reflect on what ought to be done to ensure that the use of the test in South Africa is conducted in a manner that does not violate privacy, competitiveness, and professional standards within the industry. To fulfil that, this chapter of the study will provide a comprehensive conclusion on this study as a whole and further provide three main recommendations that this study argues ought to be looked at and addressed.

5.1 Conclusion

The findings of this study are that lie-detector methods have been around for more than a century, both in the United States of America (hereafter the USA) and Africa. They have been changing with time, particularly with the advent of new technological devices. In South Africa, polygraph examinations are used in the private and public sectors, for example for pre-employment screening, continuous integrity screening programmes, and to monitor criminal and other unethical employee behaviours at a company or government institution. The results of these examinations are used for honesty verifications.²⁷⁶

There are two main associations, namely the South African Professional Polygraph Association (hereafter the SAPPA) and the American Polygraph Association (hereafter the APA). The two associations offer their members publications and conferences related to polygraph testing. They further provide training, model best practices for testing and offer professional resources for their members. The South African Qualifications Authority recognizes accreditations by the APA.²⁷⁷

²⁷⁶ Polygraph Institute of South Africa <https://polysa.co.za/the-science-behind-polygraph/>.

²⁷⁷ Polygraph Institute of South Africa <https://polysa.co.za/the-science-behind-polygraph/>.

The CCMA has issued guidelines on how to use polygraph testing, which are based on the *APA Code of Practise and Code of Ethics* and the *South African Labour Law Guide* namely the *Labour law and Employment Manual*.²⁷⁸

An employee who is to be examined cannot be compelled to do the test unless the request is made in terms of a contractual agreement. If the employee refuses to do the test, he or she will be in breach of the contract and can be charged with misconduct or breach of contract.²⁷⁹ However, in the matter of *Harmse v Rainbow Chicken Farms*,²⁸⁰ the employer's conduct of exerting some pressure on the employee was found to be justifiable (as discussed earlier). The affected employee must present themselves without force or coercion and they retain the right to withdraw from the examination at any stage. This study contends that in an event that an employee decides to do the test he or she must ensure full cooperation so that the results can be more accurately recorded for evaluation.

The refusal to do the test does not imply automatic incrimination and/or guilt. If an employee refuses to do the test, this study holds the view that it would be advisable that they at least provide reasons for their refusal. In reality, a refusal may infer misconceptions that might not be in their favour. Some factors may legally justify a refusal to do the test such as mental illness, effects of alcohol and drugs, post-traumatic stress, etc.

In South Africa, polygraph test results are admissible during any disciplinary procedures and/or at any legal proceedings. There has not been any statute and/or regulation prohibiting their use. The principles that were laid down in the *Mahlangu* case,²⁸¹ remain the best points of reference to consider when polygraph testing is used. As stated by Advocate Andre Bezuidenhout,²⁸² in his published legal opinion,

²⁷⁸ Watson *An examination of the operational application and utilisation of polygraph testing: a case study in the Limpopo Province* 36.

²⁷⁹ Prinsloo *Exploring the use of the polygraph examination in the workplace and as evidence in labour disputes* 40.

²⁸⁰ *Harmse v Rainbow Farms (Pty) Ltd* CCMA WE 1728, 1997

²⁸¹ The *Mahlangu* case.

²⁸² Bezuidenhout *The province of law which concerns itself with truth determining devices* 65.

polygraph examinations have not been prevented from being used in court either at common law or statute (criminal or civil procedure or on the labour law procedures). However, it is important to remember that any irrelevant evidence is accordingly inadmissible.²⁸³

As stated in Chapter 3, evidence that involves a polygraph has been allowed at the Labour Court and CCMA regardless of the decision by the Health Professions Council of South Africa (hereafter the HPCSA) to consider polygraph as invalid and unreliable. The reality that a presiding officer/commissioner might not be an expert in the field does not disqualify them from hearing such evidence. A case in point, a presiding officer/commissioner is allowed to hear a matter that involves medical negligence even if they are not an expert in the field. It is important to emphasize that case law has clarified that polygraph results do not indicate deception and if they are to be used other evidence must corroborate them.

Polygraph test results are important to the courts and dispute resolution such as the CCMA, although they are disputable. The results are used as corroborating evidence for the evidence that is already available; they do not prove innocence or guilt, but they add a probative value. In the matter of *Van Schalkwyk v National Trading and Co*,²⁸⁴ the court held that the test results supported the evidence that was already available and added weight to the inference that the applicant was guilty as charged. This has been the case for almost 20 years; however, there have been differing views, particularly at the CCMA level. Findings and expert witnesses are subject to the usual scrutiny in terms of the Law of Evidence and Criminal/Civil procedure and/or any other evidence presented in court.²⁸⁵

It is important to note that according to paragraphs 3.8.1 to 3.8.6 of the *APA By-Law* the “pre-test, in-test, and post-test” phases are the required steps for a complete

²⁸³ Bezuidenhout *The province of law which concerns itself with truth determining devices* 65.

²⁸⁴ *Van Schalkwyk v National Trading and Co* (2000) 21 ILJ 2323 (CCMA).

²⁸⁵ Watson *An examination of the operational application and utilisation of polygraph testing: a case study in the Limpopo Province* 111.

polygraph test.²⁸⁶ Different circumstances and settings may call for additional stages to be included. A polygraph test is a complicated process. It places a huge administrative burden on the employer because he/she is in most cases the one who requires the employees to do it. The employer is also likely to be the one who gets blamed when the procedure is not properly followed.

The criteria in determining the admissibility of any evidence run along the following lines: the concern is how the test was conducted, the technique that was used, the Polygraph Examiner's qualifications, questions that were asked, etc. Any refusal to admit a duly qualified expert witness to tender evidence may amount to an irregularity.

This study agrees with Watson's view that the current polygraph testing procedure is consistent with the *Constitution* and labour laws, for the following reasons: Although there are challenges, the polygraph-testing procedures give effect to the spirit and purpose of the *Constitution* especially with regard to the right to a fair trial.²⁸⁷ Ethically, to some extent they can be said to promote fair labour practices, respect for human rights and privacy of the examinee. They allow the examinee to be heard, and they recognize that irrelevant questions may violate privacy and dignity.²⁸⁸ Although there are indications that at the international level there is a desire to disallow polygraph testing, the reality is that this is a procedure that is tempting and already in use in many parts of the world.

²⁸⁶ Paragraph 3.8.1 to 3.8.6 of the *APA By-Law*.

²⁸⁷ Prinsloo *Exploring the use of the polygraph examination in the workplace and as evidence in labour disputes* 77.

²⁸⁸ Prinsloo *Exploring the use of the polygraph examination in the workplace and as evidence in labour disputes* 77.

5.2 Recommendations

Considering what has been stated in the previous chapters, it is important to reflect on what should be done to ensure that the use of polygraph testing in South Africa is practised in a way that does not violate privacy, competitiveness, and professionalism within the industry. In this study's recommendations, it is submitted that on top of everything that has been stated in the previous chapters it is important to address the following main points:

5.2.1 Regulating the Polygraph Industry

As stated in Chapter 1, there was an unsuccessful attempt in 1999 to statutorily regulate the industry. It is proposed in this study that the process needs to be revised because there is a huge gap in the absence of more specific and detailed legislation. This study concurs with Watson²⁸⁹ on the suggestion that statutory regulation should focus on three areas, namely enforcing training standards, requiring annual statutory registration, and enforcing ethical and operational standards.²⁹⁰

This will assist in achieving the following two objectives:

Firstly, it will ensure that each person who wants to be recognized as a polygraph examiner can meet the required minimum local and international standards. Currently, it is a requirement for a person to undergo an APA-accredited course and register with at least one of the local associations. However, there is no local body that is empowered by legislation to maintain discipline and accepted ethical standards within the industry.²⁹¹ This has opened the door for improperly trained and inexperienced people to practise as examiners.

²⁸⁹ Watson *An examination of the operational application and utilisation of polygraph testing: a case study in the Limpopo Province* 103.

²⁹⁰ Watson *An examination of the operational application and utilisation of polygraph testing: a case study in the Limpopo Province* 103.

²⁹¹ Watson *An examination of the operational application and utilisation of polygraph testing: a case study in the Limpopo Province* 103.

Secondly, as Watson has stated that the state must create a national register of fit and proper polygraph examiners operating in South Africa. This register will help to ensure that all unregistered examiners are purged and that all polygraph examinations are conducted lawfully.²⁹²

5.2.2 *Making the Polygraph Industry Stronger*

It is suggested by Watson²⁹³ that, to make the polygraph industry stronger, there must be one powerful association, unlike the present situation where there are two separate associations. One association will consolidate the two associations and ensure a coherent institutional functioning of the industry. Although Watson²⁹⁴ suggests that there are some ideological and historical differences between the two, it is contended that both associations need to speak in one voice and subject themselves to the “unification process started by Van Rooyen and others in 2010”.²⁹⁵

5.2.3 *Modernising the Industry*

The current *APA Constitution* is not consistent with the present terms and definitions. This is because paragraphs 3.2.1 to 3.2.3 of the *APA Constitution* differentiate between the terms “evidentiary examination”, paired-testing, and investigative examination.²⁹⁶ It is proposed in this study that all forms of examinations within the polygraph test must meet the highest standards possible without differentiation if the test is conducted for criminal, civil, or other purposes. Therefore, it is further suggested in this study that there must be a draft that places the same standard for all the polygraph examinations.

²⁹² Watson *An examination of the operational application and utilisation of polygraph testing: a case study in the Limpopo Province* 104.

²⁹³ Watson *An examination of the operational application and utilisation of polygraph testing: a case study in the Limpopo Province* 104.

²⁹⁴ Watson *An examination of the operational application and utilisation of polygraph testing: a case study in the Limpopo Province* 104.

²⁹⁵ Watson *An examination of the operational application and utilisation of polygraph testing: a case study in the Limpopo Province* 104.

²⁹⁶ *APA Constitution*.

The local polygraph industry must ensure that it operates in ways that polygraph practitioners can always be updated on the latest research and trends. This is the case because according to paragraph 3.3.4 of the *APA Constitution*.²⁹⁷ It is a requirement for polygraph practitioners to undergo 30-hour coursework programme every two years.²⁹⁸ The programme will enhance their educational level on polygraph.²⁹⁹

In the context of the USA, state institutions and the *APA Constitution* provide a programme of lectures aimed at ensuring that practitioners are updated on the recent research and trends.³⁰⁰ Although there are frequent APA magazines and journals, it is expensive for South African practitioners to travel to the USA to attend conferences. This demonstrates that, in the context of South Africa, such reforms need to be considered.

In effect from 1 January 2012, all practitioners have been mandated in line with paragraph 3.1.5.1.4 of the *APA Constitution* to use a component of the test that uses all five senses.³⁰¹ The reality is that most practitioners use a component that has four senses. The cost of the component that uses five senses is R35 000 to R56 000.³⁰² It is contended that such a requirement has financial implications which most or some practitioners in the South African context might not be able to fulfil. As a result, it is important for the proposed laws and/or *Constitution* to consider the best alternatives to accommodate most practitioners and at the same time maintain the same standard.

The keeping of records should be adjusted to be the same as that in the criminal and/or civil procedure which is about five years after the matter is finalized. According to paragraph 4.7.2 of the *APA Constitution*, all examination records must be kept for at least one year.³⁰³ This study is of the view that such records must be kept for at least

²⁹⁷ *APA Constitution*.

²⁹⁸ *APA Constitution*.

²⁹⁹ *APA Constitution*.

³⁰⁰ Watson *An examination of the operational application and utilisation of polygraph testing: a case study in the Limpopo Province* 105.

³⁰¹ *APA Constitution*.

³⁰² Watson *An examination of the operational application and utilisation of polygraph testing: a case study in the Limpopo Province* 105.

³⁰³ *APA Constitution*.

five years or more after the matter has been finalized because they are important should an employee be required to undergo a polygraph test at a later stage. The records will assist an examiner to “develop a long-term profile of the examinee's honesty and integrity”.³⁰⁴

It is clear from this study that employees' rights to privacy in the workplace remain vulnerable to violations and infringements. It is proposed in this study that the above-mentioned reforms need to be looked at in detail and be addressed. Without an integrated and comprehensive legislative framework, the employer has leverage over the employee.

³⁰⁴ Watson An examination of the operational application and utilisation of polygraph testing: a case study in the Limpopo Province 105.

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CERTIFICATION

This serves to confirm that I, *Vivien van der Sandt*, took care of the language editing of:

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by

J MAEBELA

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