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## **POLYGRAPH TESTING: IS IT A LEGITIMATE MEANS TO CURTAIL CRIMINAL BEHAVIOUR IN THE WORKPLACE?**

By Terrance M. Booysen and reviewed by Osborne Molatudi (Partner: Hogan Lovells)

On a worldwide basis, criminal activity in the workplace -- detected or undetected -- is at an all-time high. Fraud, corruption and other forms of economic crimes are rife, and perceptions of increasing illicit behaviour are backed by reputable subject matter experts and research agencies, with alarming statistics. Research conducted by the Association of Certified Fraud Examiners (ACFE) show that workplace fraud has steadily increased between 2012 and 2016. In 2012, case studies showed that the median loss caused by workplace related occupational fraud was US\$140,000. But by 2016, figures showed that the median loss caused by such cases had increased to US\$150,000.

In South Africa ('SA'), the Institute of Risk Management ('IRMSA') identified increasing corruption as the country's number one risk on the list of the top ten country-level risks\*. IRMSA's surveys show that corruption moved from the second-highest national risk in August 2016 to the highest risk just five months later in January 2017.

The PricewaterhouseCoopers ('PwC') Global Economic Crime Survey: South Africa 2016, found that economic crime remains a serious challenge in South Africa. The trend has not changed from 2014, with 69% of respondents indicating they had experienced some form of economic crime in the twenty-four months preceding the survey.

The top five countries reporting the most economic crime -- according to the PwC survey -- were: SA (69%); France (68%); Kenya (61%); Zambia (61%); and Spain (55%).

Asset misappropriation, financial mismanagement, procurement fraud, bribery and corruption are typically the most commonly experienced forms of economic crimes; both in SA and internationally.

*"South African respondents reported the highest percentage of economic crime in the world, with France coming in at a close second, followed by Kenya and Zambia. This does not make for good reading from the perspective of the African continent."*

**PricewaterhouseCoopers  
(PwC) Global Economic Crime  
Survey 2016 - 5<sup>th</sup> South African  
Edition (2016)**

As part of their risk-management strategies, organisations are continuously considering ways to prevent and address economic crimes perpetuated in the workplace, and -- if used correctly and in appropriate circumstances in conjunction with other crime-fighting measures -- ***polygraph testing*** could pose a legitimate solution to mitigate economic crimes in the workplace.

### **Polygraph testing: Approach with caution**

In considering the use of a polygraph test (also referred to as lie-detector test) to deter criminal behaviour in the workplace, or to screen prospective employees for a job in a high-risk position of trust; a certain measure of caution must be exercised by employers -- and such is the case in countries like Germany, Canada, Australia and the United Kingdom. The United States of America has legislated the circumstances in which employees may be tested and, in the absence of legislation which specifically deals with the subject, South Africa has followed the American procedure as an example of best practice. In addition, legal guidance for the conduct of polygraph tests in South Africa can be found in the Constitution of the Republic of South Africa, 1996 ('Constitution'), the Labour Relations Act, 1995 ('LRA'), the Employment Equity Act, 1998 ('EEA') and other relevant prescripts/codes of good practices in the workplace.

The Constitution states that everyone has the right to inherent dignity, moreover the right to have their dignity respected and protected. It also provides that everyone has the right to privacy and freedom, including the right of physical security. Forcing an employee to undergo a polygraph test -- without their written consent -- can be considered to be an invasion of that person's constitutional rights.

The Constitution also sets out a number of labour rights and -- in particular -- the right every person has to fair labour practices. Accordingly, employers must have regard to rules of fairness, equity and consistency in all of their dealings with their employees, not least also when subjecting them to a polygraph test.

In a case where an employee is dismissed based solely on a polygraph finding which suggests that they were dishonest, it is worth noting that the South African courts have found that the sole reliance by an employer on unspecific polygraph test results is insufficient to discharge the onus, as required by the LRA, that the dismissal was fair. There must be other corroborating evidence in addition to the polygraph test results, to prove the guilt of an employee and the fact that their subsequent dismissal was fair. To comply with the test of fairness required by the LRA, the Labour Court requires that a polygraph test must be shown to be: scientifically valid and reliable; capable of being fairly applied to employees; and unbiased against any employee or group, i.e. to ensure equity and consistency.

The EEA states that medical and psychological testing of employees and other similar assessments can amount to unfair discrimination in certain circumstances. It has been suggested that the disciplining or dismissal of employees on the basis of the outcome of a polygraph test that is not standardised and objective could constitute unfair discrimination under the EEA, although that Act does not specifically refer to polygraph testing.

### **To what extent are polygraph results admissible in court?**

The credibility of the polygraph test has been disputed and, as such, South African courts have indeed exercised caution when considering its results in workplace labour related disputes.

It is significant to highlight that the polygraph test does not actually detect a lie, but rather the body's psychophysiological response to certain questions. As such, its accuracy is not always guaranteed. The mental and physical state of the examinee may be influential in the outcome, as may also be the credibility and experience of the examiner; the composition and formulation of the control questions; and the setting in which the test is administered.

Case law has confirmed that polygraph tests are viewed as a subjective interpretation of data. The results of a polygraph test will be regarded as an aggravating factor in sentencing an employee, especially when there is other supporting evidence to corroborate the results.

### **Polygraph testing in the South African workplace**

In order to protect an employee's right to privacy and to ensure a fair process, it is common practice in SA for strict rules to be applied when a voluntary polygraph test is undertaken. The employee must consent -- preferably in writing -- to undergo a polygraph test and must be informed that the test is voluntary.

*"It is very important to note that polygraph results were never intended to provide irrefutable probative evidence to a Court of Law. The polygraph is an investigative tool and polygraph results should be used primarily to assist investigators in narrowing investigations by identifying suspects and collecting information relevant to the investigation."*

**Polygraph Institute of South Africa  
(PISA)**

Only questions discussed in the pre-test interview may be asked of the employee, and those questions may not be too vague and must be understood by the employee. The employee has the right to request an interpreter

or any other person to be present, provided that the person present does not interfere in any way with the proceedings.

Employers often use polygraph tests to investigate specific incidents linked to misconduct, particularly where there is reasonable suspicion that the employee was involved. In addition to making use of a polygraph test in cases involving *misconduct*, notably other forms of polygraph *assessment* tests are also being used by some employers. Depending on the nature of the employment position being offered by the employer, an employee may be requested to undergo a polygraph assessment test to determine their suitability for promotion, or in the case of a prospective employee, whether the person should be employed by the company at all (pre-employment testing).

While the rights of employees are prioritised and guarded, it is also acknowledged that employers need to protect their businesses against increasing incidences of economic crime. Where the polygraph is used as a *tool* to support and prevent the *combatting of crime* in the workplace -- and where it is administered correctly -- our view is that, in answering the question posed in the title of this article, it can play a powerful part in *minimising* organisational risks if not also "*discouraging*" misconduct of a criminal nature in our various workplaces.

\* IRMSA Risk Report: South Africa Risks (2017)

**ENDS**

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**For further information contact:**

CGF Research Institute (Pty) Ltd  
Terrance M. Booysen (Chief Executive Officer)  
Tel: +27 (11) 476 8264 / Cell: 082 373 2249  
E-mail: [tbooyesen@cgf.co.za](mailto:tbooyesen@cgf.co.za)  
Web: [www.cgf.co.za](http://www.cgf.co.za)

Hogan Lovells Attorneys  
Osborne Molatudi (Partner)  
Tel: +27 (0) 11 523 6143  
E-mail: [Osborne.molatudi@hoganlovells.com](mailto:Osborne.molatudi@hoganlovells.com)  
Web: [www.hoganlovells.com](http://www.hoganlovells.com)