IN THE HIGH COURT OF LESOTHO

Held at Maseru

Constitutional Case No.08/2014

In the matter between:

'MOPE MALEFANE	**1ST APPLICANT**
RETSELISITSOE MABETHA	**2ND APPLICANT**
MOKOMA TSEETSANE	**3RD APPLICANT**
And	
LETŠENG DIAMOND (PTY) LTD	**RESPONDENT**

JUDGMENT

CORAM: T.E. MONAPATHI ACJ
S.P. SAKOANE AJ
K.L. MOAHLOLI AJ
HEARD: 29 JULY 2014
DELIVERED: 25 AUGUST 2014

SUMMARY

Disciplinary Proceedings – right to a fair determination of civil rights and obligations, right against self-incrimination, right to equality before the law and equal protection of the law, freedom

from torture, cruel, inhuman and degrading treatment – sections 4(h), 12(7), 12(8) 8 and 19 of the Constitution – relevance scope and ambit of the rights and freedoms – exclusion of legal representation at disciplinary proceedings per Disciplinary Code – whether this constitutes violation of the right to fair trial – propriety of such exclusion is determinative with reference to the complexity of the matter – held that the confinement of representation to a fellow employee does not by itself infringe upon the rights guaranteed by section 12(8) – administering polygraph examination on an employee – whether such procedure violates right against self-incrimination and freedom from cruel, inhuman or degrading treatment – not shown that there was any compulsion in administration of polygraph examination – held to infringe the constitutional rights guaranteed by sections 12(8) and 8. There be proof of compulsion or chicanery on the part of the employer.

Fundamental rights – infringements – remedies – access to court in terms of section 22 of the Constitution – prima facie proof of threatened infringements of a right or freedom – test thereof – it be shown the existence of a realistic or appreciable probability of infringement and not a mere reasonable possibility – held that there is no prima facie right proof of a probable infringement of the rights and freedom guaranteed by sections 12(8), (8) and 19 of the Constitution – Court granting testimonial immunity for polygraph tests but no transactional immunity for information or material discovered subsequent to the tests.

ANNOTATIONS

CITED CASES:

Attorney-General And Another v Swissbourgh Diamond Mines (Pty) Ltd And Others (No.1) LAC (1995-1999) 87

Attorney-General v 'Mopa LAC (2000-2004) 427

Lerotholi Polytechnic v Lisene LAC/CIV/05/2008

British Columbia (Attorney-General) v Christie (2008) 24 BHRC 357

Gafgen v Germany (2010) 28 BHRC 463

Selvi & Ors v State of Karnataka And Another 5 May 2010

MEC: Department of Finance, Economic Affairs & Tourism, Northern Province v Mahumani [2005]2 All SA 479 (SCA)

Mustek Ltd v Tsabadi NO and Others Case No. JR 2732/2010 (LC) 2 March 2012

Safcor Forwarding Johannesburg (Pty) Ltd v National Transport Commission 1982 (3) SA 654 (A)

Truworths Ltd v CCMA [2008] ZALC 115

United Parties v Minister of Justice, Legal and Parliamentary Affairs and Others 1998 (2) BCLR 224 (ZS)

STATUTES:
The Constitution of Lesotho, 1993

The High Court (Amendment) Act No.34 of 1984

Labour Code (Amendment) Act No.3 of 2000

Labour Code (Codes of Good Practice) Legal Notice No.4 of 2003

Public Service (Amendment) Act No.3 of 2007

BOOKS:
Allen and Crasnow (2002) Employment Law & Human Rights (Oxford University Press)

Jan Zonderman (1999) Beyond The Crime Lab (John Wiley & Sons)

Joubert (ed) LAWSA 2nd Edition Vol. 13 Part 1

Palmer & Poulter (1972) The Legal System of Lesotho (Mitchie: Virginia)

SAKOANE AJ:

A. INTRODUCTION

[1] The applicants are employees of the respondent. The applicants were due to face disciplinary charges starting from 30 July 2014, when a day before, on 29 July 2014, they brought an urgent constitutional motion seeking:

> "1. An order dispensing with the forms and service provided for in the constitutional litigation rules and disposing of the matter at such time and place and in such manner and in accordance with such procedure as this Honourable Court may deem fit.
>
> 2. *Rule nisi* be issued on a date and time determined by the above Honourable Court calling upon respondents (sic) to show cause, if any, why an order in the following terms shall not be made final:-
>
> 3. That the respondent be interdicted from holding disciplinary hearings against the applicants scheduled to take place on the

30th July 2014 for 2nd and 3rd applicant and 31st July for the 1st applicant pending final determination of this application.

4. That it be declared that polygraph testing examination of the applicants pursuant to respondent's policy is unconstitutional in that it violates the following constitutional rights of the applicants:

   (a) Right to a fair determination of their civil rights and obligations contrary to section 4(h) and section 12(8) of the Constitution.

   (b) Right against self-incrimination in contravention of section 12(7) of the Constitution.

   (c) Right to freedom from cruel, inhuman and degrading treatment contrary to section 8 of the Constitution.

   (d) Right to equality before the law and equal protection of the law contrary to section 19 of the Constitution.

5. That it be declared that the pre-hearing interviews of applicants flowing from polygraph examination and leading to the disciplinary hearing referred to in prayer 3 above were unlawful.

6. That in the unlikely event that the Honourable Court finds the polygraph test does not violate the constitutional rights of the applicants as envisaged in prayer 4 above, that Article/Section 1.3.4.1.2.2 of respondent's **Disciplinary Code and Procedure** is unconstitutional to the extent that it vitiates applicants' right to fair determination of civil rights and obligations by denying them legal representation of their choice.

7. Granting applicants further and/or alternative relief."

Prayers 2 and 3 were to operate with immediate effect as interim relief pending the finalization of the matter.

[2] The respondent was served with the application on the very day it was to be moved (29th July 2014). Mr. Rasekoai appeared on behalf of the applicants while Mr. Woker appeared on behalf of the respondent.

[3] The Court took the view that the matter was indeed urgent and proceeded to hear oral argument by both sides on the propriety of issuance of a *rule nisi* and interim interdictory relief.

B. ISSUES FOR DETERMINATION

[4] The issues raised in this matter are the following:

1. Whether disciplinary proceedings in which external legal representation is prohibited per a disciplinary Code constitute an unfair hearing violative of sections 4(h) and 12(8) of the Constitution.

2. The legal propriety of interdicting, *pendente lite*, disciplinary proceedings under a code of conduct subscribed to by the employer and employee in compliance with the **Labour Code (Codes of Good Practice) Legal Notice No.4 of 2003**.

3. Whether the submission of the employees to polygraph tests by the employer for the purpose of investigating a disciplinary misconduct constitutes torture or inhuman or degrading treatment contrary to section 8 of the Constitution.

4. Whether the evidence yielded by polygraph tests constitutes an infringement of freedom of self-incrimination contrary to section 12(7) of the Constitution.

C. SUBMISSIONS

[5] Mr. Rasekoai, who appeared on behalf of the applicants, contended:

(a) that disciplinary proceedings were scheduled to proceed the following day (30th July 2014) whereat there was a real danger that the applicants would be denied legal representation in view of notices of hearing which restricted their right to legal representation to "internal representation" and were thereby in violation of section 12(8) of the Constitution;

(b) there was a danger that reliance would be put on the evidence of results of polygraph tests to which applicants were subjected to without their own volition;

(c) that by being subjected to the polygraph examination without their consent and/or by enforcement of the respondent's policy, this constituted a violation of sections 8 and 12(7) of the Constitution.

[6] Mr. Woker, who appeared on behalf of the respondent, countered the above arguments by contending:

(a) that the case concerns the right of the employer to discipline employees pursuant to the disciplinary code;

(b) applicants, on their own papers, say that they signed "consent forms" in terms of which they consented to being subjected to polygraph examinations – an acceptable practice per **Truworths Ltd. v. CCMA [2008] ZALC 115**;

(c) that as a general rule courts will not readily interfere in domestic hearings;

(d) that both issues of permissibility and need of legal representation from "outside" and inadmissibility of evidence of polygraph tests were matters that can competently be raised before and dealt with by the disciplinary tribunal.

[7] After hearing these submissions, the Court dismissed the application with costs being - persuaded that the applicants had not shown any *prima facie* realistic or appreciable probability of violation of constitutionally protected rights.

D. ANALYSIS

Likelihood of Violation of Constitutional Rights : Procedure And Remedies

[8] The applicants have approached this Court, as they are entitled to do, in terms of section 22 of the Constitution. This section reads in material parts:

> "(1) If any person alleges that any of the provisions of section 4 to 21 (inclusive) of this Constitution has been, is being or is likely to be contravened in relation to him …. Then, without prejudice to any other action in that respect to the same matter which is lawfully available, that person …. may apply to the High Court for redress."

[9] In interpreting section 24(1) of the Constitution of Zimbabwe which is in *pari materia* with section 22(1) of the Lesotho Constitution, the Supreme Court held that:

> "The applicant must be able to show a likelihood of itself being affected by the law impugned before it can invoke a constitutional right to invalidate that law."

And further that:

> "Much turns on the meaning of the phrase 'likely to be contravened'. Certainly it does not embrace any fanciful or remote prospect of the Declaration of Rights being contravened. Nor does it refer to the Declaration of Rights being **liable** to contravention…. Rather it means a 'reasonable probability' of such a contravention occurring… There must exist a realistic or appreciable probability – and not merely a reasonable possibility – for

there to be the requisite basis to invoke a constitutional challenge." (**United Parties v. Minister of Justice, Legal And Parliamentary Affairs And Others 1998(2) BCLR** 224 (ZS) at 227F, 228 I-J and 229A).

[10] Writing on for runner of this section in the 1966 Lesotho Constitution Palmer and Poulter state that:

> "Under section 20 a party may complain not only of past and completed contraventions of his fundamental rights but of contraventions "likely" to infringe his rights as well. Consequently an individual may seek preventive remedy against threatened or imminent violation. The degree of proximity between the threat and the foreseen infringements described by the term "likely" is redolent of the "probable" cause standard for obtention of a warrant in search and seizure questions. It seems to convey the notion that the infringement, given a set purpose of enforcement by the Government and motions in that direction, will on average take place more times than not. In coping with their mandate to protect against likely infringement the courts may be expected to employ a repertoire of remedies, not the least of which are interdict and declaratory relief. It may be added here that the benefit of declaratory relief lies not merely in the prevention of enforcement of an unconstitutional law but in extricating the individual from the dilemmatic choice between the perils of his own interpretation of his fundamental rights and the abandonment of those rights out of fear of incurring serious injury, e.g. a term of imprisonment or loss of employment." (See **Legal System of Lesotho 1972 (Virginia: Mitchie) pp 366-367)**

[11] The procedure of *rule nisi* then becomes proper if the exigencies of a situation calls for urgent judicial protection. This is a procedure of

urgency whose utility is to protect immediate interests which would be in risk if the normal procedures are resorted to. As put in **Safcor Forwarding Johannesburg (Pty) Ltd v. National Transport Commission** 1982 (3) SA 654 (A) @ 674 H – 675A:

> "The procedure of a *rule nisi* is usually resorted to in matters of urgency and where the applicant seeks interim relief in order adequately to protect his immediate interests. It is a useful procedure and ….to be encouraged rather than disparaged in circumstances where the applicant can show, *prima facie*, that his rights have been infringed and that he will suffer real loss or disadvantage if he is compelled to rely solely on the normal procedures for bringing disputes to Court by way of notice of motion or summons" [Emphasis added]

[12] To preserve the status quo and protect immediate interests, interim interdictory relief is often the remedy to effectuate such protection. The requirements of such a remedy have been summarized by the Court of Appeal as follows:

(a) A *prima facie* right;

(b) A well grounded apprehension of irreparable harm;

(c) A balance of convenience in favour of the granting of interim relief; and

(d) The absence of any other satisfactory remedy (**Attorney-General And Another v. Swissbourgh Diamond Mines**

(Pty) Ltd And Others (No.1) LAC (1995-1999) 87 @ 99F-H)

The Court of Appeal has further held that:

> "… there can be doubt as to the overriding discretionary nature of the remedy. Whilst such discretion must always be exercisable judicially, no comprehensive strictures can be laid down which can exclude this discretion … That delay, on the part of the applicant is a consideration to which regard can be had in exercising the court's discretion is also clear …" (op cit. @ 100 C-E)

I will, in due course, show that in the circumstances *in casu*, the invocation of the *rule nisi* procedure and attendant prayer for interim interdict were not predicated on any shown *prima facie* right and its threatened infringement and that where any such rights existed, if at all, the Disciplinary Procedure Code was adequate to safeguard them.

[13] The applicants' complaint is in connection with the manner in which the disciplinary process is likely to be conducted and not how it is being conducted. In that sense, theirs is at best a reasonable possibility, and not a realistic or appreciable probability, of anticipatory violation of their constitutional rights. But even assuming in their favour that there exists such an appreciable risk, I

cannot discern any reason to doubt the ability and competence of the disciplinary tribunal to conduct proceedings in a manner which will not be protective of the constitutional and labour law rights of the applicants. Nothing to the contrary has been suggested. The expectation must then be that the disciplinary process will unfold in compliance with the constitutional imperatives of a fair hearing before an independent and impartial disciplinary tribunal per section 12(8) and the panoply of procedural protections of due process provided for in the Respondent's Disciplinary Code and Procedure.

[14] A declarator sought pursuant section 22 constitutional access to this Court is mandatorily issued if the Court finds that there is a violation of the provisions in the Bill of Rights. This is different from a declarator sought at common law or under section 2(1)(c) of the **High Court (Amendment) Act** No.34 of 1984 which is issued on a discretionary basis. The difference in approach lies in the subjective and objective positions of the litigants. In constitutional litigation the Court determines the validity of the law or conduct on an objective basis in disregard to the subjective positions of the parties. But when making a determination of the existence of a right at common law or

per the Act referred to, the subjective positions of the parties are controlling because a declaratory in this regard serves the purpose of binding the parties and rendering the matter as *res judicata* between them. (**National Director of Public Prosecutions v. Mohamed** NO. 2003 (4) SA 1 (CC) paras [54] – [59])

Minimum Standards For Fairness In Disciplinary Proceedings

[15] The holding of a disciplinary hearing is regarded as a pre-dismissal or pre-sanctioning procedure which serves the purpose of affording the employee a fair and proper hearing. It is on this basis that "The courts of law will only in highly exceptional instances issue an interdict to restrain disciplinary hearings" (**LAWSA 2nd Edition Vol.13 Part 1 para 722**).

[16] For the disciplinary procedure to be fair, it must generally meet a ten-point test (otherwise known as the ten golden rules) as follows:

(a) The employee must be fully informed about the charges brought against him or her prior to the hearing, that is, he

must be provided with all relevant facts and dates relating to the alleged misconduct.

(b) He or she must be informed about the charges timeously and also when and where the hearing will take place; this means that he or she must be afforded a fair opportunity to reflect on the charges and to prepare his or her case;

(c) The hearing must be held within a reasonable time after the commission of the alleged misconduct;

(d) The hearing must be conducted in the employee's presence unless he or she refuses to attend the hearing; if necessary, he or she must be provided with an interpreter;

(e) The employee is entitled to be represented at the hearing by a co-employee such as a trade union official, an employee may only be assisted by a legal representative in serious and/or complex cases;

(e) The employee must be afforded a fair opportunity to state his or her case to a disciplinary tribunal after the employer has presented his or her case; in other words, the employee is entitled:

(i) to full discovery of and access to all evidence (including documents) to be used against him or her;

(ii) to cross-examine witnesses testifying against him or her;

(iii) to give evidence and put forward his or her defence;

(iv) to call witnesses to substantiate his or her defence; and

(v) to make concluding representations to the disciplinary tribunal.

(g) The disciplinary tribunal must be unbiased and must consider all relevant circumstances and facts relating to the charges objectively with a just and open mind;

(h) After a finding of guilty, but before the imposition of a penalty, the employee must be afforded the opportunity to adduce evidence in mitigation of sentence; similarly the employer may adduce aggravating circumstances, previous warning, disciplinary record, and so forth;

(i) The decision and the reasons for the decision must be made known to the employee; and

(j) The employee must be reminded that he or she is entitled to appeal against the decision to the Labour Court in terms of section 4(5) of the **Public Service (Amendment) Act No. 3 of 2007** if a public servant, or if a private sector employee, that he or she may refer the dispute to the Directorate of Dispute Prevention and Resolution (DDPR) terms of Section 226 (2) (d) of the

Labour Code (Amendment) Act No. 3 of 2000 (See also **LAWSA** (ante) para 724)

[17] All the above standards are codified in the respondent's **Disciplinary Code and Procedure**. But for the insistence of legal representation, there is nothing in the papers to suggest that the disciplinary proceedings will be conducted in a manner contrary to the **Code**.

Constitutional Imperatives for Fair Hearing

[18] The ten-point standards mirror the constitutional right to a fair trial as guaranteed in section 12(8) of the Constitution of Lesotho. Section 12(8) reads:

> "Any court or other adjudicating authority prescribed by law for the determination of the existence or extent of any civil right or obligation shall be established by law and shall be independent and impartial; and where proceedings for such a determination are instituted by any person before such a court or other adjudicating authority, the case shall be given a fair hearing within a reasonable time".

[19] In interpreting section 12(8) with regard to the extent of the entitlement to legal representation in civil proceedings, the Court of Appeal has held:

[22] … The question, however, now arises as to whether the Constitution, quite apart from not abrogating the common law right to legal representation in civil proceedings in the way it does in relation to criminal proceedings, nonetheless itself provides a foundation for claiming an entitlement to legal representation in civil proceedings, either generally or in appropriate circumstances.

In my view it does so, in appropriate circumstances. The protection has not been created by entrenching such right *per se*. The protection lies in the provision for a right to a fair hearing in civil proceedings. That entitlement will not automatically found a claim under the Constitution to legal representation in all cases. It will however do so when the requirements of a fair hearing in turn make legal representation appropriate. It follows that such a claim will not lie in all civil proceedings, in the way it exists (by virtue of the specific stipulation in section 12(2) (d) in all criminal proceedings.

> [24] The distinction may be simply illustrated. A statute may conceivably provide for the determination of a civil dispute of a very simple kind and with minimal consequences. Examples might include labour legislation providing for the determination of minor disciplinary matters and excluding an entitlement to legal representation, or legislation regulating the adjudication of minor disputes between neighbours, or even property claims of very low value. Sound policy considerations, balancing concerns of cost, fairness, expedition and lack of formality, may in appropriate circumstance justify that approach, and not trench upon the right to a fair trial. Whether or not a particular provision excluding an entitlement to legal representation infringes upon the right to a fair trial would have to be examined on each instance on its own terms." (**Attorney-General v. 'Mopa** LAC (2000-2004) 427 paras [22] – [24].)

[20] The respondent's **Disciplinary Code and Procedure** provides, *inter alia*, for the participation of an accused employee and "A representative of an accused employee who must also be an employee of Letšeng". It is pursuant to this paragraph of the **Code** that the

notices of hearing written to the applicants remind them of "The right to internal representation". Mr. Rasekoai's attack on this reminder and the relevant paragraph of the **Code** whence it is sourced is that this constitutes a violation of the right to a fair determination of applicants' civil rights and obligations guaranteed under sections 4(h) and 12(8) of the Constitution. Is it so? I think not as expounded hereafter.

[21] In their own terms, and as interpreted by the Court of Appeal in the **'Mopa case** (supra), these sections do not provide *expressis verbis* for the right to legal representation in civil proceedings. Any need for legal representation can only be fact-driven and case-specific. So it does not follow as a matter of course that in civil proceedings there is necessarily a need for legal representation in all circumstances or there cannot be such a need at all. It is the gravity or complexity of a case that will yield an answer for the cry for such a need. (**British Columbia (Attorney General) v Christie** (2008) 24 BHRC 357 paras 24-27)

[22] This is the approach that the Labour Appeal Court has also adopted in those cases in which the question of a prior exclusion of participation by external lawyers in disciplinary proceedings has arisen. In **Lerotholi Polytechnic v. Lisene LAC/CIV/05/2008** para 25 (dated 20 January 2009 (as yet unreported), the Court held as follows:

> "The fact that a member of staff's entitlement to representation has not been qualified is in itself a strong indication of an intention not to exclude a residual discretion to allow representation of a different kind in appropriate circumstances. That does not mean, of course, that permission to be represented by lawyer who is neither a student nor a member of the staff of the Lerotholi Polytechnic is to be had simply for the asking. It will be for the Staff Disciplinary Committee to consider any such request in the light of the circumstances which prevail in the particular case. As Chaskalson CJ once put it in **Minister of Public Works and Others v. Kyalami Ridge Environmental Association and Another (Mukhwevho Intervening) 2001(3) SA 1151 (CC) at 1184 E**, ultimately, procedural fairness depends in each case upon the balancing of various relevant factors, including the nature of the decision, the "rights" affected by it, the circumstances in which it is made, and the consequences resulting from it. In doing so, the Lerotholi Polytechnic's legitimate interest in keeping disciplinary proceeding 'within the family' is of course also to be given due weight, but cannot be allowed to transcend all else no matter how weighty the factors in favour of allowing of 'outside' legal representation may be."

Similar sentiments have been expressed in South Africa by the Supreme Court of Appeal in **MEC**: **Department of Finance, Economic Affairs and Tourism, Northern Province v. Mahumani** [2005]2 All SA 479.

[23] The need for legal representation in disciplinary proceedings comes into sharp focus where the employer's case is marshaled by a lawyer. In this context the principle of equality of arms become important and relevant. According to this principle, fairness and the constitutional imperatives of equality before the law and equal protection of the law in section 19 of the Constitution dictate that the employee also be legally represented if he/she so wishes and has the means to afford a lawyer. The motivation for this commendable approach made by Allen and Crasnow (2002) **Employment Law & Human Rights** (OUP) p. 85 is that:

> "Care will need to be taken in relation to equality of arms in all cases in which there is a represented and unrepresented party. Issues could arise in relation to any of the following :
>
> (a) The time needed to comply with direction to prepare written documents.

(b) The consideration given to a witness' statement which has been written by an individual rather than by a lawyer.

(c) The way in which examination of witnesses takes place.

(d) Knowledge of, or access to, the relevant law.

(e) The length of time given to each party to adduce evidence, cross-examine or make speeches or representations."

[24] It was contended on behalf of the applicants that theirs is a case which cried for 'outside legal representation' because the respondent had subjected them to polygraph tests under compulsion. They feared that the results of such tests would be tendered in evidence before the disciplinary tribunal. Shortly stated, the compulsory polygraph examination constituted evidence which had been procured in violation of their freedom from cruel, inhuman and degrading treatment guaranteed in section 8 of the Constitution as well as their right against self-incrimination as guaranteed in section 12(7) of the Constitution. In other words legal representation is warranted by the unconstitutional conduct on the part of the employer.

[25] One issue that must be cleared out of the way is that the applicants cannot rely on a section 12(7) right against self-incrimination as that is a right that belongs to persons who are tried for criminal offences. Any supportable basis for such a right would be section 12(8) as a constitutional imperative for fair procedures. It is settled law that this right has symbiotic nexus with the right to silence and freedom from torture or to inhuman or degrading punishment. They form the corpus of rights and freedoms serving the critically important purpose of ensuring fair procedures in criminal and civil proceedings and protecting the bodily integrity of the accused persons and litigants. As held by the European Court of Human Rights:

> "167. As to the use of at the trial of real evidence obtained as a direct result of ill-treatment in breach of art 3, the court has considered that incriminating real evidence obtained as a result of acts of violence, at least if those acts had to be characterized as torture, should never be relied on as proof of the victims guilt, irrespective of its probative value. Any other conclusion would only serve to legitimize, indirectly, the sort of morally reprehensible conduct which the authors of art 3 of the convention sought to proscribe or, in other words, to 'afford brutality the cloak of law' ….
>
> 168. As regards the use of evidence obtained in breach of the right to silence and the privilege against self-incrimination, the court reiterates that these are generally

> recognized international standards which lie at the heart of the notion of fair procedures under art 6. Their rationale lies, *inter alia*, in the protection of the accused against improper compulsion by the authorities, thereby contributing to the avoidance of miscarriages of justice and to the fulfillment of the aims of art 6. The right not to incriminate oneself, in particular, presupposes that the prosecution in a criminal case seek to prove their case against the accused without resort to evidence obtained through methods of coercion or oppression in defiance of the of the accused…" (**Gafgen v. Germany** (2010) 28 BHRC 463)

[26] The question is whether by the employer subjecting an employee to a polygraph test, the parties are in a position comparable to that of a criminal suspect who is ill-treated or coerced by an investigator of a criminal offence so that the rights of silence and self-incrimination and freedom from torture or ill-treatment are engaged. To answer this question, it must firstly be found out what a polygraph test is and how it is conducted.

[27] In Jon Zonderman (1999) **Beyond The Crime Lab,** Revised Edition (John Wiley and Sons) pp 184-185 the author writes:

> "The polygraph or so-called lie-detector usually measures three physiological indicators as a subject is put through a series of

questions. The indicators are a rate and depth of respiration, measures by straps placed around the abdomen and chest; cardiovascular activity as it is reflected in blood pressure, measured by a cuff around the bicep; and the electrodermal response, an indication of perspiration, measured by electrodes on the fingertips.

Although these three indicators show changes brought about by increases in certain kinds of stress, most scientific examinations of polygraphs have come to the conclusion that they are not good at determining whether someone is telling the truth. One reason is that a person's level of anxiety can be changed by the interaction with the polygraph examiner; by the way in which questions are phrased, the speed at which they are put, and the order in which they are presented; and by a host of other factors. In addition, one can train oneself to 'beat' a polygraph in the same way that one can train oneself to endure physical or emotional duress and torture. In short, skilled lairs can beat polygraphs, producing what scientifically is termed a false negative. At the other hand, many truth-telling people who are

emotionally charged can be shown by a polygraph to be lying, a false positive."

[28] From the aforegoing description of the methodology of administering a polygraph test, there can be no denying that it is an investigative technique which is exacted on the body of a person for the purpose of extracting usable information or statements from which the truthfulness or falsity can be determined. *Prima facie*, therefore, administering of a polygraph tests without consent affects the constitutional rights against silence and self-incrimination and the freedom from torture or inhuman or degrading punishment or other treatment.

[29] In the context of criminal proceedings, the Supreme Court of India has held as follows regarding the administration of polygraph and Brain Electrical Activation Profile (BEAP) tests:

(a) The consequences of undergoing a polygraph or a BEAP test are similar to making an oral and written statement. By making inferences from the result of these tests, the examiner is able to derive knowledge from the subject's

mind which otherwise would not have become available to the investigators through lie-detection or gauging a subject's familiarity with stimuli, personal knowledge is conveyed in respect of a relevant fact. It is also significant that unlike the case of documents, the investigators cannot possibly have any prior knowledge of the tested person's thoughts and memories, either in the actual or constructive sense. Therefore, even if a highly strained analogy were to be made between the results obtained from the impugned tests and the production of documents, the weight of precedent leans towards restrictions on the extraction of personal knowledge through such means.

(b) The compulsory administration of polygraph test impedes the person's right to choose between remaining silent and offering substantive information. The requirement of a positive volitional act becomes irrelevant since the person is compelled to convey personal knowledge irrespective of his/her own volition.

(c) The results obtained from the tests should be treated as personal testimony since they are means of imparting knowledge about relevant facts. Thus, if obtained through involuntary administration, the polygraph examination results come within the scope of testimonial compulsion, thereby attracting the right not to be compelled to be a witness against oneself.

(d) However, the right against self-incrimination is not implicated where:

(i) a person gives his/her informed consent to undergo a polygraph test,

(ii) where compulsion to undergo the tests is in the course of administrative proceedings or any other proceedings which may result in civil liability;

(iii) where the test results could become the basis of non-penal consequences for the person such as custodial abuse, police surveillance and harassment among others.

(e) Compulsory administration of the polygraph test constitutes cruel, inhuman or degrading treatment. The law disapproves of involuntary testimony, irrespective of the nature and degree of coercion, threats, fraud or inducement used to elicit the same. Although popular perceptions of terms such as torture and cruel and inhuman or degrading treatment are associated with gory images of blood-letting and broken bones, it must be recognized that a forcible intrusion into a person's mental processes is also an affront to human dignity and liberty, often with grave and long-lasting consequences.

(f) No individual should be forcibly subjected to any of the techniques in question, whether in the context of investigation in criminal cases or otherwise. Doing so

would amount to unwarranted intrusion into personal liberty.

(g) Even where a person has given consent to undergo any of these examinations, the tests results by themselves cannot be admitted as evidence because the person does not exercise conscious control over the responses during the administration of the techniques. But any information or material that is subsequently discovered with the help of voluntary administered test results can be admitted. (**Selvi & Ors v. State of Karnataka & Anor** 5 May 2010 paras 160, 161, 166, 205 and 223)

[30] The golden thread that runs through the above principles is that voluntariness or consent of the person subjected to a polygraph test is dispositive of the question of impropriety of use of polygraph tests and the admissibility of information or material subsequently discovered.

[31] The answer, therefore, to the question posed earlier as to whether the positions of employer versus employee and police investigator versus criminal suspect are comparable vis-à-vis the administration of polygraph tests must, in my judgment, be answered in the positive. The **Selvi principles** govern both relationships.

[30] Thus, to succeed the attack Mr. Rasekoai directed against the administration of polygraph tests on the applicants and the possible use of test results in the disciplinary proceedings, applicants would have to show *prima facie,* that there was no consent given. In their own affidavits, the applicants aver that they singed consent forms before being subjected to polygraph tests; (Affidavits paras 4.10(b) 4.11(b) and 4.11(c) respectively.) They go further to state that they signed the forms "as a measure of keeping my work and out of my free and voluntary volition" and that "the resulting testimony cannot be readily characterized as voluntary in nature."

[31] What the applicants do not disclose is whether they expressed their fears of loosing their jobs if they refused to sign the forms to the respondent's personnel at whose instance they were subjected to the

polygraph examination. Their silence on this crucial aspect disables the Court from determining whether their consent was negatived by any conscious act on the part of the respondent. I am, therefore, not persuaded that the polygraphs tests were conducted on the basis of compulsion, deception or chicanery from the respondent. *Prima facie*, no right to silence or self-incrimination has been, or is being threatened.

[32] Regarding the contention that "the resulting testimony cannot be readily characterized as voluntary in nature," the validity thereof finds support in the **Selvi principles**. But this support only applies to the extent that such testimony is a product of an involuntary administration of polygraph test. Where the polygraph test is administered voluntarily, the force of the contention lies on the basis of the inadmissibility of the test results on the ground that the applicants did not exercise conscious control over the responses during the administration of the test. What is admissible however is, any information or material that is subsequently discovered with the help of voluntary administered test results.

[33] In short testimonial immunity is granted to the test results and not the transactional testimony about information or material discovered subsequently. This approach differs from the evolving jurisprudence in South African courts which holds that polygraph test results are usable testimony corroborative of the employer's evidence and can be dispositive of the employee's guilt (See **Truworths Limited v. CCMA** (supra); **Mustek Ltd v. Tsabadi NO & Others** Case No. JR 2732/2010 (LC) dated 2 March 2012 (as yet unreported).

[34] I hold the view that the testimonial immunity if polygraph tests as propounded in **Selvi** case should be the preferred approach in Lesotho as it talks to the protection of guaranteed rights and freedoms. These rights and freedoms bind both state-actors and non-state actors in terms of section 4(2) of the Constitution. (See Palmer and Poulter **Legal System of Lesotho** (supra) p.339) The non-penal consequences which might flow from the use of such tests in disciplinary proceedings to prove the guilt of an employee might be too drastic for the rights of the employee. The constitutional protection is effectuated by not granting testimonial immunity to the

polygraph test results in disciplinary proceedings except transactional immunity for information or material subsequently discovered.

DISPOSITION

[35] It is for the aforegoing reasons that the Court refused to issue a *rule nisi* and interim reliefs.

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S.P. SAKOANE
ACTING JUDGE

I agree

_____
T.E. MONAPATHI
ACTING CHIEF JUSTICE

I agree

_____
K.L. MOAHLOLI
ACTING JUDGE

For the Applicant : Adv. M.S. Rasekoai
For the Respondents : Adv. H.H.T. Woker