



REPUBLIC OF SOUTH AFRICA

Reportable

**THE LABOUR COURT OF SOUTH AFRICA,  
IN JOHANNESBURG  
JUDGMENT**

Case no: JR 1559/09

In the matter between:

SEDIBENG DISTRICT MUNICIPALITY

Applicant

and

THE SOUTH AFRICAN LOCAL  
GOVERNMENT BARGAINING  
COUNCIL

First Respondent

SAMWU obo MOKOENA AND MOLEKA

Second Respondent

E VAN ZYL

Third Respondent

K VAN DER MERWE

Fourth Respondent

M A MSIBI

Fifth Respondent

MAPHOKO MATHOLE (NO)

Sixth Respondent

**Heard: 04 February 2011**

**Delivered: 31 May 2012**

**Summary:** (Review – polygraph test results as a criterion for appointment).

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## **JUDGMENT**

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**LAGRANGE, J**

### **Introduction**

- 1] This is an application to view and set aside an arbitration award handed down in May 2009 by the sixth respondent ("the arbitrator").
- 2] The issue before the arbitrator was whether the applicant ("the municipality") had committed an unfair labour practice by not promoting the individual respondents, Mr M W Moleko and Ms M Mokoena ('the employees') to the posts of Licence Services Centre manager and supervisor : DLTC respectively. Moleko had acted in the first mentioned post since 2002 and Mokoena in the second post since October 2003. The posts were advertised in July 2006 and appointments were made with effect from the September 2007. Neither of the individual respondents were successful in being appointed to the posts they applied for. By the time the arbitration hearing took place, Moleko had already resigned as a result of an injury sustained in May 2008.
- 3] The respondents and five other candidates were shortlisted for four positions as Licence Service Centre Managers and were interviewed together with five other candidates. They were interviewed on 20 December 2006 by a selection panel consisting of four members. In terms of the scores they achieved Mr Moleko was ranked second and Ms Mokoena ranked fourth out of the eight candidates interviewed.
- 4] Between March and June 2007 all the short listed candidates also underwent competency and polygraph testing, to which they had consented in writing. Korb, the Licensing Manager, testified that all the

candidates were asked at the end of each of their interviews if they had any objection to undergoing competency and polygraph tests. The respective interview scores and polygraph results of the eight candidates interviewed are set out below

| Candidate           | Interview score | Polygraph outcome | Appointed |
|---------------------|-----------------|-------------------|-----------|
| Mr M A Msibi        | 438             | Passed            | Yes       |
| Mr M N Moleko       | 430             | Failed            | No        |
| Mrs E van Zyl       | 390             | Passed            | Yes       |
| Mrs L Mokoena       | 387             | Failed            | No        |
| Mrs E Nhlapo        | 356             | Passed            | Yes       |
| Mr S Harmse         | 351             | Passed            | No        |
| Mrs K van der Merwe | 350             | Passed            | Yes       |
| Mrs L Matsobane     | 305             | Passed            | No        |

- 5] In respect of the competency tests only two of the eight candidates were 'partially recommended' in terms of the summary of the results appearing in the letter of recommendations drawn up by Mr Korb. Of the four successful candidates only one of them was 'partially recommended' on the basis of the competency test, whereas the remaining three were not recommended on the basis of competency. All four of the successful candidates passed the polygraph test. The competency tests were conducted by examiners who were not part of the interview panel and the examiner's conclusions were captured in the letter of recommendation drafted by Korb. In that letter he recorded the competency examiners' comments on each candidate as follows:

5.1 Mr M A Msibi: *"Based on the fact that Alex does not meet most of the requirements of the role we do not recommend him for the role of the Licence Service Centre Manager."*

5.2 Ms E van Zyl: *"Elmarie would appear not to be suitable for the*

*position at this stage. She shows potential for further career growth, providing the training and coaching supports a long-term development.*"

5.3 Ms N.E Molakeng (Nhlapo): "*Elizabeth would appear to be partially suitable for the position. She shows potential for further career growth, providing that coaching supported long-term development, which addresses the areas of weakness.*"

5.4 Ms M C van der Merwe: "*Based on the fact that Martha does not meet most of the requirements of the role, we do not recommend her for the role of a Licence Service Centre Manager.*"

(emphasis added)

6] The more detailed comments relating to the two unsuccessful employees under consideration and the other unsuccessful candidates read as follows:

6.1 Mr M N Moleko: "*Shows a poor average match to the competency identified as critical for success in the role of a licence service centre manager. Based on the fact that Mohau does not meet the cognitive requirements for the role, we do not [recommend] him for the role of Licence Service Centre Manager. However it is clear that with some development (specifically of his cognitive skills) that Mohau shows the ability to be effective in this role.*"

6.2 Ms M Mokoena: "*Based on the fact that Maria does not meet most of the requirements of the role, we do not recommend her for the role of a Licence Service Centre Manager.*"

6.3 Mr I J S Harmse: "*Sakkie would appear to be partially suitable for the position. He shows potential for further career growth, providing that coaching supported long-term development, which addresses his areas of weakness.*"

6.4 Ms L Motsobane: "Lebo would appear to be not suitable for the position at this stage. She shows potential for further career growth, providing the training and coaching support to long-term development."

(emphasis added)

- 7] Korb said that candidates were shortlisted for interviews on the basis of their qualifications, experience and knowledge of the work, which determined if they satisfied the criteria. These factors played no further role in the selection process once the shortlist had been compiled, except that it turned out later that Harms' qualifications were not equivalent to the required grade 12 certificate.
- 8] The municipality contended that even though the polygraph and competency tests were not set out as prerequisites in the advertisement of the posts, omitting to mention them did not exclude such factors being taken into account in making the appointments. It maintained that the polygraph test was a reasonable and fair criterion to take into consideration in deciding whether or not to appoint them. However, the employees contended that the failure to pass the polygraph test was the sole reason for not appointing them. Insofar as there is a factual dispute between the parties, it concerns whether the latter assertion is correct. In this regard, the evidence of Mr Korb was relied on by both parties. The following extracts from the record are pertinent:

*"Mr van Wyk: Then we get to Mr Maleko at the bottom of the page and you see that, I see that you did not recommend him.*

*Mr Korb: That is correct.*

*Mr van Wyk: How did you arrive at that recommendation?*

*Mr Korb: Based on the polygraph test that Mr Maleko failed.*

*Mr van Wyk: If it were not for the polygraph test would your recommendation have been different?*

*Mr Korb: Surely it would have.*

*Mr van Wyk: What would your recommendation have been?*

*Mr Korb: To tell this panel the honest truth all top applicants would have recommended for appointment.”*

(sic)

- 9] Korb further testified that the polygraph test was important enough to change a decision based on interview scores because the test was meant to indicate their honesty and integrity, which both the employees failed. Later in Mr Korb's testimony in cross-examination, the following exchange occurred:

*“Mr Nkoenyane: You testified that the four people other than the polygraph test should have been the people who could have been appointed. Is that correct?*

*Mr Korb: I said if it was not for the polygraph test the 4 first candidates would have been appointed.”*

(sic)

- 10] The arbitrator found that both the employees were better candidates than the other applicants who were appointed and they had higher qualifications than the other candidates, apart from the fourth respondent, Mr Van der Merwe. He also found that the individual employees' testimony that they did well when interviewed was not disputed by the municipality. Crucially, the arbitrator held that the reason they were not appointed was because they failed a polygraph test.
- 11] It had not been stated as a requirement in the advertisement of the posts that applicants would be required to undergo a polygraph tests and the arbitrator found that it was unfair of the applicant to introduce the test as a criterion since it had not been stated in the advertisement.

- 12] The arbitrator then ordered that the applicant should pay Mokoena the salary and benefits she would have received had she been appointed to the advertised position with effect from 1 October 2007 and made a similar order in respect of Mr Moleko. In addition he awarded them each a year's salary at the lowest scale of a licence service centre manager.

### **Grounds of review**

- 13] Firstly, the applicant contends that the dispute over the failure to appoint the employees to positions as License Service Centre managers was not a dispute about promotions. In construing the dispute as a promotion dispute, the arbitrator acted unreasonably and irrationally.
- 14] A closely related ground of review, if indeed it is distinct from the first, is that the arbitrator did not arbitrate the dispute that had been referred to conciliation, which was not a promotion dispute. In support of this claim, the applicant attached the referral form requesting conciliation of the dispute. In paragraph 3 of the form, the employees summarised the facts of the dispute referred in the following terms:

*"The two applicants acted for senior position six years but the employer failed to appoint them."*

(sic)

- 15] The result of conciliation sought by the employees was recorded in the referral form as:

*"Permanent appointment to the post they acted and applied for."*

- 16] In describing special features or additional information pertaining to the dispute in paragraph 8 of the form, the employees stated:

*"The selection and the interview process was flawed in all respect."*

(sic)

- 17] Secondly, the applicant contended that the arbitrator had not considered the circumstances leading to the appointments, namely that all the candidates were treated the same and the tests to which they were subjected were fair, consistent and reasonable. Instead of focussing on the fairness of the process, the arbitrator acted as if he was an employment agency.
- 18] Thirdly, the arbitrator misdirected himself in finding that it was unfair of the employer to introduce polygraph testing as a criterion when that was not one of the pre-requisites set out in the advertisement. The applicant argued that the polygraph testing was merely part of the process leading up to the appointments which the employer was not obliged to spell out.
- 19] Two additional grounds of review were provided in the employer's supplementary affidavit. The fourth ground of review was that the arbitrator failed to take account of the fact that the polygraph test was only one of the criteria that was introduced whereas the competency test was also something which was introduced during the selection process.
- 20] Lastly, the arbitrator should not have interfered with the applicant's 'prerogative', without showing that the applicant had not applied its mind to the selection.
- 21] In the applicant's heads of argument it was further argued that the arbitrator had exceeded his jurisdiction by ordering payment of one year's salary as well as ordering the applicant to pay the employees the difference between their actual earnings and what they would have received if they had been successful.

### **Evaluation**

- 22] When the matter came to be argued, the applicant did not persist with all the stated grounds of review. Only those grounds that were still advanced at the hearing are considered.

***The nature of the dispute***

- 23] The applicant, correctly, abandoned the contention that the matter did not concern a promotion dispute. Nevertheless, it maintained that the issue decided by the arbitrator, namely the fairness of using a polygraph as a selection tool, was not the issue before him. The applicant contended that neither the referral to conciliation, nor SAMWU's letter of complaint to the Municipal Manager of 4 August 2007 mentioned the polygraph testing as an issue in the dispute. Rather, the thrust of the complaint referred by the employees concerned the manner of making the appointments coupled with a claim based on a reasonable expectation of appointment arising from the employees having acted in the positions applied for.
- 24] I agree that the significance which the polygraph testing acquired, was not something foretold in the dispute referral but at that time it appears that the employees had not had sight of the report containing the recommendations of Mr Korb, in which the importance of the polygraph test results in the appointment process becomes obvious. I do not see why the employees should have been precluded from relying on evidence which only came to light after the conciliation in support of their claim that they were unfairly refused appointment. The particular facts cited in support of their claim in the referral form could not confine them only to a consideration of those facts. In my view it is sufficient that they made it clear that they believed they ought to have been appointed and that they claimed the process of appointments was flawed. That laid a basis for contesting the substantive and procedural fairness of the matter.

***Did the arbitrator misdirect himself on the issue to be decided?***

- 25] The municipality argued that the arbitrator misdirected himself in asking if it was fair to introduce a polygraph test as a criterion without mentioning it in the advertisement. Instead, the arbitrator should have asked whether or not it was fair to decline appointment of the employees based on a policy

of using polygraph testing as a way of measuring the honesty of candidates, in the context of making appointments to senior positions requiring a high degree of integrity. According to the applicant, by failing to address this issue, the arbitrator's reasoning was irregular. Further, his conclusion that the failure to mention the polygraph testing in the advertisement determined the unfairness of the promotions was in fact an irrelevant consideration in determining the fairness of the appointments.

26] The municipality argued that it was not obliged to spell out every factor that might be taken into account in the selection process in the advertisement. I agree, that not every consideration that is taken into account needs to appear in the advertisement, though it is certainly preferable to mention upfront a factor that might completely disqualify a candidate. However, I am inclined to agree that the arbitrator did misdirect himself in emphasising the importance of the criterion not being advertised, whereas the real issue in dispute between the parties was whether, or alternatively to what extent, the municipality could have regard to the outcomes of the polygraph tests in deciding on the appointments. It is clear from the opening statements of employees' representative at the arbitration hearing that it was the role played by the polygraph results, and not the failure to mention them in the advertisement, as such, which lay at the heart of the dispute.

27] Consequently, the arbitrator's finding that the municipality committed an unfair labour practice by not stating in the advertisement that passing a polygraph test was a pre-requisite for appointment should be set aside given the true nature of the dispute between the parties. It must also be mentioned that the respondents did not really dispute this ground of review with any conviction.

***The finding that the reason the employees were not appointed was simply because they failed the polygraph test***

- 28] The applicant argued that passing the polygraph test was a necessary, but not sufficient, condition for appointment to the vacant posts. In this regard it was suggested that the polygraph testing was but one of a number of factors considered, and it could not be said that the appointments were based solely on the polygraph results. The arbitrator should not have decided which factor ought to carry more weight.
- 29] Clearly, there were other factors that were taken into consideration by the selection panel in deciding who should be recommended for appointment. For example, the applicant's qualifications, competency and the interview scores were also factors which were taken into consideration. However, it is clear from Korb's evidence, mentioned above, that but for the polygraph results, the two employee would have been recommended for appointment based on their interview scores. In finding that the polygraph test was decisive by disqualifying the two employees the arbitrator was not setting himself up as a selection panel or deciding which factor should carry more weight. He was merely reflecting how the municipality arrived at its decision. There is nothing irregular or irrational about his finding based on the evidence before him.

### ***The arbitrator's award of compensation***

- 30] From paragraphs 9.1 and 9.2 of the award it is apparent that Moleko was awarded compensation of 12 months' remuneration at the lowest pay scale of the advertised post and over and above that she was to be paid the difference in her actual salary and that of a licence service centre manager with effect from 1 October 2007. Consequently, Moleko would have received more financial recompensation than she would have obtained if she had been a successful candidate. The same can be said of the relief granted to Mokoena.
- 31] Ms Gaibie, appearing for the employees, argued that such relief was competent under s 193(4) of the LRA, which empowers an arbitrator to make an award on terms that the arbitrator "deems reasonable, which may include ordering reinstatement, re-employment or compensation". The employees argued that the order to pay the difference between the

salaries received and those they would have received was not compensatory in nature. In support of their argument they cite the case of ***Willemse v Patelia NO & others (2007) 28 ILJ 428 (LC)*** in which the court ordered the employer to pay the employee the salary and benefits he would have received if he had been appointed to the post he applied for. So called “protective promotion” orders of this nature are not uncommon, but are not coupled with an additional award of compensation.

- 32] The arbitrator provided no reason for the two-pronged relief he granted, and there is nothing in his summary of the facts of the case to suggest that the matter before him justified the extraordinary relief granted. Irrespective of whether or not the two forms of relief exceeded the arbitrator’s power to award compensation, it is difficult to see how any reasonable arbitrator could order relief of such magnitude in the circumstances, and accordingly his orders in paragraphs 9.2 to 9.4 of the award must be set aside.

#### **Appropriate relief**

- 33] As the arbitrator’s substantive finding on what made the failure to appoint the employees unfair and the relief awarded is set aside, the question arises whether this matter should be referred back to another arbitrator. As the record was complete and the dispute goes back a considerable time, it would be undesirable to refer the matter back, and it is more appropriate to substitute the court’s own findings for that of the arbitrator.

#### **Merits reconsidered**

- 34] The essence of the dispute about the fairness of the failure to appoint the employees is whether the employer was entitled to rely on the polygraph test results to disqualify them for appointment in circumstances in which they would otherwise have been employed based on their interview scores. It is apparent that the results of the competency test played no role in the selection process provided a candidate’s interview score was one of the four highest.
- 35] Addressing the significance of the polygraph testing, applicant’s counsel,

Mr Brassey, argued that if it was legitimate to make subjective assessments of candidates in the interview process and if the interview process could legitimately include questions aimed at ascertaining a candidate's integrity, then there was no inherent reason, in principle, why polygraph testing could also not be used as a means of assessing honesty. Although he conceded that polygraph testing was highly controversial and inappropriate as the sole measure of guilt in the context of dismissal disputes, he argued that this did not mean polygraph testing could not be used as a legitimate assessment tool. In support of this contention, the applicant argued that the courts have not held that polygraph test results are something an employer cannot take account of.

36] It followed therefore that the courts have implicitly recognised that polygraph test results do have some probative value and are not worthless. Consequently, polygraph testing may be used as a legitimate tool in considering promotions. I agree that such an approach would not seem to be at odds with the jurisprudence discussed below.

37] Both parties referred to the decision of this court in ***Truworths Ltd v Commission for Conciliation, Mediation and Arbitration* (2009) 30 ILJ 677 (LC)**. In her judgment Basson J usefully summarised the status and treatment of polygraph test results as evidence:

*"[36] It is accepted that a polygraph is a controversial method of gathering information and that opinion is divided on the probative value of the results. Professor Grogan in Sosibo & others v Ceramic Tile Market (2001) 22 ILJ 811 (CCMA); [2001] 5 BALR 518 (CCMA) sets out the divergent approaches in respect of polygraphs .*

*'Following the Mahlangu case, attitudes to polygraph test evidence have followed the several and divergent lines:*

*(1) Some cases have held the view that "our courts do not accept polygraph tests as reliable and admissible. Nor do they*

*draw an adverse inference if an accused employee refuses to undergo such a test'. See Kroutz v Distillers Corporation Ltd (1999) 8 CCMA 8.8.16 case no KN25613; Malgas v Stadium Security Management (1999) 8 CCMA 10.8.1 GA21495; E Themba & R Luthuli v National Trading Company CCMA (1998) KN16887;*

*(2) Polygraph test evidence is not admissible as evidence if there was no evidence on the qualifications of the polygraphist, and if he or she was not called to give evidence. See Sterns Jewellers v SACCAWU (1997) 1 CCMA 7.3.12 case no NP144; Mudley v Beacon Sweets & Chocolates (1998) 7 CCMA 8.13.3 KN10527; Spoornet - Johannesburg v SARHWU obo J S Tshukudu (1997) 6 ARB 2.12.1 GAAR002861; Chad Boonzaaier v HICOR Ltd CCMA (1999) WE18745;*

*(3) Although admissible as expert evidence, polygraph results standing alone cannot prove guilt. See the arbitration Metro Rail v SATAWU obo Makhubela (2000) 9 ARB 8.8.3 GAAR003888; NUMSA obo Masuku v Marthinusen & Coutts (1998) 7 CCMA 2.9.1 (case no MP5036); Ndlovu v Chapelat Industries (Pty) Ltd (1999) 8 ARB 8.8.19 GAAR003528; but see Govender and Chetty v Container Services CCMA (1997) KN4881 where the dismissal was upheld even though there was no direct evidence linking the applicants to the theft. The commissioner found the inference of the polygraph test to be "overwhelming".*

*(4) Where there is other supporting evidence, polygraph evidence may be taken into account. See CWIU obo Frank v Druggist Distributors (Pty) Ltd t/a Heynes Mathew (1998) 7 CCMA 8.8.19 case no WE10734.'*

*[37] What appears from the foregoing is that a polygraph test on its own cannot be used to determine the guilt of an employee (see also John Grogan Workplace Law (9 ed) at 160). However, a polygraph certainly may be taken into account where other*

supporting evidence is available provided also that there is clear evidence on the qualifications of the polygraphist and provided that it is clear from the evidence that the test was done according to acceptable and recognizable standards. At the very least, the result of a properly conducted polygraph is evidence in corroboration of the employer's evidence and may be taken into account as a factor in assessing the credibility of a witness and in assessing the probabilities. The mere fact that an employee, however, refuses to undergo a polygraph is not in itself sufficient to substantiate an employee's guilt.

[38] I have already made reference to the fact that it appears from the award that the commissioner completely ignored the outcome of the polygraph test in circumstances where a trained polygraphist testified at the arbitration and explained the results of the polygraph and the manner in which the test was conducted. Although these types of tests should be approached with caution, at the very least the commissioner ought to have considered the outcome of the polygraph test as part and parcel of the totality of evidence which had to be weighed up in assessing the probabilities. If the commissioner was of the view that the polygraph test should not be taken into account or that it was not relevant then she should not have drawn a negative inference from Breytenbach's perceived refusal to take a polygraph test as indicative of possible knowledge of the missing watches. She should also not have drawn a negative inference in respect of Beytenbach's credibility if she was of the view that the polygraph test was irrelevant.”

(emphasis added)

- 38] More recently and in a similar vein, the Labour Appeal Court found nothing untoward about an arrangement in terms of which the representative union had agreed that its members could be removed from their baggage handling duties if they failed a polygraph test, even in the absence of any

independent evidence of theft.<sup>1</sup> However, it is important to note that in the ***Khulani Fidelity*** case the union had not only agreed that polygraph testing could be conducted on a regular basis, but also that the employer was entitled to transfer members out of baggage handling posts solely on the basis of the test result.

- 39] In two other recent decisions of this court, judges have accepted expert evidence to the effect that polygraph tests are not a reliable indicator of deceit. The following extract from the judgment of Steenkamp J in ***National Union of Mineworkers & Others v Coin Security Group (Pty) Ltd t/a Protea Coin Group (2011) 32 ILJ 137 (LC)*** encapsulates what was said by Basson J in ***Food & Allied Workers Union on behalf of Kapesi & others v Premier Foods Ltd t/a Blue Ribbon Salt River (2010) 31 ILJ 1654 (LC)***

*“[29] Professor Tredoux, the head of UCT's department of psychology, has provided a detailed report on the reliability of polygraph testing. He gave similar evidence in the FAWU matter where that court found him clearly to be an expert in the field of polygraph testing and a 'highly competent and respected expert' with 'extensive and impressive qualifications'. (I pause to note that the court in Khulani did not have the benefit of any expert evidence on polygraph tests.) Tredoux's report shows that polygraph testing has not been scientifically shown to be a reliable, accurate and valid means of detecting deception. It follows that polygraph test results cannot be a 'fair and objective' basis for selecting who should be dismissed. In fact, this court held in FAWU that:*

*'In the light of the foregoing and in the light of the controversy that surrounds the accuracy and reliability of polygraph tests, I am not persuaded that the polygraph is a reasonable or fair alternative to minimize retrenchment.... In the context of a disciplinary process the polygraph can be a useful tool in the*

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<sup>1</sup> ***SA Transport & Allied Workers Union & Others v Khulani Fidelity Security Services (Pty) Ltd (2011) 32 ILJ 130 (LAC)*** at 134J-136C

*investigation process but can never substitute the need for a disciplinary hearing. A polygraph test on its own cannot be used to determine the guilt of an employee.... I am, as already pointed out, not persuaded that it constitutes a fair and objective selection criteria or a fair and objective method alternative to minimize retrenchment in the context of s189 and s 189A of the LRA.'*

*[30] The respondent has not explained in its pleadings what benefit its 'client' derives from its use of polygraph testing. It has not, on the pleadings, shown that it was either a fair and objective selection criterion or, as was the case in Khulani, an agreed one."*<sup>2</sup>

(emphasis added)

40] Even if polygraph test results may constitute relevant material in determining a person's integrity, the question remains whether it is fair to rely exclusively on them as a touchstone of integrity in the recruitment context, where the prejudice to an applicant that might follow rejection on account of a polygraph test is not the same as that of an employee facing a dismissal. In this case, there was no other independent evidence that the two employees were previously implicated in some wrongdoing or corruption. It might be said that because the consequence of not being promoted is less serious than being dismissed, an employer is entitled to place greater reliance on polygraph testing as a one method of assessing job applicants, despite its unreliability. However, in this instance, it was the sole reason for not appointing candidates who would otherwise have succeeded, thereby making it not merely one of many factors to weigh up, but a deciding one. In such circumstances, the same concerns about its reliability as an accurate measure of deception which make courts hesitate to accord it a decisive impact in disciplinary cases, ought to raise similar concerns when eliminating candidates who would otherwise be appointed.

41] Consequently, I am of the view that the exclusive reliance on the

polygraph test results to eliminate candidates for appointment on the basis of their deceitful character, in the absence of any other information placing a question mark over their integrity is unfair.

### **Relief**

- 42] I have indicated my concerns with the relief originally granted. It seems to me that a more reasonable solution would place the employees in the same financial position they would have been if they had been appointed on 1 October 2007.

### **Costs**

- 43] Although the applicant was successful in having aspects of the award set aside, the employees are ultimately successful in their claim. Consequently, it would be fair to both parties that they each bear their own costs.

### **Order**

- 44] The sixth respondent's findings on the reason for the applicant's failure to appoint the employees to the posts of licence service centre managers in paragraph 9.1 and the relief he awarded to the employees in paragraphs 9.3 and 9.4 of his award issued in May 2009 under first respondent's case number GPD 090602, are set aside.

- 45] The arbitrator's findings and relief set out in paragraphs 9.1 to 9.4 of the arbitrator's award are replaced with the following:

45.1 The applicant committed an unfair labour practice relating to promotion in relying exclusively on the result of a polygraph test to determine the honesty of the candidates.

45.2 The applicant must pay Mr M W Moleko and Ms M Mokoena the difference between the remuneration they received from 1 October 2007 and the remuneration they would have received if they had

been promoted to posts of License Service Centre managers from that date at the lowest pay scale for that post.

45.3 The applicant must pay the said amounts within 15 days of the date of this judgment.

46] No order is made as to costs



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R LAGRANGE, J

Judge of the Labour Court of South Africa

#### APPEARANCES

APPLICANT: MSM Brassey, SC instructed by Mashile Twala Inc.

SECOND RESPONDENT: S Gaibie of Cheadle, Thompson & Haysom