# JURISDICTION, DETAILS OF THE HEARING AND REPRESENTATION

1. I satisfied myself that the CCMA had jurisdiction to hear this matter.
2. The arbitration hearings were held on 10 March, 28 April & 10 June 2016 at the CCMA offices, Anton Lembede St, Durban. The applicant represented himself on the first day and by Mr……….. (attorney) for the remainder of the arbitration. The respondent was represented by Mr ………….(attorney).
3. The proceedings were conducted in English and recorded.
4. The parties handed in their respective bundles of documents. The vast majority of the applicant’s documents were already included in the respondent’s bundle of documents. Accordingly, the remainder of the documents were removed from the applicant’s bundle and incorporated into the respondent’s bundle. The applicant, who is literate, was given time to peruse the respondent’s bundle. Having perused the documents he indicated thereafter that he admitted the authenticity of all the documents in the bundle and the correctness of the contents thereof.
5. One of the documents accepted by the applicant at the outset – except for the sanction of dismissal – was the chairperson’s findings on issues of fact. The respondent accordingly chose not to call the chairperson and closed its case after calling only one witness. However on 28 April 2016 the applicant questioned a finding of fact made by the chairperson. On this basis the respondent applied for and was granted leave to re-open its case and call the chairperson.
6. A pre-arb was conducted on 10 March 2016 to identify the disputed issues and issues on which there was agreement. During the pre-arb the applicant alleged that the chairperson of the disciplinary hearing was biased and prejudiced against him and that he had conducted the hearing in a “one-sided” manner and had failed to take into consideration the applicant’s submissions. Later that day the applicant stated that he did not wish to pursue any procedural complaints including any complaint that the chairperson was biased. (The applicant raised the issue of bias in his supplementary closing statement. I do not intend making any finding on this issue having regard to that issue having been abandoned.)
7. At the outset the parties were advised as follows: “*The purpose of cross-examination is, amongst other things, to show that your version is more probable than that of the other side. It is important to bear 3 things in mind when cross-examining – (a) You must put your version to the opposing witness; (b) If an opposing witness has left out an important fact then that should be put to the witness; (c) If you consider that any evidence of the witness to be false or incorrect then that should also be put to the witness. The purpose of all this is to give the opposing witness an opportunity of commenting on your version. It is very important to contest evidence that you disagree with because evidence that is left uncontested is likely to be accepted as being true. An adverse inference may be drawn if you do not put your version or put a new version ie a version that was not part and parcel of your case previously*.”
8. On the day that he was unrepresented, the applicant was invited to, and did, request assistance whenever he was not sure of any procedural step or any other issue.

# ISSUE TO BE DECIDED

1. Whether the applicant was dismissed unfairly. He sought reinstatement alternatively compensation.

# BACKGROUND TO THE DISPUTE

1. The applicant is ……………….(male age 34), a controller of debtors. The parties concluded a fixed term employment contract for the period 31 August 2015 to 28 February 2016. The applicant commenced employment on 31 August 2015 and was dismissed on 11 September 2015 after being suspended with pay on 7 September 2015. His salary was R15 000 per month for working a 5 day / 40 hour week. He remains unemployed despite making attempts at finding alternative employment. He has not earned any money from casual work. The applicant is a single parent with responsibility for 2 children who are with their mother in Johannesburg. The applicant’s highest standard of education is Gr 12.
2. The respondent is ………………… (PTY) LTD, a transporter of new cars for its motor manufacturer clients. It is part of a group of 33 companies. It has approximately 290 employees at 4 sites around the Republic.
3. The applicant worked only for 4 days. He was given a notice to attend a disciplinary hearing on 7 September 2015 and advised to attend the hearing on 9 September 2015. He attended, representing himself, and gave evidence in support of his case. He pleaded not guilty to the alleged misconduct but was found guilty and dismissed. The applicant lodged an appeal on 22 September 2015. It was dismissed on 17 October 2015.
4. The applicant referred an alleged unfair dismissal dispute with the CCMA on 9 November 2015. The matter was set down for conciliation on 27 November 2015 but remained unresolved. The arbitration hearing on 8 December 2015 was postponed by consent of the parties. The arbitration hearing on 22 January 2016 was postponed on the application of the respondent.
5. The applicant submitted a written closing statement on 10 June 2016. The respondent submitted its written closing statement on 13 June 2016. The applicant also submitted a supplementary closing statement.

# SURVEY & ANALYSIS OF EVIDENCE & ARGUMENT

1. The following gave evidence for the respondent: …………….(national HR manager of the respondent for 4 years and employed by the respondent for 10 years); …………..(employee relations specialist for approximately 2 years in the holding company of the respondent. He possesses an LLB and a Bachelor’s degree in Criminology. He was the chairperson of the disciplinary hearing.). Only the applicant gave evidence in support of his case.
2. The following was either common cause, agreed to, undisputed or conceded in the pre-arb or the evidence-in-chief or in cross-examination:
   1. The applicant’s job entailed dealing with the respondent’s customers; ensure that they were invoiced and sent statements timeously; ensure that they paid monies owing to the respondent within the 30 day term period; to resolve any queries with them; and track all outstanding debts;
   2. That at the time that the applicant applied for the job, he was not in a position to meet his own financial obligations to his creditors, ie he was unable to pay his debts;
   3. That the payment of debts was important;
   4. That a need had arisen in the respondent to appoint a debtor’s controller for a fixed term of 6 months;
   5. That various recruitment agencies (RAs) were engaged to source suitable candidates;
   6. The RAs were asked to ensure that the following criteria were followed in determining suitability –
      1. Application form and CV provided;
      2. Reference checks done with previous employers;
      3. Background check (criminal, ITC, ID validation and fraud listings);
   7. Purporting to follow the above criteria, …………..from …………Recruitment and Events, a RA, recommended 2 candidates, including the applicant. She send an email to the respondent dated 5 August 2015 in the following terms in relation to the applicant: “*Dear Chantal, Attached herewith please find 1 x CV for the abovementioned position for your perusal and consideration. The candidate has confirmed his availability for the 6 month contract position and has confirmed that he will commit to the duration of the contract if he is successful. He unfortunately does not have SAP, however, he has gained vast experience on various packages and does not feel that learning a new package in a short amount of time will be a problem. He is also aware of the pressure of the role and is prepared and able to work overtime if and when necessary. He is well spoken, is currently completing Credit Management 3 and has solid credit control and debtors experience. Please advise if you would like to meet with this candidate and I will co-ordinate accordingly – he has confirmed that he is available for interview at your convenience. Kind regards, Carole Peto*.”
   8. It was assumed by the respondent that Carjay had recommended the applicant based on the criteria set out in para f above;
   9. Before making the recommendation ……………….had conducted an interview with the applicant on 4 August 2015 in which she had asked him the following questions: “*Question: Any criminal or ITC against your name? Answer: Not aware, no; Question: Any skeletons in the closet or anything I need to be aware of regarding your application? Answer: No skeletons, no*.” (A written record of the interview was part of the respondent’s bundle);
   10. That ITC is a reference to a credit bureau that keeps a record of whether consumers of goods, services and loans are paying their respective debts timeously;
   11. ……………….informed the respondent that the other candidate had made a disclosure: “*She has advised me up front that she has a longstanding credit listing (due to a previous relationship). She has been paying off the debt bit by bit and when she has been able to*.”
   12. Based on the above emails from ……………., the respondent chose the applicant for an interview. The other candidate was specifically excluded from further consideration because of her listing with ITC and unpaid debts. This exclusion was based on the respondent’s policy which reads as follows: “*The company does not employ staff with ITC listings (specific to finance positions) and criminal records (in exceptional circumstances the CEO and ER department must be involved)*”;
   13. That the position to be occupied by the applicant was a finance position;
   14. That Carjay had engaged the services of Kroll MIE to conduct a check on the applicant’s criminal record. A report dated 14 August 2015 by Kroll MIE stated that the applicant had no criminal record;
   15. Carjay had not been able to obtain details of any ITC listing due to a computer system error but had omitted to mention this problem to the respondent in her email of 5 August 2015 (set out above in para g);
   16. As a result of the recommendation of Carjay, the respondent conducted an interview with the applicant between 14 and 30 August attended by the applicant, Govender and the debtor’s line manager;
   17. Govender kept contemporaneous notes of the interview as follows: “*personal – divorced; born Durban relocated to Johannesburg; 2 children; single parent; stable job; flexible on working hours; aware temp position; no SAP experience; how often do you see your kids in Johannesburg?*”. Other notes kept of the interview show that the applicant was aware of the steps that must be taken when customers do not pay their accounts timeously;
   18. The applicant’s CV shows that he has completed courses in credit management I, II and III;
   19. That one of the modules of credit management III includes references to the role of credit; vetting processes; dealing with default customers; whether a customer is good for credit; and ITC;
   20. Govender and her colleague expressed satisfaction with the applicant after the interview and he was duly informed that he would be given the position;
   21. Even though the applicant was due to commence duties on 1 September, he presented himself for work on 31 August 2015. He worked on that day and signed the employment contract and the job description on the morning of 1 September 2015;
   22. At the time that the employment contract was signed the respondent was not aware that the applicant was in fact ITC listed under an “adverse code” and had various outstanding debts totalling about R27 000. That information became available later that day (ie 1 September) after Carjay submitted a report to the respondent. The report further indicated that the applicant’s creditors had “handed over”. This was understood to mean that the debt had been handed over to debt collectors / attorneys for collection;
   23. The applicant was listed by ITC on 30 June 2015 for 5 unpaid debts and on 7 April 2015 for the remaining unpaid debt;
   24. The ITC report came to Govender’s attention on 2 September 2015. She became concerned about the applicant having the adverse listing and raised the issue with Carole Peto about making a recommendation not in compliance with the respondent’s criteria (set out in para f above). The latter informed Govender that details of ITC listings had not initially been obtained because of a computer system error. She further informed the respondent that the applicant had been asked specifically whether he had any ITC listings and he had informed her that he did not. She confirmed this in an email dated 3 September 2015 as follows: “*I hereby confirm that during my interview process I asked Ashton if he had any ITC listings against his name and he did not advise me at that time that he did. When I received the ITC report it indicated that he had several listings against him. I therefore find that Ashton has displayed dishonesty with this application*.”; (The applicant did not challenge the correctness of this email from Carjay at the outset or during his cross-examination of Govender. When he gave evidence he stated that he had advised Carole Peto that he had outstanding debts. On the probabilities I find that the applicant failed to disclose this fact to Carole Peto. Had he done so, she would probably have included that fact in her report (para k above), as she had done for the other unsuccessful candidate.);
   25. That Govender was under the erroneous impression that the applicant only had a debt of about R4000. She expressed her concerns to the applicant, and being under the impression that the outstanding debt was for only R4000 gave the applicant a letter on 3 September 2015 giving him an opportunity to pay off the debt within 3 months and thereby clear his adverse listings. The applicant replied on the same day by email that he could not pay the debts off within 3 months having regard to the fact that the outstanding debts amounted to R27 000. With the applicant not being in a position to pay off his debts and clear his name, he was asked to remain at home pending the matter being raised with the CEO;
   26. Govender raised the matter with the CEO of the respondent on 4 September 2015;
   27. At a meeting attended by the applicant, the CEO and Govender on 7 September 2015 the applicant was informed by the CEO of the respondent’s policy of not employing persons in finance positions of they were ITC listed. He was also advised that his failure to disclose or divulge the fact of his ITC listings amounted to misrepresentation and had led to a breakdown of trust between the parties. The applicant was offered notice pay of R7500 to terminate the employment amicably; alternatively that he face a disciplinary hearing. The applicant chose a disciplinary hearing on the advice of his attorney;
   28. Later on that day the applicant was suspended and given a notice to attend a disciplinary hearing. It contained the following charge: “*It is alleged that you have misconducted yourself in that: During or about August 2015 and at a time at which you were interviewed by Carjay Recruitment and Events (Carjay) for the position of debtor controller, you wrongfully and dishonestly misrepresented to Carjay and the company that you had no credit record whereas you did in fact have several credit issues according to an ITC credit report. It was, at all material times incumbent upon you to honestly and fully disclose to the company the fact of you having a credit record and the nature of such credit record. The company, to its detriment, relied upon the honesty of your representations in employing you and/or maintaining you in the position of debtor controller in the finance department – a position requiring honesty and integrity. In consequence of your gross dishonesty and misrepresentations you have breached the relationship of trust and good faith existing between yourself and the company and have further exposed the company to potential reputational risk with its clients*.”.
3. To determine whether the applicant was unfairly dismissed, the following questions must be answered:
   1. Whether there was a duty on the applicant to disclose his credit status to the respondent;
   2. Whether the applicant ought reasonably to have disclosed his credit status to the respondent regardless of whether he was asked about the issue or not;
   3. Whether the applicant was asked about his credit status; and if so, whether his answer to that inquiry was honest or dishonest.
4. I find as follows:
   1. Whether there was a duty on the applicant to disclose his credit status to the respondent: I find that there was a duty to disclose for the following reasons:
      1. The applicant submitted in his closing statement – quoting authority – that there was no duty on him to disclose information that the employer already knows or which is readily available to the employer. I agree with the applicant that in such circumstances there is no duty. However in this case the undisputed evidence shows that as at 31 August 2015 (when the applicant commenced employment) the respondent did not know that the applicant was ITC listed because Carjay had omitted to disclose to respondent that it had not yet obtained that information due its computer problems. The undisputed evidence further shows that respondent assumed that Carjay had followed the respondent’s criteria in recommending the applicant. Had the respondent known that the ITC report had not yet been accessed, and having regard to the respondent’s policy of not employing ITC listed persons in finance positions, it is probable that it would have delayed the appointment of the applicant until the report was at hand.
      2. Of course, the applicant for his part also would not have known whether the respondent had the ITC report or not. Quoting the same authority, it was his case that he had assumed that the respondent had the ITC report and as such there was no duty on him to disclose. All we have is evidence that the applicant assumed – as opposed to having knowledge – that the respondent had the relevant report. Accordingly the authority quoted by the applicant is of no assistance to him.
   2. Whether the applicant ought reasonably to have disclosed his credit status to the respondent regardless of whether he was asked about the issue or not: The applicant repeatedly submitted that he was not aware that he was ITC listed and as such he could not disclose something of which he was not aware. The respondent submitted that the applicant ought to have reasonably known he was listed because anyone who has unpaid debts must expect to be listed. As such he ought to have disclosed his status. I agree with the respondent’s submission for the following reasons:
      1. The applicant is not a lay person with no knowledge of the credit control industry: he had worked for 12 years previously in credit control;
      2. The applicant had completed a module in credit management III which includes references to the role of credit; vetting processes; dealing with default customers; whether a customer is good for credit; and ITC;
      3. The position to be occupied by the applicant related to the management of credit for the respondent. I do not understand how the applicant concluded that he was a fit and proper person for the job when his own creditworthiness was questionable;
      4. The applicant was dishonest in his responses to questions posed to him by Carole Peto on 4 August 20154. These were: *Question: “Any criminal or ITC against your name? Answer: Not aware, no; Question: Any skeletons in the closet or anything I need to be aware of regarding your application? Answer: No skeletons, no.”* Having regard to the position that he was applying for he ought to have known that his own creditworthiness would be relevant. Had the applicant been honest and candid he would probably have replied: “I am not aware of any ITC listing but I think that you should know that I have unpaid debts”.
      5. The respondent emphasised that persons who worked in finance were required to have clean credit records in their personal lives and that the applicant ought to have been candid about making the disclosure upfront. The applicant had unpaid debts and this is something that he ought reasonably to have disclosed to the respondent so that it could make an informed decision whether it wanted to employ him or not. He failed to do that.
   3. Whether the applicant was asked about his credit status; and if so, whether his answer to that inquiry was honest or dishonest: I find that the applicant was asked about his credit status and his response was dishonest for the following reasons:
      1. The other candidate for the position was also interviewed by Carjay. She honestly disclosed that she had outstanding debts. That disclosure would probably have been made in response to a question that Carole Peto posed to her ie whether she had outstanding debts. It is equally probable that …………..posed that very same question of the applicant. I accordingly find that the applicant was asked expressly about his credit status. I find however that the applicant did not answer that question honesty. Had the applicant answered that question honestly, it is probable that ……………would have indicated that fact in her email to the respondent of 5 August 2015. With outstanding debts having eliminated the other candidate, the outstanding debts of the applicant would probably have led to him being eliminated as well;
      2. I find further that the applicant’s dishonesty led to him being invited for an interview and ultimate offer of a job.
5. The main issue raised by the applicant during his cross-examination of Govender was the timing of the discovery of his adverse listings; and the fact that he was not aware that he had any listing. As regards timing, Govender stated that the respondent had not been informed by Carjay that the applicant had any adverse listings due to it (ie Carjay) having a computer system error in August 2015. It was on that basis that the respondent had offered employment to the applicant. Govender stated that had the respondent known of the applicant’s ITC listing he would not have been offered a position.
6. The applicant submitted that the respondent had afforded him an opportunity to pay-off his debts – and remaining in employment – even after discovering that he was a bad debtor. In other words that it had “waived” its right to dismiss him. I find that it is unnecessary to decide whether the respondent waived its right to dismiss the applicant: it is undisputed that the applicant did not unconditionally take up the opportunity afforded to him. In any event it was undisputed that the offer by Govender was based in an error on her part: she was under the impression that the applicant had a debt for only R4000.
7. Govender stated that a good working relationship between the parties could not be re-established; that the applicant had broken the trust between the parties; that reinstatement was not practicable as the position was filled and that the 6 month period had already expired in February 2016; that the charge was serious; that dishonesty was considered by the respondent as a serious offence in its disciplinary code and the prescribed sanction in the first instance was dismissal. The applicant for his part disagreed that trust between the parties had been breached. I find that trust was breached as the applicant had dishonestly chosen not to disclose the existence of a “skeleton” in his cupboard. This dishonesty was serious because it manifested itself at the inception of the employment relationship.
8. In all the circumstances I find the applicant’s dismissal to be fair.

# AWARD

1. The application is dismissed.

Dated at DURBAN on this 15th day of JUNE 2016.

\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

R J PURSHOTAM

*Commissioner*