# JURISDICTION, DETAILS OF THE HEARING AND REPRESENTATION

1. I satisfied myself that the ………….had jurisdiction to hear this matter: the dispute falls within the ambit of s 186(1)(a) of the Labour Relations Act 66 of 1995.
2. The arbitration hearings were held on 13 August, 14 September, 12 November 2012 and 14 May 2013 in the HR Boardroom,……………..and the ………, Durban. The proceedings were recorded. The applicant was represented by Mr ………….(union official and regional deputy secretary of …………), while the respondent was represented by Mr …………(HR manager) in the …………..unit (the Unit). The interpreters were S Nkabinde (13 August), B A Hadebe (14 September) and S Nzama (12 November and 14 May),
3. The following postponements occurred during the course of this arbitration:
	1. The matter was postponed by consent on the application of the applicant on 14 September 2012 because Mr Madlala had suffered a bereavement. The applicant’s trade union tendered the wasted costs for the day. (A separate ruling has been made in this regard.);
	2. The matter was postponed on 18 February 2013 because I was indisposed after having been injured in a motor vehicle accident;
	3. The matter was postponed on 15 April 2013 on the application of the respondent because of the indisposition of its representative Mr Molefe. The question of costs was reserved until his return on 14 May 2013. On that day Mr Molefe tendered a sick note. The question of costs of 15 April 2013 was raised, and he was reminded that the applicant’s union had tendered the costs of 14 September 2012 despite a bereavement. On that basis Mr Molefe agreed that the respondent would have to tender the costs. (A separate ruling has been made in this regard.)
4. Mr Madlala indicated that he had approximately 1 year of experience in representing employees at arbitration, while Mr Molefe indicated that he had 5 years of such experience. Having regard to the experience of the parties the proceedings were conducted in a largely adversarial manner.
5. Both parties handed in their respective bundles of documents. The applicant admitted the authenticity of all the respondent’s documents, and the correctness of their contents except for one document. Most of the documents contained in the applicant’s bundle were duplicates of the respondent’s bundle. To that extent those documents were returned to the applicant. The respondent admitted the remainder of the applicant’s documents.
6. Both parties submitted written closing statements.

# ISSUE TO BE DECIDED

1. The issue to be decided is whether the applicant was unfairly dismissed. He sought reinstatement and back pay.

# BACKGROUND TO THE DISPUTE

1. The applicant is …………………, a general assistant. He commenced employment with the respondent on 20 October 1997 and was dismissed on 8 May 2012. He earned R8457.59 for working a 5 day/40 hour week. The applicant remains unemployed but is not seeking alternative employment as he is awaiting the outcome of these proceedings.
2. It was agreed that as a general assistant, the applicant’s main job function was to assist the park supervisor to cut grass and maintain the city’s verges. He had also taken on the additional duty of driving, including the driving of tractors.
3. The respondent is ………………….., a local government body. The applicant worked in the Unit. The Unit employs approximately 4000 persons while the municipality as a whole employs approximately 20 000 persons.
4. The applicant was given a notice to attend a disciplinary hearing on 31 March 2011. He was charged therein as follows: “*It is alleged that you misconducted yourself in terms of clause 1.2.5 of the disciplinary procedure by failing to conduct yourself with honesty and integrity in that between the 2nd and 7th of July 2009 you stole the Council tractor registration number ………… which you sold to Mr S C Mpofana*.”
5. The disciplinary hearing sat on 12 April, 19 September, 9 November, 11 November 2011, 26 & 27 January, 11 April and 8 May 2012. The applicant chose not to give evidence in his own defence, nor call any witnesses in support of his case. He was found guilty and dismissed on 8 May 2012. He chose not to employ the appeal procedure.
6. He referred an unfair dismissal dispute with the ……………on 15 May 2012. The matter was set down for conciliation on 11 June 2012 but remained unresolved. Hence the referral to arbitration.
7. At the outset of the arbitration and at the request of the parties a pre-arb was conducted. The following were identified as being disputed issues:
	1. Procedural issues:
		1. Whether the chairperson of the disciplinary hearing was impartial and unbiased. The applicant submitted that he had reached the conclusion that he was not because he (ie the chairperson) had been asked to make a ruling on the authenticity of a certain report at the hearing and that he had failed to make such ruling. That, so the applicant submitted, had prejudiced the applicant in the manner in which he would have conducted his case at the hearing. (No evidence was ultimately led by the applicant on this issue and therefore no further reference will be made to this issue);
		2. Whether the disciplinary proceedings had been commenced promptly and without delay: the applicant contended that they had not been, but that he could not pursue this issue further because the respondent had applied for and was granted condonation for its delay in terms of clause 6.3 of the disciplinary procedure collective agreement (the collective agreement). The respondent submitted that the delay had been occasioned because the matter was being investigated by the respondent’s ombudsperson;
	2. Substantive issues:
		1. Whether the applicant had breached the rule. It was agreed that the rule entails that employees must conduct themselves with honesty and integrity in the workplace and in relation to the employer’s assets;
		2. Whether the respondent had applied the rule consistently in its workplace. (No evidence on the consistent application of the rule was led. Hence no further reference is made to this issue);
	3. As regards the factors contained in Sidumo & Another v Rustenburg Platinum Mines Ltd & Others 2007 28 ILJ 2405 (CC):
		1. Whether dishonesty in the workplace always warranted dismissal: the applicant agreed that dishonesty warrants dismissal but questioned the inconsistent application of sanction. (No evidence was placed before me at the arbitration on the alleged inconsistent application of the sanction. Hence no further reference to this issue is made in this award.);
		2. That the applicant’s defence was that he was not involved in any way whatsoever with the theft of the tractor. He submitted that he had been implicated for no reason. He was unsure of the motive but submitted that he was being made a scapegoat because the Unit was pursuing him to conceal its own alleged poor asset management. Further that no one except the applicant had been charged in relation to the theft of the tractor. (Even though it was put to two of the respondent’s witnesses in cross examination that the respondent’s asset management was poor, there was no evidence put before me by the applicant on this issue.)
		3. It was agreed that the applicant had a clean disciplinary record;
		4. Insofar as harm to the respondent was concerned it submitted that an asset valued at R180 000 had been stolen and been painted red (from its original green) and sold. Fortunately for the respondent it had been recovered;
		5. The respondent submitted that the alleged misconduct by the applicant had breached the relationship of trust between the employer and the employee. The applicant disagreed. He submitted that if that was the case then he ought to have been suspended from July 2009 – being the date of the alleged incident – to the date of the finalisation of the disciplinary hearing. (The applicant failed to cross examine the witnesses of the respondent on the alleged breach of trust.)
8. A typed version of the pre-arb minute was furnished to the parties on 14 September 2012. Both parties confirmed on 12 November 2012 that it reflected the issues correctly. (It was then read into the record.) The parties were advised that they must lead evidence on issues that they had raised during the pre-arb.

# SURVEY OF EVIDENCE AND ARGUMENTS

1. The following persons gave evidence at the arbitration: …………….(senior horticulturist of 10 years and employed by the respondent for 21 years), …………..(sergeant in the South African Police Service but who was a constable during 2009. He has been employed by the SAPS for 10 years); ……………(forensic investigator with 15 years of experience, and employed by the respondent for 13 years). Only the applicant gave evidence in support of his case.
2. The following facts were either common cause, agreed or undisputed in cross examination:
	1. The applicant was a general assistant. However he volunteered to do duties that were out of his job description. For purposes of this matter, those additional duties related to driving tractors. Chetty allowed the performance of these duties in order to develop the applicant;
	2. The respondent owned and operated a green New Holland tractor with registration number plate ……………(the Tractor);
	3. The Tractor was stolen and painted red;
	4. The Tractor was loaded onto a tow truck and was being transported in a southerly direction on 7 July 2013;
	5. The tow truck was intercepted by SAPS member Chiya;
	6. In the cab together with the tow truck driver was one Sibongiseni Mpofana. He was arrested by the police and taken into custody;
	7. When questioned, Mpofana indicated that he had purchased the Tractor from the applicant;
	8. The applicant was located and taken into custody by the police and questioned;
	9. The applicant maintained his silence on advice that he received;
	10. The applicant was criminally charged for the theft of the Tractor;
	11. The criminal trial could not proceed, and a finding of not guilty was rendered, due to the unexplained death of Mpofana;
	12. The magistrate presiding at the criminal trial however stated that had Mpofana given evidence, the applicant would have been found guilty of the theft of the Tractor;
	13. Mpofana had given a sworn statement to Mathanjana freely and voluntarily, without any pressure being exerted on him, about his knowledge of the matter;
	14. The applicant was not suspended and reverted to his normal job description while the theft of the Tractor was being investigated. In other words his driving duties were taken away from him;
	15. The applicant had a clean disciplinary record.
3. The context within which a further undisputed fact emerged during Chetty’s testimony must be mentioned. Chetty – while being re-examined – stated that “*no one else could have collected the tractor except Mr Gumede*”. (This conclusion was premised on his earlier undisputed evidence that the driver who drops a tractor must also pick it up from the workshop.) After the re-examination was completed, I clearly identified this evidence as being “new matter” and invited the applicant to cross examine Chetty on this issue. The invitation was declined.
4. Circular 6/2010, a collective agreement, provides in para 14.1 as follows: “*The employer may suspend the employee or utilise him temporarily in another capacity pending an investigation into alleged misconduct if the municipal manager or his authorised representative is of the opinion that it would be detrimental to the interests of the employer if the employee remains in active service*.”
5. Mpofana’s evidence, in summary, as contained in his affidavit was as follows:
	1. That he had been approached by the applicant and asked whether he would be interested in purchasing a tractor as the respondent was selling them for R15 000 each;
	2. He expressed an interest. On 2 July 2009 the applicant arrived at Mpofana’s place of residence with a green tractor. Mpofana indicated that he was interested in buying it. The applicant stated that the colour would have to be changed. It was driven to a painter and painted red;
	3. Mpofana agreed to purchase the Tractor from the applicant;
	4. Mpofana paid the painter a sum of money and in addition a sum of R13 000 to the applicant;
	5. On 6 July 2009 a tow truck driver was hired to transport the Tractor to Harding;
	6. On 7 July 2009 while it was being transported, the police intercepted it. Mpofana stated to the police that he had purchased it from the applicant.
6. That affidavit was written out by Mathanjana in consultation with Mpofana. Mathanjana confirmed that Mpofana had given the sworn statement – being part of the respondent’s bundle – freely and voluntarily and that he (ie Mpofana) had read it before signing it. Mathanjana had attested the affidavit as the commissioner of oaths. This was not disputed.
7. The respondent submitted in its closing statement that the dismissal was fair and should be upheld. It asked for the admission of the affidavit of Mpofana into the evidence.
8. The applicant submitted that the dismissal of the applicant was unfair and that the applicant be reinstated. He asked that Mpofana’s affidavit not be admitted into the evidence.

# ANALYSIS OF EVIDENCE AND ARGUMENT

1. I find that the applicant was correctly found guilty of the charge, on the probabilities, for the following reasons:

Mpofana’s affidavit

* 1. The respondent applied to have the affidavit of Mpofana admitted into the evidence. This was opposed by the applicant. I deal with this issue in two parts: Its admissibility as a document; and secondly its admissibility having regard to the hearsay rule. The latter issue is governed by the Law of Evidence Amendment Act 45 of 1988.
	2. As regards its admissibility as a document is concerned, the learned author Zeffertt *Evidence* 685 states all documents have to comply with three conditions before being admitted: the “Best evidence rule”, the document’s authenticity, and the Stamp Duties Act of 1968. For present purposes the Stamp Duties Act is not relevant. I find that the affidavit contains the best evidence because Mpofana is not available to give evidence in person due to his death. Insofar as its authenticity is concerned, I find that the affidavit is authentic because Mpofana signed it in the present of Mathanjana, who attested it as the commissioner of oaths. I therefore find that the affidavit, as a document, is admissible;
	3. Reliability of the evidence is an issue when hearsay is being tendered. I find that the contents of the affidavit are reliable because it was read by Mpofana before he signed it in the presence of Mathanjana who attested it as commissioner of oaths. Furthermore it is undisputed that the affidavit was made freely and voluntarily;
	4. Insofar as its contents are concerned, they are subject to the hearsay rule which is governed by Act 45 of 1988. Applying this Act and the factors contained in s 3(1)(c) of that Act, I find as follows:
		1. *The nature of the evidence:* The evidence is in the form of an affidavit. It must be borne in mind that the revelations in the affidavit were against the interests of Mpofana because he was effectively admitting therein to purchasing stolen property. I cannot find that he would have had any motive to lie, or be confused about the matter;
		2. *The nature of the proceeding:* The evidence is being tendered in an arbitration. An arbitration is unlike a court where the rules and principles of evidence have to be observed strictly. Arbitrators have a wider discretion when applying the rules of evidence;
		3. *The purpose for which the evidence is being tendered:* The evidence is being tendered to prove that there was a purchase and sale transaction between the applicant and Mpofana;
		4. *The probative value of the evidence:* The evidence was being tendered to show that the applicant had sold the Tractor to Mpofana. It was common cause that the Tractor did not belong to the applicant. Hence his sale of the Tractor could only have come about if he stole it from the respondent;
		5. *The reason why the evidence is not given by the person upon whose credibility the probative value of such evidence depends:* The reason for tendering the affidavit is that Mpofana has died;
		6. *Any prejudice to a party which the admission of such evidence might entail:* I cannot find that any prejudice will be suffered by the applicant by the admission of the affidavit. I accept that the applicant has been deprived of the opportunity of cross examining Mpofana. The principal issue on which Mpofana would have given evidence (had he been alive) was the purchase and sale transaction between him and the applicant. I cannot find that Mpofana’s cross examination would have made any difference on this issue;
		7. *Any other factor, which should, in the opinion of the court, be taken into account, is of the opinion that such evidence should be admitted in the interests of justice:* The applicant did not lead evidence or make submissions on any other factor that I should take into account against the admission of the affidavit.
	5. For all the above reasons I admit Mpofana’s affidavit and its contents into the evidence.
	6. I find accordingly that the applicant probably entered into a transaction with Mpofana for the sale of the Tractor to the latter. The evidence indicated that the Tractor was owned by the respondent. The taking into possession of the Tractor by the applicant for purposes of disposing of it to Mpofana constituted dishonest conduct on the part of the applicant. With it being undisputed that he removed the Tractor from the workshop, I find that he probably drove it away on that day in order to further his dishonest purpose.
	7. It is significant that the criminal trial magistrate stated that the applicant would have been found guilty had Mpofana given evidence in court.
	8. The following are further factors that point to the applicant’s guilt on a balance of probabilities.

Maintaining silence

* 1. The applicant’s defence was a bare denial. The applicant had the following opportunities to convey this bare denial but failed to do so. Instead he maintained an inexplicable silence:
		1. When the Chiya asked him to make a statement;
		2. At the criminal trial;
		3. When Mathanjana asked him for a statement;
		4. During his disciplinary hearing;
		5. At the appeal stage. (He chose not to appeal);
	2. The first occasion when the applicant said anything about his case was at the arbitration. Maintaining one’s silence can be understood in the context of one’s fear to incriminate oneself. In this case there was no question of the applicant incriminating himself. His version was that he simply did not know anything about the allegations in question and disputed them. Why he chose, after allegedly being advised by his union, not to make this bare denial known to the respondent and to the police was not explained.
	3. I raised this issue with Mr Madlala, the applicant’s representative, and inquired why the applicant had been advised in this manner and whether anyone from the trade union would be giving evidence. He submitted, *without taking the oath*, that the advice given to the applicant was a mistake. He did not explain how the mistake came about.
	4. I cannot accept Mr Madlala’s “explanation”. If it was a genuine error then he or some other union official ought to have given evidence on oath about how the error came about. I cannot accept that the decision to advise the applicant to maintain his silence would have been taken lightly. After all, the applicant’s future was at stake.
	5. The applicant for his part did not explain why he accepted the advice of his union, when clearly, on his own version, he knew nothing about the matter and had nothing to hide.

Alleged physical assault on the applicant

* 1. The applicant, when giving evidence, raised a very serious matter of his physical integrity being violated by the police while he was in their custody. He stated that he had been assaulted by them. Inexplicably, this very serious allegation was not put to Chiya when he was being cross examined. The applicant was furthermore ambivalent about whether it was even conveyed to the magistrate. In this regard it must be noted that the applicant stated in his evidence that he had engaged the services of an attorney during the criminal trial. But there is no evidence that the matter was even reported to the Independent Police investigation Directorate (IPID), nor is there any evidence that the applicant has instituted a damages claim against the SAPS.
	2. I find that the alleged assault on the applicant did not occur and is a recent fabrication.

Motive for persons to implicate the applicant

* 1. Mpofana, was on the applicant’s version, not known to him. As for his employment, the applicant, appears to have been a model employee having regard to him volunteering for duties that were out of his job description. In addition he had a clean disciplinary record. Why would Mpofana and the applicant’s superiors conspire to give evidence against him and have him dismissed? No motive was given by the applicant why these individuals would fabricate a case against him.

Inconsistency in the applicant’s version

* 1. The applicants version of the whereabouts of NDM3537 was not consistent. The applicant put to Chetty during cross examination that he would when giving evidence say that the Tractor had been lent to another district during the period in question. However when Mathanjana was being cross examined, it was put to him that the Tractor had in fact been in the workshop for the past 2 years.
	2. I find that a person that is speaking the truth will only have one version of events.

Irretrievable breakdown in employment relationship due to lack of trust

* 1. The respondent led evidence to show that the employment relationship had broken down irretrievably due to the applicant’s gross dishonesty and breach of trust. The applicant for his part disagreed during the pre-arb with this proposition. However he did not show, by way of evidence, why he considered that the relationship was intact or capable of being mended.
	2. Chetty gave evidence on the lack of trust between the parties. He was not cross examined on this issue.
	3. The applicant attempted to show, only in argument, that the employment relationship was not damaged, because the respondent had allocated alternative duties to the applicant while the matter was being investigated. During the pre-arb the applicant attempted to argue that he ought to have been suspended pending the investigation. I cannot accept this argument for two reasons:
		1. There was no evidence that any potential existed for the applicant to interfere with the investigation;
		2. There was no indication that the applicant would destroy any evidence;
		3. The applicant was deprived of any driving duties while the matter was being investigated. As such the potential of him repeating the mischief was eliminated.
	4. I do not interpret para 14.1 of the collective agreement as compelling the respondent to suspend an employee pending a disciplinary hearing. In any event the applicant failed to show any prejudice that he had suffered as a result of him not being suspended. Nor did he show that his performance of duties had the effect of mending or renewing trust between the parties.
	5. I find accordingly that the employment relationship was destroyed by the actions of the applicant.
1. The collective agreement provides for dismissal for theft of the respondent’s property. I find that that sanction was correctly applied in this case. For all the above reasons, I find the applicant’s dismissal to be both substantively and procedurally fair.
2. I propose to dismiss the application.

# AWARD

1. The application is dismissed.

Dated at DURBAN on this the 28th day of MAY 2013.

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R J PURSHOTAM

*Arbitrator*