



# ARBITRATION AWARD

Panellist/s: Leslie Martin  
Case No.: PSHS101-11/12  
Date of Award: 2-Jul-2012

**In the ARBITRATION between:**

**JOUBERT A**

(Union / Applicant)

and

**Department of Health- Western Cape**

(Respondent)

## **DETAILS OF HEARING AND REPRESENTATION**

1. The arbitration was scheduled at the Western Cape College of Nursing in Klipfontein Road Athlone and at the Department of Environmental Affairs, 6 Dorp Street, Cape Town on 18 January, 9 February, 1 March, 2 March, 27 March, 30 March, and on 3 May 2012. An extension for the submission of the award was granted. During such period further documentation was called for from the applicant party and the respondent was afforded an opportunity to respond thereto by no later than Thursday 28 June 2012.
2. The applicant, Mr. Andre Joubert (Joubert), was represented by Ms. C. Venter, a practising attorney. The respondent was represented by Ms. L. Abrahams, an advocate instructed by State Attorney, Ms. C. Bailey.

## **ISSUE TO BE DECIDED**

3. Was the dismissal of Joubert fair?

## **BACKGROUND TO THE ISSUE**

4. Joubert was dismissed on 5 April 2011 on charges of sexual harassment as contained in the Notice to attend a disciplinary hearing (pages 26 and 27 of the respondent's bundle of documents)
5. In terms of Section 138(7) of the Act, I am required to provide brief reasons with my award. Accordingly, I shall only refer to the evidence I consider relevant to determining the dispute between the parties.

## **SURVEY OF EVIDENCE AND ARGUMENT**

6. Each party handed a bundle of documents into evidence. The respondent objected to page 5 of the applicant's bundle of documents and the applicant is required to prove the document in its entirety.
7. The applicant objected to the additional document handed in by the respondent which appears to be a call log record and the respondent is required to prove the document in its entirety.
8. It was common cause between the parties that Joubert started to work for the respondent from 17 May 1983 until 5 April 2011 when he was dismissed. At the time of his dismissal Joubert was a deputy director administration and earned R348,000.00 (three hundred and forty eight thousand rand) p.a.
9. At the time of his dismissal on charges of sexual harassment arising out of an alleged incident on 1 November 2010, Joubert was occupied at the Brooklyn Chest Hospital (the hospital).
10. Ms Andrea van der Berg (van der Berg), an administrative officer at the hospital, Mr. Trevor Gandanamo (Gandenamo), a driver at the hospital, Mrs. Natalie Fabrick (Fabrick), a secretary at the Hospital, Mrs. Jean Jeanette Manuel (Manuel) a food manager at the hospital, Timothy Mark Gordon, an assistant nursing manager at the hospital, testified under oath for the respondent.
11. Joubert testified under oath on his own behalf. Mr Zane Arnoldus (Arnoldus), an employee of AFSOL, an expert witness regarding the tracking report generated by the tracking units of the government vehicles and in particular the tracking report dated 1 November 2010 of the Polo Vivo vehicle with registration number GCK 116 G, Mr. Allen Paulse (Paulse) a driver at the hospital, Mr. Kevin Lemmetjies (Lemmetjies), a handyman in the workshop at the hospital, Mr. Logan Dave Cloete (Cloete) a buyer in the workshop at the hospital, and Mr Isghaak Titus (Titus), testified under oath for the applicant.

## **THE EVIDENCE FOR THE RESPONDENT:**

12. At the time of the incident van der Berg resorted under the direct supervision of Joubert as her line manager. He was like a father figure to her and would regularly advise her on her personal problems which she brought to him. He was a mentoring person and would tell her to 'pull up her socks' and how not to lose her job.

13. Joubert's office was located next to van der Berg's until he moved his office further down the corridor to the end of the hallway. This move had occurred before 1 November 2010.
14. On her return from lunch around 13h30 on 1 November 2010 which van der Berg had spent with Gandanamo she encountered some protesting patients at the entrance to the hospital. They were not making a noise but were upset and wanted to speak to management.
15. She went to Joubert's office to report this to him. When she arrived at his office he unlocked the door and invited her in. After he had finished a phone-call with which he was busy he told her that he was aware of the protest and that he would be leaving for head office via the outside door to his office.
16. When she then got up to leave, Joubert got up from his desk and blocked the door to the hallway, effectively preventing her from leaving.
17. He then said to her "wanneer gaan jy dan vir my 'n naai gee".
18. When she asked him what he was doing and to open the door he smiled and said "komaan Andrea, jy weet jy skuld my al lankal." She backed away and he said to her "ek wil aan jou poesie vat".
19. She backed away into the boardroom where he touched her on her vagina and forced her to drop her slacks and panties. After he had looked at her exposed vagina he told her that he wanted to taste it the next time. Van der Berg could not say anything. She was confused and did not know what happened and wanted to get it over with.
20. After Joubert unlocked the office door and allowed her to leave Van der Berg went to her office and telephoned Gandanamo. When she saw Joubert coming down the passage she put down the telephone
21. When Gandanamo had thereafter come to her office as he could hear that she was upset, she told him how Joubert had touched her. They had spoken in her office. When Gandanamo had arrived at her office he had found the door open. At the time Gandanamo had also noticed Joubert's door open.
22. Thereafter she went to the smoking area where she had consulted her trade union representative, Andrews, who referred her to trade union official, Mr. Marius Rademeyer, with whom she then consulted the next day.
23. Later Joubert called van der Berg to his office where he showed her how the BMI works. She sat next to him reluctantly and when he could see that she had been crying he asked her why she was afraid of him.
24. When she told him that it was because of what had happened and that she was not comfortable with it he told her that she was a big girl and could handle it.
25. When she left the office he told her that she should not tell anyone what had happened.

26. At 16H00 van der Berg informed Astrid the driver in the lift club that she was not going to travel home with them. She did this because she did not want to speak to them about what had happened.
27. She then arranged to travel home that day with Gandanamo and they left around 16H30 which is the end of the working day for him.
28. While she was waiting for Gandanamo in the kitchen she spoke to Manual and informed her of the entire incident.
29. Manual had pressed her for a response after observing that she was not her usual self.
30. It came as a shock to Manual when van der Berg told her about Joubert's conduct in respect of her private parts as he is a married man and she was in a relationship.
31. Since the time that van der Berg was at the Hospital she had grown in stature, had a lively personality and was very confident when interacting with anyone yet she was respectful.
32. Many, especially the males, spoke ugly of van der Berg. Manual could not say that Van der Berg was her friend but she did not strike Manual as lying that day. She believed van der Berg and did not doubt her for one moment.
33. While van der Berg was relating the incident to Manual her cellphone rang and she related the entire incident to the person on the telephone. She was sobbing while doing so.
34. The following day van der Berg met with Rademeyer at the trade union offices and he arranged for the statement to be typed up. The statement is at page 42 of the respondent bundle and is the typed version of page 42 of the respondent bundle.
35. She also reported the matter to the police in Maitland where she received trauma counseling. Her statement to the police is at page 43 of the bundle and she had been to the police once since that.
36. That day she had been accompanied by Fabrik. On the way to the police station a call came in on van der Berg's cellphone which Fabrik answered in a disguised voice. The caller did not identify himself but she recognized Joubert's voice. He had also not asked why van der Berg was not at work.
37. Fabrik did not hear van der Berg making a comment to Witbooi to the effect that he must be glad that she got rid of Joubert.
38. She had also not heard van der Berg make light of the matter otherwise she would have reprimanded her.

39. When the members of the lift club were about to leave at the end of the day none of them knew why van der Berg was not travelling home with them that day. So Astrid sent van der Berg an sms to find out why.
40. Van der Berg also visited the doctor and is on medication for sleeplessness and depression. She also uses rescue drops for anxiety
41. The doctor also put her off work from 3 to 14 November 2010 as is evidenced by the medical certificate at page 65 of the respondent's bundle of documents.
42. Van der Berg also had 3 counseling sessions with a psychologist at ICAS through the employee assistance program.
43. This counseling had assisted her but now that she had to be involved with this case again she is required to go back for counseling.
44. The incident has brought about many changes in van der Berg's life. People are making snappy comments at work and she even has to be careful of what she says at home. Her 12 year old daughter had overheard her telling someone about the incident which resulted in her having to tell her daughter that it is not in order for someone to do what Joubert had done.
45. On 1 November 2010 Van der Berg had seen the workmen in Joubert's office and they had worked there only until lunchtime.
46. Lemmetjies would be lying if he testified that he was in Joubert's office around 13h30.
47. Cloete would be lying if he testified that he had seen her in Joubert's office around 14H30.
48. Pause would be lying if he testified that he had driven Joubert to Canal Walk Shopping Complex(Canal Walk) around 13H33 as reflected on the trip authority at page 5 of the applicant's bundle.
49. Van der Berg could not recall Joubert's requesting BAS reports from her or having a conversation about poor work performance on her part.
50. She was in fact under the impression that he was satisfied with her work.
51. Joubert would be lying if he testified that she had said to him that she had a bout of hay fever that day as a consequence of the grass being cut that day. No one had cut the grass that day.
52. She could also not recall his scolding her or shaking hands with her afterwards.
53. Joubert had spoken to her and Trevor that morning in her office. He had said to her that that she should be wary of Gandanamo as he messes up girls and then ditches them. She could not recall his having said anything about wedding bells.
54. Joubert had expressed his unhappiness with Gandanamo's being in her office but not about her work performance.

55. Van der Berg had testified at the disciplinary hearing that she had been involved in acting and was able to shed tears deliberately.
56. Van der Berg had not been involved in acting out lewd scenes of sexual intercourse in the workplace.
57. According to Gandanamo there was a good relationship between Joubert and Paulse, the former always preferring to interact with the latter regarding certain things.
58. It was also usual that only one person filled in a trip authority and for the use of the vehicle for the day. Gordon also found it strange that a passenger had authorized the trip authority. It was also strange to him that there were different handwritings on the trip authority. He also thought that the fact that Phillips being indicated as the driver while Paulse in fact drove the vehicle was fraudulent.
59. In the morning of 1 November while Gandanamo was sitting in van der Berg's office Joubert did say to them that he does not like the idea of Gandanamo sitting there as soon he would be hearing church bells. Gandanamo did not pay any attention to this remark as Joubert always says such things.

#### THE EVIDENCE FOR THE APPLICANT:

60. During the morning of 1 November 2010, when Paulse had come to Joubert for him to sign the trip authorities for the day, Joubert had told him that he wanted to go to ABSA after lunch to fetch the latest statement of the hospital facility board cooperative account.
61. Joubert had not mentioned at the disciplinary hearing that he had been to the ABSA bank at Canal Walk because his representative had decided how to run his case and therefore to concentrate on character evidence. Joubert had also not mentioned it at the disciplinary hearing because he was traumatised.
62. Paulse had also not testified at the disciplinary hearing that he had been at Canal Walk with Joubert as he had not been asked. He had been reminded only at these arbitration proceedings of their having been at Canal Walk.
63. Joubert did however mention at the disciplinary hearing that he was not in his office at the time of the alleged incident.
64. With reference to the trip authority Joubert testified that further trips could be added onto it after it had initially been signed, for example, by himself.
65. The trip authorization shows in Paulse's handwriting that Joubert was a passenger in the vehicle and the tracker record that it had left the premises of the hospital at 13h33,22.
66. Joubert had not returned to the hospital with the vehicle but with Pierre whom he had met at Canal Walk. Pierre is a sub-contractor who could advise Joubert on a motor for that main gate at the hospital.

67. Upon his leaving ABSA bank Joubert had seen Pierre exiting the mall through the revolving door at Canal Walk. Joubert had then met Pierre at the parking paypoint.
68. When Pierre told him that he was on his way to Macro Joubert took a lift with him as he would be passing the hospital and could then discuss the motor for the gate.
69. Joubert had then informed Paulse who was waiting in the parking area that he would be returning to the hospital with someone else, removed his laptop from the vehicle and had given Paulse the parking ticket to have it stamped at Pick 'n Pay to get the parking fee reduced or cancelled.
70. Paulse did this and returned to the hospital at 14H40. Joubert had in the meanwhile arrived at the hospital at around 14H20 with Pierre, who then advised him on the gate motor after assessing the gate.
71. Thereafter Joubert went to the nearby store to speak to Cloete regarding certain quotations for air-conditioning for Mostert's office.
72. Joubert then returned to his office and was seated at his desk at 14H20. Thereafter he had telephoned Cloete about the quotations for the air-conditioning which Cloete then brought a few minutes later.
73. Joubert did not adjust the time in his testimony to saying that at 14H20 he was at his desk on account of the telephone record showing that at that time he had made a phonecall from his extension.
74. When Cloete had brought the quotations he had passed the outside door of Joubert's office and had seen van der Berg standing in front of Joubert's desk. He proceeded around the building which he then entered through the main entrance. When he arrived at Joubert's office from the passage Cloete found that van der Berg had already left and gave the quotations to Joubert. Before he had entered Joubert's office he could see that van der Berg had already left.
75. Van der Berg had already left Joubert's office after he had told her that the demonstration of patients at the main entrance was none of her business and after he had reprimanded her about certain reports which she had not yet furnished him with notwithstanding the fact that he had asked her several times therefor.
76. He had also informed her about the unlikelihood of her getting a position that she had applied for. He had told her this in discussion about her poor work performance and because he knew that the position had already been filled.
77. After Cloete had then left Joubert had then telephoned van der Berg to come to his office in order to assist him manually with the completion of the BMI which task was the reason for his wanting the report from her.
78. She had then come to his office where she sat next to him at his desk and they filled in the BMI with her supplying the information therefor.
79. Van der Berg had also said that this delay in furnishing Joubert with the reports would not happen again.

80. When she left they had shaken hands and he had expressed that there were no hard feelings.
81. When van der Berg had left at the end of the day she had bid him “goodbye Andre”.
82. When Lemmetjies had returned from lunch at 13H30 that day there was nobody in Joubert’s office. Lemmetjies knew that it was around 13H30 as he had seen the time on a wall-clock in the office. He had looked at the clock out of habit.
83. Lemmetjies had also not seen anybody in Joubert’s office. Later he remembered that he had seen the 2 visitors to Joubert’s office i.e. the new employee whom Joubert had asked van der Berg to show around and one, Lisa Mostert, who had been for an interview.
84. He agrees that his testimony at this arbitration differs from that at the disciplinary hearing as in the former he had said that van der Berg had been in Joubert’s office and in the latter that she had not.
85. The procedures at the respondent’s requires that a disciplinary hearing be held within a month to 60 days of the day on which an employee is suspended.
86. Joubert was suspended on 5 November 2010 and his disciplinary hearing held on 5 February 2010, 3 months after his suspension.
87. It was clear from the outset of the disciplinary hearing that the chairperson, Miller, was biased in that he had addressed Swarts, Joubert’s representative, in a highhanded manner.
88. Miller had also refused to furnish Joubert with both copies of van der Berg’s statement for the purposes of a comparative cross examination thereon.
89. Titus testified to an interaction where he demonstrated how one rugby team would beat another, by lifting van der Berg onto a table and lying on top of her. Thereafter van der Berg had said “..hoe lekker nat is ek.”
90. In October 2011 she asked him to lie at these arbitration proceedings. This he deduced from her saying to him that she could not remember what one, Angela Claasen, had said in her report and that she herself could not remember what had happened.

#### **ANALYSIS OF EVIDENCE AND ARGUMENT**

91. An overview of the evidence presented at this arbitration shows that much hinges on specific timeframes within which most of the circumstances out of which the evidence arises is alleged to have taken place.
92. The point of departure is clearly that of van der Berg’s return from lunch at 13H30. This was her testimony and confirmed by that of Gandanamo.
93. It is at around 13H31 and for 5 to 10 minutes thereafter that she alleges the incident of sexual harassment occurred.

94. On the other hand it is clearly Joubert's defence that he was not in his office at that time as he was on his way to Canal Walk.
95. Regarding the presence or otherwise of van der Berg in his office at the time of the alleged incident Joubert's testimony as to his finding upon his return from Canal Walk the items which van der Berg had brought from the tuckshop as a bribe, on his version, locates her in his office between the time he alleges he left (13H20) and the time of his return (14H20).
96. When further consideration is then given to the testimony of Lemmetjies that he had returned to Joubert's office from lunch at 13H30 and that there was no one there at the time besides himself and other workmen until Joubert returned, the version of Joubert then locates van der Berg in his office between 13H20 and 13H30. On Joubert's version that is the only time that van der Berg could have delivered the items from the tuckshop to his office.
97. This would then place van der Berg in Joubert's office according to his version partially in her lunchtime and thereafter.
98. If this is the case then it would have been possible that van der Berg had come to Joubert's office according to the time reflected on the telephone records at around 13H20 when he was completing that telephone call reflected in the telephone records.
99. This would of course tie in with Manuel's testimony about what Lemmetjies had told her viz. that he was on lunch at the time of the alleged incident. Lemmetjies' testimony is that he had returned from lunch at 13H30 which he checked against the wallclock in Joubert's office. His testimony in this regard is accepted.
100. It is also important to note that the telephone record does not show a call being made at around the time that van der Berg said she entered Joubert's office after lunchtime (13h31), the time van der Berg alleges Joubert was on the phone.
101. This kind of discrepancy in the various times can only be justified through evidence of the time reflected in the telephone records and the time
102. Of van der Berg not being synchronised. There is no such evidence before me.
103. The testimony of van der Berg regarding her having brought the items from the tuck shop before going on lunch is accepted.
104. The value however that lies in this evidence is that it serves as an example of the untruthfulness or unreliability in the applicant party's testimony in particular that of Joubert.
105. A further untruth, is the fact that Joubert, in his statement pointed to a flavoured water bottle on his desk when van der Berg asked him what he wanted from the tuckshop (see A4 of the applicant's bundle, his written recollection of his activities on 1 November dated 4 November). The inference here is threefold viz/ that Joubert had himself emptied the bottle on his desk by drinking its contents / that he does drink flavoured water and thirdly that he had in fact requested a bottle of flavoured water. Joubert's testimony then is that he in fact does not drink flavoured

water. The fact of the matter is that is a further contradiction or untruth on the part of Joubert used to deliberately put van der Berg in a poor light. And then to show his resistance to being bribed in order to put himself in a good light.

106. Further untruths or inconsistencies are to be found in the testimony of Paulse too. This manifests itself in his testimony regarding the diligence and accuracy with which he completes the forms relating to travelling with the motor vehicles of the respondent. The evidence then adduced under cross examination reveals a story of a different kind where Paulse had in fact not completed such forms in accordance with what he himself testified the standard at the hospital was and which he testified was that he adhered to.
107. Notwithstanding the afforegoing the testimony of Paulse supports his having taken Joubert to Canal Walk on 1 November 2010. In this regard I must point out that the respondent has accepted that Paulse had in fact driven the motor vehicle to Canal Walk that day and that its argument is merely that Joubert was not in the vehicle at the time it departed from the hospital.
108. While the evidence suggests that Joubert prefers driving himself in his own vehicle on his version his vehicle was not available to him that day for the purposes of going to Canal Walk as it had been taken for a service.
109. I have therefore taken the liberty to call for the service records of the vehicle in order to have corroboration of the vehicle having gone for a service on 1 November 2010. This would support the reason for Joubert's having to have used Paulse to drive him to Canal Walk that day.
110. I have considered it necessary to obtain the vehicle's service record because of the many uncertainties that arise out of the evidence of the applicant.
111. In this regard I have accepted the document handed in by the applicant which reflects the servicing of the vehicle at Jimmy's Auto Service Centre on 1 November 2010.
112. I must also emphasize that Joubert's testimony regarding his vehicle having gone for a service is uncontested.
113. This accordingly increases the likelihood of Joubert's having gone to Canal Walk with Paulse using the Polo.
114. In respect of the medical evidence submitted by the respondent to demonstrate van der Berg's medical state after the alleged incident there is sufficient such evidence to suggest that she had suffered a traumatic experience on 1 November 2010. This is evidenced in particular by the medical certificate notwithstanding the fact that the nature of the illness is not disclosed.
115. Furthermore the evidence on the medical and psychological interventions that van der Berg received are commensurate with one having suffered the kind of trauma that one would after being subjected to the kind of abuse alleged by van der Berg.

116. It is clear from the evidence that Joubert had not raised at the disciplinary hearing the defence of his having been at the ABSA Bank Canal Walk or on his way there at the time of the alleged incident. This would clearly have had as a result that the alibi which he raises at this arbitration proceedings would not have been tested at the disciplinary hearing. Even his contention of his having at least placed before the disciplinary hearing that he was not in his office at the time of the alleged incident would not have allowed his version to have been thoroughly tested. These omissions of Joubert at the disciplinary proceedings would no doubt have contributed largely to his having been found guilty at that process and accordingly dismissed.
117. It is in fact strange that Joubert had not raised his alibi of having gone to Canal Walk on 1 November 2010 at the disciplinary hearing, especially in the light of the fact that he had written down on Thursday 4 November 2010 ;that he had gone to Canal Walk. This brings into further question the fact that the alibi is omitted from his statement at the police on 7 December 2010. These omissions are glaring to such an extent that it brings into question even whether Joubert had in fact written the statement on 4 November 2010 and whether he had in fact known on 4 November 2010 that he had been to Canal Walk and therefore whether he had been there at all.
118. There is however no evidence before me to support the contention that this statement is a recent fabrication on the part of Joubert. It is in fact to be noted that Joubert had asked the respondent for a copy of his statement and that the respondent had refused to furnish him with it, leaving him to obtain it by way of a subpoena.
119. It is however not strange that Paulse had not been asked at the disciplinary hearing about the trip to Canal Walk as nowhere in the disciplinary hearing is mention made thereof. Paulse had been called to the disciplinary hearing to testify regarding remarks van der Berg allegedly made to the drivers after Joubert had been dismissed.
120. It was Joubert's contention that he had not raised the visit to canal Walk in his defence as his representative at the disciplinary hearing had decided that they should concentrate on character evidence. He had also not raised it as he had not had sight of the tracker report at the time and because he was traumatised.
121. It is worth noting that none of the people that Joubert testified he spoke to or interacted with that day were called to testify at the arbitration in support of his testimony regarding his interaction with them on his "ground rounds". This is so with the exception of only Cloete and Paulse.
122. Save therefore for Paulse's testimony there is no other corroboration of Joubert's having left the hospital grounds that day to go to Canal Walk.
123. It has also been generally accepted throughout these proceedings that the times of the vehicle tracking system and that of van der Berg and its telephone records are synchronized. This being the case these time frames testified to by all parties are accepted as correct.

124. It is furthermore clear from the evidence of van der Berg that at the time she entered Joubert's office around 13H31 he was on the phone. The telephone record of the calls made from Joubert's extension shows however that no telephone call had been made at or around that time.
125. The last telephone call made by Joubert before he went on lunch is calculated from this document to have ended around 13H19 and 18 seconds on 1 November 2010. The record shows then that the next call was made at 14H21, at which time, it was the testimony of Joubert, he was already behind his desk after having arrived back at the hospital from Canal Walk. When consideration is given to Joubert's statements at Page 33 of the respondent's bundle his evidence is that he had left his office between 13h05 and 13H10. This shows a time discrepancy of between 10 and 15 minutes between this and his testimony at the arbitration regarding the time he left his office viz. 13H20 or shortly thereafter according to the telephone records.
126. With reference to page 33 of the respondent's bundle of documents Joubert's statement to the police the evidence therein contained shows that Joubert had in fact not left the hospital grounds. He had in terms of this statement remained on the hospital grounds and had not gone to Canal Walk.
127. Further discrepancies in the time lines attested to by Joubert in respect of specific timeframes are in respect of his alleged time of arrival back at the hospital from Canal Walk. At page 33 of the bundle of documents it shows that he was at his desk just after 14H00 while at this arbitration he testified that he had arrived at the hospital with Pierre at around 14H20 and was at his desk at 14H21, the time at which the telephone records show a phone-call had been made from his extension.
128. In dealing further with the question of whether Joubert was at Canal Walk or not
129. the proximity of the ABSA bank to the revolving door and parking paypoint is sufficiently close for me to accept Joubert's testimony that it was when he exited the ABSA Bank that he had seen Pierre going through the revolving door and had then met and spoken with him at the paypoint.
130. The major difficulty in this matter is whether that which had allegedly been done within particular timeframes could in fact have been done within such time frame. Most of the evidence e.g. the time it takes to travel from the hospital to Canal Walk suggests that it can probably be done. Even the time that it would have taken Joubert to get the information from Cloete which he testified he did is not improbable to include the time so spent within the timeframes generally.
131. Notwithstanding this it is still in question whether Joubert was in fact at the ABSA Bank Canal Walk on 1 November. The testimony around the manner in which a trip authority may be dealt with places in question whether a trip authority is in fact what it purports to be. It is clear that further evidence would have to be adduced in order to support the document.
132. When considering all the evidence pertaining to the completion of a trip authority there essentially emerges 2 opposing views viz. that the trip authority may be completed by several persons and on different dates and on the other hand that the trip authority must be completed by one person with an appropriate higher authority approving it.

133. A difficulty with the former is of course that it would be easy for a driver to then fabricate trips.
134. In this regard therefore the testimony of Paulse would be of critical importance. Firstly then his testimony was that the trip authority of 1 November 2010 had been filled in by Mvimbi while Paulse filled in his own identity number and the name of the passenger. This he did on 1 November 2010.
135. Paulse conceded that it was possible to fill in the passengers details afterwards. He also confirmed that he had access to the cabinet in which the trip authorities are stored. He denied having filled in Joubert's name as a passenger retrospectively. He had filled Joubert's name in when he boarded the vehicle and told him he wanted to be at Century City.
136. Paulse however confirmed with reference to trip authorities at pages 1 and 2 of the respondent bundle that he had omitted to write in the names of the passengers on that occasion stating as the reason therefor that he had forgotten to do so.
137. Paulse had also not testified at the disciplinary hearing about their being at Canal Walk as no one had asked him about it. Joubert had also not asked him such a question at the disciplinary hearing.
138. Joubert had asked him about their being at Canal Walk when this arbitration had come about. This had reminded him that they were at Canal Walk on 1 November 2010.
139. As stated above the evidence shows further that it was never contested that Paulse was in fact the driver of the vehicle on its trip to Canal Walk on 1 November 2010.
140. There is also no evidence before this arbitration regarding his having been there for any other reason than taking Joubert there.
141. It is clear from the evidence presented by the respondent that Gandanamo and Manuel gained knowledge of the alleged sexual harassment from van der Berg herself. It is also clear that they believed what she had told them and that she was in a distraught state at the time.
142. Gandanamo's testimony under cross examination was that when he came to van der Berg's office after she had telephoned him he did not see Joubert but saw his office door open.
143. It is further worth noting that when van der Berg stopped Gandanamo from confronting Joubert her reason for doing so was not that Joubert had left for head office as she averred he had told her, or that he was not in his office as she had seen him leaving his office when first she was about to call Gandanamo. She had simply told Gandanamo not to go to Joubert's office.
144. Gandanamo's testimony was clearly that of respecting van der Berg's wish not to confront Joubert.

145. Manuel testified that Lemmetjies told her he was on his nerves as Joubert had asked him to testify that he was there at the time but he was not there at the time as he was on lunch.
146. The significance of this is that Lemmetjies avers here that this incident had occurred during lunchtime and not thereafter when he had returned from lunch. This is in accordance with his ultimate testimony at this arbitration.
147. The specific trip authority pertaining to the tracker record of the Polo leaving the hospital at 13h33.22 on 1 November is that at page 2 of the respondent's bundle of documents. It shows that the vehicle had been requested for 07H00 on that day.
148. Joubert's testimony is that during that morning Paulse approached him with the trip authorities for the day. He told Paulse that he envisaged going to ABSA after lunch for the latest statement of hospital facility board cooperative account.
149. It was Paulse's testimony that Joubert had told him that morning he wanted to go to Canal Walk.
150. It is furthermore not beyond the realms of probability that Joubert had intended to go to the Green Cross shop at Canal Walk and then to attend to the hospital's banking requirements at the same time.
151. During that morning Joubert had seen Trevor and van der Berg in her office and had commented thereon. He had made a remark pertaining to "wedding bells" ringing from the frequency of their being together in the workplace. He had later passed her office and she was not there. In response thereto he had left a note for van der Berg to phone him. He had wanted to know about a report that he had requested from her.
152. Regarding her going to the tuckshop that morning her evidence and the version put to her in cross examination suggests that she had gone to and returned from the tuckshop before lunch. Joubert's testimony on the other hand, as stated above, was that he found the items from the tuckshop in his office after he had returned from Canal Walk. The inference is that she had not brought the items from the tuckshop at the time she said as he would have known thereof. I have however accepted the testimony of van der Berg in this regard.
153. The testimony of Joubert was that when he had left his office during lunchtime and was inspecting the automation regarding the gate he saw Paulse coming whereupon he boarded the vehicle and left for Canal Walk.
154. The testimony of Arnoldus is that the tracker report reflects the time of departure of the vehicle from the hospital as being 13h33 which is taken from the time the vehicle was started. This time he said cannot be manipulated. The time of arrival of the vehicle back at the hospital was 14H40.
155. Very important too is the statement of Joubert at page A4 made already on 4 November 2010, only 3 days after the alleged incident. This statement shows clearly that Joubert recollected having been at Canal Walk on the day of the incident.

156. The testimony of Joubert pertaining to Pierre is corroborated only through Paulse's testimony that Joubert had told him that he would be returning to the hospital with someone else and that he in fact then did return alone at 14H40.
157. One must further consider the probability of Joubert's leaving the hospital premises with Paulse at 13h33 and arriving at Century City at 13H42, walking to the ABSA bank doing business in the bank, having a discussion at Century City with Pierre, informing Paulse of his travelling back to the hospital with Pierre, having a discussion with Pierre about the gate at the hospital, his walking to the store and then to his office to be seated there by 14H20.
158. Regarding the trip authorization and the testimony of both Joubert and Paulse as to how these are filled in leaves me with the understanding that it is, in this workplace, merely a document which records the fact that the vehicle has been requested and the work that it has done. It is clear from the testimony of both Joubert and Paulse that it is a document that does not necessarily record in advance the purpose for which the vehicle would be used. It can be filled in as the day progresses and the need for the vehicle arises.
159. The evidence is that the document is also not used for the purposes of financial reckoning or accounting within the respondent.
160. It is therefore clear too from the testimony of both Joubert and Paulse that the document can be manipulated retrospectively. This is however not to say that in this particular instance that it had been manipulated retrospectively adding to it the name of Joubert as a passenger and also the destination, Canal Walk/ABSA.
161. Can it be said however that Joubert became so lucky that fortune presented him with a tracker report proving the time of departure of a vehicle from the hospital to be almost exactly that as the time that van der Berg alleges the incident occurred? This tracker report in fact shows the vehicle moving to the gate of the hospital as if by pre arrangement.
162. As I have said above I would require evidence that suggests that the time of  
163. Van der Berg is ahead of that on the telephone system. There would have to be shown that the time of Joubert's making the phonecall at 13H12 and ending around 13H20 does not correlate with the time of van der Berg, which I presume is the time that she referred to when knocking on Joubert's office door upon her return from lunch(13h31). The telephone record shows no telephone call made from Joubert's extension at that time.
164. It is clear from the evidence that Joubert denies that the incident had taken place. The evidence is clear that the only persons at the alleged incident were van der Berg herself and Joubert. The further issue that arises in such circumstances is that of the testimony of the single witness and the caution with which it must be approached.
165. The evidence shows that van der Berg did not appreciate the attitude of Joubert to the relationship between herself and Gandanamo. Regarding the comment that Joubert made about "wedding bells" this was confirmed by Gandanamo and contradicted by van der Berg. She testified rather to Joubert's having said something directed rather at her breaking off her relationship with Gandanamo,

which was not confirmed by Gandanamo. Gandanamo did however testify that Joubert was given to making such remarks.

166. This, and remarks of Joubert such as Gandanamo's messing up and ditching girls, could indicate a circumstance prevailing for van der Berg that Joubert wanted to terminate the relationship between herself and Gandanamo and which could serve as motivation for her wanting to harm Joubert.
167. Regarding the actual incident of sexual harassment alleged by van der Berg her own testimony shows scant resistance to the advances of Joubert. Her testimony shows further no attempt on her part to clearly reject or refuse firmly such advances.
168. Her testimony shows a succumbing to an allegedly unwanted advance in a manner contrary to what the evidence shows her disposition to be. It was the testimony of Manuel that van der Berg was a person with much 'spunk', who stood her ground against anyone, regardless of who it might be. The evidence in general showed her addressing Joubert in precisely such a confident manner when interacting with him in the workplace.
169. Furthermore, the evidence through the testimony of Titus shows van der Berg's not shying away from an expression of conduct with sexual connotations. In this regard too the testimony of Titus was unchallenged in cross examination while van der Berg mustered only a bald denial of the incident having occurred. I accept the testimony of Titus in respect of their acting out a sexual act and the words uttered thereafter by van der Berg.
170. Regarding even the alleged incident in Joubert's office it is difficult to conclude that van der Berg was not an unwilling participant therein. Her testimony was that she wanted to get it done with as she knew Joubert was wanting to leave to go to head office as he allegedly told her. Surely van der Berg should have concluded that Joubert would leave anyway thereby releasing her from her ordeal. She nonetheless chose to expose her private parts in order to get it over with.
171. What is also strange in the alleged interaction between van der Berg and Joubert and which brings into further question whether van der Berg was a willing participant or not is the fact that she backed away from Joubert into the boardroom. From the stance that van der Berg alleges prevailed when Joubert first blocked her at the door to the passage leads me to conclude that the natural direction for her to have backed into was the door which exited Joubert's office to the outside.
172. In the circumstances it would be well to approach with caution the evidence of van der Berg as there is no corroborating evidence in support of her contention.
173. The evidence of Gandanamo, Fabrik and Manuel is by and large evidence of their interpretation of her demeanor and their belief of what she told them.
174. I further find it strange that van der Berg had virtually gone straight from the scene of the alleged sexual harassment by Joubert to her shop steward Andrews to enquire about this conduct. This is hardly the conduct of a woman who had been so wronged that she had required medical intervention of a psychological nature. Her recovery from one who was confused by what had happened to a calculated

step such as reporting the incident to her union representative is strange. The haste with which she had done that belies the extent to which the evidence suggests she was distraught. It is also noted that there is no medical evidence which shows what the cause of the medical condition was.

175. While I am of the view that such psychological issues could be caused by an interaction such as van der Berg alleges had happened I am not persuaded that this requires an element of unwillingness to prevail. I am of the view that even if van der Berg were a willing participant in the alleged incident the psychological consequences could be the same as if she were an unwilling participant. It would depend on the motive for her being part of the interaction.
176. In the circumstances and having considered all the evidence presented at this arbitration I find that on a balance of probabilities the respondent has not adduced sufficient evidence to prove that the dismissal of Joubert was fair. I accordingly find that the dismissal of Joubert was substantively unfair.
177. In considering the fairness of the procedure afforded Joubert the evidence shows that there were certain timeframes in its own procedure that the respondent had failed to adhere to. It had, for example, failed to have the disciplinary hearing within 60 days of Joubert's having been suspended. I find however that Joubert had not suffered any prejudice as a consequence of such delay and accordingly find this insufficient to consider the dismissal procedurally unfair for this reason. Even the fact that Joubert was notified of the outcome of his disciplinary hearing more quickly than the 5 days stipulated in the respondent's rules cannot be said to have rendered the dismissal procedurally unfair.
178. The fact that the disciplinary chairperson had not allowed cross examination on both statements of van der Berg that had been handed into evidence is unfair but again not sufficiently so to render the entire procedure afforded Joubert unfair.
179. The evidence in fact shows that Joubert had been afforded a substantively fair procedure. He had been given ample notice of the date of his disciplinary hearing and had been allowed to call and cross examine witnesses. He had been afforded his right to a representative and his right to appeal the outcome of his disciplinary hearing.
180. Having considered all the evidence presented at this arbitration I find that the dismissal of Joubert was procedurally fair but substantively unfair.
181. I therefore find it appropriate that Joubert be reinstated into the position he held prior to his dismissal on 5 April 2011. I do however find that Joubert had contributed significantly to his own dismissal especially in that he had not raised at the disciplinary hearing the fact that he had been at Canal Walk on 1 November 2010.
182. I find therefore that the respondent should not be held liable for the payment of the full income lost subsequent to the date of Joubert's dismissal on 5 April 2011. The contribution that the respondent ought to pay is encouraged by the fact that it had failed to furnish Joubert timeously with a copy of his statement made on 4 November 2010.

**AWARD:**

183. In making this award I have taken into account the provisions of the Labour Relations Act 66 of 1995 as amended in particular sections 193 and 194.
184. I therefore order the respondent to reinstate Joubert into the position he held prior to his dismissal on 5 April 2011 and that such reinstatement be effected by no later than Monday 9 July 2012.
185. I further order the respondent to pay Joubert an amount equivalent to 6 months of the salary he lost as a consequence of his unfair dismissal and in the amount of R174,000,00 (6 X R29,000.00 (monthly salary)), which amount is due and payable by no later than Friday 13 July 2012 after which, if not paid, it will attract interest at the legal rate of interest.

Panellist/s: **Leslie Martin**  
Sector: **Public Health & Social Development**