

**IN THE LABOUR APPEAL COURT**

**HELD AT DURBAN**

**APPEAL NO: DA3/00**

In the appeal of:

**THE ADMINISTRATOR OF THE PROVINCE OF  
KWAZULU NATAL**

**APPELLANT**

and

**S. LOT**

**RESPONDENT**

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**JUDGMENT**

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**JOFFE AJA:**

1. The court a quo determined that the dismissal of the present respondent by the present appellant was an unfair labour practice. It ordered the reinstatement of the respondent. The appellant appeals against this determination.
2. The events which gave rise to the dismissal of the respondent occurred on 3 November 1994. A disciplinary inquiry was held in the magistrates' court on 10 July 1995. The respondent was found guilty of the unlawful possession of certain pharmaceutical products which were the property of the appellant. The presiding officer recommended that a fine be imposed on respondent, and, in addition thereto, respondent be transferred to another post within the

department wherein he was employed.

3. Respondent appealed against the finding of guilt. He was informed by letter dated 5 September 1996 that the appeal was dismissed. The proceedings in the court a quo commenced early in 1997. The hearing seems to have taken place some time in 1999.
4. This account of the history of the matter is relevant in the assessment of the credibility of the various witnesses and the cogency of their evidence. The witnesses, who were called on behalf the appellant, testified as to events that occurred during the course of their working day, more than four years prior thereto. It would be surprising, if, in that time, their memory of the events of 4 November 1994 had not become somewhat clouded. Allowance must be made for this in determining their credibility and the cogency of their evidence. The same applies, but to a lesser degree, in the case of the respondent. He has a personal interest in the events. This would tend to keep his memory of the events sharp and more focussed. Nonetheless the time elapsed would impact on his memory as well.
5. Difficulties were encountered in the preparation of the record. The recording of the evidence of Mr. J.F. Khumalo, appellant's last witness, and the commencement of respondent's evidence -in-chief was lost. Appellant's attorney of record reconstructed that portion of the record, principally from the hand-written notes of the presiding officer in the court a quo. There is no suggestion that the record, as reconstructed, is not an accurate reflection of the proceedings in the court a quo.
6. At the hearing in the court a quo, appellant adduced the evidence of the following witnesses;  
Mr. T Zulu, he is a security guard in the employ of appellant at the Addington Hospital. He originally apprehended respondent

Mr. H.J. Coetzee, he is a senior security officer in the employ of the appellant at the Addington Hospital. At the time of the relevant events he was a security officer and Mr Zulu's superior.

Mr. D.R Gooden, he is the chief pharmacist at the Addington Hospital. At the time of the relevant events he was the principal pharmacist.

Mr B.W. Munsamy, he was a pharmacy assistant at the Addington Hospital.

Mr. J.F. Khumalo. He was the deputy director of the Provincial Services.

7. Respondent testified at the hearing. He did not call any other witnesses. At the time of the events respondent was employed as a pharmacy assistant at the Addington hospital.
8. The case advanced against respondent relies principally on the evidence of Mr. Zulu. He was on duty at the gate in front of the Addington hospital. He saw the respondent leaving the hospital. His attention was attracted to the respondent by reason of the fact that respondent was carrying a jacket under his arm. It appeared to him that there were bulges in the jacket. He asked to see the jacket. Respondent continued walking. When Zulu started following respondent, respondent commenced running. Mr Zulu ran after him. As they approached a police station, respondent slowed down. Mr Zulu caught up to respondent and apprehended him. They went into the police station. Members of the South African Police Services searched the jacket at the request of Mr Zulu. They found pharmaceutical products in the pockets. Mr Coetzee was summoned. Thereafter together with Mr Coetzee, Mr Zulu and respondent returned to the security office at the Addington hospital. Mr Gooden was called to identify the pharmaceutical products as being the property of Addington hospital and to determine their cost. All this he did. Thereafter Mr Coetzee and Mr Zulu took respondent back to the police station where he was charged.
9. Respondent testified that he had arranged to leave work on the day in

question at 12h00. He had arranged a lift with a friend. His friend's car was to be parked in front of the Addington hospital. In addition to his allocated duties that day, respondent had agreed to assist a colleague Mr Munsamy. Mr Munsamy's function that day was, inter alia, to recover excess medicines from certain wards at the Addington hospital. Respondent did this for him. He placed the excess medicines in a plastic bag. Whilst going back to the pharmacy he decided to approach the exit of the hospital to see if his friend's car was there. He confirmed that the car was there. He turned to go back into the hospital to go to the pharmacy. At that stage he was still well within the hospital's premises. Mr Zulu approached him, grabbed him and took him off to the police station. At the time he, that is respondent, was wearing a white jacket which was part of his hospital attire. He did not have a jacket under his arm.

10. The court a quo found that neither Mr Zulu nor respondent were good witnesses-the latter being assessed as a slightly better witness than the former. The evidence of the other witnesses adduced by appellant was not regarded as helpful, as they were not eye witnesses. Finally, the court a quo found, that the respondent's version was slightly more probable than the version advanced by Mr Zulu.
11. The presiding officer in the court a quo misdirected herself in typifying respondent's version as being more probable than Mr Zulu's version. The two versions have already been set out. On the mere reading of respondent's version, its inherent improbability is apparent. Why Mr Zulu should behave in such an inexplicable manner is not apparent. Not only is there no basis for his inexplicable conduct but a mala fide motive for such conduct is expressly disavowed by respondent.
12. In addition to misdirecting herself as to the basic improbability inherent in respondent's version, the presiding officer in the court a quo also failed to

take into account evidence which tends to corroborate Mr Zulu's evidence.

13. It is central to respondent's version that he was wearing a white hospital jacket at the time he was apprehended. Mr Zulu testified that respondent was carrying a jacket under his arm. He could not recall the colour of the jacket but he emphasised that it was not a white jacket. Mr Coetzee testified that when he saw the respondent at the police station, he saw a leather jacket on the counter. He did not see a white jacket. Likewise Mr Gooden testified that when he saw the respondent in the security department's office, respondent was not wearing a jacket. He did not see a white jacket in the office. He testified that respondent was wearing a windbreaker. Counsel for the respondent pointed to the different descriptions of the garment that respondent was wearing. Clearly there are differences. All the witnesses however concur that respondent was not wearing a white jacket. It is not suggested, nor can it be suggested, that the three witnesses who testified in regard to the jacket conspired against respondent. In the absence of such conspiracy, the reason for their different descriptions of the jacket, must be found elsewhere. It is probably to be found in the time lapse alluded to earlier. In the circumstances the court a quo should have found that the evidence of Mr Coetzee and Mr Gooden in regard to the absence of the white jacket, corroborated Mr Zulu's evidence.
14. On respondent's version the pharmaceutical products found in his possession were contained in a plastic bag. According to Mr Zulu they were secreted in the pocket or pockets of the jacket which respondent carried under his arm. Mr Coetzee testified that the products were taken back to the hospital in a large official envelope. Mr Gooden testified that he did not see a plastic bag used to collect medicines from the wards in the office of the security department. Again this evidence, and in particular Mr Coetzee's evidence, corroborates Mr Zulu's version. If the pharmaceutical products were taken to the police station in a plastic container, it is probable that they would have

been taken back to the hospital in the same container. It would not have been necessary to place them in an envelope. The absence of the plastic container as testified to by Mr Coetzee and Mr Gooden again tends to corroborate Mr Zulu's evidence.

15. Finally in this regard Mr Coetzee testified that whilst respondent did not say that he stole the pharmaceutical products, he did apologise and asked that the charges against him be dropped. Mr Gooden testified to a similar effect. Whilst there may not have been an express admission of guilt, the nature of the apology tendered by respondent is, in the context, tantamount to such a confession. Moreover any apology emanating from respondent is totally inconsistent with his version of the facts. On his version, he should have been seeking an apology, not tendering one. Again this evidence tends to corroborate Mr Zulu's evidence.
16. The court a quo was not impressed with Mr Zulu's evidence. Counsel for the respondent likewise submitted that his evidence is unacceptable. He certainly cannot be described as a good witness. As already intimated, the reason may be found in the lapse of time alluded to. At the end of the day, however, his evidence cannot be rejected, nor was it rejected by the court a quo. Indeed, regard being had to the corroboration emanating from the evidence of Mr Coetzee and Mr Gooden, Mr Zulu's evidence must be accepted.
17. Weighing up the two versions that were before the court a quo, the court a quo erred in finding that the appellant had not discharged the onus resting upon it. The court a quo should have found that appellant had proved on a balance of probability that respondent was guilty of the unlawful possession of the pharmaceutical products which were the property of the appellant. That being so, the court a quo erred in finding that the dismissal of the respondent constituted an unfair labour practice. It was not contended on behalf of the respondent that dismissal was not an appropriate sanction in the event of it

being found that appellant had discharged the onus resting on it. The appeal accordingly falls to be upheld.

18. As far as costs are concerned, there is no good reason why costs should not follow the result in both courts.

19. The following order is made:

1. The appeal is upheld with costs
2. The order of the court a quo is set aside and substituted with the following order:  
“The application is dismissed with costs”

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M M JOFFE  
ACTING JUDGE OF APPEAL

I agree

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R M M ZONDO  
JUDGE PRESIDENT

I agree

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M T R MOGOENG  
JUDGE OF APPEAL

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| Counsel for Appellant:         | Adv. R.J Seggie              |
| Attorney for Appellant:        | Shepstone & Wylie Tomlinsons |
| Representative for Respondent: | Mr I. Lawrence               |
| Attorney for Respondent:       | Garlicke & Bousfield Inc.    |

Date of hearing: 25 August, 2000  
Date of judgment: 20 September 2000