

SOUTH AFRICA / JUDGMENT

Bam v Safety and Security Sectoral Bargaining Council and Others (C148/2017) [2025] ZALCCT 3 (8 January 2025)

[2025] ZALCCT 3

COURT

Labour Court Cape Town

BEFORE

R Lagrange

CASE / FILE NUMBER

C148/2017

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FLYNOTES:

LABOUR – Dismissal – Shoplifting – Police officer found with unpaid items – Disciplinary charges included giving false name and address when arrested – Arbitrator upheld substantive fairness of dismissal – Employee making factual allegations in review which not part of evidence before arbitrator – Arbitrator refused to allow additional cross-examination of witness – Applicant wished to recall witness to impugn her credibility – Arbitrator faced with contrived and inherently implausible version by applicant and her mother – Application to review arbitration award dismissed.

THE LABOUR COURT OF
SOUTH AFRICA
AT CAPE TOWN
Not Reportable/Of
interest to other judges
Case
no: C 148/2017
In

the matter between:	NOREEN BAM First Applicant and SAFETY AND SECURITY SECTORAL BARGAINING COUNCIL First Respondent J P HANEKOM (N.O.) Second Respondent THE MINISTER OF POLICE (N.O.) Third Respondent THE NATIONAL COMMISSIONER OF THE SOUTH AFRICAN POLICE SERVICE (N.O.) Fourth Respondent
Heard:	17 April 2024
Delivered:	8 January 2025
Summary:	(Review application – Unfair dismissal for misconduct – SAPS Disciplinary regulation 20 (q) – failing to uphold employer’s interest by shoplifting – Dishonestly giving false name at time of arrest - Application dismissed)

JUDGMENT

LAGRANGE, J

Introduction

- [1] This is an application to review and set aside an arbitration award in which the arbitrator upheld the substantive fairness of the dismissal of the applicant, Ms N Bam (‘Bam’), who was employed as a sergeant in the police service. The application was first enrolled in November 2018 but was postponed sine die owing to the withdrawal of Bam’s attorney and the judge’s stipulation that the matter could only be re-enrolled once the taxed costs of the postponement had been paid by her.

Background

- [2] Bam was called to a disciplinary hearing and dismissed on 4 December 2014 on charges of contravening Regulation 20(q) of the South African Police Disciplinary Regulations of 2006 in that Bam failed to uphold the interest of the employer by unlawfully removing items from the shelves at Checkers Hyper and further that Bam failed to act honestly by giving a false name and address when arrested. At the time Bam was serving at Mowbray police station.
- [3] She was found guilty and dismissed on 24 August 2015. At the arbitration hearing she only disputed the substantive fairness of her dismissal.
- [4] Evidence was led of Sergeant D Vergotine ('Vergotine'), from Parow police station, who had arrested the applicant and her mother and returned the stolen goods found in their possession to the store. She testified that the applicant gave a false name, asked if her mother could not take the blame, was very nervous and asked not to be detained. At the police station, she repeated her plea not to be arrested and asked if her mother could not take the blame. Her repeated request to find another way of dealing with it rather than arresting her made SV wonder why she was so persistent about this issue. This evidence was not contested.
- [5] Colonel M Dyers was the station commander at Mowbray SAPS where Bam. Bam did not report for work on the Monday after her arrest and Colonel Dyers first learnt of her arrest from Parow police station later in the day. Bam did not open up to her about what happened when she was compiling a disciplinary report. She testified she could not trust her on account of the serious nature of her misconduct.
- [6] The third witness was a security officer at the store, Ms P Zinxondo ('Zinxondo'). She saw Bam and her mother loading items from a store trolley into a black and white bag and a baby bag. At the till they only paid for certain items and did not pay for anything in the bags. The alarm went off when they left the store and Zinxondo found unpaid for store items in the bags. Bam gave her name as Suzette Karelse, the name of a singer. Bam begged her to let them go and offered to draw R 1,000-00 to pay for the stolen items. The alarm had been activated by unscanned tags on meat packets. She remembered that Bam and her mother had a navy bag (a non-branded shopping bag) and a black and white bag. They had one Checkers bag as well when they were leaving the store. She denied they had any Cash Crusader or Game plastic bags as claimed by Bam
- [7] Bam testified she and her mother had gone shopping on the day. While she had been busy changing her baby's nappy in the car, an unknown man sold her mother something. She was unaware of this transaction at the time and was drowsy from medication she was taking. She claimed that when they entered Checkers the alarm went off. This allegation was not canvassed with Zinxondo when she was cross-examined by Bam's attorney. The security officer did not look in the two bags they were carrying but taped the baby bag and a Game and Cash Crusaders packets, containing inter alia globes (not in the list). Zinxondo testified that she never saw any Game or Cash Crusaders packets.

[8] The alarm went off when they exited after buying some groceries. When Zinqxondo emptied the bags in a trolley, she found the meat her mother had bought from the stranger. Bam testified that this was the first time she became aware of her mother's purchase. Zinqxondo made a list of the stolen goods and according to Bam she included items they had paid for to build a stronger case against them. Bam denied she had identified herself as 'Suzette Karelse'. Rather it was her mother who identified her this way. The appellation had been Bam's nickname as a child on account of her singing. Zinqxondo had testified that all the items which were emptied from the bags were scanned by her at a till to obtain the prices, which appear on the annexure to the SAPS 299 form which records the stolen property returned to the owner. Zinqxondo also testified that the goods found in the two bags amounted to over R1,000-00, including the meat items mentioned. These were all listed in the annexure to the SAPS 299 form. She agreed under cross-examination that the number of items stolen which was a factor in deciding whether to accept and

admission of guilt fine.

[9] Bam's mother testified that she had bought meat items from a stranger for R 50-00 while her daughter was busy with her baby. According to the list of returned stolen goods, the value of fresh meet items came to about R 440-00. She felt sorry for the man who begged her to buy the goods and did not have a proper look at them. He emptied the goods into her black and white handbag. Then they went and shopped at Game, before going to Checkers. She denied they stole anything from Checkers.

The arbitrator's findings

[10] In summary, the arbitrator found that:

10.1 Vergotini's evidence of Bam's involvement was clear. Bam did not dispute her evidence of the list of stolen items Zinqxondo handed to Checkers.

10.2 At the time of the incident, Bam had not made any claim made that some goods found in the bags were from Cash Crusaders or Game. Zinqxondo corroborated Vergotini's evidence there were no plastic bags from Cash Crusaders or Game.

10.3 It was Bam who had used a false name when confirming disposal of stolen property.

10.4 Dyer's evidence on the breakdown of the relationship was not really contested by Bam.

10.5 Zinqxondo was honest and admitted not being able to see what Bam and her mother loaded from the trolley into their bags. She accepted that Bam had begged Zinqxondo to release her so she could draw R 1,000.00 from an ATM. It was unlikely she would fabricate evidence in such detail.

10.6 Bam did not dispute that Zinqxondo had returned the Checkers packet containing the items they had paid for together with the slip.

10.7 Bam did not dispute that it was the meat packets which triggered the alarm.

10.8 Bam's version was based on simple denial.

10.9 Zinqxondo had no motive to falsely implicate Bam by adding items to the list of stolen ones. The list of items provided by her when the goods were returned to Checkers was not disputed by Bam or her mother at the time as comprising all the stolen items. It was unlikely that Bam would have given her written consent to the return of the goods listed to Checkers without a protest. In passing, it should be noted that Bam did not consent in her own name, but signed as 'S Karelse'.

10.10 Bam's mother contradicted herself on the shops they visited and what she had told Bam about her purchases from the stranger. She could not explain where the additional stolen items came from if it was only meat she bought from the stranger.

10.11 Bam and her mother's evidence on whether or not Bam still used the nickname "Suzette Karelse" was contradictory.

[11] The arbitrator concluded that the employer's version was more probable and that Bam had fabricated her version of the theft and why the name "Suzette Karelse" came to be used on the occasion.

[12] The arbitrator found her transgressions were serious and warranted her dismissal.

Review grounds

[13] Bam raised a number of grounds of review, which are summarised below.

[14] Before dealing with those it is necessary to address another feature of her founding and supplementary affidavits. In both she makes a number of factual allegations which were not part of the evidence before the arbitrator. To cite just one example, she goes into detail about the nature of the medication she was on at the time of the incident to supplement her evidence in the arbitration. This is simply unacceptable in a review application.

[15] Save in situations where the alleged misconduct of an arbitrator is not evident from the record of the arbitration and the award itself, no party can lead additional evidence to advance its case in the review proceedings. To allow this would confound the very foundation of a review which is an evaluation of the reasoning and, or alternatively the conduct of the arbitrator in relation to the evidence before them, or to events occurring during the conduct of the proceedings. In the case of grounds of review relating to the conduct of the arbitrator, which does not appear on the record itself, it follows that evidence of the events in question will have to be set out in the founding and supplementary affidavits.

[16] However, the reviewability of an award based on alleged flaws in the arbitrator's assessment of the case before them cannot be based on the introduction of fresh evidence that was never placed before them. What is astonishing is that the founding affidavit containing this supplementary 'evidence' was settled by Bam's original attorneys of record. It is incomprehensible why they filed an affidavit tendering such patently impermissible allegations for the purpose of augmenting the evidence adduced in the arbitration

proceedings. It is hardly necessary to confirm that all these allegations have been disregarded for the purposes of the review application.

[17] Leaving those impermissible grounds aside, Bam did raise the following permissible grounds of review, namely:

17.1 Bam had subpoenaed Zinqxondo to subject her to further cross-examination to test her credibility, but the arbitrator had refused to allow additional cross-examination. She claimed that additional cross-examination to test Zinqxondo's credibility should have been allowed because she could not know on what grounds to challenge her evidence until she had testified for the Rx and she had motivated why Zinqxondo had contradicted herself.

17.2 The arbitrator's finding that the trust relationship had broken down could not be justified in view of her own evidence that she was not guilty of misconduct.

17.3 The arbitrator failed to consider the issue of whether Bam had the intention to provide a false name, and in the absence of having such intent she could not have been found to be dishonest.

17.4 The arbitrator erroneously characterised her defence as one of "mere denial".

17.5 The arbitrator failed to appreciate that only herself, her mother and Zinqxondo could provide direct testimony in respect of the shoplifting charge and accordingly, should have preferred her and her mother's version on those events.

Evaluation

[18] During the arbitration hearing, in motivating why Zinqxondo should be recalled, Bam claimed that her attorney had failed to cross-examine the security officer on allegedly contradictory evidence she had given at the disciplinary enquiry even though he had the record of the disciplinary enquiry and despite her instruction to him to do so. The other reason she advanced for needing to recall her was to get to the truth of what transpired on the day in question.

[19] When pressed to explain what the alleged conflicts between Zinqxondo's evidence at the enquiry and arbitration were, she identified the following:

19.1 She had estimated Bam's toddler's age at the enquiry as six or seven years' old whereas her child was two and a half years old at the time.

19.2 In the enquiry she had said the child was walking alongside her mother, whereas in the arbitration she said she was standing in the shopping trolley.

19.3 She had consistently said they had two shopping bags, but Bam had the bags with her and wanted to question her about that.

19.4 In the enquiry she had said she had stopped them leaving the store on her own, whereas she said at the arbitration that she was accompanied by a man who had stopped them and handed them over to her.

19.5 In the enquiry she had denied Bam had told her that certain items had been bought outside at other stores whereas in the arbitration hearing she recalled Bam had said something to that effect.

19.6 Vergotini had testified that there were wet wipes in the blue baby bag, but that Zinxondo said there were none.

19.7 Zinxondo also needed to clarify where she said Bam and her mother were standing when she claimed to have seen them taking items from the trolley and putting them in the bags.

[20] The first point to be made is that the reason Bam wished to recall the witness was purely to impugn her credibility by dealing with alleged inconsistencies between what the witness allegedly said in the disciplinary enquiry and in the arbitration proceedings, and between her testimony and that of Vergotini. None of the alleged inconsistencies could have altered the evidence of the unpaid goods which were found in the bags of Bam and her mother. In relation to whether or not Bam identified herself by her nickname, there was the evidence of Vergotini and the contemporary documentary evidence which supported the version that she did indeed do so. Moreover, even if it was plausible to conclude that only the fresh meat items found in the bag were the unpaid for ones, that would not materially alter the finding of guilt, as the highly contrived version of the stranger who hurriedly sold more than R 400-00 worth of meat for R 50-00 was so inherently implausible in any event. It would have requires truly exceptional circumstances to have permitted further cross-examination of the witness to impugn her credibility when all the information required to do so had been before Bam and her attorney at the time she was originally cross-examined. The respondent could not be subject to the disadvantage of having its witnesses recalled because of alleged oversights of Bam's representative, which were not

excusable ones. To permit such prolongation of proceedings, which are at odds with the practice norms for adducing evidence, would be to invite the prospect of never-ending hearings. I cannot find the arbitrator at fault for not permitting the witness to be

cross-examined twice.

[21] The claim that the arbitrator erred in accepting evidence that the trust relationship had broken down is premised on the assertion that she did was not guilty of the misconduct. As the finding that she was guilty was more than plausible, this ground of review falls away.

[22] In relation to the contention that the arbitrator allegedly failed to consider the if Bam had the intention to provide a false name, the first point to be made is that Bam did not admit to doing so in the first place. In so far as this is an alternative line of attack, based on an assumption that she had identified herself using a false name, the decision to do so must have been a conscious one on Bam's part, bearing in mind that she even wrote that name

confirming the return of goods to Checkers. In the circumstances, the arbitrator was perfectly entitled to assume she had done so deliberately. Moreover, because Bam's actual defence was that it was her mother who proffered that false identity on her behalf, there was no reason for the arbitrator to have considered if Bam had somehow done so 'negligently'..

[23] It is true the arbitrator characterised Bam's defence as one of "simple denial". However, it is clear that the arbitrator nonetheless weighed up both versions in the light of the evidence, so this statement had little bearing on her actual analysis of Bam's version.

[24] Regarding, the arbitrator's failure to prefer Bam and her mother's version of the shoplifting incident, the arbitrator clearly did find Zinqxondo a credible witness. Faced with the contrived and inherently implausible version provided by Bam and her mother, the arbitrator cannot be said to have made a finding on this that no other reasonable arbitrator could have arrived at.

[25] In light of the analysis above, the review application must fail.

Order

1. The application to review the arbitration award of the Third Respondent issued on 8 February 2017 under case number PSSS 394-15/16 is dismissed.
2. No order is made as to costs.

R Lagrange

Judge of the Labour Court of South Africa.

Appearances

For the Applicant J Brunsdon of Brunsdon Attorneys Inc For the Third Respondent L Dzai instructed by the State Attorney (Cape Town)

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