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Not Reportable

IN THE LABOUR COURT OF SOUTH AFRICA

BRAAMFONTEIN

CASE NO: JR1235/13

DATE: 2015-02-12

In the matter between

10 **FUELOGIC (PTY) LIMITED**

Applicant

and

J. SCHOEMAN & OTHERS

Respondents

J U D G M E N T

EUIJEN AJ: This is an application in terms of Section 145 of the Labour Relations Act 66 of 1995, seeking to review and set aside an award of a Bargaining Council Commissioner dated 28 May 2013, in which the Commissioner (the second respondent) refused an application for a
20 postponement of the proceedings by the present applicant, and instead allowed the matter to proceed by default.

After hearing evidence from the first respondent in these proceedings, the dismissed employee, Mr Schoeman, the Commissioner rendered an award in which she found that the dismissal of Mr Schoeman, was procedurally and substantively unfair, and she ordered that he be reinstated with effect from 15 June 2013, and paid an amount of R81 000, by way of arrear salary.

It is that award which the applicants seek reviewed in these proceedings.

Although there was criticism levelled at the way in which the grounds of review are formulated in the founding affidavit by Mr Wagenaar who appeared on behalf of the first respondent, I accept that the principal ground of review is that the Commissioner's decision to refuse the postponement, is alleged to be so at variance with the evidence tendered in support of the postponement application, that the conclusion which the Commissioner reached, is said to be grossly unreasonable, rendering the entire result of the arbitration proceedings susceptible to review.

The test on review is now well established and I do not need to restate it. It is set out in the Supreme Court of Appeal cases of *Heroldt v Nedbank Limited* [2013] 11 BLLR 1074 (SCA) at 1084 paragraph 25 and also *Edcon Ltd v Pillemer NO and Others* [2010] 1 BLLR 1 (SCA) at page 9, paragraph 16. That, in brief, is that the result which the Commissioner reached must be so unreasonable that no reasonable Commissioner could have reached the same conclusion.

It therefore becomes necessary to examine the basis for the postponement and the Commissioner's reasons for refusing it. The sole basis upon which the applicant applied for a postponement of the Bargaining Council proceedings was that its key witness, Mr Church, could not be at the Bargaining Council on the day scheduled for the arbitration, namely 27 May 2013, as he had an important MANCOM meeting of the applicant to attend on the same day.

Although Mr Wagenaar has made submissions about the *bona fides* of that application, since there is evidence that it was arranged only after receipt of the notice of set down, I accept both that Mr Church was an essential member of the MANCOM meeting and that also it was an important meeting for the applicant's business.

However, even accepting those two facts, I do not at all accept that a MANCOM meeting on its own, no matter how important it may be to the applicant, can, without more take precedence over Bargaining Council proceedings.

- 10 Ms Pillay, who appeared for the applicant, levelled much criticism at the Commissioner's reasons for not finding that it would be impossible for Mr Church to get from the Bargaining Council proceedings held in Bloemfontein, to the MANCOM meeting to be held in Johannesburg later that afternoon, if he was required to attend the Bargaining Council proceedings. To my mind that is not the real issue.

- The issue is that the applicant made a deliberate decision to attend its own MANCOM meeting instead of the duly constituted statutory dispute resolution proceedings set down for the same day in terms of the LRA. It ought therefore to have realised, prior to the Bargaining Council
- 20 proceedings commencing, that if it elected to hold its own business interests of attending its MANCOM meeting to be more important than the Bargaining Council proceedings, then it would have to take the consequences of that decision. There is nothing to suggest that the MANCOM meeting could not have been re-scheduled; as stated earlier, the applicant simply considered its own business interests to outweigh

those of attending at the Bargaining Council.

The consequences of that decision were that Mr Church, who the applicant says was its essential witness at the Bargaining Council proceedings, was not then present at those proceedings. The applicant also did not have any other witnesses present, with whom it could proceed at those proceedings.

Ms Pillay submitted that the Commissioner made a mistake in believing that there were other witnesses who were to be called by the applicant, whereas the true position was that only Mr Church would be called. To

10 my mind this is all immaterial.

The fact remains that on the day appointed for the hearing at the Bargaining Council, the applicant was not in a position to proceed with any witnesses. The only explanation offered as a basis for the postponement was that the applicant considered its own MANCOM meeting scheduled for later on that day in Johannesburg, to be more important. That is the sole fact which the Commissioner was required to consider in support of the postponement application.

Based on that fact, the Commissioner, in my view, perfectly correctly refused the postponement, and I do not find anything unreasonable or
20 irregular in her doing so.

That then meant that the Bargaining Council proceedings went by default. The first respondent testified in support of his own case, and called one other witness. From the transcript of the evidence led it is clear that the thrust of the first respondent's evidence was that he was not the person who was responsible for the alleged negligent

performance of the duties with which he was charged and that led to his dismissal. The applicant led no evidence at the arbitration to contradict that.

Various other issues of procedural fairness were debated between the parties but in my view the Bargaining Council's conclusion or the result, which is what the authorities enjoin me to have regard for, is justifiable simply on a finding of substantive unfairness alone.

I do not therefore proceed to enter the debate as to the reasonableness or otherwise, of the Bargaining Council Commissioner's findings on
10 procedural fairness.

On an overall conspectus of this award I cannot find anything unreasonable about it. To my mind it is perfectly correct. I would have also refused the postponement. In those circumstances, the evidence led at the default proceedings is unassailable and justifies the Commissioner's order made. I simply cannot find any grounds on which to review that award.

In the result, in my judgment, the application must be dismissed. Mr Wagenaar asked for additional relief aimed at enforcing compliance with the award if I was of a mind to dismiss the review application. There is
20 no formal counter-application. In my view, I do not have any power in the absence of a proper counter-application, to award the extra relief which Mr Wagenaar has sought. The first respondent must enforce his Bargaining Council award in the same way that every other litigant does in terms of the Labour Relations Act, taking into account the new amendments.

Therefore the order of the court in this matter is that the review application is dismissed with costs.

TMG Euijen

Acting Judge of the Labour Court

Date revised: 27 February 2015

Appearances:

10 For the applicant: Ms Pillay

For the first respondent: Mr Wagenaar