IN THE LABOUR COURT OF SOUTH AFRICA
HELD AT JOHANNESBURG

Case No: C 608/05

In the matter between:

PIETER BREUGEM Applicant

and

COEN DE KOCK NO First Respondent

THE COMMISSION FOR CONCILIATION, MEDIATION AND ARBITRATION Second Respondent

WELTEVREDE KWEKERY Third Respondent

JUDGMENT

REVELAS J

[1] The applicant seeks to set aside the arbitration award of the first respondent ("the arbitrator"), made in favour of the third respondent. The arbitrator found that the third respondent had fairly terminated the services of its former managing director (the applicant in this matter). The review is brought in terms of section 145 of the Labour Relations Act, 66 of 1995, as amended ("the Act"), and in particular, sections 145(1) and 145(2)(a)(iii) thereof.

[2] The facts which gave rise to this application are rather interesting. The applicant was initially suspended by the respondent, pending a disciplinary enquiry into his publication of a book about a court

battle between the third respondent and a Mr Keith Kristen (which case the third respondent had won), and the applicant's alleged lack of capacity to manage the business of the third respondent. Ultimately he was dismissed for attempted extortion, the amount in question being R5 million.

[3] The chairperson of the disciplinary hearing into the initial charges directed (instead of imposing a sanction as would be the usual case), that the parties should meet to agree on a financial settlement agreement regarding their "**parting of ways".** The chairperson further directed that a failure to reach such consensus would result in the dismissal of the applicant. In my view, this directive of the chairperson was as open an invitation to discord as one may hope to find at the end of an enquiry of this nature, particularly given the nature of the allegations levelled against the applicant. No specific evidence was led on the charges, but neither of them, *per se*, would necessarily result in dismissal.

[4] Some might argue that the applicant should have been grateful for the choice between a summary dismissal for misconduct or a negotiated departure with a "**severance package**" as if he was never dismissed. In my view, if the chairperson was indeed clear in his mind that the applicant was guilty of the alleged misconduct, he would have imposed an appropriate sanction, which may not even have been dismissal. Writing a book about a court case involving the third respondent, is the exercise of the right of freedom of speech, an act that would seldom warrant the dismissal of a managing director. The second charge (as a first offence) would also not in the normal course, be visited with the harshest sanction

to be imposed in labour relations without giving the employee a chance to improve. In my view, the applicant was placed in a very unenviable bargaining position. He had to accept what the third respondent had to offer him, or face dismissal. That has to be unfair.

[5] The subsequent meeting as directed by the chairperson, held on 12 March 2004, was an unhappy one, as it was bound to be. The third respondent was represented by Mr Carinus, who had been appointed managing director in the applicant's place, in the interim. The applicant represented himself. Another senior person of the third respondent was also present at the meeting, namely Mr de Kock. All present were in decision making positions within the third respondent. They were not mere assistants. Their conduct towards each other, in unpleasant circumstances must be assessed in that light. It is to be expected, given the preceding events, that the atmosphere at the meeting would be unpleasant.

[6] At the meeting, Mr Carinus placed an offer of R150 000, 00 (six months' remuneration) on the table, as the third respondent's offer to the applicant, who had until the next day to decide whether he wanted to accept it or not. The applicant found this offer unacceptable and accused Mr Carinus and a Mr van der Vyfer (of PriceWaterhouseCoopers or "PWC"), of manipulating the finances and books of the third respondent to reflect a loss. He spoke of a file which he had kept since 2000 (which would substantiate his accusations) and which was with his attorney in case something happened **("iets gebeur")** to him or his wife. On this melodramatic note he handed a written counter offer to Mr Carinus, wherein he

demanded R5 million. He said that he would be expecting a response on his offer the next day. As he walked out of the meeting, he remarked to Mr Carinus that he should remember that there are no golf courses in prison. During argument, one of the legal representatives aptly referred to this remark as the applicant's **"parting shot".**

[7] The third respondent's response to the applicant's outrageous offer was to convene a second enquiry into allegations of **"dishonesty, attempted blackmail or extortion, and conduct destroying the employment relationship"** due to his conduct at the 12 March meeting where he "**falsely alleged criminal misconduct on the part of the managing director, and threatened to report this to the authorities unless the company paid [him] R5 million to secure the remuneration of [his] employment".**

[8] The chairperson of the ensuing disciplinary hearing, found the applicant guilty as charged, and summarily dismissed him.

[9] The arbitrator rejected the applicant's explanation that the remark was an impulsive one, made out of sheer frustration with the third respondent and the underhand financial practices of its directors.

[10] The arbitrator accepted the contention of the third respondent's representative that the applicant attended the meeting of 12 March with the specific purpose of placing Mr Carrinus under undue pressure, to give in to his demand, by referring to the file (which was not shown to the arbitrator) which was with his attorney. The arbitrator also observed, that even though there was no direct ultimatum, there was a sufficient nexus between the offer (or

demand) and the references to financial mismanagement, and the possibility of jail, to draw the conclusion that any failure to pay the R5 million, would lead to criminal prosecution.

[11] In considering the aforesaid findings, the arbitrator should have had sufficient regard to the undisputed evidence of the applicant, that prior to the meeting, he had spoken to a Mr F Eksteen of the South African Revenue Services about the financial practices of the third respondent. According to the applicant, Mr Eksteen had specifically advised him not to disclose the fact that the third respondent was under investigation. This evidence flies in the face of extortion, which must contain a threat of future action.

[12] There was also evidence before the arbitrator that two days prior to his suspension, the applicant attended a meeting with, *inter alia*, the third respondent's auditors, because he was concerned about monies of the third respondent that had disappeared. Apparently Mr van der Vyfer (the auditor of PWC referred to above) responded by telling the applicant that he was talking s**t. This meeting was preceded by another meeting with Mr Carinus at Hermanus, where the applicant had expressed his dismay at the way Carinus dealt with certain other money. In 2002, the applicant says he unsuccessfully requested an internal audit.The aforesaid testimony of the applicant suggests that there may have been grounds for him to be unhappy, and that could just have meant oil on troubled waters at the meeting of 12 March. When I say this, I am mindful that the applicant was the managing director of the company, and as such he should have been, one might wonder, in a position to put an end to any mismanagement. Yet, the absence of a

specific threat or ultimatum in this circumstances does not warrant a finding of extortion in the conventional sense.

[13] Even if the arbitrator's findings on the events at the meeting of 12 March are not open to any criticism, she did fail to properly consider whether the third respondent was entitled to charge the applicant with misconduct for a second time, even if the charges were different.

[14] The effect of the order of the first disciplinary enquiry chairperson was clear and unambiguous in this respect: If the matter could not be resolved financially, the applicant would be automatically dismissed in terms of the charges levelled against him. The matter could not be resolved financially, and therefore the applicant was to be dismissed. It was not open to the third respondent to charge the applicant a second time in such circumstances. It could take steps against him in a civil or criminal court, but not within the parameters of an employment relationship which technically no longer existed. The applicant should not have been charged at all. In that respect his second dismissal was unfair, apart from the fact that the first dismissal was also unfair, insofar as the sanction imposed was unfair.

[15] In my view, the above considerations render the award reviewable and it is to be set aside with costs. In view of the applicant's conduct at the meeting of 12 March, which was quite unacceptable and which displayed avarice on his part, I do not believe he is entitled to the maximum compensation provided for by the Act. I think the most practical remedy is, to place the parties in the

position wherein they would have been if they had negotiated a settlement agreement of their own will, and not by decree of a chairperson with the sword of dismissal hanging over the applicant's head. The third respondent was willing to pay R150 000, 00 (six months' remuneration). A party's first offer is usually not the highest amount it would be prepared to pay. So it is possible that a higher amount could have been offered. The applicant had a very long service record which does not make the offered amount seem overly generous. These were high ranking business people and they did not confine themselves to the statutory minimums on "departure" packages. A substituted award must also reflect the fact that the dismissal was substantively unfair. I believe that adding a further three months' remuneration to the initial offer would meet the case.

[16] In the circumstances, I make the following order:

1. The award of the first respondent is hereby set aside and substituted with the following.

"1.1 The dismissal of the applicant was substantively unfair.

1.2 The third respondent (Weltevrede Kwekery) is to pay the applicant compensation in an amount equal to 9 months remuneration".

2. The third respondent is to pay the applicant's costs.

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Elna Revelas

Judge of the Labour Court

Date of hearing: 30 May 2006

Date of judgment: 1 June 2006

Written reasons: 11 July 2006

On behalf of the Applicant

Mr H.C. Niewoudt of Deneys Reitz Inc.

On behalf of the Respondent

Adv. P Kantor, instructed by Craig Schneider Associates.