REPUBLIC OF SOUTH AFRICA

Not reportable

THE LABOUR COURT OF SOUTH AFRICA, CAPE TOWN

JUDGMENT

Case no: C 1142/10

In the matter between:

Paul E ROGERS **Applicant**

and

EXACTOCRAFTY (PTY) LTD **First Respondent**

Delivered: **23 May 2014**

RULING ON LEAVE TO APPEAL

STEENKAMP J

Introduction

[1] The respondent, Exactocraft, seeks leave to appeal against my judgment of 16 April 2014 in which I made the following order:

> "The respondent is ordered to pay the applicant the following amounts:
>
> 1. Compensation of R 136 593, 84, being the equivalent of three months' remuneration;

2. R 20 033, 00 as damages for short notice;

3. Costs of suit."

[2] In considering this application, I am mindful of the cautionary note recently sounded by Davis JA in *Martin and East (Pty) Ltd v NUMSA & others*[1]:

> "Before I conclude there is a further comment I wish to make. I indicated that the events in this case took place in 2010. The Labour Relations Act was designed to ensure an expeditious resolution of industrial disputes. This means that courts, particularly courts in the position of the court *a quo,* need to be cautious when leave to appeal is granted, as should this Court when petitions are granted.
>
> There are two sets of interests to consider. There are the interests of the parties such as appellant, namely who are entitled to have their rights vindicated, if there is a reasonable prospect that another court might come to a different conclusion. There are also the rights of employees who land up in a legal "no-man's-land" and have to wait years for an appeal (or two) to be prosecuted.
>
> This was a case which should have ended in the labour court. This matter should not have come to this court. It stood to be resolved on its own facts. There is no novel point of law to be determined nor did the Court *a quo* misinterpret existing law. There was no incorrect application of the facts; in particular the assessment of the factual justification for the dismissals/alternative sanctions.
>
> I would urge labour courts in future to take great care in ensuring a balance between expeditious resolution of a dispute and the rights of the party which has lost. If there is a reasonable prospect that the factual matrix could receive a different treatment or there is a legitimate dispute on the law, that is different. But this kind of case should not reappear continuously in courts on appeal after appeal, subverting a key purpose of the Act, namely the expeditious resolution of labour disputes."

[3] In the case before me, Rogers has not cross-appealed on the one aspect that did raise a novel point of law – that is, the application of s 84(1) of the

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[1] CA 23/2012, unreported 10 March 2013.

Basic Conditions of Employment Act. Had he done so, I would have been inclined to grant leave to appeal on that point as it did raise a novel point of law. But he did not. It remains to consider the other grounds of appeal.

First ground: procedural fairness

[4] In considering the appropriate amount of compensation to be awarded, I restricted it to three months' compensation because Rogers did not come up with any viable proposals and did very little to explore any alternatives. That does not mean, as the company would have it, that his dismissal was procedurally fair. I am satisfied that I did not misinterpret the facts or misapplied the law, to use the test set out by the Labour Appeal Court in *Martin and East*. Leave to appeal should not be granted on this ground.

Second ground: notice of termination of fixed term contract

[5] The second ground of appeal raised by the company is not entirely clear. It appears to suggest that notice was only given of the termination of the fixed term employment contract, and not of the employment relationship. There is no merit in this submission. It is common cause that the company dismissed Rogers and that the reason for dismissal was its operational requirements. In the trial, the company no longer relied on its earlier mistaken advice that it could simply terminate the contract on three months' notice.

Third ground: application of section 189 of the LRA

[6] The company submits that the court erred in its interpretation of the initial notice given to the employee in terms of section 189 (3) of the LRA. What the court found in para [45], is that, "without following a formalistic checklist approach, the notice fell far short of that envisaged by the subsection." Ms Painczyk conceded as much under cross-examination. That is not an incorrect interpretation of the law or the facts.

Fourth ground: joint consensus seeking process

[7] This ground is formulated as follows:

> "That the honourable court erred in finding that they could accordingly not have been a joint consensus seeking process, although it admitted that it was due to the [employees]'s resistance that the [company] was not afforded the opportunity to do so."

[8] It is not clear what the company means with this submission. Although the employee's lack of cooperation was open to criticism, the company gave notice of the termination of his contract before proposing alternatives and a mere two days after the initial notice of 18 May 2010. Any consultation after 20 May would have been meaningless. As I found in paragraph 47, there was no prospect of meaningful consultation in those circumstances. That finding is not open to appeal.

Fifth ground: the letter of 18 May 2012 [sic]

[9] The company submits that the court erred "in not taking notice of the content of the letter of 18 May 2012". Presumably that refers to the initial notice of 18 May 2010. The company then submits that "the probabilities favoured the respondent version, i.e. that it eventually had to send the letter registered mail to the applicant as he did not want to engage in the process at all and that he did not attend the meetings so stipulated in the said [*sic*] letter of 18 May 2012 [*sic*] ."

[10] On the contrary, the court did find that the company sent the letter by registered mail. But the company had already told the employee that he would be dismissed on 20 May 2010. Further meetings would have served no purpose. And Ms Paynczyk could not recall why she sent the letter by registered mail.

[11] These findings do not constitute grounds for appeal.

Sixth ground: two weeks' notice

[12] The company submits that the court "erred in compensating the applicant by granting in the two weeks' short notice when the evidence led does not support such a conclusion."

[13] The award of two weeks' notice is not a compensation award. It is an award for damages. The evidence was that notice was two weeks short. That is a correct factual conclusion.

Seventh ground: compensation for procedural unfairness

[14] This is merely a regurgitation of the first and fourth grounds raised by the company. I have already addressed it.

Eighth ground: costs

[15] The granting of costs is within the judicial discretion of the court.

Conclusion

[16] Taking into account the factors set out by the Labour Appeal Court in *Martin and East*, there is no reason why leave to appeal should be granted in this case. There is no reasonable prospect that another court will come to a different conclusion. The novel point of law raised in the court a quo is not subject of the appeal or of a cross appealed. The employee was dismissed four years ago. He is [……] years old. There is no valid reason why he should wait any longer to be paid the compensation due to him and why he should incur further costs on appeal.

Order

The application for leave to appeal is dismissed with costs.

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Steenkamp J

APPEARANCES

APPLICANT:	B Schiff of Bagraims.
RESPONDENT:	C Brümmer

Instructed by Chris Smit attorneys, Langebaan.