IN THE EMPLOYMENT RELATIONS COURT
AT SUVA
APPELLATE JURISDICTION

ERCA No. 02 of 2020

BETWEEN : **NARSEYS PLASTIC INDUSTRIES LTD**

APPLICANT

AND : **THE LABOUR OFFICER** for **ILIESA MATANI**

RESPONDENT

BEFORE : M. Javed Mansoor, J

COUNSEL : Mr. N. Tofinga for the Applicant

: Ms. P. Chandra for the Respondent

Date of Hearing : 20 April 2022

Date of Decision : 4 January 2024

DECISION

EMPLOYMENT LAW *Leave to appeal – Strike out application by employer – Demand notice to employer under section 247 – Writ of summons to recover wages – Whether writ proceedings maintainable after sending demand – Sections 214, 238 and 247 of the Employment Relations Act 2007*

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1. This is an application seeking leave to appeal the decision of 24 January 2020 by the resident magistrate, who struck out the applicant's application to strike out the respondent's action for the recovery of wages related to public holidays, annual leave, over time and meal allowances. The respondent sought judgment in the sum of 7,081.31.

2. The respondent filed a notice of motion dated 21 August 2019 applying to determine whether the application is a miscellaneous provision, and whether or not there is no prescribed form or manner in which the provisions of sections 60 and 247 (b) of the Employment Relations Act may be enforced. Section 60 imposes a duty on an employer to make payment to a worker for leave on termination of employment. Section 247 creates an offence where an employer fails to comply with the requirements imposed under the section.

3. In his determination, the resident magistrate stated that the Employment Relations Act did not expressly recognise a category of applications filed in the Employment Relations Tribunal as "miscellaneous applications". The magistrate observed that some applications were categorised as miscellaneous for purposes of case management, as an internal administrative measure. The tribunal noted that its registry categorised actions filed for the recovery of wages under section 214 of the Act as miscellaneous, and that this was for administrative reasons. On this basis, the tribunal held, the need to decide whether the writ of summons filed by the respondent is a miscellaneous application, did not arise.

4. The next question before the tribunal was whether a method is prescribed by which to enforce sections 60 and 247 (b) of the Act. The tribunal noted that action was instituted under section 214 of the Act and not section 247 (b), and held that the issue raised by the applicant concerning whether action was initiated under

section 247 (b) did not arise. The tribunal held that the Act did not prescribe a particular form in which to initiate action for the recovery of unpaid wages, and that section 238 (2) allowed provisions of the Magistrate Court Act to be followed in recovery actions. The tribunal also referred to section 192, and dismissed the applicant's strike out application.

5. The applicant filed a notice of motion on 6 February 2020 seeking leave to appeal the tribunal's determination. The grounds on which the application is premised are these:

a. "That the learned Tribunal in the court below erred in fact and in law when he determined that there was no prescribed process for the recovery of wages in the Employment Relations Act 2007 (ERA 2007) without taking due cognizance of the fact that the Labor inspector did invoke s.247 on or about 2nd November 2018 and that the said proceeding was still on foot.

b. That the learned Tribunal in the court below erred in fact and in law when he failed to determine whether or not the Writ of Summons application for the recovery of wages under s. 214 of 20th May, 2019 was an abuse of process without taking due cognize of the fact that the Labor Inspector did invoke s.247 on or about 2nd November 2018 and that the said proceeding was still on foot".

6. The applicant submitted that the labor officer took a hybrid approach by commencing the process against the employer under section 247 by sending a demand notice dated 2 November 2018, and subsequently filed a writ of summons for recovery of monies under section 214 of the Act. According to Mr. Tofinga, section 214 is to be used where there is a lacuna in the Act, and a section 247 proceeding was the proper way in which to proceed against an employer.

7. The applicant submitted that the employer was not notified that proceedings under section 247 was withdrawn, and that nothing prevented the labour officer from continuing the process initiated by the demand notice under section 247. The applicant submitted that the tribunal was statutorily required to give a written decision with reasons for findings, and that the demand notice sent by the labour officer under section 247 had not been considered, although proceedings were still on foot.

8. The applicant submitted that pending proceedings under section 214 was an abuse of the process of law as another proceeding was on foot for recovery of wages. The applicant submitted that section 247 of the Act was to ensure that claims are dealt with expeditiously, and that proceedings under section 214 would take much longer.

9. In reply, the respondent submitted that the claim was instituted by a writ of summons on 20 May 2019 to recover a sum of $7,081.31. The respondent says there is no prescribed process for the recovery of wages under section 214 of the Act, and that that the labor office relies on section 238 (2) for recovery purposes by using the Magistrates Court Rules.

10. Ms. Chandra submitted that section 247 of the Act was criminal in nature and that the tribunal could impose a sentence upon finding an employer guilty of an offence. The respondent submitted that it is possible to institute a criminal action under section 247 and a separate action under section 214 to recover sums payable to a worker. In this matter, there is no evidence that the labour office filed proceedings under section 247, although a demand notice was sent. According to Mr. Tofinga, the demand notice amounts to an institution of proceedings for recovery of wages, but did not refer to any authority in support of his argument.

11. Court agrees with the submissions made by the respondent. The relevant provisions make the position clear.

12. Section 214 states:

(1) "Without affecting other remedies for the recovery of wages or other money payable by an employer to a worker under an employment contract, if—

(a) there has been default in payment to a worker of wages or other money; or

(b) payment of wages or other money has been made at a lower rate than that legally payable under this Promulgation or an employment contract,

the whole or any part, as the case may require, of the wages or other money may be recovered under this Promulgation by the worker or by a labour officer or a labour inspector on behalf of the worker by action commenced in the prescribed manner in

the Tribunal, notwithstanding any acceptance or express or implied agreement by the worker to payment at a lower rate.

(2) An action under this section may be commenced within 6 years after the day on which the money became due and payable".

13. Section 247 states:

"An employer who—

(a) fails to pay wages in accordance with the worker's contract of service except where the employer proves that he acted in good faith or took reasonable steps to pay the wages;

(b) upon demand in writing by the Permanent Secretary, a labour officer or a labour inspector, fails within 7 days of the demand to pay any wages due to a worker;

(c) if the employment contract—

(i) provides for the payment of wages at the end of the contract period; or

(ii) where a worker's employment is being terminated under this Promulgation,

fails to pay all wages due to a worker after a demand has been made within 24 hours of the termination of the contract or after expiry of the notice required under this Promulgation;

(d) pays or agrees to pay the wages of a worker other than in the currency which is legal tender at the place where the wages are paid;

(e) makes a deduction from the wages of a worker in the nature of a fine, or due to poor or negligent work;

(f) imposes conditions upon the expenditure of the worker's wages;

(g) except where expressly permitted by this Promulgation or any other law, makes a deduction or makes an agreement or contract with a worker for a deduction from the wages to be paid by the employer to the worker, or for a payment to the employer by the worker;

(h) pays a worker on a piece-work basis which results in the worker receiving less than the rate of wages prescribed in the applicable employment contract,

commits an offence and is liable on conviction—

(i) for an individual, to a fine not exceeding $20,000 or to a term of imprisonment not exceeding 5 years or both; or

(ii) for a corporation to a fine not exceeding $100,000".

14. Section 214 provides for the filing of an action for the recovery of wages or other money without affecting other remedies for the recovery of wages or other money payable by an employer to a worker under an employment contract. The proceeding is civil in nature. The section imposes a limitation of six years of the money becoming due and payable in which to commence an action. A workman may institute action to recover wages or other unpaid monies from his employer within this period. The enactment makes no reference to any penal consequence. A labour officer or labour inspector may institute recovery action on behalf of a workman.

15. Section 238 (2) (a) states that in the absence of rules or where no provision is made for a particular circumstance the Magistrates' Courts Rules are to apply to proceedings before the tribunal. Section 214 does not prescribe a mode by which to commence an action for recovery. The respondent chose to institute action by way of a writ of summons, and the action appears to have been regularly commenced.

16. On the other hand, an employer who defaults in paying wages is regarded as having committed an offence under section 247. Upon conviction, an individual employer is liable to a fine not exceeding $20,000.00 or to a term of imprisonment not exceeding 5 years or both. A corporation is liable to a fine not exceeding $100,000.00. This enactment is penal in nature and is not concerned with recovery of outstanding wages.

17. The demand notice dated 2 November 2018 says failure to pay the mentioned sum within 7 days will mean the issuance of a fixed penalty notice of $5,000.00. The notice says, "the failure to pay the fixed penalty notice within 21 days will leave us with no alternative but to institute legal proceedings in the Employment Relations Tribunal with a maximum fine". Section 262 of the Act imposes a time limitation within which to institute proceedings when an offence is alleged to be committed.

There is no evidence proceedings were instituted following the demand notice. Mr. Tofinga's submission that the notice initiated criminal proceedings is, therefore, misconceived.

18. The applicant was heard to say that the practice was to institute proceedings under section 247 for recovery of payments from the employer. Section 214, according to the applicant was to be used, when the Act was not of assistance. Regardless of the practice that may have been followed, the Act provides a method by which wages and other payments may be recovered from an employer by or on behalf of a workman. The labour office has made use of the provision.

Conclusion

19. The resident magistrate has given sufficient reasons for the determination. The respondent is entitled to continue proceedings for the recovery of payments due from the employer. The application for leave to appeal the resident magistrate's determination of the employer's strike out application is struck out with costs.

ORDER

A. The notice of motion is struck out.

B. The applicant is to pay the respondent $1,000.00 as costs summarily assessed within 21 days.

C. The case record is to be sent to the chief magistrate for directions.

Delivered at **Suva** on this **04th** day of **January, 2024**

M. Javed Mansoor
Judge