

T N BAKERY
versus
THE STATE

HIGH COURT OF ZIMBABWE
HUNGWE & MUSHORE JJ
HARARE, 5 October 2017 & 23 May 2018

Criminal Appeal

I.M.T. Rujuva, for the appellant
T. Nyahunzvi, for the State

MUSHORE J: The complainant, one Edrine Mutizwa, was once employed by the appellant company as a sales person. He began working for the appellant in January 2012 earning US\$255-00 per month. In March 2012, complainant became a permanent employee. Complainant stopped working for the appellant on the 18th July 2015 when the appellant company closed down. The appellant owed complainant salary and other benefits at the time that complainant left the appellant. Complainant experienced difficulties in attempting to recover the money which appellant owed him leading to the complainant filing a complaint in the Labour Court. Eventually the parties went before a labour officer on the 18th November 2015. The labour officer who determined complainant's claim, ultimately managed to get the parties to reach a settlement as follows:-

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“Concerning: Alleged underpayment of wages and non-payment of wages.

We resolved by agreement of the parties on the **09/03/16** and further that the terms of agreement are as follows: **The parties agreed that the complainant will be paid a total of US\$ 6152-57 as follows \$2,800-00 will be offset by 5 Marvel Double Beds which be (sic) delivered on or before 23 April 2016 and the remaining \$3300-00 will be paid by instalments of \$305 monthly starting on the 29th April 2016 to 28th February 2017 until the mount is finished.**”

Thereafter, according to the State Outline, appellant reneged on its promise, causing the complainant to return to the labour officer. Thus on the 13th June 2016, the labour officer issued a prosecution letter addressed to the Officer in Charge, ZRP Gweru Central suggesting that the appellant be prosecuted in terms of s 13 (2) of the Labour Act [*Chapter*

28:01] for withholding and unreasonably delaying payment of the complainant's wages without the Minister's permission. Section 13 (2) reads as follows:

“(2) Any employer who without the Minister's permission withholds or unreasonably delays the payment of any wages or benefits owed in terms of subsection (1) shall be guilty of an offence and liable to a fine not exceeding level seven or to imprisonment for a period not exceeding two years or to both such fine and such imprisonment.”

Accordingly complainant proceeded with the prosecution in the matter on the basis that appellant had breached s 13 (2) of the Labour Act. The court found in favour of the complainant and convicted appellant and sentenced him to pay-

1. A fine of \$400-00 in default of payment of which a warrant of execution against appellant's property be issued forthwith.
2. In addition appellant was ordered by the court to pay complainant \$6152-00 by the 11th August 2016 failing which another warrant of execution would be issued for the execution of appellant's property in order to recover the said sum of money (\$6152-00).

In the present appeal, appellant insists that the employer/employee relationship no longer existed because of the settlement agreement and that therefore he should not have been convicted of the abovementioned offence. The basis of appellant's argument is that the relationship between the parties has mutated to that of debtor and creditor thus the prosecution in terms of the Labour Act was invalid. Appellant submits that when the parties came to an agreement before the labour officer, they had come to make a compromise agreement and that such a compromise agreement reflects their debtor/creditor relationship.

With due deference, the agreement entered into on the 9th March 2016 does not constitute a compromise agreement. A compromise agreement is “*an agreement between opposing parties to settle a dispute or reach a settlement in which each party gives ground, rather than continue the dispute or go to trial*” or “*to reach a settlement in which each party gives up some demands*”

The facts show that in the 9th March 2016 agreement; complainant did not give ground at all on his claim. He simply accepted an alternative mode of payment for part of the appellant's indebtedness to him i.e. 5 beds in lieu of cash in the amount of \$2,800-00, without accepting less than was due to him. The sum owed remained at \$6,152-00. The labour officer's use of the word “offset” bears this out. A set off is defined as “*a set-off is an equitable defence to the whole or to a portion of the plaintiff's claim*”. It is a tender or

compensation for the original debtor. Because the set-off pertains to the original debt, the relationship between complainant and appellant has not changed and remains to be that of employer/employee. The payment due to the complainant, which payment appellant reneged on is for payment of salary and benefits arising from his employment with the appellant.

The settlement agreement which was presided over by the labour officer can be compared to a Deed of Settlement in a civil matter. The Deed of Settlement is not a compromise but is merely time-to-pay. Thus the relationship between complainant and appellant still being that of employer/employee makes the withholding of complainant's salary by the appellant a prosecutable offence in terms of s 13 (2) of the Labour Act. Complainant was fully within his rights to have taken up the prosecution in this matter, and the court *a quo* properly convicted the appellant of the offence in question.

As far as the appeal against sentence is concerned, it is not based upon a valid defence. The '*harsh economic environment*' is not a valid excuse to liability. No meaningful argument has been advanced by the appellant in challenging the sentence imposed. Certainly the sentence does not induce a sense of shock as it falls well within the guidelines.

Accordingly the appeals against conviction and sentence are without merit.

In the result, we order as follows:

"Both appeals between conviction and sentence are dismissed".

National Prosecuting Authority, respondent's legal practitioners
Dururu & Associates, appellant's legal practitioners