

DISTRIBUTABLE (15)

Judgment No. SC 24/10  
Civil Appeal No. 130/09

GERSHUM HOMBARUME v ZIMBABWE REVENUE AUTHORITY

SUPREME COURT OF ZIMBABWE  
CHIDYAUSIKU CJ, SANDURA JA & ZIYAMBI JA  
HARARE, MARCH 23 & OCTOBER 6, 2010

*J B Wood*, for the appellant

*T Mpofu*, for the respondent

SANDURA JA: This is an appeal against a judgment of the Labour Court which dismissed the appellant's appeal against the termination of his employment by the respondent.

The background facts in this matter may be tabulated conveniently as follows.

1. The appellant ("Gershum") was employed by the respondent ("Zimra") as a revenue specialist.
2. On September 23, 2004 Gershum borrowed R10 000.00 in South Africa from a South African resident, without the authority of the Reserve Bank of Zimbabwe ("the RBZ"). With that money he purchased a motor vehicle in South Africa and brought it to Zimbabwe.

3. On August 4, 2005 Gershun appeared in the regional magistrate's court at Beitbridge, and was charged with contravening s 5(1)(a)(i) of the Exchange Control Act [*Cap. 22:05*] (“the Exchange Control Act”), as read with s 4(1)(b)(i) of the Exchange Control Regulations, 1996, published in Statutory Instrument 109 of 1996. In terms of these provisions, it was a criminal offence for any Zimbabwean resident to buy or borrow any foreign currency outside Zimbabwe from any person, without the authority of the RBZ, if the transaction resulted in or was likely to result in a debt payable in or from Zimbabwe. Gershun pleaded guilty to the charge, and was convicted. He was sentenced to a fine of Z\$10 000 000.00 or, in default of payment, four months' imprisonment with labour. In addition, the motor vehicle bought in South Africa was forfeited to the State.
  
4. On August 12, 2005 Gershun was suspended from duty without salary and benefits, and was charged with the following acts of misconduct in terms of the Zimra Code of Conduct (“the Code”):

**“Group D Most Serious Offences**

Charge 1: D28

Failing to uphold ethical and professional standards of behaviour within the workplace including practicing nepotism and victimizing, threatening or harassing subordinates or colleagues or making employment conditional in any way.

Charge 2: D18

Conviction in any court of law for any offence, not necessarily involving work, where dishonesty (or) fraud is (a) material element. ...

Charge 3: D25

Carrying out any act which is inconsistent with the express or implied conditions of the contract of employment.

Charge 4: D26

Deliberate misrepresentation of facts in the declaration of assets ...”.

On the day he was suspended from duty and charged, Gershum was notified that the disciplinary hearing would be held at Beitbridge on August 21, 2005 at 2 pm.

5. Thereafter Gershum contacted a legal practitioner and requested him to represent him at the disciplinary hearing. As he was not available to represent Gershum on August 21, 2005, the legal practitioner requested the disciplinary and grievance committee to postpone the hearing to a later date.
6. On August 17, 2005 the disciplinary and grievance committee informed Gershum’s legal practitioner that his request for the postponement of the hearing had been turned down.
7. On August 22, 2005 the disciplinary hearing commenced. There is nothing on the record to indicate why the hearing did not commence on August 21, 2005, as previously arranged. Nevertheless, Gershum was present, but his legal practitioner was not. As Gershum was not prepared to take part in the proceedings without his legal practitioner, he walked out of the hearing. However, the hearing continued and Gershum was found guilty as charged on all counts, and was dismissed

with effect from August 12, 2005, the date when he had been suspended.

8. On August 23, 2005 Gershum appealed to the appeals committee. That appeal was heard on August 31, 2005, and Gershum was represented by his legal practitioner. The appeals committee confirmed the convictions in respect of the first three counts, but quashed the conviction on the fourth count. Nevertheless, the penalty of dismissal was confirmed.
9. Dissatisfied with that result, Gershum appealed to the Labour Court, and was represented by a legal practitioner different from the one who had represented him before the appeals committee. The Labour Court set aside the conviction in respect of the first count, but confirmed the convictions in respect of the second and third counts, as well as the penalty of dismissal.
10. Aggrieved by that result, Gershum appealed to this Court.

Although a number of issues were debated in this appeal, in my view there are two main issues to consider. The first is whether the refusal by the disciplinary and grievance committee to postpone the disciplinary hearing to enable Gershum's legal practitioner to represent him amounted to a denial of Gershum's right to a fair hearing. And the second is whether Gershum was properly found guilty on the second and third counts. I shall deal with the two issues in turn.

### **THE FIRST ISSUE**

In my view, the refusal by the disciplinary and grievance committee to postpone the hearing did not amount to a denial of the right to a fair hearing.

On August 12, 2005 Gershum was informed that the disciplinary hearing would be held on August 21, 2005. Five days later, i.e. on August 17, 2005, the disciplinary and grievance committee informed Gershum's legal practitioner that his request for a postponement of the hearing had been turned down. This was five days before the hearing, bearing in mind the fact that the hearing took place on August 22, 2005. In my view, the period of five days was long enough for Gershum to brief another legal practitioner, either in the firm of the legal practitioner he had first briefed, or in any other firm. The fact that Gershum did not make alternative arrangements for his legal representation was his own fault.

In addition, the disciplinary and grievance committee followed the correct procedure in terms of the Code. In this regard, clause 9.3 of the Code, in relevant part, provides as follows:

“At the hearing, the disciplinary and grievance committee shall give the employee the chance to present his case either personally and/or by a workers committee member or a chosen representative. He has the right to call witnesses in his defence. ... Where a witness or representative does not attend, the meeting shall proceed without them, or an alternative representative may attend in their place ...”. (emphasis added)

In the circumstance the disciplinary hearing was not a nullity.

## **THE SECOND ISSUE**

The issue here is whether Gershum was properly convicted on the second and third counts. Although these charges have already been set out in this judgment, for the sake of convenience I will set them out again. They are as follows:

“Charge 2: D18

Conviction in any court of law for any offence, not necessarily involving work, where dishonesty (or) fraud is (a) material element. ...

Charge 3: D25

Carrying out any act which is inconsistent with the express or implied conditions of the contract of employment.”

As already stated, on August 4, 2005 Gershum appeared in the regional magistrate's court at Beitbridge and was charged with contravening s 5(1)(a)(i) of the Exchange Control Act, as read with s 4(1)(b)(i) of the Exchange Control Regulations, 1996. In terms of these provisions, it was a criminal offence for any Zimbabwean resident to buy or borrow any foreign currency outside Zimbabwe from any person, without the authority of the RBZ, if the transaction resulted in or was likely to result in a debt payable in or from Zimbabwe. Gershum pleaded guilty to the charge, and was convicted.

Bearing in mind the above facts, which were common cause, there can be no doubt that Gershum was properly convicted on the second and third counts.

Firstly, as a Zimra official employed as a revenue specialist, Gershum knew that he could not lawfully borrow the foreign currency without the authority of the RBZ. However, knowing that no such authority had been sought by or granted to him, he, nevertheless, borrowed the foreign currency in question, in the hope that the

offence would not be discovered. In doing so, he undoubtedly acted dishonestly and, in my view, dishonesty was a material element of the offence. He was, therefore, properly convicted on the second count. See *Nusca v Da Ponte and Ors* 1994 (3) SA 251 (B), on offences involving dishonesty, where the court held that the offence of unlawfully dealing in diamonds was an offence involving dishonesty, although dishonesty *per se* was not a requirement for the offence.

Secondly, with regard to the third count, I am satisfied that by borrowing the foreign currency without the authority of the RBZ, Gershun committed an act inconsistent with the implied conditions of his contract of employment. In my view, it was an implied term of Gershun's contract of employment that he would observe and uphold the provisions of the Exchange Control Act and the Regulations made thereunder. Accordingly, he was properly convicted on the third count.

Finally, as far as the penalty is concerned, the Code provides for dismissal in respect of both acts of misconduct.

In the circumstances, the appeal is dismissed with costs.

CHIDYAUSIKU CJ: I agree

ZIYAMBI JA: I agree

*Byron Venturas & Partners*, appellant's legal practitioners

*Sinyoro & Partners* respondent's legal practitioners