

**GWERU WATER WORKERS' COMMITTEE**  
v  
**CITY OF GWERU**

**SUPREME COURT OF ZIMBABWE**  
**MALABA DCJ, GARWE JA & HLATSHWAYO JA**  
**HARARE, SEPTEMBER 29, 2014**

*A Mugandiwa*, for the appellant

*T Magwaliba*, for the respondent

**MALABA DCJ:** At the end of the hearing, the Court dismissed the appeal with costs having determined that it was without merit. It was indicated that the reasons would follow in due course. These are they.

The appeal is from the decision of the Labour Court holding that the appellant had no *locus standi* in the proceedings before it. The question for determination is whether a *universitas personarum* at common law can substitute itself for a workers committee created by statute and enforce its statutory rights which can only be enforced by a workers committee in terms of the Labour Act.

The facts are common cause. The appellant is a voluntary association of former members of the Zimbabwe National Water Authority (ZINWA). On 29 January 2009, while presenting the National Budget for the Year 2009, the acting Minister of Finance

announced the Government's decision to decentralise the management of the use of water to local authorities with effect from 1 February 2009. As a result of the decision, management of the use of water in Gweru was transferred to the respondent together with the employment of the appellant's members in the undertaking in terms of s 16(1) of the Labour Act ("the Act"). The respondent engaged the appellant's members on terms and conditions inferior to what they enjoyed at ZINWA immediately prior to the transfer. The appellant took up a complaint of an unfair labour practice with a labour officer alleging that the respondent's conduct was in breach of s 16(1) of the Act. A certificate of no settlement was issued and the matter was referred to compulsory arbitration. The appellant did not act to represent the case of the employees but acted in their place as the possessor of the rights it sought to vindicate. In other words it sued in its name.

On 14 January 2010, the appellant obtained an arbitral award in its favour as against the respondent. The parties approached the arbitrator for the quantification of the award. A hearing was conducted on 7 April 2010 and the arbitrator issued an arbitral award on 30 April to the effect that the award of 14 January 2010 was to be enforced in terms of a table from ZINWA showing the wages and salary rates that the appellant's members enjoyed as at the date of transfer from ZINWA to the Gweru City Council. On 26 May 2010 and 27 July 2010, the arbitrator issued further awards dealing with the implementation of the original award of 14 January 2010. A deadlock ensued between the parties and the arbitrator on the meaning of the awards. On 30 August 2010 the arbitrator issued what he termed an "interpretation award".

The appellant appealed against the 'interpretation award'. The respondent

raised as a preliminary point the question whether the appellant had *locus standi* to sue or be sued. At the commencement of the hearing Mr *Mutseyekwa* for the respondent submitted that the respondent was no longer challenging the appellant's *locus standi*. The appeal in that matter was allowed by the Labour Court under judgment no. LC/MD/26/11. Subsequently, the award of 14 January 2010 was quantified by the arbitrator on 9 August 2012. On 22 August 2012, the respondent appealed to the Labour Court seeking an order setting aside the quantification award, on the ground that it was a nullity as the appellant was not a legal entity capable of suing and being sued in its own name.

The appellant argued that the Labour Court was *functus officio* in relation to the *locus standi* issue. It further argued that the respondent had waived its right to challenge the *locus standi* of the appellant when it made the concession on the issue at the hearing of the appeal on 14 September 2011. On 20 April 2013, under judgment No. LC/MD/43/13, the Labour Court found that it was not bound by the concession which was wrongly made. It found that its earlier decision was void as the appellant had no *locus standi*. On this basis, the Labour Court set aside the quantification proceedings. The appellant was aggrieved by that decision and noted the appeal to the Supreme Court.

The dispute arose from the enforcement of the rights of workers arising from the transfer of an undertaking provided for under s 16 of the Labour Act. The appellant is a *universitas personarum*, created in terms of its own constitution, capable of suing and being sued in its own name. The question is whether a *universitas personarum* can sue in its own name for the rights of employees provided for under s 16 of the Act.

A workers committee is defined in s 2 of the Act to mean a workers committee appointed or elected in terms of Part VI. The formation of a workers committee in terms of the Act is provided for under s 23. Its functions are provided for under s 24. Section 23 provides:

**“PART VI**

**WORKERS COMMITTEES: FORMATION AND FUNCTIONS**

**23 Formation of workers committees**

*(1) Subject to this Act and any regulations, employees employed by any one employer may appoint or elect a workers committee to represent their interests:*

*Provided that no managerial employee shall be appointed or elected to a workers committee, nor shall a workers committee represent the interests of managerial employees, unless such workers committee is composed solely of managerial employees appointed or elected to represent their interests.*

*(1a) Subject to subsection (1b), the composition and procedure of a workers committee shall be as*

*determined by the employees at the workplace concerned.*

*[Subsection inserted by section 14 of Act 17 of 2002]*

*(1b) Notwithstanding subsection (1a), if a trade union is registered to represent the interests of not less than fifty per centum of the employees at the workplace where a workers committee is to be established, every member of the workers committee shall be a member of the trade union concerned.*

*(2) For the purposes of appointing or electing a workers committee, employees shall be entitled to—*

*(a) be assisted by a labour officer or a representative of the appropriate trade union; and*

*(b) reasonable facilities to communicate with each other and meet together during working hours at their place of work; and*

*(c) be provided by their employer with the names and relevant particulars of all employees employed by him; so however, that the ordinary conduct of the employer's business is not unduly interfered with.*

*(3) In the event of any dispute arising in relation to the exercise of any right referred to in subsection (2) either party to the dispute may refer it to the labour officer mentioned in paragraph (a) of that subsection, or, in the absence of such labour officer, any other labour officer, and the determination of the labour officer on the dispute shall be final unless the parties agree to refer it to voluntary arbitration.”*

Section 24 provides:

**“24 Functions of workers committees**

*(1) A workers committee shall—*

- (a) subject to this Act, represent the employees concerned in any matter affecting their rights and interests;  
and
- (b) subject to subsection (3), be entitled to negotiate with the employer concerned a collective bargaining agreement relating to the terms and conditions of employment of the employees concerned; and
- (c) subject to Part XIII, be entitled to recommend collective job action to the employees concerned; and
- (d) where a works council is or is to be constituted at any workplace, elect some of its members to represent employees on the works council.
- (2) Subject to subsection (3), where a workers committee has been appointed or elected to represent employees, no person other than such workers committee and the appropriate trade union, if any, may—
- (a) act or purport to act for the employees in negotiating any collective bargaining agreement; or
- (b) direct or recommend collective job action to the employees.
- (3) Where an appropriate trade union exists for any employees, a workers committee of those employees may negotiate a collective bargaining agreement with an employer—
- (a) in the case where the trade union has no collective bargaining agreement with the employer concerned, only to the extent that such negotiation is authorized in writing by the trade union concerned; or
- (b) in the case where there is a collective bargaining agreement, only to the extent permitted by such collective bargaining agreement; or
- (c) where the Minister certifies in writing that—
- (i) the issue in question was omitted from or included in the principal collective bargaining agreement when it should not have been so omitted or included; and
- (ii) the parties to the principal collective bargaining agreement have failed or are not in a position to reach an agreement on such an issue.”

A workers committee is a committee formed on the authority given under s 23(1) of the Act composed of employees appointed or elected at a workplace by other employees employed by one employer to represent the category of employees who appointed or elected its members on matters affecting their rights and interests. It does not share these features with any other body of people. In that regard a workers committee is a *sui generis* institution, the formation, rights and obligations of which are matters exclusively governed by

specific provisions of a statute concerned with labour matters. It enjoys no rights and bears no obligations of bodies constituted in terms of the law of voluntary associations.

Mr *Mugandiwa* argued that the appellant was a common law *universitas personarum*. What is clear from s 16 of the Act is that the rights provided for accrue to the employees themselves. The section relates to the terms and conditions of the contract of employment. In that regard, anyone wishing to assist employees to vindicate their rights in a court of law can only do so in a representative capacity.

The definition of a workers committee in s 2 is very clear. A workers committee can only be formed in terms of s 23 (1) of the Act for it to perform the functions set out under s 24. There is no other provision by which authority is granted for the formation of a committee known as a workers committee with the powers listed under s 24 of the statute. There can be no workers committee outside the confines of the Act. The fact that workers committees are specific statutory creations is further established by the provisions of s 26 of the Act which give the Minister of Public Service, Labour and Social Welfare or any other Minister to whom the President may, from time to time assign the administration of the Act, powers to make regulations governing the procedures to be followed by employees at workplaces when forming workers committees, the tenure of office of members and the operation, management and conduct of their affairs. A workplace is a place at which an employee must attend at specific times of the day to provide services to the employer in accordance with the terms and conditions of a contract of employment between the parties.

Unlike a common law *universitas personarum*, the functions of which are defined by its written Constitution, the procedures for the formation of workers committees, the nature and scope of their functions, are provided for by statute.

Section 26 provides:

***“26 Minister may make regulations relating to workers committees***

*(1) The Minister may, after consultation with the appropriate advisory council, if any, appointed in terms of Section nineteen, make such regulations as he considers necessary for the control of workers committees and works councils and, without derogation from the generality of his power in this regard, such regulations may provide for—*

*(a) the methods or procedures to be followed for the formation of workers committees;*

*(b) the tenure of office of members of workers committees;*

*(c) the operation, management and conduct of the affairs of workers committees and works councils;*

*(2) Regulations made in terms of subsection (1) may provide penalties for any contravention thereof:*

*Provided that no such penalty shall exceed the penalties referred to in section one hundred and twenty-eight.”*

A workers committee cannot sue for any rights in a court of law because if it did, it would be acting without any authority. Any organisation performing the functions listed in s 24 of the Act cannot act outside the scope of those functions and contrary to what the regulations made by the Minister under s 26 have prescribed. Workers committees have no right to represent employees in litigation. *Cold Storage Co National Workers Committee v Cold Storage Co Ltd* 2002(1) ZLR 141(H).

The appellant sought to enforce the rights of the employees provided for and protected under s 16 of the Act. Enforcement of these rights would fall within the contents of

the functions of a workers committee as defined by the Act. Except where expressly provided the functions of a workers committee are inextricably linked to a workers committee and only that body would be entitled to exercise them in the manner prescribed by the employees at the workplace who appoint or elect its members or under the regulations made by the Minister in terms of s 26(1) of the Act. In other words it is the employees who decide whether a workers committee should be established at a particular workplace and it is they who, in the absence of regulations made by the Minister, determine the composition and procedure of the workers committee. The functions can only be exercised on behalf of employees who appointed or elected the workers committee at a specific workplace. A common law *universitas personarum* cannot arrogate to itself functions specifically reserved for a workers committee by a statute.

Unlike workers committees, trade unions, employers' organisations and employment councils are required to be set up in terms of written constitutions. Trade unions so set up become bodies corporate when registered. The relevant sections provide as follows:

***“28 Requirements for formation of trade unions and employers organizations***

*(1) Every trade union, employers organization or federation shall—*

*(a) subject to subsection (2), before it raises funds from any source; and*

*(b) within six months of its formation;*

*adopt a written constitution which shall provide for—*

...

***29 Registration of trade unions and employers organizations and privileges thereof***

*(1) Subject to this Act, any trade union, employers organization or federation may, if it so desires, apply for registration.*

*(2) Every trade union, employers' organization or federation shall, upon registration, become a body*

*corporate and shall in its corporate name be capable of suing and being sued, of purchasing or otherwise acquiring, holding or alienating property, movable or immovable, and of doing any other act or thing which its constitution requires or permits it to do, or which a body corporate may, by law, do.”*

Section 60 of the Act provides that every employment council shall upon registration in terms of the Act, become a body corporate and in its corporate name be capable of suing and being sued. It is also capable of doing any other act which its constitution requires or permits it to do, or which a body corporate may by law do. A workers committee which has to be formed in terms of s 23 of the Act for the purposes of performing the functions specified under s 24 is not required to adopt a written constitution because it is not intended to become a legal entity with its own existence and rights independent of the members appointed or elected by the employees at the workplace.

The legislature was conscious of the fact that employees at workplaces may need to be represented in matters affecting their rights and interests. The legislature provided for the creation of workers committees to fulfil this function. The workers committee so created, has the right to represent the employees concerned in any matter affecting their rights and interests at the workplace level. It has no right to sue and be sued because it is not a corporate body distinct from the members who constitute it. A body which claims a right to institute proceedings in a court of law claiming rights of employees under s 16 of the Act cannot be a “workers committee”.

A *universitas* is an aggregate of natural persons or individuals forming a legal *persona* or entity, with separate existence from them and having the capacity of acquiring rights and incurring obligations. It also enjoys the right of perpetual succession. See *Voet* 1.8.28; 3.4.1, 3.4.2, *Webb and Co v Northern Rifles* 1908 TS 464. *The Law of Partnership and Voluntary Association in South Africa* by Bamford, 3<sup>rd</sup> ed, p 126. JTR Gibson (ed) *Wille’s Principles of South African Law*, 7<sup>th</sup> ed. p 156-157.

A workers committee set up in terms of s 23 of the Act cannot set up a written constitution in order to imbue itself with the capacity to sue which it does not have under the statute in terms of which it is formed. In *CT Bolts v Workers Committee* SC-16-12 GARWE JA said:

“Under the common law, an unincorporated association, not being a legal persona, cannot as a general rule, sue or be sued in its name apart from the individual members, whose names have to be cited in the summons. A *universitas* on the other hand has the capacity, apart from the rights of the individuals forming it, to acquire rights and incur obligations. The position is also established that a body that has no constitution is not a *universitas* for it is the constitution that determines whether an association is or is not a *universitas*. On a proper interpretation of s 24 of the Act, it is clear that a workers committee exists to safeguard and champion the interests and welfare of the workers at the work place. It has no other function. There is no provision in the Act requiring a workers committee to adopt a constitution. There is also no requirement for a workers committee to acquire rights apart from the rights of the individuals forming it and the employees they represent. There is also no provision for a workers committee to acquire assets in its own name.”(my emphasis)

If a workers committee was endowed with the power of a voluntary association established in terms of a written constitution with the capacity to sue and be sued in a court of law, there would be no need of making provision for separate workers committees for non-managerial employees and for managerial employees. Provision for separate workers committees underscores the fact that the interests of non-managerial employees at workplaces are different from those of managerial employees. Each category of employees needs its own workers committee to effectively articulate and protect its interests at the workplace.

Mr *Mugandiwa* argued that the title ‘Gweru Water Workers Committee’ should not mislead the court into thinking that the entity is a workers committee. He argued

that the entity is a *universitas personarum*, created in terms of its constitution. It has the capacity to sue and be sued.

There is no doubt that the appellant can be sued and sue in its name for rights of its members not specifically provided for in their capacity as employees under the Act. The question is whether the entity can specifically act on behalf of the employees and perform the functions specifically reserved for a workers committee under the Act. A workers committee has the power to represent the employees at a particular workplace in any matter affecting their rights and interests. Only a trade union can represent its members before a determining authority or in the Labour Court. It cannot arrogate to itself, as was done by the “Gweru Water Workers Committee”, the cause of action of the employees and sue on their behalf. It is clear that the rights provided for under s 16 of the Act accrued to the employees concerned in their individual capacities.

The appellant claimed on behalf of the employees. A workers committee can only represent the interests of the employees who appointed or elected it at the workplace. It cannot substitute itself for the employees and claim their rights in litigation. The right to sue accrues to the employees and the employees in their individual capacities can enforce the rights. The employees would be claiming rights under contracts of employment with their employer. A *universitas personarum* would not have a right to sue for those rights when it is not privy to any of the contracts of employment. Representation in the context of s 24(1) of the Act does not mean that a person or body would have the right to substitute itself in place of the employees as a party to proceedings.

Mr *Mugandiwa* sought to meet the challenge by saying that the claimants in the dispute with the City of Gweru have always been the former ZINWA employees now employed by the City of Gweru. He argued that the respondent would not suffer any prejudice should the employees be substituted for the *universitas personarum*. The argument concedes the fact that the rights sought to be enforced by the *universitas personarum* belong to the employees in terms of their contracts of employment with the respondent. The employees had the right to sue for their rights in a court of law.

The objects of the appellant are provided as follows:

- a) To promote the interests of its members in so far as their employment with the City of Gweru is concerned;
- b) To represent members in any matters and/or disputes concerning their employment with the City of Gweru.
- c) To undertake any activities that may be lawfully taken by any organisation such as this as per the provisions of the Labour Act (Chapter 28:01) and the Regulations made thereunder in terms of any other laws relevant to employment in Zimbabwe.

The objects of the appellant are the same as those a workers committee would be seeking to achieve by the performance of the functions listed under s 24 of the Act. The legislature did not intend that a body, acting in terms of s 24 should have capacity to sue and be sued.

For the above reasons, we were of the unanimous view that the appeal had no merit. We accordingly dismissed it with costs.

**GARWE JA:**

I agree

**HLATSHWAYO JA:**

I agree

*Wintertons*, appellant's legal practitioners

*Danziger and Partners*, respondent's legal practitioners