

**DISTRIBUTABLE:** (20)

ZIMBABWE EDUCATIONAL SCIENTIFIC, SOCIAL AND CULTURAL  
WORKERS UNION  
v  
THE UNITED METHODIST CHURCH

CONSTITUTIONAL COURT OF ZIMBABWE  
CHIDYAUSIKU CJ, MALABA DCJ, ZIYAMBI JCC, GWAUNZA JCC, GARWE  
JCC, HLATSHWAYO JCC, PATEL JCC, GUVAVA JCC & MAVANGIRA JCC  
HARARE: 11 FEBRUARY 2015 & 23 NOVEMBER 2020

*T. Mpfu*, for the applicant

*No appearance*, for the respondent

**Judgment No. CCZ 18/20**  
**Constitutional Application CCZ 230/14**

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**HLATSHWAYO JCC:** This is an unopposed application brought in terms of s 85 (1) of the Constitution of Zimbabwe Amendment (No. 20) Act (the Constitution) for a declaration of infringement of the applicant's constitutional rights as embodied in s 58 and s 65 of the Constitution.

The applicant seeks relief in the following terms:

1. “The Respondent's refusal to deduct and remit union dues as sanctioned by Applicant's members is a
  - 1.1 Breach of right to freedom of association as provided for in s 58 (1) of the Zimbabwean Constitution

- 1.2 Breach of their right of fair labour standards and practices, as provided for in s 65 (1) of the Constitution of Zimbabwe together with ss 52 and 54 of the Labour Act [28:01].
- 1.3 Breach of the right to form and join trade unions as provided in s 65 (5) (c).
2. Respondent shall deduct and remit union dues for Applicant within **14 days** of this order and shall deduct and remit union dues for Applicant's members new and old as per **s 52 and 54 of the Labour Act [28:01]**.
3. Respondent shall pay costs of suit.”

The applicant is a registered trade union in terms of s 36 of the Labour Act [Chapter 28:01] (the Act) and the respondent is a *universitas* or duly registered ecclesiastic body in accordance with the laws of Zimbabwe.

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It is the applicant's case that the respondent has been failing to deduct and/or remit union dues of at least 272 of its employees who are members of the former. It has been submitted that the applicant is entitled to levy union dues against its members in terms of s 52 of the Act, which dues are recoverable from said members' employer. The applicant contends that s 54 (1) of the Act places a legal obligation upon the respondent to remit union dues on behalf of its employees to it.

In the absence of fulfilment of that obligation, the applicant seeks to approach the court in terms of s 85 (1) of the Constitution for a declaration of rights in terms of s 58, s 65 (1) and s 65 (5) (c) of the Constitution which provide for the right to freedom of association, the right to fair labour standards and practices and the right to form and join trade unions, respectively.

Although the application is unopposed, it is necessary to consider whether or not it is properly before the court. The applicant relies on s 45 (2) and s 85 (1) of the Constitution in bringing this application. Section 45 (2) of the Constitution provides as follows:

**"45 Application of Chapter 4**

- (1) This Chapter binds the State and all executive, legislative and judicial institutions and agencies of government at every level.
- (2) This Chapter binds natural and juristic persons to the extent that it is applicable to them, taking into account the nature of the right or freedom concerned and any duty imposed by it.
- (3) Juristic persons as well as natural persons are entitled to the rights and freedoms set out in this Chapter to the extent that those rights and freedoms can appropriately be extended to them." (Emphasis added)

Section 85 (1) of the Constitution further provides:

**"85 Enforcement of fundamental human rights and freedoms**

- (1) Any of the following persons, namely—
  - (a) any person acting in their own interests;
  - (b) any person acting on behalf of another person who cannot act for themselves;
  - (c) any person acting as a member, or in the interests of a group or class of persons;
  - (d) any person acting in the public interest;
  - (e) any association acting in the interests of its members; is entitled to approach a court, alleging that a fundamental right or freedom enshrined in this Chapter has been, is being or is likely to be infringed, and the court may grant appropriate relief, including a declaration of rights and an award of compensation." (emphasis added)

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The applicant contends that its right of claim is as a body to which the respondent's employees belong, and to which members contribute to ensure the continued existence of its operations. Accordingly, it is accepted that the application falls within the ambit of s 85 (1) of the Constitution, more particularly, s 85 (1) (e) of the Constitution. Furthermore, s 45 (2) of the Constitution provides for the legal standing of the applicant, as a juristic person, to make a claim for infringement of fundamental human rights and freedoms to the extent that it is applicable to it. In *Meda v Sibanda and Ors* 2016 (2) ZLR 232 (CC) at 236B-D the court held as follows in this regard:

“It is clear from a reading of s 85(1) of the Constitution that a person approaching the Court in terms of the section only has to allege an infringement of a fundamental human right for the Court to be seized with the matter. The purpose of the section is to allow litigants as much freedom of access to courts on questions of violation of fundamental human rights and freedoms with minimal technicalities. The facts on which the allegation is based must, of course, appear in the founding affidavit.

Whether or not the allegation is subsequently established as true is a question which does not arise in an enquiry as to whether the matter is properly before the Court in terms of s 85(1). In this case, the applicant alleged in the founding affidavit that her right to property had been infringed. Whether her allegation is true or not is not the issue. What matters is that she alleged a violation of a fundamental human right and as such the Court was properly seized with the matter. The question of the veracity of the allegation would have been tested on the basis of evidence placed before the Court.” (*emphasis added*)

In the light of the foregoing and given the allegation of constitutional infringement by the applicant, the application is therefore taken as being properly before the court.

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The violations complained of by the applicant are in relation to s 58, s 65(6) and

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s 65 (5) (c) of the Constitution. Section 58 of the Constitution provides:

**"58 Freedom of assembly and association**

- (1) Every person has the right to freedom of assembly and association, and the right not to assemble or associate with others.
- (2) No person may be compelled to belong to an association or to attend a meeting or gathering.

Section 65 (1) of the Constitution states the following:

**"65 Labour rights**

- (1) Every person has the right to fair and safe labour practices and standards and to be paid a fair and reasonable wage.

Section 65 (5) (c) of the Constitution additionally provides that:

- "(5) Except for members of the security services, every employee, employer, trade union, and employee or employer's organisation has the right to—  
(c) form and join federations of such unions and organisations.”

Remaining mindful of the fact that the claim before the court turns on a failure to remit union dues to the applicant by the respondent, it is not immediately evident what causal link exists between the rights relied upon by the applicant and the actions of the respondent. The applicant has sought to submit that in failing to remit union dues to the applicant, the respondent has effectively barred its employees from joining a trade union of their choice, in addition to preventing them from "congregating" in association with it and, as a result, an inability to advocate for fair labour standards and practices in the workplace through the medium of the applicant. With respect, I am not convinced that a failure to remit union dues raises a constitutional issue, i.e, a matter involving the "interpretation, protection or enforcement" of the constitution. The case of *Chani v Mwayera J N.O & Ors* CCZ 02/20 at p 7 of the cyclostyled judgement is appropriate in this regard, wherein it states:

"A matter does not become a constitutional matter and fall within the jurisdiction of the Constitutional Court merely because it is brought in terms of s 85(1) of the Constitution. The mere reference to constitutional provisions or alleged infringement of constitutional rights does not mean that a constitutional issue has been raised. See *Magurure and Ors v Cargo Carriers International Hauliers (Pvt) Ltd t/a Sabot* CCZ 15/16."

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Interestingly, the applicant has made reference to several provisions of the Act in support of this application. It is evident that the constitutional provisions relied upon by the applicant have apposite provisions in terms of the Act and available methods of redress thereon. In other words, the applicant has enough remedies under subsidiary legislation and need not invoke the constitution to obtain relief.

Section 4 (1) and s 50 (1) of the Act provides for the right of employees to join trade unions in the following terms:

**"4 Employees' entitlement to membership of trade unions and workers committees**

- (1) Notwithstanding anything contained in any other enactment, every employee shall, as between himself and his employer, have the following rights—
  - (a) the right, if he so desires, to be a member or an officer of a trade union;
  - (b) where he is a member or an officer of a trade, the right to engage in the lawful activities of such trade union for the advancement or protection of his interests;
  - (c) the right to take part in the formation and registration of a trade union;
  - (d) the same rights, *mutatis mutandis*, as are set out in paragraphs (a), (b), and (c) in relation to workers committees."

**"50 Right of membership of registered trade unions and employers organizations**

- (1) Every employee shall be entitled to membership of any registered trade union which represents his undertaking or industry if he is prepared to comply with its rules and conditions of membership."

Further to that, s 2A and s 6 of the Act provides for the right to fair labour standards and practices in the following manner:

**"2A Purpose of Act**

- (1) The purpose of this Act is to advance social justice and democracy in the workplace by—
  - (a) giving effect to the fundamental rights of employees provided for under Part II;
  - (b) ....
  - (c) providing a legal framework within which employees and employers can bargain collectively for the improvement of conditions of employment;
  - (d) the promotion of fair labour standards;
  - (e) the promotion of the participation by employees in decisions affecting their interests in the work place;
  - (f) securing the just, effective and expeditious resolution of disputes and unfair labour practices.
- (2) This Act shall be construed in such manner as best ensures the attainment of its purpose referred to in subs (1).
- (3) This Act shall prevail over any other enactment inconsistent with it"(Emphasis added)

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**"6 Protection of employees' right to fair labour standards**

- (1) No employer shall—
  - (a) pay any employee a wage which is lower than that to fair labour specified for such employee by law or by agreement made under this Act; or

- (b) require any employee to work more than the maximum hours permitted by law or by agreement made under this Act for such employee; or
  - (c) fail to provide such conditions of employment as are specified by law or as may be specified by agreement made under this Act; or
  - (d) require any employee to work under any conditions or situations which are below those prescribed by law or by the conventional practice of the occupation for the protection of such employee's health or safety; or
  - (e) hinder, obstruct or prevent any employee from, or penalize him for, seeking access to any lawful proceedings that may be available to him to enable him lawfully to advance or protect his rights or interests as an employee.
- (2) Any person who contravenes subs (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."

Having identified the relevant rights as contained in the Act, it is necessary to determine what matters the Labour Court is entitled to entertain. Section 46 of the Act provides as follows:

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**"46 Matters to be determined by Labour Court**

In the event of any dispute as to—

- (a) the extent or description of any undertaking or industry; or
- (b) whether any employees are managerial employees; the matter shall be referred to the Labour Court for determination" (Emphasis added)

Additionally, the right to union or association dues and the collection thereof is provided for in terms of s 52 and s 54 of the Act as follows:

**"52 Right to union or association dues**

- (1) For the purpose of fulfilling its obligation to represent the interests of its members employed or engaged in the undertaking or industry for which it is registered, a registered trade union or employers organization may, subject to this Act, levy, collect, sue for and recover union and association dues."

**"54 Collection of union dues**

- (1) Union dues shall be collected by an employer from his employees and transferred to the trade union concerned—
  - (a) by means of a check-off scheme or in any other manner agreed between the trade union and the employees and the employer or employers organization concerned; or

(b) failing such agreement as referred to in para (a), by authorisation in writing of an employee who is a member of the trade union concerned.

...

(6) Any employer who fails or refuses to collect union dues and transfer them to the trade union concerned in accordance with this section 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"  
(Emphasis added)

With due regard to the foregoing, it appears to me that there was no need for the applicant to approach this Court when the dispute and redress sought was resolvable in the Labour Court and/or in terms of the applicable subsidiary legislation. The case of *Katsande v Infrastructural & Anor v Infrastructure Development Bank of Zimbabwe* SC 9/17 at p 7 of the cyclostyled judgment is reflective of the Court's position wherein it states:

"...where it is possible to decide any case, civil or criminal, without reaching a constitutional issue, that is the course which should be followed'. See *State v Mhlungu* 1995 3 SA 867 (CC) para [59].

The doctrine (of avoidance and subsidiarity) was affirmed in *Zentsi v Council of State, Ciskei & Others* 1995 4 SA 615 (CC) paras [2] – [8]. It is a well-founded principle in our law that this court will not ordinarily consider a constitutional question unless the existence of a remedy is dependent solely upon it. The doctrine of avoidance was fortified in *Sports and Recreation Commission v Sagittarius Wrestling Club and Anor* 2001 (2) ZLR 501 (S) in which Ebrahim JA said the following: -

'There is also merit in Mr Nherere's submission that this case should never have been considered as a constitutional one at all. Courts will not normally consider a constitutional question unless the existence of a remedy depends upon it; if a remedy is available to an applicant under some other legislative provision or on some other basis, whether legal or factual, a court will usually decline to determine whether there has been, in addition, a breach of the Declaration of Rights.' (emphasis added)

In the circumstances, I am of the view that the matter presented before the court is not a constitutional one and is capable of redress in the Labour Court or in terms of some other relevant subsidiary legislation.

**DISPOSITION**



This Court declines jurisdiction in this matter basically for two reasons. Firstly, the issues raised by the applicant do not involve “the interpretation, protection or enforcement of the constitution”. Thus, there is no constitutional matter before the court. Secondly, on the basis of principles of avoidance and subsidiarity as outlined above, this Court will not assume jurisdiction in such a matter.

Accordingly, the application is removed from the roll with no order as to costs.

**MALABA DCJ:** I agree

**ZIYAMBI JCC:** I agree

**GWAUNZA JCC:** I agree

**GARWE JCC:** I agree

**PATEL JCC:** I agree

**GUVAVA JCC:** I agree

**MAVANGIRA JCC:** I agree

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*Matsikidze & Mucheche*, applicant' legal practitioners

*The United Methodist Church, respondent*

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