IN THE LABOUR COURT OF SOUTH AFRICA,

DURBAN

Reportable
Case no: D20/16

In the matter between:

NATIONAL BARGAINING COUNCIL FOR THE CLOTHNG MANUFACTURING INDUSTRY (KZN)	Applicant
and	
GLAMOUR FASHIONS WORKER PRIMARY CO-OPERATIVE LIMITED	First Respondent
SUGARBAY WORKER CO-OPERATIVE LTD	Second Respondent
SRN MANUFACTURING WORKER CO-OPERATIVE LTD	Third Respondent
FANTASY PRIMARY WORKER CO-OPERATIVE LTD	Fourth Respondent
MASAKHE CLOTHING WORKER CO-OPERATIVE LTD	Fifth Respondent
KZN MANUFACTURING WORKER CO-OPERATIVE LTD	Sixth Respondent
RICHARD LYSTER N.O.	Seventh Respondent

Heard: 19 October 2016
Delivered: 15 February 2017

Summary: Labour Relations Act, 1995 and Co-Operatives Act 14 of 2005 - court cannot issue blanket declaratory order stipulating that workers' co-operatives are subject to the Labour Relations Act – Labour Relations Act applies only to 'employees', as defined - no conflict between Labour Relations Act and Co-Operatives Act.

JUDGMENT

WHITCHER J

[1] Applicant is a bargaining council registered in terms of section 29 of the Labour Relations Act 66 of 1995. First to Sixth Respondents purport to be worker co-operatives, registered under section 7 of the Co-Operatives Act 14 of 2005 ("COA").

[2] Applicant, as per the notice of motion, seeks a declaratory order that the provisions of section 6 of Schedule 1, Part 2 of the COA do not prevail over the provisions of the LRA pursuant to the provisions of section 210 of the LRA, and accordingly that members of worker co-operatives who otherwise fall within the

definition of an “employee” in terms of section 213 of the LRA are employees for the purposes of the LRA, and the co-operatives and such members are accordingly bound by the provisions of the LRA.

The statutory framework

[3] Section 210 of the LRA provides as follows:

> 210 Application of Act when in conflict with other laws
> If any conflict, relating to the matters dealt with in *this Act*, arises between this Act and the provisions of any other law save the Constitution or any Act expressly amending this Act, the provisions of *this Act* will prevail.

[4] Section 6 in Schedule 1, Special provisions relating to certain kinds of Co-Operatives, part 2 Worker Co-Operatives of the COA reads:

> 6 Application of Labour Legislation
>
> (1) A member of a worker co-operative is not an employee as defined in terms of the Labour Relations Act, 1995 (Act 66 of 1995), or the Basic Conditions of Employment Act, 1997 (Act 75 of 1997).
>
> (2) Despite subsection (1), a worker co-operative is deemed to be the employer of its members who work for the co-operative for the purposes of the following Acts: [Skills Development Act, Skills Development Levies Act, OHSA, COEDA, UIF Act and Unemployment Insurance Contributions Act].

[5] Section 4 and 5 of Schedule 1, part 2 to the COA provides:

> 4 Termination of membership
> (1) Despite any other provisions of this Act, the constitution of a worker co-operative may give the board of directors the power to terminate the membership of a member if there is good reason to do so.
>
> (2) Before terminating the membership of a member, the board of directors must give such member- (a) notice that termination is contemplated; (b) reasons for the proposed termination which, in the case of a member that has served a period of probation, must relate to the conduct or capacity of the member to carry out his or her duties, or to the operational requirements of the co-operative; and (c) a right to be heard.
>
> (3) A member whose membership is terminated by the board of directors has a right to appeal to a general meeting within the time limits set out in the constitution.

(4) A termination of the membership of a member by the board of directors is confirmed on appeal if the members, at a duly called general meeting, do not reverse the decision of the board of directors.

(5) If the general meeting is called to consider the appeal of a member whose membership is terminated and a quorum of members is not present, the decision of the board is confirmed.

5 Laid-off member

(1) A temporary lay-off of a member does not result in termination of that member's membership.

(2) If a member is laid off and two years have elapsed since the date of the lay-off without the member having resumed employment with the co-operative, the board of directors may, in accordance with the constitution of a co-operative, terminate the membership of the member.

(3) The provisions of item 4 (2) to (5) apply to the termination of a member's membership in terms of this item.

Applicant's submissions

[6] The necessity for the declarator arises from a proliferation in the registration of worker co-operatives in the clothing manufacturing industry falling within its registered scope and hence jurisdiction.

[7] The proliferation arises solely in order to circumvent the application of the LRA and Applicant's main collective agreements to employees previously engaged as such by close corporations or companies who have now converted into worker co-operatives but who operate no differently than they did before.

[8] The worker co-operatives seek to avoid the provisions of the LRA by way of reliance on section 6 part 2, Schedule 1 of the COA, and, in so doing, argue that the former employees of the juristic entities, now framed as "members" of the primary worker co-operative, are not employees for the purpose of the LRA and accordingly, the co-operatives are exempt from according such members (who are no more than employees) the rights and protections accorded employees under the LRA.

[9] While items 4 and 5 of the COA purport to accord members of worker co-operatives rights akin to some of those set out in the LRA, they afford no substantive, alternatively no adequate substantive re-dress for the breach of those provisions and are in conflict with employees' rights to fair labour practices entrenched in section 23 of the Constitution.

[10] Section 6, part 2, Schedule 1 to the COA is in direct conflict with the provisions of the LRA. It is accordingly inconsistent with the provisions of the LRA, in particular the definition of "employee" as contained in section 213 of

the LRA and flowing therefrom is inconsistent with the rights and remedies afforded employees by the LRA.

[11] The COA does not, however, serve to expressly amend section 210 of the LRA or the definition of "employee" in terms of section 213 of the LRA, or for that matter, any other provision of the LRA which confers rights and remedies on employees as defined in terms of the LRA.

[12] Accordingly, the COA is not an Act expressly amending the LRA, and, accordingly its provisions purporting to exclude members who fall within the definition of employee in terms of the LRA from the ambit of the LRA do not supersede the provisions of the LRA. Given the requirements in section 210 for express amendment, an implied amendment by virtue of the COA's reference in section 6 to the LRA, is insufficient.

[13] It is trite that the legislature is deemed to know the law and further that where a supremacy provision in an earlier Act (such as the LRA) requires an express amendment of it in order for a subsequent Act to prevail over its provisions, such Act would have to specifically and expressly amend or repeal the supremacy provision contained in the preceding Act, *in casu,* section 210 of the LRA, which the COA does not do.

[14] It is evident from the preamble to the LRA as well as lists of Acts set out in the LRA which have expressly amended the LRA (the COA is not one of them), seen together with the absence of any express provision in the COA repealing or amending section 210 or 213 of the LRA, that the LRA prevails over any inconsistent provisions of the COA and accordingly the definition of an "employee" contained in section 213 of the LRA prevails over the exclusion granted in section 6, Schedule 1 part 2 of the COA.

[15] Members who fall within the definition of employee pursuant to the provisions of section 213 of the LRA accordingly enjoy the rights and remedies afforded them by the LRA; not the watered down rights and remedies accorded to members in terms of sections 4 and 5 of part 2, schedule 1 of the COA.

Respondents' submissions

[16] The COA was enacted after the LRA, and consequently the presumption that the Legislature was aware of the LRA when it enacted the COA is applicable. That presumption is raised to an almost certainty when one considers that Schedule 1, Part 2, Section 6(1) specifically refers to the LRA. Had the Legislature intended the LRA to apply to members of a worker co-operative, more particularly the LRA's definition of "employee", why did it specifically enact Schedule 1, Part 2, Section 6(1) of the COA, to the effect that "a member of a worker co-operative is not an employee as defined in terms of the Labour Relations Act, 1995 (Act 66 of 1995)…"?

[17] Patently the Legislature intended to exclude members of a co-operative from the definition of "employee" under the LRA, and consequently exclude such members from the provisions of the LRA itself.

[18] Applicant incorrectly interprets section 210 of the LRA and fails to appreciate the true nature of co-operatives. Section 210 heralds the LRA as the pre-eminent legislation *in labour matters* that are dealt with by that Act. Only the Constitution itself or a statute that expressly amends the LRA can take precedence in application to such labour matters.

[19] Schedule 1, Part 2 of the COA does not deal with matters that are dealt with by the LRA, and consequently the provisions of section 210 can find no possible application to First to Sixth Respondents' members.

Relief sought

[20] Put simply, Applicant seeks a declaration that provisions of the COA to the effect that members of worker co-operatives are not employees in terms of the LRA do not prevail over the provisions of the LRA itself since section 210 of the LRA provides for the latter Act's precedence. While concerned with sham worker co-operatives, Applicant wishes this court to make a *legal* finding that sections of the COA are, *a priori*, inconsistent with the definition of "employee" contained in the LRA. This finding is to be made without reference to the facts of how any particular worker co-operative functions. Given the framing of the relief sought and the arguments presented by Applicant, I am called upon to adjudicate a conflict of laws that will have a blanket effect on all worker co-operatives.

Analysis

[21] While much time was spent arguing whether the COA effectively amended the LRA or not, the outcome of this case, to my mind, flows from a proper consideration of the definition of employee in section 213 of the LRA. For reasons given below, I can only consider exercising this court's discretion to issue a declarator in respect of the members of worker co-operatives who indeed fall within the definition of an "employee" set out in section 213 of the LRA. But it is not self-evident that all members of workers' co-operatives are covered by the LRA's definition of 'employee'. Any declaratory order could, logically, only cover those co-operative members who work *for* another person and who receive any remuneration[i]. What this means is that any declaration of the LRA's precedence over the COA could only apply to those members of sham co-operatives who are in fact employees as defined in the LRA in the first place. There is no point granting such a declaratory order because the issues are essentially fact-dependent and their determination in the abstract would have little, if any, precedential value and thus no practical effect.

The meaning of 'employee'

[22] Despite the fact that a worker co-operative's primary purpose is to provide employment (or work) to its members, I am not prepared to find that this activity necessarily brings its members within the ambit of the LRA; an Act regulating solely the relationship between employers and employees. The COA appears to me to regulate work of another variety. The mere fact that co-operative members are employed or receive remuneration is not sufficient for the LRA to cast its net over them. The nature of the relationship between the parties performing co-operative work on the one hand and directing and paying for it on the other hand must be considered. One of the main objects of

labour law is to ensure equity in the relationship between individual employees and their employers; with it being accepted that the latter possess considerable social and economic power over the former[ii]. However, if the relationship between the parties to production have transcended the traditional employment hierarchies, where those providing their labour also jointly own the enterprise, share in any surplus and have a democratic say in the running of the operation, then, in my view, labour law should not and does not apply.

[23] This flows from the definition of both 'employee' and 'remuneration' in section 213 of the LRA which envisages affording the protections of the Act to persons working *for* as opposed to *with* other persons. A legitimate and properly constituted co-operative is characterized by the values of collective self-help, self-reliance, self-responsibility, democracy, equality and social responsibility[iii]. At its heart is the impulse of members to voluntarily associate with each other and to apply democracy as the basis of organisational decision-making[iv]. This is reflected in provisions of the COA dealing with shareholding and the allocation of surpluses, requiring regular meetings, and instituting the general membership of the cooperative as the highest decision-making body of the organisation[v]. Members of a workers' co-operative may be employed in a very wide sense but, in legitimate co-operatives, these members are not working *for* another person in the same way a wage-earner is. They do not place their capacity to work at the disposal of others. They are working *with* others for themselves in an enterprise they jointly own and collectively control.

[24] Case law and commentary on the meaning of 'employee' is dominated by the distinction between contracts of service (characteristic of employees) and contracts of work (characteristic of independent contractors)[vi]. This distinction does not assist very much in this case because both employees and independent contractors perform work for - or render services to - other persons; the extent of control, dependence, exclusivity and ownership of tools merely differing. Members of a legitimate and properly functioning co-operatives cannot be assessed against section 200A of the LRA since they do not work for or render services to a party distinct from the collective of which they are a part, even though their day-to-day work may be subject to the control of appointed managers.

[25] One has to come to terms with the fact that legitimate workers' co-operatives engage in an entirely novel variety of work, characterized chiefly by their being joint owners and being capable, at intervals, of exercising democratic control over the enterprise. Should the situation arise where the termination of the membership of one particular member is sought by the others, such a member has democratic channels at his disposal to resist this outcome. He also has the right to be heard in terms of Items 4 and 5 of Schedule 1, part 2 to the COA. Given that the nature of a member's relationship with others in a legitimate co-operative is based on voluntary association underpinned by democratic decision-making, the substantive and procedural protections in the LRA against unfair dismissal are out of place.

[26] It may at first glance appear that Section 6 in Schedule 1, part 2 of the COA gives the game away that members of workers' co-operatives are indeed thought of as employees but then excluded from labour law protections. This section provides that members are still subject to various labour statutes *other than* the LRA and BCEA, such as the Skills Development Act, Occupational Health and Safety Act, and the Unemployed Insurance Fund Act. This is not the case. These are deeming provisions that, so to speak, opt *into* certain labour law obligations while asserting the fundamental point of this case; that members of workers' co-operatives are not employees.

[27] Applicant has urged that I consider the rights on termination of membership afforded to members of a co-operative in items 4 and 5 of Schedule 1 to the COA to be inadequate to the task of ensuring 'employees' rights to fair labour practices entrenched in section 23 of the Constitution. In the first instance, this begs the question of whether the members are employees or not. If the co-operative is a sham and 'members' manifestly are employees, these employees access their rights to fair labour practices via the LRA by pleading a case of unfair dismissal in the Commission for Conciliation, Mediation and Arbitration (CCMA) or Bargaining Council. Should the facts bear their contentions out, these labour forums will both have jurisdiction and will provide them with appropriate relief. However, I have already found that the members of a legitimate and properly constituted workers co-operative do not fall within the definition of employee in the LRA as they do not work *for another* person. As such, their remedies lie, much as an independent contractor or partner in a company does, outside labour law. Indeed, their position will most closely resemble that of a trade union official outvoted at a general meeting. He or she may enforce compliance with the organisation's constitution and the rules of natural justice. He or she may decry *male fides* or irrationality but not complain that the Code of Good Conduct on Dismissal was not observed in the termination of his association with the union.

[28] It may be argued that since the right to fair labour practices is indeed extended to 'everyone'[vii] perhaps the meaning of employee in the LRA, (the statute meant to give expression to that fundamental right), should be more expansively interpreted. Perhaps in creating a distinction between working *for* and *with* another person, I am unduly excluding people from the ambit of the LRA and thus the constitutional right to which the LRA is meant to give expression. Perhaps working in - or for - a co-operative should be taken to be working for another person; in this case a juristic one.

[29] I am alive to these arguments and, in interpreting the meaning of 'employee' in section 213 of the LRA, I am enjoined to do so in a way that gives effect to the spirit, purport and object of the Bill of Rights.[viii] This means I must prefer a reasonable interpretation of a statute that preserves the scope of a constitutional right over one that unduly limits it. Section 3 of the LRA also requires that those interpreting this statute do so in a manner that gives effect to its primary objects and in compliance with the Constitution.

[30] However, it strikes me that section 22 of the Constitution exerts some interpretive pull on the scope of the definition of 'employee' too. In *Affordable Medicines Trust,*[ix] the Constitutional Court noted:

> 'Freedom to choose a vocation is intrinsic to the nature of a society based on human dignity as contemplated by the Constitution. One's work is part of one's identity and is constitutive of one's dignity. Every individual has a right to take up any activity which he or she believes himself or herself prepared to undertake as a profession and to make that activity the very basis of his or her life. And there is a relationship between work and the human personality as a whole. "It is a relationship that shapes and completes the individual over a lifetime of devoted activity; it is the foundation of a person's existence".[x]

[31] As I have stated earlier, the relief sought by Applicant would cover even those working in legitimate and properly functioning co-operatives. These are "autonomous associations of persons united voluntarily to meet their common economic and social needs and aspirations through a jointly owned and democratically controlled enterprise organised and operated on co-operative principles"[xi]. I do not understand Applicant to deny the existence of legitimate workers' co-operatives. And yet, were I to declare that sections of the COA are, *a priori*, in conflict with the provisions of the LRA, (which would take precedence by virtue of section 210), the effect would be that these enterprises and those who consider themselves joint-owners of a democratically controlled enterprise run co-operatively with others would be treated in law as no more than businesses with wage or salary earners. It would not be a stretch to say that such a declaration may limit the freedom of vocation of these citizens in the way set out in the passage from *Affordable Medicines Trust* above, by impacting the dignity and sense of identity that comes with the work one does.

[32] I mention section 22 of the Constitution to illustrate that, sensitivity to the spirit, purport and object of the Bill of Rights does not inexorably lead to an interpretation of 'employee' in the LRA that extends the reach of labour law over as many varieties of work as reasonably possible. A countervailing freedom is also at play in declaring that joint owners of a workers' co-operative are not, *in substance*, employees.

[33] On the balance, I am satisfied that members of a legitimate workers' co-operative do not fall under the definition of 'employee' in the LRA and that the reasons I have given above flow from a constitutionally healthy interpretation of the relevant provisions of the statutes concerned.

<u>Conflict between the LRA and COA</u>

[34] Much was made in this case about a potential conflict of laws between the LRA and the COA. Section 210 of the LRA envisages a situation in which the application of the LRA might conflict with other laws. In this regard the LRA states:

> ‘If any conflict, relating to the matters dealt with in this Act, arises between this Act and the provisions of any other law save the Constitution or any act expressly amending this Act, the provisions of this Act will prevail’.

[35] Respondents argued that the LRA was expressly amended by the COA. Although, it is unnecessary to rule on this issue given the approach I have taken, I have my doubts whether the COA amended the LRA. The word “expressly” in section 210 of the LRA sets out the form in which any amendment to that statute must take place. For the sake of legal certainty, even if a later Act purported to amend the LRA, such as the COA does, this is of no effect since such an amendment was not done in a manner required by the earlier Act; i.e. expressly.

Sham co-operatives

[36] Nothing in this judgment should be taken to condone sham co-operatives who adopt the form of a workers’ co-operative to circumvent labour law. These simulations are a blight on the labour market and a serious abuse of worker rights. The COA itself creates criminal offences relating to the malfunctioning of co-operatives to which it attaches sanctions, including imprisonment. In particular, section 92 (2) provides:

> Any person who knowingly-
> (a) makes or assists in making a report, return, notice or any other document to be sent to the registrar or any other person, as required by this Act, that contains an untrue statement of a material fact; or
> (b) omits to state a material fact on any of the documents referred to in paragraph (a), that will be sent to the registrar or any other person, as required by this Act, is guilty of an offence and is liable on conviction to a fine or to imprisonment for a period not exceeding 24 months or to both a fine and such imprisonment.

[37] Unscrupulous employers setting up sham co-operatives to circumvent labour law will, *on a proper examination of the facts on a case by case basis,* hopefully come short in the CCMA or Bargaining Council.

Findings

[38] For the reasons given, I am unable to issue a blanket declaratory order stipulating that all workers’ co-operatives are subject to the Labour Relations Act of 1995. The LRA applies only to ‘employees’, as defined.

[39] There is also no direct, *a priori*, conflict between the Labour Relations Act of 1995 and the Co-Operatives Act 14 of 2005. These laws serve different purposes. There is nothing inherently sinister in the Co-Operatives Act 14 of 2005. It seeks to create and regulate a new variety of economic enterprise in which members work *with* others for mutual gain. The provisions of the Labour Relations Act are not suited to regulate this variety of enterprise, nor does the Labour Relations Act apply to them. The fact that the Co-Operatives Act 14 of 2005 provides for exemptions from labour law for members of genuine worker co-operatives is not the problem. It is the misuse of the co-

operative form by unscrupulous employers that is the problem. Unfortunately these abuses will have to be addressed as and when the facts as labour disputes[1] on a case by case basis.

[40] Since the application raised novel and important legal issues whose determination is of benefit to many other parties, I intend to depart from the general rule that costs follow the result.

Order

[41] The application is dismissed, with no order as to costs.

_____

Whitcher J
Judge of the Labour Court of South Africa

APPEARANCES:
For Applicant: Adv C Nel, instructed by MacGregor Erasmus Attorneys
For First to Sixth Respondents: Adv M E Stewart, instructed by Omar & Associates

---

[i] See subsection (a) of the definition of employee in section 213 of the LRA. Subsection (b) does not apply in this case.
[ii] *Certification of the Constitution of the Republic of South Africa*, 1996 (4) SA 744 (CC) at para 66
[iii] Preamble to COA
[iv] Section 2(b) of the COA
[v] Section 27(2) of the COA
[vi] see *Niselow v Liberty Life Association of Africa Ltd* 1998 (4) SA 163 (SCA); *Phaka and Others v Bracks and Others* [2015] 5 BLLR 514 (LAC)

[vii] Section 23 of the Constitution states that "*Everyone* has the right to fair labour practices"(my emphasis)
[viii] Section 39(2) of the Constitution
[ix] *Affordable Medicines Trust and Others v Minister of Health and Another 2006 (3)* SA 247 (CC)
[x] Kommers *The Constitutional Jurisprudence of the Federal Republic of Germany* 2 ed (Duke University Press, Durham and London 1997) translating the German Court decision in the *Pharmacy* case [7 BVerfGE 377] at 274.
[xi] Definition of 'co-operative' in section 1 of the COA.

---

[1] See *National Bargaining Council for the Clothing Manufacturing Industry (KZN Regional Chamber) and Hot Chilli Worker Primary Co-operative Ltd* (2013) 34 ILJ 3377 (BCA).