



IN THE LABOUR APPEAL COURT OF SOUTH AFRICA, DURAN

Not Reportable

Case no: DA04/2017

In the matter between:

**NATIONAL BARGAINING COUNCIL FOR THE
CLOTHING MANUFACTURING INDUSTRY (KZN
CHAMBER)**

Appellant

and

GLAMOUR FASHIONS WORKER PRIMARY

CO-OPERATIVE LIMITED

First respondent

SUGARBAY WORKERS CO-OPERATIVE LIMITED

Second respondent

SRN MANUFACTURING WORKER PRIMARY

CO-OPERATIVE LIMITED

Third respondent

**FANTASY PRIMARY WORKER CO-OPERATIVE
LIMITED**

Fourth respondent

**MASAKHE CLOTHING WORKER CO-OPERATIVE
LIMITED**

Fifth respondent

KZN MANUFACTURERS WORKER CO-OPERATIVE

LIMITED

Sixth respondent

RICHARD LYSTER N.O.

Seventh respondent

Heard: 22 March 2018

Delivered: 15 May 2018

Summary: Bargaining council sought declaratory order that the provisions of the Co-operatives Act 14 of 2005 (COA) do not prevail over the Labour Relations Act (LRA) and that members of worker co-operatives are employees within the meaning of s 213 of the LRA. Application dismissed by the Labour Court. On appeal found that the appellant sought no order of invalidity and that any conflict between the LRA and the COA, in as far as such exists, must be interpreted consonantly with the LRA. Appeal dismissed with no order as to costs.

Coram: Musi JA, Hlophe and Savage AJJA

JUDGMENT

SAVAGE AJA

Introduction

- [1] This appeal, with the leave of the Court *a quo*, is against the judgment and order of the Labour Court (Whitcher J) dismissing an application brought by the KwaZulu Natal Chamber of the National Bargaining Council for the Clothing Manufacturing Industry (KZN-NBCCMI) for a declaratory order that the provisions of item 6 of Part 2 of Schedule 1 to the Co-operatives Act 14 of 2005 (COA) do not prevail over the Labour Relations Act 66 of 1995; that members of worker co-operatives are employees within the meaning of s213 of the Labour Relations Act 66 of 1995 (LRA); and that the co-operatives and their members are bound by the provisions of the LRA.

[2] In its application before the Labour Court, the KZN-NBCCMI sought an order against the first to sixth respondents (the respondents), all worker co-operatives, to compel discovery in certain bargaining council arbitration proceedings and that the respondents do not conduct business as genuine worker co-operatives. In addition, declaratory relief was sought concerning the applicability of the LRA to employees of worker co-operatives.

Applicable statutory provisions

[3] An “employee” is defined in s 213 of the LRA as:

- ‘(a) any person, excluding an independent contractor, who works for another person or for the State and who receives, or is entitled to receive, any *remuneration*; and
- (b) any other person who in any manner assists in carrying on or conducting the business of the employer.’¹

[4] Section 210 of the LRA provides that:

‘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’.

[5] Item 6(1) of Part 2 of Schedule 1 of the COA² states that:

‘A member of a worker co-operative is not an employee as defined in terms of the Labour Relations (Act 66 of 1995) or the Basic Conditions of Employment Act, 1997 (Act 75 of 1997)’.

[6] Section 71 of the Co-operatives Amendment Act 6 of 2013, which has been passed by Parliament but not as yet promulgated by the President, is to substitute item 6 of Part 2 of Schedule 1 to the COA as follows:

¹ A different meaning to employee is given in s78 of Chapter V of the LRA.

² Section 6(2) reads: 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: (a) The Skills Development Act, 1998 (Act No. 97 of 1998); (b) the Skills Development Levies Act, 1999 (Act No. 9 of 1999); (c) the Occupational Health and Safety Act, 1993 (Act No. 85 of 1993); (d) the Compensation for Occupational Injuries and Diseases Act, 1993 (Act No. 130 of 1993); (e) the Unemployment Insurance Act, 2001 (Act No. 63 of 2001); and (f) the Unemployment Insurance Contributions Act, 2002 (Act No. 4 of 2002).

'Application of labour legislation

- 6(1) An employee of a worker co-operative is any member or non-member of a co-operative who satisfies the definition of 'employee' as defined in the Labour Relations Act, 1995 (Act No. 66 of 1995).
- (2) All worker co-operatives must comply with labour legislation.
- (3) Despite subsection (1), a co-operative may apply to a bargaining council with jurisdiction over the sector within which the co-operative operates or, where there is no such bargaining council, to the Minister of Labour for full or partial exemption from the need to comply with applicable labour legislation in respect of employees of the co-operative.
- (4) The bargaining council or the Minister of Labour, as the case may be, may only grant an exemption in terms of sub-section (3) if reasonably satisfied that there are good grounds for doing so.
- (5) The Minister must, in consultation with the Minister of Labour, within six months from the date of commencement of the Co-operatives Amendment Act, 2013, and thereafter from time to time, make regulations determining what constitutes good grounds for the purposes of subsection (4).'

Background

- [7] The KZN-NBCCMI issued compliance orders against the respondents, all registered worker co-operatives, for failing to register as employers with the bargaining council. Thereafter, it sought to enforce such compliance orders against the respondents using the mechanisms of the bargaining council. This required that the KZN-NBCCMI show at arbitration that each of the respondents was not a *bona fide* worker co-operative, but a sham designed to circumvent the provisions of the LRA.
- [8] On 16 July 2015, the seventh respondent (the arbitrator), refused a special plea raised by the respondents and ordered that they produce certain documents related to the constitution and operation of their respective co-operatives. Thereafter, on 13 January 2016, the KZN-NBCCMI applied to the

Labour Court for an order that the respondents be directed to produce and deliver the documents as ordered on 16 July 2015. In addition, an order was sought declaring that:

1. the respondents do not conduct business as genuine worker co-operatives; and
2. item 6 of Part 2 of Schedule 1 of the COA does not prevail over the provisions of the LRA, with the result that members of worker co-operatives are employees in terms of s213 of the LRA and worker co-operatives and their members are bound by the provisions of the LRA.

[9] The Labour Court dismissed the application before it with no order as to costs, finding that a blanket declaratory order could not be made in that the members of legitimate workers' co-operatives did not fall under the definition of "employee" in the LRA. The LRA and the COA were found to serve different purposes. Furthermore, the Court took the view that the COA did not amend the LRA and "*a constitutionally healthy interpretation of the relevant provisions of the statutes*" permitted a conclusion that members of a legitimate workers' co-operative do not fall under the definition of "*employee*" in the LRA. Rather, the problem is the misuse of the co-operative form by unscrupulous employers, who create sham co-operatives.

Submissions on appeal

[10] At the hearing of the appeal, the KZN-NBCCMI indicated that it intended to abandon the enforcement proceedings instituted against the respondents at arbitration and no longer sought an order that the respondents did not conduct business as genuine worker co-operatives. The appeal, therefore, proceeded only on the issue of the declaratory relief sought, namely whether the applicable provisions of the LRA prevailed over item 6 of Part 2 of Schedule 1 of the COA. This, it was contended by the appellant, remained a live issue of national importance, given what the KZN-NBCCMI considers to be a clear conflict between the provisions of the COA and the LRA.

[11] The respondents opposed the appeal on the basis that since no order of statutory invalidity was sought in the application of the law, it remained relevant whether the respondents operated as sham co-operatives. Furthermore, since a sham cooperative, set up illegally, may be deregistered by the Registrar of Cooperatives, it was not necessary for the KZN-NBCCMI to seek the declaratory relief it did given that an alternative remedy existed. As to any claim of a conflict between the statutory provisions, the relevant executive authorities such as the Minister of Trade and Industry, the Minister of Labour and/or the Registrar of Cooperatives should have been joined to the proceedings. The failure to do so had the result that there was no explanation placed before the Court why the amendment to item 6(1) of the COA has been passed by Parliament but not as yet promulgated by the President. The appeal, it was submitted, should for these reasons be dismissed with costs.

Discussion

[12] In its application to the Labour Court, the KZN-NBCCMI sought no order of invalidity against any provision of the COA. Rather, by way of declaratory relief, it sought a declaration that item 6 of Part 2 of Schedule 1 of the COA does not prevail over the provisions of the LRA; that worker co-operatives and their members are bound by the provisions of the LRA; and that members of worker co-operatives are employees as defined in s213 of the LRA.

[13] While s158(1)(a)(v) of the LRA permits the Labour Court to make a declaratory order, neither the LRA nor the Rules of the Labour Court prescribe the circumstances in which an order may be made.³ S21(1)(c) of the Superior Courts Act 10 of 2013 provides that a High Court may “*in its discretion, and at the instance of any interested person,... enquire into and determine any existing, future or contingent right or obligation, notwithstanding that such person cannot claim any relief consequential upon the determination*”.

[14] Declaratory relief is of particular value in a constitutional democracy in enabling courts, after a consideration of relevant circumstances, to declare

³ *National Employers' Association of South Africa v Minister of Labour* [2012] 2 BLLR 198 (LC) at paras 17-18.

the law with it then left to other arms of government, the executive and the legislature, to decide how best to observe the law.⁴ In deciding whether a declaratory order should be made, the court applies a two-stage test: firstly, it must be satisfied that the applicant is a person interested in an existing, future or contingent right or obligation. Secondly, if so satisfied, the court must decide whether the case is a proper one for the exercise of the discretion conferred on it.⁵ Whether alternative remedies exist is a factor to be taken into account by the court in the exercise of its discretion;⁶ and while the public interest may be a factor,⁷ declaratory relief should not be granted where the issue raised is hypothetical, abstract and academic.⁸

- [15] While item 6 of Part 2 of Schedule 1 provides that a member of a worker co-operative is not an employee as defined in s213 of the LRA, s210 of the LRA makes it clear that the LRA is to prevail in the event of a conflict between the matters dealt with in the LRA and the provisions of any other law. It follows therefore that if a member of a worker co-operative falls within the definition of an employee in s213 of the LRA, the provisions of the LRA must prevail. As such, there is no conflict between the two statutes, when the COA is concerned with the members of a worker co-operative and the LRA is concerned with employees.
- [16] Since legislation has been enacted to give effect to both the rights of members of worker co-operatives and employees,⁹ and with there being no conflict between the statutes as they stand, a proper case was not made out for the relief sought by the KZN-NBCCMI. The Labour Court cannot, therefore, be faulted for dismissing the application before it.

⁴ *Rail Commuters Action Group v Transnet Ltd t/a Metrorail (Rail Commuters)* 2005 (2) SA 359 (CC); 2005 (4) BCLR 301 (CC) at para 108.

⁵ *Shoba v Officer Commanding, Temporary Police Camp, Wagendrift Dam, and Another* 1995 (4) SA 1 (A) at 14G-I and other cases referred to therein.

⁶ *National Employers' Association of South Africa v Minister of Labour* [2012] 2 BLLR 198 (LC) at paras 17-18; *Director of Public Prosecutions v Mohammed N.O.* 2003 4 SA 1 (CC); *Trinity Asset Management (Pty) Ltd v Investec Bank Limited* 2009 4 SA 89 (SCA) at para 40.

⁷ *African Bank Limited v Weiner and Others* [2003] 4 All SA 50 (C) at para 39.

⁸ *London Clubs International (Overseas) Investments (Pty) Ltd v Free State Gambling and Racing Board and Others* [2005] ZASCA 35 at para 39.

⁹ See *Mazibuko and Another v City of Johannesburg and Others* 2010 (4) SA 1 (CC); [2010] 3 BCLR 239 (CC) at para 73 in which the Constitutional Court made it clear that "where legislation has been enacted to give effect to a right, a litigant should rely on that legislation in order to give effect to the right or alternatively challenge the legislation as being inconsistent with the Constitution".

[17] For these reasons, the appeal cannot succeed. There is no reason in law and fairness why costs should not follow the result.

Order

[18] For these reasons, the following order is made:

1. The appeal is dismissed with costs.

Savage AJA

Musi JA and Hlophe AJA agree.

APPEARANCES:

FOR THE APPELLANT:

Ms C Nel

Instructed by MacGregor Erasmus
Attorneys

FOR THE FIRST TO SIXTH RESPONDENTS: Mr M E Stewart

Instructed by Omar & Associates