

Co-operatives - is it really necessary to change the law?

 By [Faan Coetzee](#)

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The Co-operatives Amendment Bill (Bill) endorsed by the National Council of Provinces during May 2013 and referred to the president for assent seeks to remove from the Co-operatives Act (Act) a provision (exclusion) that currently excludes labour legislation in respect of a member of a worker co-operative as follows:

"A member of a worker co-operative is not an employee as defined in terms of the Labour Relations Act, 1995 (Act No. 66 of 1995), and the Basic Conditions of Employment Act, 1997 (Act No. 75 of 1997)."

The Bill also provides for the setting up of a Co-operatives Tribunal and Co-operatives Advisory Council (CDA) and introduces certain administrative and governance aspects. The stated purpose of these amendments is to "ensure that co-operatives take their rightful place and contribute effectively to the country's economy as they have the capacity to create jobs and eradicate poverty".

Amendment to the Act

The amendment to item 6 of Part 2 of Schedule 1 to the principal Act reads as follows:

"Application of labour legislation

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 subsection (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, 2012, and thereafter from time to time, make regulations determining what constitutes good grounds for the purposes of subsection (4)."

In terms of the proposed amendment, not only will the exclusion be removed, but any member of a worker co-operative will now become an employee and worker co-operatives are now compelled to comply with the relevant labour legislation unless an exemption has been granted.

Definitions and concepts

The proposed amendment has been criticised in that it "would heap onerous requirements on co-ops and would probably kill them". Is that fair comment? And what effect will the amendment removing the exclusion have on members of worker co-operatives?

A co-operative is defined as "an autonomous association 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".

The Act distinguishes between various defined co-operatives. For purposes of this discussion the following two are important: (1) a 'marketing and supply co-operative' which means a co-operative that engages in the supply of production inputs to members and markets or processes their products, and also includes an agricultural marketing and supply co-operative, and (2) a 'worker co-operative' which means a co-operative whose main objective is to provide employment to its members.

A worker cooperative has the characteristic that the majority of its workforce owns shares and the majority of shares are owned by the workforce. Membership is not always compulsory for employees, but generally only employees can become members either directly (as shareholders) or indirectly through membership of a trust that owns the company.

Difficulties with co-operatives

In South Africa in many instances persons received farms from the government in the form of a co-operative with 10 or more people and when the start-up capital was depleted it collapsed. Fairly recently, especially in the South African textile industry, mostly flailing businesses have been turned into co-operatives.

The main reasons for the failure of co-operatives in the informal sector identified by the Department of Labour is a lack of know-how on how to run a co-operative and lack of training in this regard.

In 2012 the Department of Labour reported that it was aware of a hundred bogus co-operatives up from seven in 2007, mostly in the textile sector. SACTWU said the move to co-operatives in this sector was to avoid having to abide by labour legislation in that the company would retain the machinery and equipment and "effectively outsourc(ing) work" to the employees in the guise of a co-operative.

The Bill seeks to address lack of training and knowledge by the introduction of the CDA to provide support and services to (especially small) co-operatives.

The definition of 'employee'

It is the deeming of a member of a co-operative to be an employee, if the member (or non-member) satisfies the definition of 'employee' in law, which may be superfluous as the Labour Court has already adopted a wide interpretation to the definition of an 'employee'.

In *UPUSA obo Mpanza / Spectra Creations Worker Co-operative Limited* [2010] 6 BALR 608 (NBCCMI) the commissioner noted the exclusion in the Act but applied S200A of the LRA (the so called 'substance over form provision') and held the members to be 'employees' despite the fact that the members had signed a form which acknowledged their membership of the co-operative. It was held that it was desirable to establish the true nature and identity of the employer and it was held that the employer was a 'worker co-operative' in name only and the sole motive for its formation was to evade its obligations under labour legislation.

It is accepted that it was necessary to remove the explicit exclusion. It is however questionable as to whether or not the proposed amendment to make members employees is really necessary in view of the existing mechanisms available to

members of worker co-operatives. Furthermore, the additional administrative requirements may well put a damper on the running of co-operatives.

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