



NUMSA-SACTWU Submission to the Portfolio Committee on Trade & Industry on the Co-operatives Amendment Bill [B17-2012]

06 July 2012

Introduction

The National Union of Metalworkers of South Africa (NUMSA) and the Southern African Clothing and Textile Workers Union (SACTWU) are aware of the inputs made by social partners (Government, Business, Labour and Community) on the *Co-operatives Amendment Bill* at NEDLAC and that there is general consensus on the need to improve the regulatory framework of co-operatives in line with the review of the Co-operatives Act No.14, 2005 initiated by the DTI a few years ago. The unions are also pleased that the constituencies endorsed the “Recommendation on the Promotion of Cooperatives” adopted by the International Labour Organisation (ILO) in 2002, making it possible for the adoption of special measures *‘to enable Co-operatives, as enterprises and organisations inspired by solidarity, to respond to their member’s needs and the needs of society’*¹.

Further, we welcome the commitments that the constituencies have made towards the establishment of a Co-operative Academy (this is matter that must be pursued by the Department of Higher Education and Training) and also the need for separate legislation on Worker Co-operatives (involving both the Department of Labour and the Department of Trade & Industry).

NUMSA – SACTWU Historical Experience of Co-operatives

Historically both NUMSA and SACTWU have been involved in the establishment of co-operatives to assist workers that have been arbitrarily retrenched or dismissed. Following one of the most protracted labour disputes in the history of our country when BTR SARMCOL dismissed almost a thousand workers belonging to the Metal and Allied Workers Union (MAWU) in 1985, the union became one of the first industrial unions to pioneer some work on co-operatives. Currently the union has facilitated the establishment of the Sihlahla Muri Worker Primary Co-operative Limited, following the liquidation of Split Rock Recycling Company in December 2009. Sihlahla Muri has approximately 9 active members and operates from JC Bezuidenhout regional quarters of NUMSA. It collects and recycles papers in the main. It is in the process of acquiring trading premises through JHB Municipal in Braamfontein. Through DTI it also bought a 4 ton truck and fork lift. The cooperative is still in need of capital and intends to expand its influence in the market.

Likewise SACTWU has its own experience and set up the the Zenzeleni Co-op to assist workers who lost their jobs in the clothing and textile sector.

In spite of the many complex challenges and obstacles faced by co-operatives, NUMSA resolved to take forward the cooperative option as the global economy slumped in 2008 leading to massive job losses and factory closures.

The Co-operative Amendment Bill [B17- 2012]

Notwithstanding that labour and the community constituency expressed some disagreement over the participation of juristic persons in primary co-operatives, NUMSA and SACTWU would like to make a few additional comments on the *Bill*:

Comment 1: Principles

We believe that the *Bill* should strengthen the provisions of the Co-operatives Act No.14 of 2005 by including the following **principles for the establishment of cooperatives**² :

¹ National Economic Development and Labour Council (NEDLAC) Report on the Co-operatives Amendment Bill, 2011: p2

² NUMSA, 2010 Preliminary Summary of Key Issues for Consideration and Action by NUMSA and the emerging Sihlahla Muri Workers’ Co-operative Limited: Workshop on forming a Workers Co-operative for workers of the Split Rock Recycling Company, NUMSA Wits Central Region, 5-6 January 2010, Johannesburg: p 2

- i) Voluntary and open membership;
- ii) Autonomy and independence;
- iii) Effective and equal participation by all members in the life of the cooperative;
- iv) Democratic member control;
- v) Emphasis on developing the skills of workers through ongoing education, training and information;
- vi) Cooperation with other cooperatives; and
- vii) Concern for community.

Comment 2: Promoting a Co-operative Empowerment Approach

In its submission to a consultative meeting on amending the *Co-operatives Act 2005*, the Co-operative and Policy Alternative Centre (COPAC)³ suggested that the Co-operatives Unit attached to the Department of Trade and Industry consider adopting a **cooperative empowerment approach**, grounded in the universal principles and values of cooperatives. COPAC argued that the Broad Based Black Economic Empowerment (BBBEE) approach in the current preamble of the *Cooperatives Act 2005* was open to abuse and encouraged fronting and ‘allowed historically white co-operatives to operate in a racialised way’ (COPAC, 2008: 3) Both NUMSA and SACTWU are aware of the dangers of fronting through misguided BBBEE ventures and the tokenism that emanates from such practices. At the same time we welcome the initiative of the Department of Trade and Industry to curb fronting by tabling the *BBBEE Amendment Bill*. However, in the context of the arguments presented by COPAC, we believe that encouraging a **cooperative empowerment approach** grounded in the universal principles and values of cooperatives is more appropriate under these circumstances.

Comment 3: Explaining the Insertion of a Minimum Floor of Labour Standards for Co-Operatives

The Cooperatives Act (2005) contained loopholes which have been brutally exploited by devious employers who use co-operatives as mechanisms to circumvent labour laws. The abuse of cooperatives for this purpose is an increasingly popular practice in the local clothing industry and has also been reported within the transport sector, amongst others.

Typically, these ‘bogus cooperatives’ are formed when employers retrench workers from their formal employment and then initiate a process of forming a co-operative by coercing the workers into forming one. This so-called co-operative then provides dedicated services to the former employer. While the workers’ relationship vis-à-vis their employer remains for all intents and purposes the same, they are no longer legally recognized as being employees of the employer. The employment relationship is disguised.

For workers, there are many problems with bogus cooperatives. Essentially these problems derive from the fact that cooperatives are not covered by a minimum floor of labour standards and thus workers within cooperatives are not due the same protections which workers in traditional employment relationships are due. This allows employers to circumvent minimum wage prescriptions as well as other income-related prescriptions governing the traditional employment relationship. As such, workers in bogus cooperatives experience a reduction in their income levels and they do not earn any benefits. Reducing the monies due to workers (and overall expenses) is, after all, the reason why devious employers adopt this strategy in the first place.

³ COPAC, 2008 Submission to Consultative Meeting on Amending the Cooperatives Act 2005 (Submission letter addressed to the Co-operatives Unit, Department of Trade and Industry, 24 January 2005)

Both NUMSA and SACTWU believe that a solution to circumvent this problem of ‘bogus co-operatives’ can be found by inserting a minimum floor of labour standards into the Co-operative legislation, and which allows the Minister or the relevant bargaining council which operates in the sectors in which co-operatives are formed the power to evaluate the authenticity of a co-operative and, if necessary, the power to act against such a co-operative if it is proved to be a vehicle for undermining other labour laws or agreements.

The solution crafted resolves a number of other anomalies. These include that:

- (a) That the exclusion of cooperatives from the BCEA excludes cooperatives from the sections prohibiting child labour and forced labour, issues that constitute a violation of core ILO Conventions which South Africa has ratified and which form part of the ILO Declaration on Fundamental Principles and Rights at Work binding on all members of the ILO.
- (b) That the exclusion of cooperative members from the BCEA as a whole (including its sectoral determinations) violates the rights of members of worker cooperatives to fair labour practices as guaranteed by section 23(1) of the Constitution. A total exclusion of this type cannot be justified as a reasonable and permissible limitation under Section 36 of the Constitution in the absence of an alternative legislative framework setting minimum working conditions for cooperative members.
- (c) That the fact that worker cooperatives (even where operating as bona fide co-ops) are able to compete as a result of their exclusion from the LRA and BCEA provides that with a massive competitive advantage against businesses in the same sector because co-operatives are not required to comply with any minimum conditions of employment. This undermines the constitutional protection of the labour rights of employees employed in firms that do comply with these legal obligations. It also poses a serious risk to employment in formal industry, which could potentially suffer massive job losses as cooperatives compete unfairly and win the orders of formal companies.
- (d) That a labour inspector can enforce compliance with health and safety conditions at a co-operative but not hours of work, even where hours of work may be so long as to endanger health and safety;
- (e) That female cooperative members are entitled to maternity pay under the UIF Act but not maternity leave under the BCEA;

Creating a minimum floor of labour standards for cooperatives may, on the surface, appear counter-intuitive, but it is not anomalous since cooperatives are not, as a category, necessarily excluded from the ambit of labour laws. Some (limited) aspects of labour law already apply to co-ops. Further, it is accepted within South African law that even a person appointed by the shareholders of a company as its managing director may fall within the definition of an employee. Hence, members of a cooperative can be considered employees too.

Comment 4: Mitigating the Impact of Juristic Persons on Co-Operatives

The Co-Op Bill divides co-operatives into a number of different categories. These include Primary Co-Ops (individual co-ops), Secondary Co-Ops (collectivities of co-ops based on

regional affinities) and Tertiary Co-Ops (overarching national representative bodies of co-ops). Primary Co-Operatives themselves are divided, according to size, into Category 1 (micro), 2 (small) & 3 (large) Co-operatives.

Both NUMSA and SACTWU share the opinion that there needs to be limits on the ability of Juristic persons to be part of primary co-operatives. Juristic persons are legal entities (companies, trusts, organizations, etc) and by their nature, juristic persons can wield more power and/ or influence and/ or resources than individuals, particularly poor individuals – who are the people which South African co-operative policies wish to attract to form and join co-operatives. Furthermore, juristic persons may very well not operate in a manner which is congruent with the core principles of co-operatives. After all, the social structure within juristic persons is not based on the core co-operative principle of equality (unless those juristic persons are themselves co-operatives). Hence if a juristic person is allowed to become a member of a co-operative, it will violate the ethic of co-operatives. Lastly, co-operatives might provide a lucrative business opportunity for devious juristic persons, who either seek access to funding and or State tender opportunities, or who wish to exploit the co-operative for BBBEE and fronting purposes.

The internationally recognized core principles of co-operatives are endorsed by the new Bill through its endorsement of ILO Recommendation 193 (see in the proposed Bill's amended Preamble⁴). This means that South African co-operatives must uphold the fundamental principles of equality, democracy, etc. Yet these core social values could be undermined in instances where juristic persons are included in co-ops.

For these reasons, NUMSA and SACTWU argue that juristic persons should have limited access to more vulnerable forms of co-operatives, particularly Primary Co-Operatives.

Currently it appears as if in practice juristic persons are only part of Category 3 Primary Co-operatives in South Africa. These include large agri-co-ops. Hence, we propose that juristic persons should be excluded wholesale from membership of Category A & B Primary Co-Ops – the smaller scale and less developed co-operatives. As for Category C Co-Ops, we propose a cap on the percentage representation of juristic persons in these co-ops. We suggested that at most 25% of the members of a Category C co-op can be juristic persons. This is already a significant compromise on the principles of co-operatives, and we suggest that anything over this threshold would simply invalidate the principles of co-operatives in their entirety.

⁴ Amongst other things, this preamble states:

this Act is aligned with ILO Recommendation 193 of 2002, which was also ratified by the South African government, and with co-operative values and principles outlined in the Co-operative Statement of Identity adopted by the International Co-operative Alliance (ICA) in 1995, which states that—

* co-operatives are based on the values of self-help, self-responsibility, democracy, equality, equity and solidarity;

* co-operative members believe in the ethical values of honesty, openness, social responsibility and caring for others; and

* co-operative principles are guidelines by which co-operatives put their values into practice,

the principles being the following:

2nd Principle: Democratic Member Control

Co-operatives are democratic organisations controlled by their members, who actively participate in setting their policies and making decisions. Men and women serving as elected representatives are accountable to the membership. In primary co-operatives members have equal voting rights (one member, one vote) and co-operatives at other levels are also organised in a democratic manner.

However, if existing Category C co-operatives were comprised of a higher percentage of juristic persons as at a time before the promulgation of this *Bill* into an Act of Parliament, then we propose that the representation of juristic persons within those co-ops shall be capped at the level of juristic person representivity as at the date of promulgation, with no ability to increase that threshold thereafter.

Comment 5: Criminalize the Unlawful Use of the Word Cooperative

Any person who registers a cooperative with the intention of evading labour legislation or other obligations which employers have to their employees, as prescribed by labour legislation, is guilty of an offence. The offending party will be subject to a penalty prescribed by the Minister or face criminal prosecution for contravening this Act.

Comment 6: Worker Buyouts

NUMSA and SACTWU believes that it is necessary to provide mechanisms to assist workers to takeover businesses that are failing or threatened with closure, and will therefore likely lead to job losses. Such measures would need to provide training and resource support to such workers. Finance for these initiatives could be provided by the State and also, possibly, by the private sector in the form of grant funding and enterprise development assistance.

Conclusion

Both NUMSA and SACTWU are confident that the Co-operative Amendment Bill will improve the regulatory framework for the establishment and support of the different types of co-operatives. We also believe that the recently signed Local Procurement Accord presents an opportunity for social partners to take up the challenge and engage government on the need to fast track the establishment of co-ops across all sectors of our economy.

We would like to leave this committee with the following extract taken from the study on co-operatives in South Africa by Kate Philip⁵:

Worker co-ops can work. When they do, they provide an inspirational example of an alternative form of work organization. But they are complex forms of enterprise; and as such, they do not provide an easy entry point into self-employment for unemployed people, particularly if they fall beyond the reach of a strong support environment. They require high levels of managerial skill internally, or sustained technical support externally to succeed. As a result, they have real limitations as an effective vehicle for mass job creation ...

But while worker co-ops have limitations as a vehicle for mass job creation, there are a different set of good reasons to support their growth and development in society. Worker co-ops have an important role to play in developing alternative forms of work organization, and in building forms of workers control and worker ownership; and they should be supported in playing that role.

⁵ Philip, K 2003 Cooperatives in South Africa – Their Role in Job Creation and Poverty Reduction, October 2003, p23-24