Amendments to Labour Relations Act tested in court

By Inez Moosa

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There has been much speculation over the recent amendments to the Labour Relations Act, No 66 of 1995 (LRA), particularly with regards to how the amendments will be interpreted and applied by the Labour Court.

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The unreported case of AMCU v Buffalo Coal Dundee (Pty) Limited (J593/15) [2015] ZALCJHB 134 (24 April 2015) sheds some light on the newly inserted s200B of the LRA.

Section 200B states that:

• For the purposes of this Act and any other employment law, 'employer' includes one or more persons who carry on associated or related activity or business by or through an employer if the intent or effect of their doing so is or has been to directly or indirectly defeat the purposes of this Act or any other employment law.

• If more than one person is held to be the employer of an employee in terms of subsection (1), those persons are jointly and severally liable for any failure to comply with the obligations of the employer in terms of this Act or any other employment law.

The facts of the AMCU case were as follows: AMCU brought an urgent application against Buffalo Coal and Zinoju Coal

(Pty) Limited seeking an order declaring that Buffalo Coal had failed to follow the procedure as required by s189A (13) of the LRA, dealing with large scale retrenchments, as well as s52 of the Mineral Petroleum Resources Development Act, No 49 of 2008 (MPRDA). AMCU further sought an order interdicting Buffalo Coal from issuing termination notices, alternatively, if the notices had already been issued, reinstating the employees.

The organisational structure was such that Buffalo owned a 70% controlling stake in its subsidiary Zinoju. Buffalo Coal conducted the mining operations and Zinoju held the mining rights.

Social and labour plan

As the holder of the mining rights, Zinoju submitted the social and labour plan (SLP) in terms of s46 of the MPRDA. The SLP made provision for processes relating to retrenchment. The employees' contracts of employment were concluded with Buffalo Coal. AMCU sought to have Buffalo Coal and Zinoju declared as co-employers by means of s200B.

The Labour Court dealt with the liability of employer obligations prior to determining the fairness of the procedure. The court noted that s200B only came into operation on 1 January 2015. Accordingly, the court held that Zinoju could not be held to be the co-employer of the employees because the provision was not retrospective.

The court relied on the case of Bandat v De Kock (2015) 36 ILJ 979 in which it was held that s200B was not retrospective. Support for this argument is found in the wording of s200B, which contains no suggestion of retrospectivity.

Furthermore, the court held that in order for s200B to be triggered there needs to be an intention or an effect to defeat the purposes of the LRA or any other employment law. The court pointed out that the employees did not present a case on this issue. Thus, on this basis too, s200B was not applicable and Zinoju was not held liable as a co-employer.

The court went on to conclude that since Zinoju was not considered as a co-employer in terms of s200B, Zinoju was not required to consult with the employees in terms of the s189 of the LRA.

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