

IN THE ESSENTIAL SERVICES COMMITTEE

Held at Johannesburg

Case No.: ES 2

In the matter between:

Department of Social Development

Applicant

and

NEHAWU on behalf of Members

Respondent

Designation in terms of Section 71 of the Labour Relations Act, 1995

1. DETAILS OF THE HEARING AND REPRESENTATION

- 1.1 As set out in paragraph 3 below, the matter was set down on a number of occasions since the referral was filed by the Applicant in 2008. The final hearing date of the matter was 16 October 2015 and final argument was presented on 30 November 2015.
- 1.2 The Applicant was represented by Advocate S.M. Shaba, instructed by the State Attorney. The Respondent was represented by Advocate A. Mosam, instructed by Cheadle Thompson Haysom Inc. Attorneys.

2. INTRODUCTION

- 2.1 This matter relates to an investigation by the Essential Services Committee ("the ESC") in terms of section 71 of the Labour Relations Act, 1995 (as amended) ("the LRA").
- 2.2 The referring party (referred to as "the Applicant" hereinafter) is the National Department of Social Development. The Applicant seeks a designation that the following services be designated as essential services:
- (a) *Care and support services at the Applicant's public treatment centres;*
 - (b) *Therapeutic and counselling services at the Applicant's public treatment centres;*
 - (c) *Care and support services at the Applicant's residential facilities for people living with disabilities; and*
 - (d) *Therapeutic and counselling services at the Applicant's residential facilities for people living with disabilities.*
- 2.3 The application is opposed by NEHAWU, a public sector trade union. The union represents a vast number of employees employed by the Applicant.

3. BACKGROUND

- 3.1 The matter has a very long history. It is deemed necessary to give a short background regarding the developments in the matter. This summary must, however, not be seen as a full chronological list of events.
- 3.2 On 24 July 2008 the Applicant filed a referral with the ESC for an investigation in order to designate certain services as essential, and as defined in section 213 of the LRA. The matter was referred in terms of sections 70 (2) (a) and 71 of the LRA. The Applicant summarised the designation that it sought as follows:
- "1.1. *This application is filed by the Department of Social Development (applicant) in accordance with sections 70 and 71 of the Labour Relations Act, 1995 (the LRA) as amended. The applicant seeks to request the Essential Services Committee (ESC) to institute an investigation with a view to declare the whole of the services mentioned herein below within the Social Development sector essential in terms of the provisions of [the] LRA.*"
- 3.3 The Applicant then lists the following services as the services that it wants designated as essential services:
- "(a) *Services rendered at secure care centres;*
 - (b) *Services rendered at places of safety;*
 - (c) *Services rendered at rehabilitation centres; and*

(d) *The service rendered at homes of persons with disabilities.*"

- 3.4 During 2010 the ESC appointed a Senior Commissioner, Mr F. Brand, of the CCMA to conduct inspections *in loco* at certain care centres.
- 3.5 The Respondent thereafter filed its Statement of Response, in answer to the Applicant's referral, on 4 July 2011. The Respondent opposed the application and alleged that the application was vague.
- 3.6 Thereafter the parties, at the insistence of the ESC, attempted to hold a pre-hearing conference and to agree on a paginated bundle of documents. Some issue was made by the Respondent, in an affidavit dated 5 July 2011, regarding the status of the minutes of this pre-hearing conference, which were filed with the ESC. These minutes were not signed by the Respondent. The Respondent pointed out that the document was a draft and it was agreed to convene a further pre-hearing conference. This, however, never took place.
- 3.7 The Applicant filed its Reply to the Respondent's Statement of Response on 19 July 2011.
- 3.8 Notice of the investigation in terms of section 71, read with the provisions of section 70 (2) (a) of the LRA, was published on 3 February 2012 (in Government Gazette No 35001, Notice 95 of 2012).
- 3.9 Prior to the publication of the aforesaid Notice, and during the latter part of 2011, the ESC also conducted various inspections *in loco*. The following centres were visited as part of the inspections *in loco*:
- (a) Walter Sisulu Child and Youth Care Centre
 - (b) Erica Child and Youth Centre
 - (c) Sally Aucamp Home for People with Disabilities
 - (d) De Novo Treatment Centre
 - (e) Magaliesoord Centre
 - (f) Mary Moodley Centre
 - (g) St Francis Care Centre
 - (h) Zanele Mbeki Centre
- 3.10 On 29 March 2012, public hearings were held. Various NGO's and non-profit organisations made oral submissions to the ESC. Many of these organisations also made written submissions.
- 3.11 On 6 July 2012 a meeting of the parties was convened by the ESC. It was agreed at this meeting that the investigation would focus on the services that were listed in the Applicant's referral and as performed/delivered by the State (i.e. that private institutions would not form part of the investigation process).
- 3.12 During this meeting (of 6 July 2012) it was further agreed that the parties would consolidate their notes on the inspections *in loco* with those of the then acting Chairperson of the ESC. The parties, however, were unable to agree on the content of the inspection *in loco* notes.
- 3.13 Over this period the ESC also made various attempts to facilitate the dispute between the parties and tried to narrow the issues in dispute between them. These efforts were unsuccessful.
- 3.14 The matter was then set down for hearing from 16 to 19 July 2013. Up to this point the parties were also in disagreement as to whether the Applicant had disclosed sufficient information and documents to allow the Respondent to adequately prepare for the case.
- 3.15 On 16 July 2013 it came to the attention of the parties that the predecessor of the current ESC, during 1997, 1998 and 2004 respectively, already designated certain services relevant to the dispute as essential. It was agreed that parties be afforded an opportunity to study the designations and it was further agreed to reconvene the hearing on 18 July 2013.
- 3.16 On 18 July 2013 the matter continued. After hearing argument from the legal representatives of the parties, the ESC issued the following directive:

"We wish to confirm that the matter was postponed sine die on 18 July 2013 to allow the parties to submit written arguments to the Essential Services Committee ("ESC") on certain matters that flowed from the hearing that was initially set down from 16 to 19 July 2013.

The ESC gave an undertaking on 18 July 2013 that it would revert to writing the issues that have to be dealt with in the written arguments of the parties.

The attention of the parties was drawn to two determinations of the ESC, dated 15 September 1997 and 16 March 1998 respectively. The two determinations were published in Government Gazette Numbers 18276 and 18761 respectively. Notice of these investigations was given in Government Notice No. R 2094 (dated 20 December 1996) and Gazette No. 18613 (dated 9 January 1998).

In terms of the latter designation, the following services were designated as essential by the ESC:

1. *The following services in the public sector have been designated as essential services:*
 - (a) *Emergency health services and the provision of emergency health facilities to the community or part thereof;*
 - (b) *Nursing; and*

- (c) *Medical and paramedical services;*
2. *The following services which support the services referred to in paragraph (1) have been designated as essential services:*
- (a) *Catering;*
 (b) *Medical records;*
 (c) *Security;*
 (d) *Porter and Reception;*
 (e) *Pharmaceutical and dispensary;*
 (f) *Medicine quality control laboratory;*
 (g) *Forensics;*
 (h) *Laundry work;*
 (i) *Clinical engineering;*
 (j) *Hospital engineering;*
 (k) *Waste removal;*
 (l) *Mortuary services; and*
 (m) *Pest Control."*
- 3.17 Furthermore to the above, the whole of the services provided by Old Age Homes as well as Child and Youth Care services in the relevant centres were designated essential services during 2004 (see in this regard Government Notice 1462 of 24 December 2004).
- 3.18 Having considered the aforesaid designations, the Applicant was of the view that the majority of the services that it sought to have designated *in casu* have already been designated as essential by the ESC. It was of the view that the scope of the investigation should move to those services that were not covered by the said designations.
- 3.19 The ESC then requested the parties to submit written arguments on the status of the current investigation (in terms of section 71, read with the relevant provisions of section 70 (2) (a) of the Act), taking into consideration the designations of 1997, 1998 and 2004, as referred to above.
- 3.20 The parties were also requested to submit written argument on the following aspects:
- (a) *The reference to the public sector in the previous designations;*
 (b) *The reference to nursing services in the previous designations;*
 (c) *The reference to the various support services listed in the previous designations;*
 (d) *Whether the ESC is entitled or obliged to take judicial notice of the previous designations;*
 (e) *The impact of the Constitutional Court judgement in SAPS vs. POPCRU [2011] BLLR 109 CC] on the current proceedings; and*
 (f) *Whether the ESC is able to deal with the matter in terms of section 71(9) of the LRA on the basis of the current referral.*
- 3.21 Both parties submitted detailed arguments regarding the issues referred to in paragraph 3.20 above. The ESC proceeded to make a Ruling on the matter on 27 July 2015. The relevant portions of the ruling were as follows:
- The Applicant is to make an election whether it wants to proceed with the investigation into the whole of the services (as referred to in paragraph 7 [above] of the ruling) or whether it wants to proceed on a limited (restrictive) investigation into the services referred to in paragraph 9 [above] of the ruling.*
- 3.22 Paragraph 3.21 above quotes from the Ruling and refers to services listed in paragraphs 7 and 9 respectively of said Ruling. For ease of reference the services listed in the Ruling were:
- (a) In terms of the said paragraph 7 (the wider investigation): *the whole of the "in-patient" services at the Applicant's institutions - also referred to as treatment centres; and the whole of the "residual care services" provided by the Applicant at care facilities for persons with disabilities.*
 (b) In terms of the said paragraph 9 (the narrow or restricted investigation): *therapeutic and counselling services; and care and support services (as rendered by care-givers).*
- 3.23 On 13 August 2015 the Applicant filed a notice setting out its election as required by the ESC. In terms of the election, the Applicant elected to proceed on a limited (restrictive) basis, confined to the investigation of therapeutic and counselling services for people with disabilities and based on the Applicant's motivation dated 10 October 2014.
- 3.24 The matter was then set down for hearing on 16 October 2015. At the commencement of the hearing on 16 October 2015, the parties advised the ESC that they had held discussions on how to expedite the conclusion of this long running matter. The parties indicated that the Applicant has submitted full motivation for the "narrow" designation that it sought and the Respondent had replied thereto. An agreed to bundle of documents was

also submitted into evidence. The parties were therefore of the view that the matter should be determined on those submissions and documents. It was then agreed that the parties will argue the matter on 30 November 2015.

3.25 Both parties filed detailed heads of argument, for which the ESC is indebted to the parties. The matter was finally argued on 30 November 2015.

4. LEGAL FRAMEWORK

4.1 The ESC has to consider the matter within the legal framework as it applies to the Republic. This legal framework can be summarised as is set out further hereinafter.

A The Constitution of the Republic of South Africa, 108 of 1996

4.2 Section 23(2) of the Constitution of the Republic of South Africa, 1996 (*"the Constitution"*) states that:

"Every worker has the right-

- (a) to form and join a trade union;*
- (b) to participate in the activities and programmes of a trade union; and*
- (c) to strike."*

4.3 In terms of Section 36 (1) of the Constitution:

"The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including:

- (a) the nature of the right;*
- (b) the importance of the purpose of the limitation;*
- (c) the nature and extent of the limitation;*
- (d) the relation between the limitation and its purpose; and*
- (e) less restrictive means to achieve the purpose."*

4.4 Section 39 (1) of the Constitution states:

"(1) When interpreting the Bill of Rights, a court, tribunal or forum –

- (a) Must promote the values that underlie an open and democratic society based on human dignity, equality and freedom;*
- (b) Must consider international law;*
- (c) May consider foreign law.*
- (2) When interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purpose and objects of the Bill of Rights.*
- (3) The Bill of Rights does not deny the existence of any other rights or freedoms that are recognised or conferred by common law, customary law or legislation, to the extent that they are consistent with the Bill."*

B The Labour Relations Act, 66 of 1995

4.5 Section 3 of the LRA states:

"Any person applying this Act must interpret its provisions –

- (a) to give effect to its primary objects;*
- (b) in compliance with the Constitution; and*
- (c) in compliance with the public international law obligations of the Republic."*

4.6 Section 65 (1) (d) (i) of the Act states that: *"No person may take part in a strike ...if-*

- (d) that person is engaged in-*
 - (i) an essential service".*

4.7 An 'essential service' is defined in section 213 of the LRA as:

"essential service" means –

- (a) a service the interruption of which endangers the life, personal safety or health of the whole or any part of the population;*

(b) the Parliamentary service;

(c) the South African Police Service".

4.8 The Constitutional Court has approved that essential services must be restrictively defined (See *Chirwa v. Transnet Ltd and Others* 2008 (4) SA 367 (CC) at paragraph [101]).

4.9 Furthermore, strike action is the primary mechanism through which workers exercise collective power (See *Ex-Parte Chairperson of the Constitutional Assembly in re:*

Certification of the Constitution of the Republic of South Africa, 1996 (4) SA744 (CC) at paragraph [66]). The Court stated:
"Workers exercise collective power primarily through the mechanism of strike action. In theory, employers, on the other hand, may exercise power against workers through a range of weapons, such as dismissal, the employment of alternative or replacement labour, the unilateral implementation of new terms and conditions of employment, and the exclusion of workers has led to it being far more frequently entrenched in constitutions than the right to lock out".

4.10 Strike action is also an important element underlying our collective bargaining system (See *National Union of Metal Workers of SA and Others v Bader Bop (Pty) Ltd and another, 2003(3) SA 513(CC) at paragraph [13]*). The Court stated:

"In the first place, it is of importance for the dignity of workers who, in our constitutional order, may not be treated as coerced employees. Secondly, it is through industrial action that workers are able to assert bargaining power in industrial relations. The right to strike is an important component of a successful collective bargaining system".

4.11 In terms of Section 39 (1) (b) of the Constitution and Section 3 (c) of the LRA, the ESC must consider international law and interpret its role in compliance with the public international law obligations of the Republic.

4.12 The first part of the definition of an "essential service" in the LRA reads as follows:

"a service the interruption of which endangers the life, personal safety or health of the whole or any part of the population"

This definition is drawn directly from a number of the International Labour Organisation ("the ILO") decisions (see Freedom of Association – Digest of Decisions and Principles of the Freedom of Association Committee of the Governing body of the ILO, fifth (revised) edition, International Labour Office, Geneva).

C Right to Strike and Essential Services

4.13 The ILO Committee of Experts and the ILO Committee on Freedom of Association have interpreted the right to freedom of association in the ILO Constitution and Convention 87, and the right to collective bargaining in Convention 98, as including the right to strike.

4.14 The right to strike is also recognised in article 8 of the International Convention on Economic, Social and Cultural Rights. It is recognised in article 6 of the European Social Charter and in article 27 of the Inter-American Charter of Social Guarantees.

4.15 The right to strike is also found in a number of modern constitutions, such as those of Italy, France, Portugal, Greece, Brazil, Argentina and Mexico.

4.16 Decision 581 of the ILO reads:

"to determine situations in which a strike could be prohibited, the criterion which must be established is the existence of a clear and imminent threat to the life, personal safety or health of the whole or part of the population".

The same criterion is referred to in Decisions 582 and 583 as constituting what is meant by "essential services in the strictest sense of the term" ("the strict definition").

4.17 Historically, public services tended to be strongly identified as essential services rather than the private sector, but as the drafters of the Act noted:

"Developments at an international level have encouraged the erosion of the public/private labour law divide. ILO Convention No.87 of 1948 concerning the Freedom of Association and the Protection of the Right to Organise and the European Social Charter apply equally to the private and public sectors. These international requirements, together with Conventions 98 and 151 of 1978, guarantee to public and private sector employees (excluding the police and armed forces) the full range of freedom of association and collective bargaining rights" (*Chirwa v Transnet Ltd and Others* 2008 (4) SA 367 (CC)).

4.18 The ILO delineates State enterprises as subject only to the "strict definition" in Decision 577, setting parameters to the application of decision 574 on "public servants exercising authority in the name of the State".

4.19 The ILO Committee of Experts has stated the following in relation to essential services:

"The principle whereby the right to strike may be limited or even prohibited in essential services would lose all meaning if national legislation defined these services in too broad a manner. As an exception to the right to strike, the essential services in which this principle may be entirely or partially waived should be defined restrictively: the Committee therefore considers that essential services are only those the interruption of which would endanger the life, personal safety or health of the whole or part of the population".

5. SURVEY AND ANALYSIS OF EVIDENCE AND SUBMISSIONS Applicant's Submissions

The submissions made on behalf of the Applicant were as follows:

5.1 A Public Treatment Centre is defined in Section 1 of the Prevention of and Treatment for Substance Abuse Act 70 of 2008 ("the PTSAA") as "an in-patient or out-patient treatment centre that is owned and financed by the government or an organ of state and established for the treatment and rehabilitation of service users who abuse or are dependent on substances".

- 5.2 In terms of Section 18 of the PTSAA "a service user is admitted to a public treatment centre for the purposes of receiving or undergoing treatment and rehabilitation, including skills development".
- 5.3 Treatment is defined in Section 1 of the PTSAA as "the provision of specialised social, psychological and medical services to service users to persons affected by substance abuse with a view to addressing the social and health consequences associated therewith".
- 5.4 The profile of service users in public treatment centres includes, but is not limited to:
- (a) Chronic addicts or alcoholics;
 - (b) Service users admitted at the treatment centre by means of a court order;
 - (c) Services users with behaviour problems who have been expelled from other treatment centres;
 - (d) Service users with long criminal records. Such persons may be referred to public in-patient treatment centres in terms of Section 296 of the Criminal Procedure Act, 55 of 1977 or be transferred from a prison environment to a treatment centre (such transfers are in accordance with the provisions of the PTSAA). Persons with criminal records are often using the treatment service as a sentence option to avoid imprisonment. These service users are often not motivated for treatment and are very difficult to manage within an in-patient treatment centre. Behaviour problems and criminal activities such as gangsterism are common amongst these service users;
 - (e) Service users with dual diagnosis. Almost 70 percent of service users admitted at public in-patient treatment centres have dual diagnosis. Dual diagnosis involves service users with an addiction problem as well as a psychiatric diagnosis. It is not always clear whether the addiction problem influences the psychiatric condition or whether the psychiatric condition influences the addiction problem. This implies that service users are unpredictable in their behaviour and might go through stages of great excitement and stages of severe depression;
 - (f) Service users with personality disorders or classified psychiatric conditions. It is often found that such service users are admitted with the understanding that their conditions are under control, but often it is discovered that the conditions of such a person are not under control. Normally such service users will be transferred to psychiatric hospitals, but often there are delays as these hospitals are unwilling or unable to admit such persons. The behaviour of such persons is often out of control and very disruptive for public treatment centres. Ongoing monitoring, intervention and control measures should always be in place;
 - (g) Services users with unacceptable sexual preferences and behaviour, which may result in sexual assaults, rapes etc.;
 - (h) The common factor amongst all these service users, is that they are all alcoholics or drug addicts in recovery. It is an ongoing challenge to keep the centres alcohol and drug free. Services users are always in touch with drug dealers to bring drugs into the centres. Service users at times run away from the centre only to return with drugs in their possession.
- 5.5 Care and support services in public treatment centres entail the following services rendered by care workers:
- (a) To ensure that services users follow the daily programme;
 - (b) To ensure that service users wash themselves, clean their environment and take regular meals;
 - (c) To observe service users for any unusual behaviour;
 - (d) To observe medical crisis, such as withdrawal symptoms or challenges of service users and intervene by reporting such instances to the relevant professionals dealing with such crisis;
 - (e) To make sure that the environment is drug free and no-one is using drugs;
 - (f) To take care of the safety of service users left in the care of the care workers during the day and night;
 - (g) To deal with discipline and disciplinary interventions;
 - (h) To make sure that service users respect the rules of the centre;
 - (i) To assist service users in their recovery by being a role model and to give guidance;
 - (j) To refer service users to professionals; and
 - (k) To report their observations to other members of the Multi-Disciplinary Teams ("MDT").
- 5.6 The non-rendering of care and support services in public treatment centres on a 24 hour basis, will result in danger to lives, personal safety and health of service users and others (including the public) in public treatment centres. Given the profile of the service users as outlined in paragraph 5.4 above, if the care and support services of the care workers is interrupted, the lives, safety and health of the service users and the public, will be endangered. The Applicant argued that a similar service is provided by care workers at Youth Centres and Old Age Homes, and these have been designated as essential services. The Respondent's failure to concede that the service *in casu* is similar to the services provided at Youth Centres and Old Age Homes is strange.
- 5.7 It is the service (in this case the care and support service) rendered by the employer that is essential and not the industry or the centre. A service has to be designated as essential based on the function (in this case the care and support service) performed by the employer and not necessarily work performed by the employee.
- 5.8 The Multi-Disciplinary Team ("MDT"), consisting of amongst others social workers, medical doctors, psychiatrists, occupational therapists, etc., conducts a comprehensive assessment on each service user that is admitted. The assessment focuses on contributing factors that give rise to a service user's problem, such as substance abuse. Through counselling, service users need to be assisted to either eliminate the contributing factors and if this is not possible, such service user needs to be assisted to learn how to deal with such contributing factors or avoid them. Service users

are taught, through counselling and therapy, how to live a life without using substances and to cope without any such substances.

- 5.9 Different professionals of the MDT teach the service users to deal with different challenges. For example, the medical members of the MDT will assist the person with health related challenges and to take good medical care of himself/herself. The social worker, as part of the MDT, takes care of social issues such as relations with family members including counselling, whilst the occupational therapist assists with vocational issues.
- 5.10 The psychologist and psychiatrist need to assist the service user to deal with his/her mental condition as a contributing factor to drug use. Criminality and acts of violence are dealt with by all members of the MDT.
- 5.11 Regular meetings of the MDT are held to share progress and interventions offered in specific cases.
- 5.12 Therapeutic and counselling services are required 24/7 because service users experience crises at different and any time of the day, including over weekends and public holidays. It is mainly after hours that such service users have telephone contact with family members that in most instances might trigger a crisis at any given time. Drug addicts in particular, are known for their need for immediate satisfaction of their drug needs. Waiting a long period for any intervention by members of the MDT to take place often makes things worse than before if therapeutic and counselling services are not continuously rendered.
- 5.13 Care workers are not able to deal with any crisis that may occur and that may need immediate counselling and therapy. Service users may commit suicide, or run away which is especially dangerous for female service users. In addition, service users use drugs that always trigger unacceptable behaviour, they become aggressive towards others and/or vandalise property (especially after drug use). Furthermore service users, after phoning family members, and depending on the content of the discussion with such family members, get upset, become uncontrollable, and act abnormally, especially after drug use, etc. These unacceptable and crisis behaviours need to be managed by members of the MDT to avoid further crises that may cause irreparable damage, if not attended to immediately and through continuous counselling and therapy.
- 5.14 The MDT at a specific public treatment centre, develops and has a trust relationship with the service user, which is often a carry through aspect during a crisis period. A new and unfamiliar face is not always acceptable to a service user in crisis.
- 5.15 If therapeutic and counselling services, as set out above, are not available on a 24 hour basis and if members of the MDT are not available to render any counselling and therapeutic service for the crisis undergone by a service user at any given time, then the lives, safety and health of service users and the public may be endangered.
- 5.16 Care and support services rendered in residential facilities for people living with disabilities is a permanent service for the care, protection, support, stimulation, development and rehabilitation of people living with disabilities whose disability situation warrants the care and support service.
- 5.17 The main function of the residential facilities for people with disabilities are amongst other to:
 - (a) provide development, educational, recreational, counselling and therapeutic services to people with disabilities;
 - (b) accommodate people with disabilities on either a temporary or permanent basis in these facilities depending on the specific needs of such disabled persons and their family environment;
 - (c) develop persons with disabilities to attain their maximum potential ability;
 - (d) receive, care, supervise and develop persons with disabilities;
 - (e) provide protection of people with disabilities from abuse or neglect;
 - (f) assist people with disabilities to reintegrate with their families and community;
 - (g) promote the safety, security, dignity and well-being of persons living with disabilities;
 - (h) ensure access to the provision of health care; and
 - (i) ensure individual development plans for people with disabilities.
- 5.18 The categories of people accommodated in the residential facilities for people living with disabilities and where care and support services are rendered, are amongst others:
 - (a) abandoned and orphaned children with disabilities without any means of support;
 - (b) abused and neglected people with disabilities;
 - (c) people with disabilities that are exploited or living in circumstances that expose them to exploitation;
 - (d) people with disabilities living in exposed circumstances, which may seriously harm their physical, mental or social well-being;
 - (e) people with disabilities in a state of physical or mental neglect;
 - (f) people with disabilities that are being maltreated, abused, deliberately neglected or degraded; and
 - (g) some of the people with disabilities accommodated in these residential facilities for people with disabilities, who can hardly do anything for themselves.
- 5.19 Care givers render care, support and supervisory services to people living with disabilities who are accommodated in the residential facilities, amongst others, as follows:
 - (a) assistance in dressing, grooming, bathing and with other personal hygiene matters;

- (b) assistance with taking medication;
 - (c) central storing and/or distribution of medication;
 - (d) arrangement for medical and dental care;
 - (e) ensuring compliance with house rules;
 - (f) supervision of schedule and activities;
 - (g) maintenance and/or supervision of cash resources or property;
 - (h) monitoring food intake or special diets; and
 - (i) providing all other basic services that people with disability cannot render for themselves.
- 5.20 Apart from the above, care and support services rendered by care workers in residential facilities for people living with disabilities further entail, amongst others, the following:
- (a) bathing - cleaning the body using a tub, shower or sponge bath, including getting a basin of water, managing faucets, getting in and out of a tub or shower, reaching head and body parts for soaping, rinsing and drying;
 - (b) dressing - putting on and taking off, fastening and unfastening garments and undergarments and special devices such as back or leg braces, corsets, elastic stockings/garments and artificial limbs or splints;
 - (c) toileting - getting on and off a toilet or commode, emptying a commode, managing clothes, wiping and cleaning the body after toileting, and using and emptying a bedpan and urinal;
 - (d) transferring - moving from one sitting or lying position to another sitting or lying position (e.g. from a bed to or from a wheelchair, or sofa, coming to a standing position and/or repositioning to promote circulation and to prevent skin breakdown);
 - (e) continence - ability to control bowel and bladder as well as to use ostomy and/or catheter receptacles, and to apply diapers and disposable barrier pads;
 - (f) eating - reaching for, picking up, grasping a utensil and a cup, getting food on a utensil, bringing food, utensil, and cup to mouth, manipulating food on plate, and cleaning face and hands as necessary following meal;
 - (g) render a stimulation programme, as lay therapists, in order to prevent secondary disability of people with severe intellectual disabilities and/or multiple disabilities through mental activities, socialization with the world, physical activities, amongst others; and
 - (h) provide supervision in order to ensure the safety and well-being of residents, in order to prevent the risk of people with severe intellectual disabilities and/or multiple disabilities to themselves and to others.
- 5.21 Care and support services rendered in residential facilities for people living with disabilities are more or less the same as those rendered in public treatment centres.
- 5.22 Given the categories of people with disabilities listed in paragraph 5.18 above, any interruption of the care and support services provided in the residential facilities in which people with disabilities are accommodated, may endanger the lives, personal safety or health of people with disabilities, staff members and members of the public present in these facilities.
- 5.23 Any interruption of any of the care, support and supervisory services provided for in the residential facilities for people living with disabilities and as outlined in paragraph 5.20 above, if interrupted, will result in the endangering of lives, safety or health of people with disabilities accommodated in these facilities and others.
- 5.24 Given the care and support services provided for in the residential facilities for people with disabilities, any interruption of these services will clearly endanger the lives, safety and health of people with disabilities in these facilities.
- 5.25 Therapeutic and counselling services by social workers and other professionals in these residential facilities are aiming at the social functioning of people with disabilities, whose social functioning is impaired as a result of injury, disability or any chronic or mental condition.
- 5.26 Therapeutic services further include counselling services, in order to improve the individual's functioning, and group work sessions aimed at empowerment of life or social skills such as sexuality, substance abuse and addressing behavioural challenges.
- 5.27 Social workers are part of the multi-disciplinary team that screen and assess new admissions in order to finalize their admission and to develop an individual development plan. The individual development plan addresses all areas of need, for example, physical, psychological and spiritual needs, etc., identified during assessment, in order to mitigate against conditions that promote marginalization, exclusion, isolation, poverty and contribute to further disability.
- 5.28 They provide psycho-social support, in order to facilitate adjustment of newly disabled people.
- 5.29 They render reconstruction services through promoting family contact and visitations, in order to facilitate re-integration and unification with their families.
- 5.30 Services by care-givers and social workers are key to the rehabilitation of people with disabilities. Rehabilitation is a goal-orientated and time-limited process aimed at enabling a person with impairments to reach an optimum mental, physical and/or social functional level, thus providing the person with the tools to change his/her own life. It involves measures (for example technical aids and other measures) intended to compensate for a loss of function or for functional limitation and it is intended to facilitate social adjustment or readjustment.

- 5.31 Therapeutic and counselling services provided by social workers in residential facilities for people living with disabilities further aim at restoring the social functioning of people whose functioning has been impaired as a result of injury, disability or any chronic, physical or mental illness.
- 5.32 Therapeutic and counselling service further entails:
- (a) Guiding through a process of helping residents in residential facilities to make important choices that affect their lives, such as choosing a preferred life-style, whilst counselling focuses on helping them make changes. Guidance is only part of the overall service provided by professional counselling.
 - (b) The aforesaid is undertaken through distinct stages such as exploration, goal setting and action, with the counsellor or therapist enabling clients to make decisions and formulate new ways of behaving, feeling and thinking.
 - (c) Imparting life skills and addressing personal, social, vocational, empowerment and educational concerns.
 - (d) The abovementioned areas include intra - and interpersonal concerns related to mental health, marriage or family issues, employment and rehabilitation from substance abuse and coming to terms with a newly acquired disability or preventing secondary disability from a long acquired disability.
 - (e) Working with those who are suicidal and those who are terminally ill.
 - (f) Addressing attention to the quality of the person's relationship with him or herself, in order to lessen harsh self-criticism, self-destructiveness and guilt.
 - (g) Providing care and protection through *inter alia* improved access to all protection services, reduce exposure to abuse, neglect, sexual exploitation and crime as well as improved physical, emotional, psychological, social and/or material assistance to beneficiaries.
 - (h) Providing a rehabilitation programme with activities ranging from recreation to specific skills development inclusive of *inter alia*, building self-esteem, providing communication skills, relaxation techniques, relationship management, anger management, goal setting as well as vocational skills development.
- 5.33 Social workers rendering therapeutic and counselling services are expected to be on call 24 hours a day to deal with all emergencies and depending on each person's circumstances. These circumstances include an inability to come to terms with a newly acquired disability or preventing a secondary disability from developing from a long acquired disability, rejection by the family due to the disability, etc.
- 5.34 These intra - and interpersonal concerns may exacerbate suicidal tendencies caused by depression due to an inability to cope with their circumstances.
- 5.35 Counselling and therapeutic services by social workers are also linked to the individual development plan developed after an assessment conducted by the multi-disciplinary team, where available.
- 5.36 Care-givers/workers are not trained to render therapeutic and counselling interventions and this service has to be rendered, in the main, by social workers.
- 5.37 There would be dire consequences should therapeutic and counselling services not be available when needed. Such consequences include, but are not limited to, the following:
- (a) endangering own life (resident);
 - (b) aggression and endangering the lives of other residents and staff;
 - (c) damage to property;
 - (d) causing the death of a resident/residents and staff in the facility;
 - (e) adverse emotional impact to the person with disability;
 - (f) retarding progress to rehabilitation and confidence of the person with a disability; and
 - (g) relapse of the resident in terms of rehabilitation.
- 5.38 Therapeutic and counselling services provided in the residential facilities for people living with disabilities, if interrupted, may endanger lives, safety or health of such people with disabilities and other in such facilities.
- 5.39 Therapeutic and counselling services cannot be rendered by care-workers or unqualified persons, because it can create more damage, especially in serious cases such as persons with suicidal tendencies.
- 5.40 Some of the employees rendering the services referred to above are not on duty 24 hours a day, but they are accessible 24 hours a day. It is similar to medical doctors that are not at work 24 hours a day but are accessible 24 hours a day. The Respondent's argument in this regard loses sight of the fact that the service has to be rendered 24 hours a day.
- 5.41 Finally, the Applicant submitted, that replacement labour is simply not available and replacement employees will not have the required training or experience to perform the required duties.

6. Respondent's Submissions

The submissions made on behalf of the Respondent were as follows:

- 6.1 The Applicant has not dealt with the question of the interruption of the service at all. It merely submits that, because the functions performed by care workers are essential, they should not be permitted to strike. The Applicant does not apply the established tests, and asks the Committee to make an unjustifiably broad determination to limit the right to strike.
- 6.2 The Respondent submitted that the Applicant failed to address some of the tests set out in our law relating to the declaration of a service as essential and referred the ESC to the following principles:
- (a) The Freedom of Association and Protection of the Right to Organise Convention (No 87) (Convention of Freedom of Association) was adopted by the International Labour Conference of the International Labour Organisation (*"the ILO"*) during 1948.
 - (b) Pursuant to South Africa's readmission as a member of the ILO in 1994, the Convention of Freedom of Association, *inter alia*, was ratified by our country during February 1996.
- (c) It is trite that conventions will only create international obligations on member States that ratify them and further that international instruments are not legally considered binding in South Africa and elsewhere, unless legislation has been promulgated bringing the relevant instrument into effect by incorporating it into national legislation or unless they are a part of international customary law.
- (d) Section 23(1) of the Constitution provides that everyone has the right to fair labour practices.
- (e) Section 1 of the LRA reads as follows:
"(1) The purpose of this Act is to advance economic development, social justice, labour peace and the democratisation of the workplace by fulfilling the primary objects of this Act which are–
- (a) *to give effect to and regulate the fundamental rights conferred by section 23 of the Constitution;*
 - (b) *to give effect to obligations incurred by the Republic as a member State of the International Labour Organisation;*
 - (c) *to provide a framework within which employees and their trade unions, employees' and employers' organisations can–*
 - (i) *Collectively bargain to determine wages, terms and conditions of employment and other matters of mutual interest; and*
 - (ii) *formulate industrial policy.*
 - (d) *to promote:*
 - (i) *orderly collective bargaining;*
 - (ii) *collective bargaining at sectoral levels;*
 - (iii) *...*
 - (iv) *..."*
- (f) In ***Sidumo & Another v Rustenburg Platinum Mines & Others (2007) 28 (ILJ) 2405 (CC)*** the Constitutional Court confirmed the following:
1. *Although the right to fair labour practices extends to employees and employers alike for employees it affords security of employment;*
 2. *Section 3 of the LRA provides that any person applying the provisions of the LRA must interpret its provisions to give effect to its primary objectives; in compliance with the Constitution; and in compliance with the Public International Law obligations of the Republic."*
- (g) The Committee is therefore obliged to comply with the provisions prescribed by the convention, through the principles enumerated in the LRA.
- (h) Additionally, the standards set out in the convention on freedom of association have been amplified by the decisions of the ILO Supervisory Investigatory Bodies, namely the Committee on Freedom of Association of the Governing Body of the ILO and the Fact Finding and Conciliation Commission on Freedom of Association.
- (i) These specialised agencies are charged with investigating and reporting on complaints concerning violations of freedom of association.
- (j) By virtue of the LRA's specific purpose to give effect to *"obligations incurred by the Republic as a member state of the International Labour Organisation"* the Committee is bound to interpret the relevant provisions of the LRA in accordance with the Convention of Freedom of Association and the ILO's amplifications thereof and decisions thereon, primarily under the auspices of the Committee on Freedom of Association (*"the CFA"*).
- (k) The convention, having been ratified by South Africa and legislation having been promulgated bringing it into effect by incorporating it into national legislation (the LRA), is binding on the Committee.
- (l) The right to strike is a fundamental right, and is conferred in the Bill of Rights without any express limitation. The Courts have clearly established that where the legislature restricts the right to strike, such legislation must be interpreted in the least restrictive way. In ***SATAWU and Others v Moloto NO and Another 2012 (6) SA 249 (CC)***, the Constitutional Court stated:
- "The right to strike is protected as a fundamental right in the Constitution without any express limitation. Constitutional rights conferred without express limitation should not be cut down by reading implicit limitations into them and when legislative provisions limit or intrude upon those rights they should be interpreted in a manner least restrictive of the right if the text is reasonably capable of bearing that meaning."*
- (m) The case law clearly establishes the right to strike as an essential right in the Labour Relations framework. Any limitations on this right should be narrowly restricted so as to infringe on the right as little as possible. The general position is as follows:

"The starting point must be that all workers should be treated equally and any deviation from this principle should be justified. The mere fact that employees are state employees is not sufficient justification. Restrictive treatment of employees must be justified on the basis of the service that they perform and, even then, it should be narrower than necessary and should be accompanied by reciprocal guarantees. For instance, essential services must be restrictively defined and where the right to strike is denied it must be replaced with final and binding arbitration ...".

- (n) In terms of section 213 of the Labour Relations Act, a service is deemed essential if it can be shown that an interruption of that service would "endanger the life, personal safety or health of the whole or any part of the population".
- (o) The particular tasks performed by different categories of employees are relevant to determining whether an essential service is provided by the body. The functions performed by employees assist to classify the nature of the service.
- (p) Once a body or organisation is declared essential, however, it does not follow that every employee of the body is automatically essential. The Labour Appeal Court in **SAPS v POPCRU and Another (2010) 12 BLLR 1263 (LAC)** established that it is particular functions of a body which are declared essential, and that these functions constitute the essential service. Not every employee is affected by the declaration, but only those employees who perform the particular functions, are designated as essential:

"...[W]hen, for example, a body, organisation or a name of a company is declared to be an essential service, it is the functions that that body, organisation or company performs, is obliged to perform or required to perform, that constitutes the essential service and it is the persons who are engaged in the performance of these functions who are not permitted to take part in a strike or any conduct in contemplation or furtherance of a strike. Therefore, when a body is declared an essential service, it is the actual service or functions performed by that body that needs to be insulated from being interrupted by way of a strike by those who are engaged in providing that service or carrying out the functions. I say this because a body cannot constitute a service or function. It may represent a service but not constitute it."

- (q) In terms of section 39(2) of the Constitution, it is mandatory for 'every court, tribunal or forum' when interpreting any legislation to 'promote the spirit, purport and objects of the Bills of Rights'. The Constitutional Court has emphasized the mandatory nature of this obligation, which must also then apply to the essential services, being a tribunal or forum.
- (r) It is therefore incumbent on the ESC to give a proper meaning and emphasis to the word 'endanger' and to the phrase "the whole or any part of the ...".
- (s) 'Endanger' means to put in danger or peril - it does not mean merely to threaten or to put at some lesser risk. The meaning of level of endangerment is 'a clear and imminent threat'.
- (t) It is the population or a part of a population that must face the endangerment, not merely isolated individuals - there is a collective component. In that respect 'population' means 'the collective inhabitants of a country, etc.'
- (u) In a similar article, the former Chairperson of the ESC, Judge Dhaya Pillay, indicated the proper approach to the definition of essential services. She makes the following salient points:

"If industrial action is unlikely to interrupt the service in question, for example, because of mechanisation or computerisation, or if the interruption can be avoided, for example by outsourcing the service or by using replacement labour, the service may not be designated as essential."

- (v) Even where the functions performed by particular workers are essential in nature, this is not enough to deny them the right to strike. There is an additional test that must be applied to the facts. This test asks whether the particular workers can be replaced by the employer, in order to prevent disruption to the service. If the work can be performed by alternative labour, or subsumed into the functions of other employees during the period of the strike, the declaration of the affected workers as essential is inappropriate. This test was set out in **Eskom Holdings**

SOC Ltd v Essential Services Committee & Others (Unreported case number C662/10). Here, the Labour Court stated:

"... the test that should have been applied is this: can the employees engaged in an essential service who decide to embark upon an industrial action be replaced without that service being interrupted. The fact that the employees may be employed by the company declared to be an essential service or a company that renders services to it cannot be a relevant consideration."

- (w) Thus, where the employer will receive sufficient notice of an impending strike and would be able to source alternative labour to perform the functions which stand to be affected by such a strike, the service should not be declared essential. This test is referred to below as the 'interruption test'. It asks whether the workers can be replaced and their functions performed, without the service being interrupted.
- 6.3 The Respondent submits that the Applicant's request must be evaluated against the principles set out in paragraph 6.2 above.
 - 6.4 The Respondent submits that the Applicant lists the functions performed by care workers at the different facilities. The Applicant initially submitted that care workers were responsible for medical interventions, and with taking care of the safety of service users. It has since amended its assertions, stating merely that care workers play a role in reporting medical crises to the relevant medical professionals and oversee the safety of service users within their care/supervision.
 - 6.5 The Applicant lists the functions of care workers and immediately declares that "it should be common cause that the non-rendering of care and support service in public treatment centres on a 24 hour basis, will result in danger to lives, personal safety and health of service users and others in public treatment centres". The Respondent has made the admission that the role of the care workers in public treatment facilities is essential. It does not follow, however, that service performed by care workers (the care and support service) should be deemed essential. The interruption test must first be considered.
 - 6.6 The list of tasks performed by care workers presented by the Applicant indicates the menial nature of the work performed. In both public treatment centres and residential care centres, the tasks entail ensuring that service users follow their programme, practice personal hygiene, and generally behave as expected.
 - 6.7 Care workers perform important but unskilled work. As a result, on receipt of notice of an impending strike, management at the facilities should have no difficulty finding temporary replacements for care workers. Alternatively, the tasks performed by care workers could easily be carried out

by nurses employed at the premises for the following reasons:

- (a) Both nurses and care workers work in 12 hour shifts;
- (b) Nurses are *already* declared essential, and will accordingly not embark on a strike along with care workers. In the case of a strike, the services already deemed essential would continue to operate;
- (c) The functions of care workers do not require any additional skills or qualifications that nurses do not possess.

6.8 In *Eskom Holdings SOC Ltd v Essential Services Committee (supra)*, the interruption test was applied to the facts as follows:

"In this matter, and based on the evidence before the ESC, it is plain that if Eskom is given 48 hours' notice by security guards of their intention to go out on a strike at Koeberg, it simply would not be possible for a single new recruit to be employed at Koeberg in within that 48 hour notice period, i.e. the service will not be able to be performed without interruption."

6.9 The same cannot be said of the services performed by care workers at public treatment centres.

- (a) Employees of the Department of Social Development must give 7 days' notice of any intended strike action. Accordingly, the centres will be informed of the strike with sufficient notice to be able to secure replacement labour.
- (b) The functions performed by care workers at the centres can, during the period of a strike, be adequately performed by either nurses or temporary workers hired during the strike period. The Applicant has advanced no reasons as to why, given the unskilled nature of the work performed by care workers, their work cannot be adequately performed by alternative labour.

6.10 The functions performed by care and support service workers can easily be transferred to the medical staff, or performed by temporary workers. The service, while essential, would not be interrupted if care workers were to embark upon a strike.

6.11 The Respondent referred the ESC to a number of memorandums that were issued by the Applicant during strikes in the Public Service, which occurred in 2007 and 2010 respectively.

6.12 In paragraph 4 of a memorandum dated 6 August 2010, the Director-General of Social Development writes:

"Departments are advised to implement the necessary mechanisms or contingency plans to mitigate the impact of the strike on services delivery".

6.13 In a memorandum dated 14 July 2010, the Director-General writes:

"Despite the latter, however, in anticipation of the impending strike action, you are all urged to put contingency plans in place to mitigate the impact of the strike on service delivery in the sector. This includes, but not limited to, the appointment of a Strike Management Committee at the relevant workplaces and institutions, in writing, to co-ordinate the strike action and to also make the necessary prompt interventions during the strike."

6.14 The memorandums referred to in paragraphs 6.12 and 6.13 above were apparently written 3 months before the industrial action actually commenced. This is indicative, the Respondent argues, that the Applicant has more than enough time to secure replacement labour and to put contingency plans in place to manage strike action.

6.15 The ESC was also referred to a memorandum dated 24 May 2007. In this memorandum the Director-General states:

"Kindly note that the industrial action is lawful and protected only in respect of employees who belong to the aforementioned trade unions at this stage."

He continues by stating:

"Labour will approach individual institutions, including social development facilities, which have been declared essential for an agreement to be concluded on minimum services, so that a skeleton staff of 25% remains in service during the strike."

The aforesaid, the Respondent argues, is indicative that the Applicant can function with 25% of its employees being on duty. In reply, the Applicant argued that a lot of time has lapsed since the 2007 and 2010 strikes and furthermore, the current proceedings before the ESC have surpassed the content of these outdated memorandums.

6.16 The Applicant asserts that therapeutic and counselling services are required 24/7. It makes this assertion in spite of the following:

- (a) The employees who perform these services do not engage in shift work.
- (b) Social workers work from 07h30 - 16h00 on weekdays. They are not expected to work over the weekend, nor do they perform standby duty.
- (c) The remaining members of the multi-disciplinary team ("MDT") either work fixed hours similar to the social workers or, are not employed at the centres at all. Where their services are required, these service providers attend the centres to consult with the service users by appointment.

6.17 The Applicant places enormous emphasis on the fact that the services in question are interlinked and cannot be separated from one another. The ESC has, however, designated certain services rendered at airports, by immigration officials, SARS and the Department of Health as essential. An argument can be made out that all the services rendered by the relevant organisations are interlinked, but the ESC has only designated those services that are truly essential.

- 6.18 The Applicant did not lead any evidence regarding the working hours of these workers. The working hours were clearly set out in the statement of response. These allegations contained in this statement have not been refuted by the Applicant.
- 6.19 In spite of this, the Applicant continues to make submissions which contradict the way it actually runs its centres. The working hours and terms of employment of therapeutic and counselling services employees do not reflect the same fear that the Applicant now wishes to present to the Committee.
- 6.20 Thus, despite the Applicant's allegations concerning the numerous and serious consequences that would follow if the services were interrupted, it does not offer these services on a 24/7 basis. In attempting to convince the Committee, the Applicant paints a dire picture which is divorced from the reality of the services currently provided at its facilities and which exaggerates the consequences, if any, which would result from a delay in the provision of these services to service users.
- 6.21 The Applicant has not demonstrated that the services performed are essential. These services are, on the whole, performed by employees who work fixed hours and meet at set times with the service users. Members of the MDT are also not all employed by the Department.
- 6.22 The Applicant asserts that this service must be provided 24/7. That is not done, is actuality. Nevertheless, none of the consequences which the Applicant has asserted would flow from any interruption have resulted. The facts are too weak to sustain a meaningful analysis against the applicable legal principles.
- 6.23 The Applicant has failed to make out a case for the designation of either the therapeutic and counselling or the care and support services at public treatment centres and residential care facilities as essential. It has provided the Committee with limited facts, which do not establish any reason for the Committee to limit the right to strike.
- 6.24 Care workers perform unskilled tasks which, while essential, can easily be performed by alternative labour during the strike period. The interruption test does not favour the relief sought by the Applicant. Employees within therapeutic and counselling services do not perform an essential service as stated by the Applicant. Their working hours and terms of employment speak against the relief sought by the Applicant.
- 6.25 The Applicant has provided no basis on which the Committee should find it appropriate to proceed with such an investigation and/or designation, it is submitted by the Respondent.
- 6.26 The Applicant has failed to demonstrate that therapeutic and counselling services are essential.
- 6.27 The Applicant has not demonstrated that, if care workers were to embark on a strike, the care and support service would be interrupted.
- 6.28 The Respondent consequently requested the Committee to decline the Applicant's request for an investigation and/or designation that care and support services and therapeutic and counselling services be designated essential.

7. Analysis of the Evidence and Arguments

- 7.1 The Labour Court endorsed this view of Brassey in **SA Police Service v Police & Prisons Civil Rights Union & Others (2007) 28 ILJ 2611 (LC)**, when it ruled that not all employees of the South African Police Service render an essential service which prohibits them from embarking on strike action. The Labour Court held that it is the service that is essential, not the industry. The suggestion that finance administrators, human resource personnel, tea ladies and cleaners render an essential service by reason only of being employed by the SAPS was, in the Court's view, difficult to comprehend. It could not be argued, on the definition of essential service in the Act, that the interruption of the service of the above workers would "endanger the life, personnel safety or health of the whole or part of the population".
- 7.2 The above judgment was confirmed on appeal by the Labour Appeal Court (see **SAPS v POPCRU and Another (2010) 12 BLLR 1263 (LAC)**). Waglay JA held that while employees employed under the Public Service Act Proclamation 103 of 1994 provide important support and complementary functions to the SAPS, they do not form part of the SAPS that is designated as an essential service by the Act. Such employees were accordingly not prohibited from striking in terms of section 65(1) (d) of the Act. Waglay JA held that giving effect to the interpretation sought by the SAPS, to the effect that all persons employed by SAPS rendered an essential service, would unjustifiably restrict the fundamental right to strike enshrined in the Constitution.
- 7.3 The Labour Appeal Court judgment was confirmed on appeal by the Constitutional Court (see **SAPS v POPCRU and Another (2011) 9 BLLR 831 (CC)**). A unanimous Constitutional Court held that the Labour Appeal Court could not be faulted in holding that not all SAPS employees are engaged in an essential service, and that the wide interpretation sought by the SAPS was incorrect. The Constitutional Court held that "a restrictive interpretation of essential service must, if possible, be adopted so as to avoid impermissibly limiting the right to strike".
- 7.4 Having regard to the above, it is clear that our law requires essential services to be restrictively interpreted, and that this means, *inter alia*, the following:
- 7.4.1 It is the service which is essential, not the industry or the institution within which the service falls;
- 7.4.2 Only those employees who are truly performing an essential service, may be prohibited from striking; and
- 7.4.3 Essential and non-essential service workers may be found working side by side in the same institution.
- 7.5 Essential service is defined in section 213 of the Act as:
- "a service the interruption of which endangers the life, personal safety or health of the whole or any part of the population".
- 7.6 Before the ESC can designate any service as essential, it must be satisfied that:
- 7.6.1 It is a service, or part thereof, that is essential. It is not employees, or a business or industry that is essential (see **SAPS v. POPCRU and Others** supra);
- 7.6.2 There must be an interruption, irrespective of whether it is partial or complete. If industrial action is unlikely to interrupt the service, or if the interruption can be avoided (for example by using replacement labour), the service will not be designated as an essential

service;

- 7.6.3 The interruption of the service must endanger life, personal safety or health. Endanger means "putting at risk", "imperial" or "jeopardise". This implies that the conditions prevailing at the time that the designation is made, must be considered, and not the circumstances that may occur at some future stage; and
- 7.6.4 The endangerment must impact on the population, being human beings (see D Pillay "*Essential Services under the new LRA*" (2001) 22 ILJ 1 and the ESC designation in the matter of the *Road Traffic Management Corporation and Others vs. NEHAWU and Others*).
- 7.7 The ESC, therefore, must act with care and due diligence when it conducts an investigation in terms of section 71 of the LRA and when it considers limiting the right to strike. The process that is followed in terms of section 71 of the LRA is an investigation. The normal onuses and burdens of proof that apply in civil and criminal matters do not apply to such a section 71 investigation.
- 7.8 While the normal onuses and burdens of proof that apply in civil and criminal matters do not apply to such a section 71 investigation, it must be borne in mind that it is the Applicant that has initiated these proceedings, and it is the Applicant that seeks to limit the right to strike for those employees that are responsible for delivering the services in question.
- 7.9 It is the view of the ESC that the Applicant has an obligation to place sufficient evidence before the Committee to enable it to make a designation that the interruption of the service would endanger the life, personally safety or health of a whole or a part of the population.
- 7.10 The Applicant in this matter relies on its submissions for the investigation, its heads of argument and a bundle of documents that comprises almost exclusively of job descriptions of employees responsible for delivering the services that it seeks to be designated.
- 7.11 The job descriptions referred to above, are for the following positions:
- (a) Facility Manager (Social Services and Support)
 - (b) Institutional Manager
 - (c) Social Workers
 - (d) Nurse
 - (e) Psychologist
 - (f) Occupational Therapist
 - (g) Child and Youth Care Workers
 - (h) Administrative Officers
- 7.12 Some of the job descriptions listed above refer to the posts of employees who are already covered by the essential services designations of 1997, 1998 and 2004 (also see paragraphs 2.16 and 2.17 above). They are therefore not relevant to the current investigation.
- 7.13 With regards to care and support services, there are two categories in question, being:
- (a) Care and support services at public treatment centres; and
 - (b) Care and support services at residential facilities for people living with disabilities.
- 7.14 On careful consideration of the submissions of both parties, but in particular the job descriptions of the care workers that provide care and support services in public treatment centres, it would appear that the work done by employees in this regard does not actively promote or sustain life, personal safety, and/or health of the patients. There is no evidence to show that if this service is interrupted, there will be an endangerment of life, personal safety and or health of the patients.
- 7.15 Turning to the care and support services provided at residential facilities for people living with disabilities, on the submissions made, which are uncontested in this regard, it would appear that the employees rendering this service play an active role in assisting the disabled. Furthermore the interruption of such assistance could seriously harm the patient's physical, mental or social well-being.
- 7.16 In respect of replacement labour, we do not agree with the Respondent that this work is menial and that replacement labour could be accessed easily. Consequently, we accept that the interruption of this service would endanger life, personal safety and or the health of the disabled patients.
- 7.17 With regards to therapeutic and counselling services, the ESC is of the view that the evidence does not support a designation of essential services. Nothing in the evidence submitted by the Applicant was persuasive that if the services were to be interrupted, it would lead to the endangerment of life, personal safety and/or the health of the patients.
- 7.18 Of specific importance was the working hours of the employees responsible for the said therapeutic and counselling services. The working hours was in dispute and no clear evidence was led on this aspect. The Applicant argued that the services are required to be available on a 24/7 basis, but the Respondent argued that in practice, the employees responsible for these services work from 07h30 to 16h00 on weekdays. They do not work on weekends and they do not engage on shift work, meaning that this service is not available after 16h00 during weekdays or on weekends.
- 7.19 The Applicant also failed to submit any evidence regarding the level of disabilities that patients suffer from. In other past designations of the ESC, the Applicants at least tried to distinguish between the levels of disabilities that patients suffer from. This placed the ESC in a far better position to balance the right to strike with that of affected patients. This was not done in this case.
- 7.20 On the evidence before it, the ESC is of the view that the Applicant has failed to demonstrate that an interruption to therapeutic and counselling services would endanger the life, personally safety or health of a whole or a part of the population.

7.21 Given the above, the Applicant's case in relation to the care and support services in public treatment centres as well as the overall therapeutic and counselling services, must fail.

8. Designation

8.1 The Committee hereby designates the following services as essential:

Care and support services at residential facilities for people living with disabilities.

8.2 The parties are directed, in terms of section 72 (1) of the LRA, to conclude a minimum services agreement in respect of those services designated as essential in paragraph 8.1 above within three (3) months of this designation.



**Luvuyo Bono Chairperson of the ESC 9
March 2016**