

**IN THE ESSENTIAL SERVICES COMMITTEE
HELD AT JOHANNESBURG**

Case No.: ES 6-16

In re: Investigation in terms of Section 71 of the Labour Relations Act, 66 of 1995:

Whether services rendered by medical officers are essential services

DESIGNATION

1. Introduction

- 1.1 On 27 March 1998, the Essential Services Committee ("the ESC") designated medical and paramedical services as essential. During the ESC intervention to encourage the public service to conclude minimum service agreements, inquiries were raised on whether the above designation includes services rendered by medical officers. Seeking clarity from the actual designation did not yeild positive results and the ESC on its own initiative in terms of Section 70B(1)(d) decided to investigate if the above mentioned services are in fact essential services.

2. Details of Hearings

2.1 Written submissions were received from the Department of Health in the Western Cape.

2.2 Public hearings were held at the follow venues:

- (a) CCMA George – 13 July 2017;
- (b) CCMA Cape Town – 14 July 2017;
- (c) CCMA Port Elizabeth – 17 July 2017;
- (d) CCMA East London – 18 July 2017;
- (e) CCMA Durban – 21 July 2017
- (f) CCMA National Office (Johannesburg) – 24 July 2017

3. Legal Framework

3.1 It is necessary to set out the legislative context within which the ESC must make its designation.

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

3.2 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."*

3.3 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."*

3.4 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

3.5 Section 3 of the Act 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."*

3.6 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".*

3.7 An 'essential service' is defined in section 213 of the Act 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".*

3.8 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]).

3.9 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".

3.10 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".

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

3.12 The first part of the definition of an “essential service” in the Act is:

“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 (hereinafter referred to as “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

3.13 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.

3.14 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.

3.15 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.

3.16 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").

- 3.17 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".

- 3.19 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".

4. Written and Oral Representations made to the ESC

4.1 In summary the representations made provide that:

Doctors can be divided into 5 broad groups:

- Medical officers
- Interns
- Community service doctor
- Specialists
- Registrars

4.2 Medical officers form the largest category of doctors in South Africa. In most institutions, medical officers form more than 50%, of the staffing component of doctors, with many institutions in the country only staffed by medical officers. If there was any interruption to the work of medical officers, healthcare in South Africa would grind to a halt and all the uninsured people of SA will suffer as a result thereof.

4.3 Nurses cannot render services provided by medical officers. A clinical nurse practitioner can see and diagnose patients to a limited extent but they cannot manage and treat all categories of patients. One of their most important skills is to recognise when a patient is too complicated for them to manage, and this is when they refer the patient to a medical officer, who will offer the patient more advanced medical care. This is not a rare occurrence; it occurs multiple times every day. An example is a child with diarrhoea- a clinical nurse practitioner can recognise that a child is dehydrated, but will refer the patient to a medical officer for further treatment.

4.4 Additionally, nurses cannot admit and manage patients in hospitals- this is done by doctors.

5. Survey of the Evidence and Arguments

5.1 The constitutional right to strike is well entrenched in our law. Section 23(2) of the Constitution gives effect to this right. It states:

"Every worker has the right-

- (a) ...;*
- (b) ...; and*
- (c) To strike."*

5.2 Section 64 of the Act sets out the procedure that must be followed when employees wish to embark on protected strike action, the provisions of which are not relevant for present purposes.

5.3 Section 36 of the Constitution allows for the limitation of the rights that are embodied in the Bill of Rights. The relevant section states:

"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."*

5.4 Section 65 of the Act provides for the limitation on the constitutional right to strike. The relevant sub-section thereof for purposes of this application is section 65 (1) (d) (i), which states:

"No person may take part in a strike ...if-

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

5.5 It is trite law that a court, tribunal or forum, when interpreting the Bill of Rights, must give consideration to international law (see paragraphs 4.11 to 4.19 above).

5.6 It is furthermore trite law that essential services must be restrictively defined (See *Chirwa v. Transnet Ltd and Others 2008 (4) SA 367 (CC) at paragraph [101]*).

5.7 Chaskalson *et al* (in *Constitutional Law of South Africa, Volume 4, Second Edition, Juta*) point out that having regard to the definition of essential service in the Act, the prohibition on strikes in essential services operates only in very restricted circumstances.

5.8 Similarly, Brassey (in *Commentary on the Labour Relations Act, Volume 3, Juta*) notes that an essential service is narrowly defined in our law; that the emphasis is on threats to safety and security, and that considerations of mere expense and inconvenience fall beyond the ambit of the definition of an essential service.

Brassey notes further:

"It is the service that is essential – not, as was so under the previous Act, the industry within which such service fell. Thus essential and non-essential service workers can be found

working side by side in the same institution. In a hospital for instance, doctors and nurses might be essential service workers, whereas the cleaners and gardeners would probably not be”.

5.9 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”*.

5.10 The above judgment was confirmed on appeal by the Labour Appeal Court. 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.

5.11 The Labour Appeal Court judgment was confirmed on appeal by the Constitutional Court. 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".

5.12 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:

5.12.1 It is the service which is essential, not the industry or the institution within which the service falls;

5.12.2 Only those employees who are truly performing an essential service, may be prohibited from striking; and

5.12.3 Essential and non-essential service workers may be found working side by side in the same institution.

5.13 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".

5.14 Before the ESC can designate any service as essential, it must be satisfied that:

5.14.1 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);

5.14.2 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;

- 5.14.3 The interruption of the service must endanger life, personal safety or health. Endanger means “putting at risk”, “imperil” 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
- 5.14.4 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*).
- 5.15 In terms of the submissions received the services rendered by medical officers (including interns, registrars, community service doctors and specialists) is an integral part to the preservation of life and health of the public.
- 5.16 Medical Doctors are in the value chain of medical and paramedical services provided public health. Nurses cannot render the services rendered by medical doctors.
- 5.17 In the event of any uncertainty existing with the 27 March 1998 designation of medical and paramedical services in so far as it includes medical officers, the ESC is satisfied that the services rendered by medical officers are essential.
- 5.18 To the extent that nursing also form part of the value chain of medical and paramedical services rendered in public health, but has been individually designated as an essential service, services rendered by medical officers should be individually designated.

6. Designation

The ESC therefore makes the following designation:

The services provided by medical officers (including Interns; Community service doctor; Specialists; Registrars) are essential services.



Advocate Luvuyo Bono
Chairperson of the ESC