



DETERMINATION

ESSENTIAL SERVICES COMMITTEE

Case Number: ES 15-19

ESC Panel: Luvuyo Bono, Aruna Ranchod, Clement Marule

Date of Award: 30 September 2019

In the Section 71(9) investigation regarding the designation made by the ESC on 12 September 1997 and published under GN R1216 GG 18276.

DETERMINATION

1. Introduction

- 1.1 The Essential Services Committee ("the ESC"), by notice GN R1216 in Government Gazette 18276, dated 12 September 1997, designated correctional services as essential services (hereinafter referred to as "the 1997 designation").
- 1.2 Given the SAPS vs POPOCRU (2011) 32 ILJ 1603 (CC), judgement which endorsed the concept of restrictive interpretation of essential services, the ESC, as part of its continuous improvement reviewed the said designation.
- 1.3 The ESC advertised in the Government Gazette No: 42608 and the Sunday times on the 4th of August 2019 that it was conducting this investigation. The ESC also notified parties that it deemed would have an interest in the matter, including but not limited to, The Department of Correctional Services, POPOCRU, NEHAWU, etc.
- 1.4 The Department of Correctional services indicated that they would not participate in the hearings.

2. Submissions

POPCRU and NEHAWU submissions

- 2.1. POPCRU made submissions on behalf of itself and NEHAWU. What follows below is a summary of the submissions made.
- 2.2. POPCRU takes in to account that the Essential Service Commission must consistently act within the primary objects of the law in the designation of services/ possible variation of designations as essential services which include but not limited to:
 - Giving effect to and regulating the fundamental labour relations rights conferred by the Constitution,
 - Promoting orderly collective bargaining and the effective resolution of labour disputes, and;
 - The right to strike.
- 2.3. It must be noted that the ESC declared the Department of Correctional Services (DCS) as an essential service despite the contention that not all occupations and functions in the Department constituted an essential service and that this is an anomaly. POPCRU believes that this investigation provides room for correction.
- 2.4. The ILO went further to define the Essential services as a term that in a strict sense depends to a large extent on the particular circumstances prevailing in a country. Moreover, this concept is not absolute, in the sense that a non-essential service may become essential if a strike lasts beyond a certain time or extends beyond a certain scope, thus endangering the life, personal safety or health of the whole or part of the population.¹
- 2.5. POPCRU also takes into account that the Constitutional Court has made a remarkable judgment on what constitutes as an essential service from a service that was previously designated as an essential service in its entirety in the POPCRU vs SAPS matter (CASE No: CCT 89/10).
- 2.6. In its judgment, the Constitutional Court ruled that, when determining if the occupation or profession is of essential service, a narrow interpretation of essential services must in some instances be followed. Based on this judgement, we want to draw the attention of this committee to the striking aspect of the findings of this court. The court found that even where a particular workforce has been designated

¹ https://en.wikipedia.org/wiki/Essential_services

essential services it does not mean that all members, irrespective of their position and appointment, are prohibited from striking. The court went further to say that if the legislation defines the essential service too widely to include other professions that would impermissibly limit the right to strike. This judgement suggests that even designated professions such as the SAPS, which perform an undoubtedly critical service, must still be afforded sufficient means of exercising their section 23 rights.

- 2.7. The Apex court has been consistent in its ruling with regard to right to strike as a powerful weapon according leverage to employees in bargaining with employer. In the matter between National Union of Metal Workers Union of South Africa (NUMSA) and Bader Bop (Pty) Ltd and Others, the CC ruled that the right to strike is a key aspect of a successful collective bargaining system².
- 2.8. With this in mind, POCRU wishes to reiterate its previous position that not all functions in the Department of Correctional Services constitute an essential service given the fact that the odds remain the same and to some extent worse when it comes to working conditions, alarming staff shortages and sky rocketing levels of overcrowding in the correctional facilities for consideration by the Committee within the context detailed below.
- 2.9. POPCRU takes into cognisance the Department of Correctional Services is responsible for the correctional system and providing the custody of all offenders under conditions of human dignity, protecting the rights and obligations of sentenced and unsentenced offenders, providing a system of community corrections, the release from correctional centre and placement under correctional supervision on day parole and parole amongst others things in accordance with Correctional Service Act 111 of 1998 as amended.
- 2.10. POPCRU further submits that, in line with the definition of the essential services and the Constitutional Court ruling on essential service, all employees in correctional services employed in terms of the PSA are not performing an essential service. These are workers performing human resources functions, clerical work and other responsibilities that if not performed due to strike cannot endanger the safety and health of the people.
- 2.11. POPCRU also submitted that in determining who should be deemed to be discharging essential services and not permitted to engage in strike between those employed in terms of CSA and PSA and those that are centre and non-centre based the ESC should also consider the conclusion of the minimum service level agreement for those employees who perform an essential service.

² NUMSA, *M Nkgabutle and 291 OTHERS Vs BADER BOP PTY (LTD)* CCT 14/02
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2.11.1. For this purpose, POPCRU submits that the following functions are essential services:

- Security
- Nutritional services
- Health care
- Maintenance and repairs
- Escort duties to Hospitals
- Hospital duty

2.11.2. POPCRU further submitted that the following functions are not an essential service:

- Social work,
- Community Corrections (correctional supervision and parole supervision)
- Human Resources and Administration
- Education
- Religious care
- Psychological services
- Supply chain
- Finance
- Parole Board
- Institutional Committee
- Human Resources Development
- Employee Relations
- Employee Assistance
- Agriculture and span duty
- Escort duty to the Courts

3. Survey of the Submissions

3.1. The essence of the POPCRU and NEHAWU submissions is that, while correctional services are not defined but the support services, i.e. services not directly involved in corrections, should be excluded from the designation.

3.2. Given the above, the panel questioned POPCRU when it made the suggestions on their view that social work and physiotherapy should be excluded, more so that public health services are designated as essential services. The panel also questioned the fact that POPCRU had conceded that escort to

hospital was an essential service but the escort to court was not in their view an essential service. POPCRU promised to relook at these matters and make submissions on the other legs of the investigation but this did not happen. The panel is of the view that given the health services designation, the health services at correctional services are essential as the interruption of these services may endanger the life and or health of the inmates.

- 3.3. It is a common knowledge that education is not an essential service. POPCRU argued that Community corrections involve the visits of prisoners who are out on parole, further that if the said employees go on strike there is no impact on the inmates. The panel does not agree with this notion, the panel is of the view that if the prisoners are not checked periodically as scheduled that this could endanger the life and or personal safety of the population, depending on the merits of each case.
- 3.4. In relation to Human Resources, Education, Religious Care and Supply Chain. In the view of the panel, Human Resources, Supply Chain services, finance, agriculture and span duty, employee relations and employee assistance have no direct involvement in the core function of correctional services. At the most these services are support services to the correctional services.
- 3.5. The panel had a look at the 1997 designation of correctional services to see what the considerations were at the time of making the 1997 designation. What is evident from the 1997 designation is the Department of Correctional Services defined its functions of corrections as:
 - a) To ensure that every prisoner lawfully detained in any prison be kept therein in safe custody until lawfully discharged or removed therefrom;
 - b) As far as practicable, to apply such treatment to convicted prisoners and probationers as may lead to their reformation and rehabilitation and to train them in habits of industry and labour;
 - c) To apply correctional supervision in respect of probationers;
 - d) As far as practicable to be self-sufficient by the optimal application of production means based on management according to business principles;
- 3.6. What is evident from the above is that only the core corrections functions were considered by the ESC. These functions are not only the safe keeping of offenders but include the corrective measures.
- 3.7. Religious Care, Parole Board and Institutional Committee are part of corrections and therefore are part of the core functions of correctional services.

4. Determination

4.1 The panel is convinced that the following services performed by Correctional services are not essential services:

- Human Resources (including Human Resources Administration and Human Resources Development)
- Education
- Religious care
- Supply chain
- Finance
- Employee Relations
- Employee Assistance
- Agriculture and span duty

4.2. The designation issued by the ESC in 1997 is hereby varied to read as follows:

“The ESC hereby designates correctional services as an essential service but excludes the following services in correctional services:

- Human Resources (Human Resources Administration and Human Resources Management)
- Education
- Religious care
- Supply chain
- Finance
- Employee Relations
- Employee Assistance
- Agriculture and span duty”

Signature:



Chairperson :

Luvuyo Bono

Sector:

ESC Chairperson
