



# DETERMINATION

## ESSENTIAL SERVICES COMMITTEE

---

Case Number: ES 17-19

ESC Panel: Joyce Nkopane, Zwe Ndlala, Makubalo Ndaba

Date of Award: 05 March 2020

---

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

---

#### Introduction

1. The Essential Services Committee ("the ESC"), by notice GN R1216 in Government Gazette 18276, dated 12 September 1997, designated services required for functioning of the Courts as essential services (hereinafter referred to as "the 1997 designation").
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.
3. The ESC advertised in the Government Gazette No: 42608 and the Sunday times on the 4<sup>th</sup> 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.
4. The Department of justice, NPA and NEHAWU indicated that they would participate in the hearings.

## Submissions

### NEHAWU submissions

5. On behalf of NEAHWU it was submitted that whilst it acknowledges that certain court services are essential, the wide designation as is currently the case is undesirable and only a certain portion of the the services should be designated as essential.
6. NEHAWU submitted that the following services should be removed from the designation: -
  - Telephone operators
  - Ushers
  - Judges Clerks
  - Legislative Language Practitioners
  - Maintenance Investigators
  - Control Staff
  - Admin Clerks grade 1-3
  - Accounting Clerks
  - Court Manager and Area Court managers
  - Court intermediary
  - Court Interpreters
  - Cleaners
  - Drivers
  - Equality Court staff
  - E-scheduler
  - General Workers
  - Groundsmen
  - Library Assistants
  - Messenger
  - Registry Clerks
  - Secretaries
7. NEHWAU further explained the services rendered by each position indicated above. It also provided motivation as to why the said services should not be designated as part of the essential services.

8. On behalf of the department of justice and the national Prosecuting authority it was submitted that that the wide interpretation should be retained as the support staff is needed in order for essential services to be rendered. It was submitted as an example that judicial services would not be rendered if supply chain staff is not available. Further that court processes would not proceed if interpreters are not there.
9. The Department of Justice and the NPA conceded that the administrative staff at the provincial offices and offices of the NPA are not rendering essential services.
10. The NPA also submitted that the functions provided in the Thuthuzela Care Centre Model also form part of the Court services and should be designated as essential services. It was submitted that this model focusses on the survivors of sexual offences. It aims to reduce secondary victimization and reduce the cycle from reporting to the finalization of the case and to improve the conviction rate of these cases. The model is court directed, victim centered with prosecutor guided investigations and stakeholder cooperation.
11. It was further submitted that department and the NPA have moved to the 4<sup>th</sup> industrial revolution. They have digitalized their processes and it is imperative for personnel to be available in order to maintain the systems.
12. All the parties agreed that it was imperative that a minimum service level agreement should be concluded.

### **Survey of the Submissions**

13. In 1997 under GG1216 the Essential Services Committee designated the services required for the functioning of the Court as essential services. The manner in which the designation is couched has the potential to cause confusion in terms which services are essential. Further the advancement of technology has resulted in some functions being performed differently. It thus became apparent that there was a need to review this designation in order to bring it in line with the changes and to bring certainty in terms of the services that are essential.
14. It is clear from the submissions that the parties agree that judicial and prosecution services are essential. All the parties further agree that the services rendered by Typists, Registrars of Court and services rendered by Maintenance Officers are essential services.

15. It is also common cause that whilst the responsible departments for rendering judicial services and prosecution services are the Department of Justice and the National prosecuting Authority , the services rendered at the regional and provincial offices of the two entities are not essential and therefore the parties agreed that those employees services do not fall under the 1997 designation and are therefore not essential.
16. The issue that the panel needs to determine is which services are required for the functioning of the courts. This has to be determined in line with considerations that were before the committee when making the 1997 designation. What is evident from the 1997 designation is the Committee grappled with the issue of whether in determining these services, would it be appropriate to use the functions of the employees to as the basis for the designation. The Committee concluded that this method was not appropriate as the same function if performed for the purposes of a bail application, may significantly differ if performed for the purposes of an inquest where life and safety is not at stake. The Committee further acknowledged at the time that the wide jurisdiction of some of the Courts introduced an element of the unknown and unpredictable. As a result of these factors the Committee opted for a wide designation.
17. As indicated above NEHAWU submitted that certain functions which are rendered at courts must be excluded from the designation and the panel agrees that services rendered by cleaners, groundsman, ushers, library assistants and human resources at courts are not essential services.
18. In relation to all the other services it is difficult for the panel to accept that the duties of the functionaries should be used to determine whether the services are essential as court services are by their own nature complex and are interdependent. In *National Union of Mineworkers v Essential Services Committee and Others* (JR 1147/16) [2019] ZALCJHB 82 (10 April 2019), the court in dealing with the test for determining minimum services said that-

“the enquiry was obviously to take place within the context of an examination of Eskom’s core business, which is the GTD of electricity; whether the core business constituted of interdependent components or not; and to further assess which of those positions were critical to the maintenance of that core business.”

19. It is therefore important that in determining which services are required for the functioning of the courts that consider the core functions required. The panel has considered the submissions of the parties and is of the view that some of the services, whilst they may appear not to be essential, such functions

are necessary for essential services to be rendered. For instance, court proceedings may be hampered if there is no interpreter. The court may hear a matter and grant the accused bail, if there is no one to accept that bail and to process it the rights of the accused are infringed. In certain circumstances if administrative staff are not present court orders in domestic violence cases may not be issued and this may lead to endangerment of life, personal safety or health of the affected individuals.

20. The panel has also considered the fact that at the time when the 1997 designation was made , the Committee also grappled with the difficulty presented by the fact that there was no legal mechanism to compel the parties to negotiate and conclude minimum services. The law has since been amended and the panel is of the view that the minimum services agreement or determination is the effective tool to determine the functions that are critical for the functioning of the courts and the functionaries that should form part of the minimum services.

## Determination

21. The panel therefore, varies the determination made in 1997, and order that the services required for the functioning of the Courts including the Thuthuzela Care Centre are designated as essential services. This designation excludes the following services: -

- Human Resources at courts, regional and provincial offices of the Department of Justice and the National Prosecuting Authority.
- Administrative services at the Regional and Provincial Offices of the Department of Justice and National Prosecuting Authority.
- Services rendered by groundsmen, Cleaners, ushers and library assistants at courts.

Signature:



Deputy Chairperson :

*Joyce Nkopane*

Sector:

*ESC Panel Chairperson*