



DESIGNATION

ESSENTIAL SERVICES COMMITTEE

Case Number: ES 4-16
 ESC Panel Chairperson: Joyce Nkopane
 Date: 16 October 2019

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

Whether the Designation made on 12 September 1997 that security services of the Department of Water and Forestry in the supply and distribution of water is an essential service should be varied.

DESIGNATION

Introduction

1. The Essential Services Committee ("the ESC") on its own accord sought to review a designation that was made in 1997 to the effect that the security services of the Department of Water Affairs and Forestry; and the supply and distribution of water are designated as essential services. This investigation was conducted in terms of section 71(9) of the 71 of the Labour Relations Act, 66 of 1995 (*"the LRA"*).
2. On the 10th March 2017, the ESC caused a notice of intention to review and vary the designation to be published in the Government gazette GG Notice 41256.
3. The gazetted terms of reference for the investigation in terms of section 71 were "Notice is hereby given for the variation in terms of section 71 (9) of the designation rendered by the Committee on 12 September 1997, under GNR1216 GG 18276, on security services of the Department of Water and Forestry in the supply and distribution of water. The variation was occasioned by virtue of the fact that the function of securing infrastructure, access control personnel and property and pump stations is no longer vested with the Department of Water affairs and Forestry but with the water

utilities, and that there is no longer the Department of water and Forestry but the Department of Water and Sanitation. (see Government Gazette No 194 of 2017 GG 41256, dated 10 March 2017).

Details of Hearings

4. The hearings were scheduled as per the notice published in Government Gazette No 194 of 2017 GG 41256, dated 10 March 2017. In the hearing the ESC received oral submissions from both Rand Water and SAMWU.

Summary of the Submissions

5. The submissions by Rand Water were effectively that security at Rand Water should be designated as an essential service. Rand Water's distribution network includes over 3 056 kilometres of large diameter pipeline, feeding 58 strategically located service reservoirs. Its customers include metropolitan municipalities, local municipalities, mines and industries and it supplies.
6. It was further submitted that Rand Water is a National Key point and that the National Key Point act prescribes the level of security that should be maintained. It was important that security be designated as essential in order to secure the infrastructure in the supply and distribution of water.
7. Rand water submitted a presentation in terms of which it highlighted the possible threats to the pipeline and the importance of security in this regard.
8. SAMWU submitted the designation was specific that security services designated were not those employed by the water utilities but rather those in the employ of the Department. Thus it was not necessary to extend this to security services at Rand Water.
9. In relation to the protection of the pipeline. SAMWU submitted that these pipes are underground and they cannot be tampered with. There was no real threat that existed.

Legal Framework

10. Section 23(2) of the Constitution of the Republic of South Africa, 1996 (*"the Constitution"*) states that...
"Every worker has the right ... (c) to strike."

11. Section 36 (1) of the Constitution states inter alia that... *"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"*.
12. Section 65 (1) (d) (i) of the LRA states that ... *"No person may take part in a strike ... if that person is engaged ... in an essential service"*.
13. An 'essential service' is defined in section 213 of the Act as:
 - (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"*.
14. The Constitutional Court in **South African Police Service V Police and Prisons Civil Rights Union and Another (CCT 89/10)** said the following: -

"In order to ascertain the meaning of essential service, regard must be had to the purpose of the legislation and the context in which the phrase appears. An important purpose of the LRA is to give effect to the right to strike entrenched in section 23(2)(c) of the Constitution. The interpretative process must give effect to this purpose within the other purposes of the LRA as set out in Section 1(a). The provisions in question must thus not be construed in isolation, but in the context of the other provisions in the LRA. For this reason, a restrictive interpretation of essential service must, if possible, be adopted so as to avoid impermissibly limiting the right to strike (footnotes excluded)"
15. It is trite that strike action is an important element of collective bargaining and it is recognised as a 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]).
16. 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:
 - It is the service which is essential, not the industry or the institution within which the service falls;
 - Only those employees who are truly performing an essential service, may be prohibited from striking; and
 - Essential and non-essential service workers may be found working side by side in the same institution.

17. In this matter it is common cause that the Committee investigated and designated security services of the Department of water Affairs and Forestry as an essential service.
18. The challenge that is presented by a designation where the service is attached to a national department or an institution is that when the institution cease to exist the designation itself becomes obsolete. This approach does not take into account the fact that the service could still be continuing and rendered albeit by a different institution.
19. In making this determination the panel considered the ruling of the Committee when it made the 1997 designation. It is apparent that the Committee in making the designation sought to secure the infrastructure, key point installations and computers located in the key point installations as essential services.
20. Both Rand Water and SAMWU in their submissions failed to indicate which security services previously vested with the department and now rendered by the water utilities. A letter was addressed requesting the parties to assist with information but there was nothing submitted.
21. The panel is of the view that the integrity of the water that is supplied to the population is important, and that in order to ensure the safety of the water security services are pivotal in that regard. Whether the security services needed for this purpose are rendered by the water utility or another institution is immaterial.
22. To the extent that the 1997 designation referred to the Department of Water and Forestry, there is a need to vary the designation as this department does not exists.
23. The panel is of the view that it is not desirable to tie a service to an institution and accordingly the designation is varied as indicated hereunder.

Designation

24. The designation made by the Essential Services Committee on 12 September 1997, under GNR1216 GG 18276, on security services of the Department of Water and Forestry in the supply and distribution of water is varied and replaced by the following designation-

The following services are designated as essential services:

- a) Supply and Distribution of water;

- b) Security services for the purposes of securing the infrastructure, access control, property and information at water utilities and pump stations.

A handwritten signature in black ink, consisting of a stylized 'J' and 'N' combined into a single fluid stroke.

Ms. Joyce Nkopane
ESC Panel Chairperson