



DESIGNATION

ESSENTIAL SERVICES COMMITTEE

Case Number: ES 413
ESC Panel Chairperson: Luvuyo Bono
Date of Designation: 15 April 2021

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

Whether the below mentioned nuclear services should be designated as essential services

DESIGNATION

1. Background

- 1.1. This investigation was brought about by an application from the South African Nuclear Energy Corporation SOC Limited (NECSA) on 13 October 2020, seeking to include NTP and Pelchem services as part of the designation issued for NECSA on 11 May 2018 under GN41621.
- 1.2. The ESC convened a meeting with the Parties on 29 October 2020 to understand the services in question and guide parties on the process. The meeting was postponed at the request of NECSA to 3 November 2020. On November 2020, NECSA submitted motivation on its application for both NTP Radioisotopes SOC LTD and Pelchem.
- 1.3. The ESC published a notice on the investigations in the Government Gazette (GN44257, GN113 of 2021, dated 12 March 2021) and in the Sunday Times newspaper of the 28th of February 2021. The notice was also sent to the parties as identified in the NECSA referral form. The hearings commenced on 23 March 2021 to 1 April 2021.

- 1.4. The notice that went out to the parties reminded them to comply with Regulations of the ESC (GG No. 38317 of 19 December 2014) especially Regulation 2(2). NEHAWU argued that in the referral form Pelchem services that are sought to be designated as essential are not identified. No case was made in the memo for the designation of the services. It also appeared that Pelchem only filed a motivation with the referral form, but no further submissions were made. Pelchem also did not comply with Regulation 2(2) and on that basis the Pelchem application was not considered. Pelchem advised the investigation that it would also consider a Section 75 application as its submissions related more on machinery.
- 1.5. At the hearings NTP sought to have the following services declared as essential:
- (a) Production Operations (This includes the production and or Manufacturing of fluorine – 18 based radiopharmaceuticals; I-131 diagnostics and therapeutic capsules for the treatment and detection of cancers; Novatech Tc-99 generators; and related nuclear medicine).
 - (b) Radiation Protection Services.
 - (c) Facilities Management and Security services
 - (d) Services rendered by shift managers and heads of the buildings.
 - (e) Control room operations.
 - (f) Maintenance services; and
 - (g) Waste Management
- 1.6. It must be noted that waste management was not included in the initial referral form, but NEHAWU did not object to the inclusion thereof, at the hearing. The ESC ruled that the reasons advanced by NTP for the late inclusion of waste management, were reasonable and NEHAWU did not object. The panel accordingly accepted the late inclusion of waste management.

2. Legal Framework

- 2.1. 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

- 2.2. 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."*

2.3. 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."*

2.4. 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

2.5. 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.*"

2.6. 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".*

2.7. 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".*

2.8. 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]**).

2.9. 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".

2.10. 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".

2.11. 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.

2.12. 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

2.13. 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.

2.14. 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.

2.15. 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 (amongst others).

2.16. 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”).

- 2.17. 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)).

- 2.18. 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”*.

- 2.19. 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”.

3. Written and Oral Representations made to the ESC

3.1. NTP's main arguments can be summarised as follows:

- NTP Radioisotopes SOC Ltd is a manufacturer and supplier of advanced nuclear technology products and services and supplies critical radioactive isotopes and radiopharmaceutical and associated products to the medical industry and to the mining industry. NTP Radioisotopes is one of only three global commercial suppliers of the key medical radioisotopes Molybdenum-99 and Iodine -131 which are used as lifesaving diagnostics and therapeutic procedures for patients with critical conditions including cancer and heart disease.
- NTP produces NovaTec Tc-99m generators using locally produced Mo-99, that is used for diagnostics cancer scans. These generators are used in all State and Private hospital to detect various cancers for the benefit of patients in South Africa and is also exported into various African countries and Mauritius. The early detection of various cancers is key to the potential successful treatment of patients. NovaTec Tc-99m generators are servicing the total South African market (>90%); without access to these generators, hospitals will need to import generators at significant higher cost and the potential of not being able to source generators for South African patients in the short to medium term.
- NTP also manufactures I-131 diagnostics and therapeutic capsules for the treatment and detection of cancers for the South African and African markets and is supplying these products to all State Hospitals and Private Hospitals via our subsidiary AEC Amersham.
- FDG and F18 PSMA is also produced and supplied to patients in South Africa.
- Radiation Protection ensures that all operations and facilities are run safely in an efficient and effective manner.
- Maintenance ensures that the facilities remain compliant as per the National Nuclear Regulator
- Waste Management is essential to enable continued safe production of the products. This includes liquid waste, gaseous emissions, and solid waste.

3.2. NEHAWU submitted that:

- NTP was on strike for a year and for that year NTP was not producing any of the diagnosis and treatment.
- It was not opposed to the services that have been identified to be designated as essential. The way they see it is that this is nuclear medicines that is produced, and it must be looked at in the same way as the ESC views the manufacture of medicine.
- It conceded that part of the work stoppage was due to safety challenges.
- Nuclear waste is very dangerous, and it is important that it is safely stored and always managed. Given that NLM is designated in the NECSA designation, it is not opposed to the inclusion of waste management.
- NEHAWU does not oppose the application by NTP but was more concerned about an overreach by NTP.

3.3. Analysis

- It is common knowledge from the parties (NTP and NEHAWU) that the services sought to be designated relate to the production and manufacturing of nuclear medication and if there is an interruption of such services, there would be an endangerment to the life and health of the population. On the evidence presented before the panel as outlined above, the panel is convinced that indeed if the services in question are interrupted, there would be an endangerment to the life and health of the population.
- The second issue that is important is whether there is a reasonable alternative. In this regard NEHAWU argued that there was a period of about a year wherein NTP did not produce nuclear medicines. NTP responded in the matter and argues that its operations were halted due to a strike at NECSA. To deal with the strike, it had to import the products from outside of the country, as there was a shortage of the product in the market. Further that when the product is imported it still needs to be processed further as it does not come ready.

Designation

Having heard and considered all of the submissions made during all the public hearings, the Essential Services Committee hereby designates the following services as essential:

- (a) Production Operations (This includes the production and or Manufacturing of fluorine – 18 based radiopharmaceuticals; I-131 diagnostics and therapeutic capsules for the treatment and detection of cancers; Novatech Tc-99 generators; and related nuclear medicine).
- (b) Radiation Protection Services.
- (c) Facilities Management and Security services
- (d) Services rendered by shift managers and heads of the buildings.
- (e) Control room operations.
- (f) Maintenance services; and
- (g) Waste Management

Signature:



Chairperson :

Luvuyo Bono

Sector:

ESC Chairperson
