



Essential Services Committee

RULING

Case Number: ES244
Commissioner: Luvuyo Bono
Date of Ruling: 10 January 2019

In the matter between

WITKOPPEN HEALTH AND WELFARE
("the applicant")

And

NEHAWU
("the respondent")

BACKGROUND

1. The Essential Services Committee ("ESC") received an application from **Witkopp Health and Welfare**, the applicant to declare service of support service an essential service. **NEHAWU**, the respondent did not oppose this application.
2. A notice was published by the ESC in terms of Section 71 of the Labour Relations Act, 1995 Act No 66 of 1995 as amended (the LRA), that the ESC is in the process of conducting an investigation as to whether support services rendered by Health and Welfare Centres are essential. The applicant gave oral and written representations to the ESC.
3. The public hearings were held at the CCMA offices on the following dates:
 - i) 25 September 2018: Port Elizabeth
 - ii) 27 September 2018: Witbank

- iii) 01 October 2018: Durban
 - iv) 05 October 2018: Cape Town
 - v) 08 October 2018: Johannesburg
4. Section 71 of the LRA provides that after having considered any written and oral representations, the ESC must decide whether or not to designate the whole or a part of the service that was the subject of the investigation as an essential service.

SUMMARY OF THE APPLICANT'S SUBMISSION AND MOTIVATION

5. The applicant has been operating for more than 70 years as a primary health care service provider and has since the early 1990's been partially funded by the Department of Health. The clinic sees over 80000 patients per annum from previously disadvantage communities of Diepsloot, Kyasands and Lion Park in Gauteng.
6. The ESC made a determination on 5 June 2018 for some of the services provided by the applicant. This application is for the support services that were not declared as essential services which are as follows: Medical record; Security; Porter and Reception; Pharmaceutical and Dispensary; Cleaning and Laundry Work; Research; Waste Removal; Driver/Transport Services.
7. The applicant submitted that stoppage or non-rendering of the support services critically prevent the essential services from rendering service effectively and efficiently. The failure to render the support service will impact the health of needy patients, thus also impacting on their constitutional right of access to quality health care. It is impossible to render the essential service without the support services which makes the support services an essential service.
8. **Reception/Admissions and Monitoring and Evaluation:** The applicant submitted that reception/admission is the entry point for patients into various services delivered at the clinic. It is critical to have correct records of patient's biographic information for correct treatment. Insufficient data can lead to unnecessary expenditure as special investigations are repeated or potentially an incorrect diagnosis/treatment plan.

9. **Security:** The clinics oversee an average of 350 patients daily which includes mental health patients who often become aggressive which could be dangerous to all persons at the clinic. The National Office of Health Standards Compliance requires that all health facilities have to protect the staff and public.
10. **Porter:** Mentally and physically disabled patients need to be assisted in and accompanied to different services delivery points. Patients referred to hospital for further treatment often need assistance to and into the vehicle transporting them.
11. **Pharmaceutical and Dispensary:** The pre-packaging is responsible for packing of drugs into smaller quantities for distributing to patients to expedite the service a clinic in order to accommodate an increasing number of patients. Incorrect dispensed or delayed dispensing of medication could have fatal consequences for patients.
12. **Cleaning and Laundry Services:** The laundry and linen services involves the laundering of bed linen, as well as the distribution and control of linen. The clinic cannot function without clean linen. Surgical procedures cannot be carried out safely without clean and sterilize line.
13. **Research:** The applicant conducts programmatic research, for the past years a total of 26 research studies have been conducted and all research have to comply with ethics approvals. Real patients and patients' files are used in studies and research findings are disseminated on local and international platforms like HIV/AIDs conventions, workshops and seminars. If the service is interrupted it could seriously impact time sensitive studies and the availability of improved patient's methods to patients at large.
14. **Drivers/Transport Services:** The applicant is equipped with an emergency service/room (ER). Despite an agreement with E24 Emergency Ambulance Services, on a daily basis, patients who are very sick, are stabilised at ER and then transported to other provincial hospitals. The applicant also has a mobile clinic that renders HIV and other services to local communities. Should drivers go on strike that will have fatal effects on patients.
15. **Audits and Compliance:** The respondent is classified as being partially funded by the Government, but they render the exact or more services than other government facilities. The

respondent is subject to the same legislation, same practices and undergoes the exact same audits and tests as other government facilities.

16. Examples of such audits are: patients' rights, patient safety/ clinical governance/ clinical care, clinical support services; public health; leadership and corporate governance; operational management; facilities and infrastructure; occupation health standard compliance.

ANAYSIS

17. The duty of determining whether a service falls within the definition of 'essential service' lies with the ESC established in terms of s70 of the LRA. The ESC is charged with investigating whether a particular service should be declared essential.
18. In this matter, the issue the ESC has to determine is whether the support services that the applicant is rendering should be designated as essential services? In determining the matter, it is important that one should set out the legal framework.
19. Section 23(3) (c) of the Constitution gives effect to the right to strike. It states:
"Every employee has the right

(c) to strike."
20. 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."
21. 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".
22. 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”.

23. The ESC made a determination on 5 June 2018 declaring some of the services rendered by the applicant as essential service. It was established that the applicant has entered into a Memorandum of Association with the Department of Health of Gauteng Province (Department) whereby the Department appointed the applicant to perform during the term the agreement for and on behalf of the Department the services as described in the service specifications. Historically, the support services of the applicant had been declared essential services.
24. Service provided by the **Reception/Admission and Monitoring Evaluation** is a point of entry to the clinic by the patients and includes retrieval and preparation of files for the health care workers who are classified as essential services. It will thus be impossible for the health care workers to provide their service to the patients in the absence of the file and the correct data. Part of their duties are to attach a direction sheet to the file and refer patients to correct person or department i.e. pharmacy. Replacement labour without experience and necessary training might create delays on the administering of treatment which could endanger the life of the patients.
25. **Security**, the ESC is of the view that industrial action is unlikely to interrupt the service of applicant taking into account that it could rely on replacement labour and/or source the services of the South African Police Service. The South African Police Service is governed by Chapter 11 of the Constitution of the Republic of South Africa, 1996 (Act 108 of 1996) that stipulates the South African Police Service has a responsibility to –
- f. Prevent anything that may threaten the safety or security of any community.
26. The ESC is not persuaded that the interruption of the service provided by the **porters** will endanger life, personal safety or health. Endanger means “putting at risk”, “imperil” or “jeopardize”. 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 the some further stage (see *D Pillay “Essential Services under the new LRA” (2001) 22 ILJ 1*). Any potential danger or risk that the patients of the applicant might encounter could be minimised by the use of replacement labour.

27. Pharmaceutical and Dispensary, taking into account the specialised training required and the legislative framework regulating the pharmaceutical industry it would not be possible to use replacement labour. It is trite that no person is allowed to dispense a medicine (E.g. headache tablets, cough mixture or any other oral medicine) unless authorised to do so under the [Pharmacy Act \(53 of 1974\)](#) as amended, and the [Medicines and Related Substances Control Act \(101 of 1965\)](#) as amended.
28. The ESC takes cognizance that the functions are not only conducted by the pharmacists and pharmacist assistants. It is clear that the core functionaries which include pharmaceutical and dispensary support services should be accessible to ensure that all services which may be required to avoid endangerment of life and health are available at all times.
29. **Cleaning and Laundry Services:** The ESC has to be satisfied that 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 POPRCU and others). The service provided by the cleaning and laundry services restrictively interpreted does not fall within the ambit of essential service. The applicant can temporarily outsource this service and/or use replacement labour for cleaning and laundry services.
30. **Research:** The ESC is persuaded that the research service is essential taking into account that real patients and patient files are used and all research has to comply with ethics approvals. Further that any interruption could seriously impact on the time sensitive studies.
31. **Drivers/ Transport Services:** The applicant stated that they are equipped with an emergency service/room and have an agreement with ER24 Emergency Ambulance Services on a daily basis which service is already determined as essential. The drivers do not provide medical assistant but drive the patients after they are stabilized and thus do not provide an essential service. The applicant can rely on replacement labour for this service.
32. **Audits and compliance:** The fact that the applicant is subject to the same legislation, same practices and undergoes the exact audits and tests as other government facilities does not satisfy the requirements of an essential service.

33. **Waste Removal** no submissions were made for waste removal. Having said this, it must be noted that on 12 September 1997 under GN R1216 GG 18276, the Esc designated the collection of infectious refuse from medical and veterinary hospitals or practices. This designation is still valid and enforceable.

DETERMINATION

34. Based on the above, it is the considered finding of the ESC that the following services by the applicant are essential services and accordingly the right to strike of employees rendering these services is limited in terms of Section 65(1)(d)(i) of the LRA:
- a) Reception/Admissions and monitoring and evaluation;
 - b) Pharmaceutical and Dispensary;
 - c) Research.
35. It is further the ESC conclusion that the following services by the applicant are not essential services and the rights of the employees rendering these services are not limited by Section 65(1) (d) of the LRA:
- 1) Security;
 - 2) Porter;
 - 3) Cleaning and Laundry Services;
 - 4) Drivers/ transport services;
 - 5) Audits and compliance.

Signature:



ESC Chairperson: Adv. Luvuyo Bono