



# DETERMINATION

## ESSENTIAL SERVICES COMMITTEE

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Case Number: **ES 379**  
ESC Panel: *Joyce Nkopane, Zwe Ndlala & Makhubalo Ndaba*  
Date of Award: *16 October 2020*

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

**Whether certain services rendered by Private Health institutions should be designated as essential services**

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### Designation

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#### Introduction

1. The ESC had received a number of section 73 (1) (a) referrals, and in terms of the said referrals institutions rendering health care in private institutions sought clarity on whether the services rendered at such institutions were essential services. In March 2020 in response to the Corona Virus (Covid 19) pandemic the Government of the Republic of South Africa published Regulations in terms of which certain services including private health care were proclaimed to be essential services.

2. The ESC considered all the existing circumstances and on its own accord in terms of section 71(1) read with sections 70B (1)(d) of the Labour Relations Act 66 of 1995 as amended (LRA) initiated an investigation as to whether private health services should be designated as essential services.
3. The gazetted terms of reference for the investigation in terms of section 71 were “Notice is hereby given in terms of section 71, read with section 70B(1)(d) of the Labour Relations Act, 1995 (Act No 66 of 1995 as amended), that the Committee is in the process of conducting an investigation as to whether Private Health Services are essential.” (see Government Gazette No 44514, GN374 Of 2020, dated 10 July 2020.

### **Details of Hearings**

4. The hearings were scheduled as per the notice published in the government gazette. Viz-
  - (a) 18 August 2020
  - (b) 19 August 2020
  - (c) 21 August 2020
  - (d) 24 August 2020
  - (e) 28 August 2020
5. In the hearings the ESC received a number of written submissions, and a number of interested parties also made oral representations to the ESC.

### **Submissions**

6. On behalf of AFRIFORUM it was submitted that the ESC must designate private health services as essential services. The Committee has already designated public health services and private health services funded by the public to be essential

services. Further The International Labour Organisation's Committee on Freedom of Association recognises the hospital sector as an essential service. It was submitted that at this point health services either in the private or public sector qualify as essential services by the definition.

7. On behalf of AFRIFORUM reference was made to six constitutional rights. It was submitted that the constitution guarantees the right to equality and human dignity. It cannot be right to deny patients access to life saving treatment because of a strike.
8. It was further submitted that equality as a constitutional value also steps prominently to the forefront. Public health services have already been declared an essential service, meaning that users of the public healthcare system would not have their right to have access to health interrupted or infringed by a strike, whereas in the case of private healthcare users, this benefit will not be enjoyed. This evidently has adverse implications for equality before the law, as guaranteed by the Constitution.
9. It was further submitted that the constitution guaranties the right to life, bodily integrity, and access to healthcare. If employees in the private health sector are allowed to strike this will infringe the above rights for users who rely on private health institutions.
10. In conclusion it was submitted that failure to designate the service as essential would entrench inequality and most importantly this would undermine the rights conferred by the constitution.
11. On behalf of BUSAMED It was submitted that a patient who enters a hospital is entitled to the highest standards of care as set by the Health Care Legislation, including the National Health Act of 2003 and all the component parts, including the

office of Health Standard compliance, the South African Health Products Regulatory Authority and the Health Professions Council of South Africa, all of which are underpinned by the legal and ethical obligations to provide the highest standard of care to patients. All these legal obligations derive from the constitutional right to life of the patient (which is often considered to be the most fundamental human right) and section 27 of the Bill of Rights in particular that provides that everyone has the right to have access to health care services, including reproductive health care, and that no one may be refused emergency medical treatment.

12. These fundamental human rights further find expression in the acuity formulas and staffing models applied to private hospitals under the Private Licensing Care Standards provided by the various Provincial Departments of Health. These establish minimum care standards to ensure that all wards receive the correct coverage from a service point of view. The licencing of these institutions places obligations to ensure that minimum standards are complied with.
13. Busamed submitted further that the care standards are extremely detailed and require significant staffing in South Africa where we already have a chronic shortage of hospital staff across the board in terms of the skills required to run a hospital. These standards are set at a level to ensure that patients are properly cared for and safe, bearing in mind that hospital users are already sick or requiring medical attention when they come into the hospital and have limited ability to deal with a disruption of the medical services. Clearly these legislative requirements together with the shortage of staff create a situation where private health care should be declared Essential as clearly any strike action would disrupt the service, which is delicately staffed and managed would endanger the lives, health and safety of patients.

14. Further that medical care is delivered in a system which involves a tightly linked chain of services from those who control and administer the entry and tracking of patients in all respects in the hospital, all aspects of pharmacy and drugs and the artisans and technicians who maintain all aspects of the buildings, equipment and cleanliness.
15. It was submitted further that this would include the interfacing with medical aids rendering a service that is indivisible and if disrupted results in an endangerment to lives, health and safety of patients.
16. DASA and HASA submitted that Disruption of any parts of the services provided by the healthcare sector, whether private or public services, as a result of uncontrolled labour unrest or protest action will adversely impact the delivery of services to patients, which will directly and indirectly endanger the life, personal safety and/or health of patients.
17. Further that the private healthcare sector is a significant role player in South Africa, not only for private and medical aid patients but also to supplement services provided by the public healthcare sector to the general public. In addition, the private healthcare sector is a significant employer employing thousands of professional and support healthcare services employees.
18. Since the services provided by the private healthcare sector are critically important to providing access to healthcare services to the public, unprotected and uncontrolled strikes and protest action will result in a total breakdown of such important healthcare services and lifesaving practices.
19. HASA in its submission also included a list of the services that it maintains should not be interrupted as any interruption would endanger the lives, health or personal safety of the whole or part of the population.

20. South African Audiology Association also submitted that the services rendered by its members should also be designated as essential services. In the submissions audiology was described as a primary healthcare profession which is concerned with all types of auditory impairments and their relationship to communication disorders. Audiologists tend to be involved in the identification, assessment, diagnosis, evaluation, treatment and management of disorders of peripheral or central auditory impairments (hearing loss/impairment, balance system disorders or dysfunction, tinnitus and other neural systems).
21. It was submitted that Audiologists are involved in the hearing conservation or the prevention of hearing loss, through auditory training, counselling, guidance and the provision and fitting of hearing protective devices such as noise plugs.
22. Essential visits to audiologists may include visits related to systemic and auditory or vestibular disease or injury where there is significant risk of permanent hearing loss because of any postponement or interruption of care, as determined by the treating practitioner. Any disruption of the service can lead to permanent hearing loss which could have been prevented.
23. NEHAWU submitted that that only a portion of the Private Health Sector Services should be designated as Essential Services in terms of the Act, and for those designated a Minimum Service Agreement be entered into in terms of section 72 (1) (a) of the Act. In this context the union submitted that only clinical services should be designated essential and non-clinical services should be designated non-essential. It was submitted that the interruption of non-clinical services would not endanger the life, personal safety or health of the whole or part of the population.

24. NEHAWU also filed a supplementary submission and in this submission sought to indicate different positions in terms of staffing and the functions performed by employees in the said functions.

### **Legal Framework**

25. In this matter the issue that the committee has to determine is whether private health services should be designated as essential services? In determining the matter, it is important that one should set out the legal framework.

26. 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.”

27. 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”.

28. 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”.

29. 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”.

30. 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)”

31. 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-Part Chairperson of the Constitutional Assembly in re: ***Certification of the Constitution of the Republic of South Africa, 1996 (4) SA744 (CC)*** at paragraph [66]).
32. 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.



33. Before the ESC can designate any service as essential, it must be satisfied that the interruption of the said service is likely to endanger life, personal safety or health of the whole or part of the population.
34. It is further trite that in view of the fact that the right that would be affected by such a designation limits or takes away a fundamental right, such designation must be reasonable and justifiable. Thus if the ESC finds that parts of the service are not essential the Committee is obliged not to designate such services, as such a designation would be unreasonable and unjustifiable.

### **Analysis of Evidence**

35. In determining whether the service must be designated as essential the panel considered the nature of the services and the applicable legal framework. As indicated above the right to strike is a fundamental human right and this right should not be interfered with unless there is justification for such interference.
36. In this matter the service under consideration is private health care. Section 27 of the Constitution of the Republic of South Africa provides that every person has the right to “to have access to health care services, including reproductive health care and further that “No person “may be refused emergency treatment”. Section 27(2) says that government must “take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation” of the right. This means taking all reasonable steps to ensure that the right is protected, promoted and fulfilled, and that over time, universal access to quality and comprehensive health care is achieved.
37. It is so that this Committee in 1998 designated all health services in the public sector as essential services. The question that arises is whether the distinction between private and public sector in health services can be sustained. On the submissions

that are before this panel and having considered the prevailing circumstances the panel is of the view that the current prevailing circumstances in the country are such that it cannot.

38. The reality is South Africa is that the state on its own does not have the capacity or the resources to discharge this obligation. The constitution also does recognize this and this can be gleaned from the wording of section 27 (2) wherein the obligation of the state extends only to taking legislative and other measures, within its available resources, to achieve the realization of this right.
39. As indicated in the introduction the panel has received a number of applications from the private sector and during the hearings evidence would be led on how the private health institutions provide health service on behalf of the state. This is an indication that the state on its own would not be in a position to discharge this mandate.
40. It was submitted before this panel that about 20 million people in South Africa rely on private health sector for treatment and this submission was not disputed. This is a huge number and it is not possible for the public sector to carry this burden in the event of a strike.
41. When one considers the difference between health services provided in the public service and services rendered by the private sector one notices that there is no significant difference save for the fact that private healthcare services are paid for. The question that arises is whether can this serve as a justification for not designating the service and the panel is of the view that the answer should be in the negative.
42. Section 27(3) of the constitution creates an obligation for the provision of emergency health care and this obligation is not only limited to the state.

43. The panel accepts that the public sector does not have adequate resources to provide health services and the Covid19 pandemic has demonstrated this deficiency clearly. This was also acknowledged by the Minister and not only during this time of the pandemic. The Department of Health has throughout the years licensed private institutions to provide health services as there was a need.
44. NEHAWU in its submissions conceded that clinical services in private health facilities should be designated as essential services. It argued that other support services should not be designated as such.
45. As indicated above the test that the ESC adopts in determining whether a service is essential is whether the interruption of that service would endanger the health, life and safety. Where the interruption of a service would cause inconvenience or economic hardship, such a service cannot be designated as essential.
46. In a hospital setup it is very difficult to separate support staff from clinical staff as the services support each other and the absence of one service may disrupt the value chain. Having said this the panel is mindful of the constitutional court judgement in **POPCRU V SAPS (supra)**, and the panel is of the view that when dealing with administrative staff for instance not all of them are rendering an essential service. However in order to ensure smooth admissions and processing of the patients / users it may be necessary to have some administrators present. The panel finds that whilst financial service, public relations Human Resources and communication are necessary to ensure the smooth running of an institution, and the interruption of such services may cause inconvenience there would no immediate loss of life or endangerment to safety or health of the users.
47. As indicated above the issue of payment is not a factor that this committee should consider in making a determination. There was a submission that the designation should include the following services:

- the artisans and technicians who maintain all aspects of the buildings, equipment and cleanliness;
- the interfacing with medical aids

Whilst cleaning in a hospital is essential the maintenance of the building and equipment (excluding medical equipment) and maintaining the beauty of the facility cannot be regarded as essential services. The issue of medical aids is also a financial issue and is irrelevant. In fact this will broaden the designation and many employees who should not be affected by this designation will be. Broadening the designation in such a way is undesirable and is in conflict with the pronouncement of the ***Constitutional Court in POPCRU (supra)*** where the court advocated a restrictive interpretation to essential services. The Committee is therefore of the view that these services should not be designated as essential.

48. The panel also considered the submissions from SAAA and concludes that the services rendered by audiologists are essential services as they form part of healthcare.

49. Having considered the written and oral submissions of the parties, as well as the applicable law referred to above, the Panel is of the view that the following services should be designated as essential:

### **Designation**

The ESC Panel therefore makes the following designation:

The following private health services are designated as essential services:

- Emergency health services and the provision of emergency health facilities.

- Nursing
- Medical and paramedical services

The following support services

- Psychological assessment
- Pharmaceutical and dispensary services
- Medicine quality Control laboratory
- Catering
- Medical records
- Porter
- Reception (only for admission purposes)
- Forensics
- Laundry
- Clinical engeneering
- Hospital engineering
- Waste removal
- Mortuary
- Pest Control
- Boiler
- Audiology
- Physiotherapy
- Security, and
- Cleaning

In terms of section 72 (1) (a) of the LRA, parties are directed to negotiate a Minimum Services Agreement as contemplated in this section within 3 months.

A handwritten signature in black ink, consisting of a stylized 'J' and 'N'.

Ms. Joyce Nkopane

ESC Panel Chairperson

16 October 2020