

**IN THE ESSENTIAL SERVICES COMMITTEE
HELD AT JOHANNESBURG**

Case No.: ES 43

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

**Whether health and wellness services rendered in car manufacturing plants should
be designated as essential services.**

Ruling

1. Background

- 1.1 On 14 September 2015, Macgregor Erasmus Attorneys referred a Section 71 dispute on behalf of Wellness Health Outcomes (Applicant).
- 1.2 On 12 November 2015, Mr. Johan Koen (ESC) and myself met with Mr. Bruce Macgregor to explain the process followed by the ESC in Section 71 applications and to get more information on the application.
- 1.3 Following the above meeting the Applicant made submissions and substantiated its application. This was also followed by a letter dated 27 January 2016.

- 1.4 Having considered the submissions and the referral, on 1 February 2016, the ESC wrote to the Applicant drawing its attention to the test that the ESC has developed to determine whether a service is to be designated as essential. It further requested the Applicant to submit a written detailed motivation in line with the test in question. The ESC undertook to consider the application once the motivation is submitted and make a decision on whether it will proceed with the investigation.
- 1.5 On 15 April 2016, the ESC wrote to the Applicant wanting to establish if it is still pursuing the matter as the motivation had not been received.
- 1.6 On 22 April 2016, the ESC received the motivation from the Applicant. The merit of the submissions will be dealt with below.
- 1.7 On 9 May 2016 the ESC wrote to the Applicant advising it that having considered the submissions made, it still held the view that on the face of the facts presented the services in question were not essential, but wished to afford the Applicant an opportunity to make its case on its prospects of success in the application through on site inspections at its plants.
- 1.8 The on site inspections were held on 6 and 7 September 2016, at the Durban and Johannesburg Toyota plants, respectively, where the Applicant renders its services.
- 1.9 The Applicant also made further submissions on 15 September 2016.

2. Legal Framework

- 2.1 It is necessary to set out the legislative context within which the ESC designates services as essential.

2.2 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.”*

2.3 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).

2.4 Brassey (in *Commentary on the Labour Relations Act, Volume 3, Juta*) notes that an essential service is narrowly defined in our law; that the emphasis is on threats to safety and security, and that considerations of mere expense and inconvenience fall beyond the ambit of the definition of an essential service.

Brassey notes further:

“It is the service that is essential – not, as was so under the previous Act, the industry within which such service fell. Thus essential and non-essential service workers can be found working side by side in the same institution. In a hospital for instance, doctors and nurses

might be essential service workers, whereas the cleaners and gardeners would probably not be”.

2.3 Before the ESC can designate any service as essential, it must be satisfied that:

2.3.1 It is a service, or part thereof, that is essential. It is not employees, or a business or industry that is essential (see ***SA Police Service v Police & Prisons Civil Rights Union & Others* (2007) 28 ILJ 2611 (LC)**;

2.3.2 There must be an interruption, irrespective of whether it is partial or complete. If industrial action is unlikely to interrupt the service, or if the interruption can be avoided (for example by using replacement labour), the service will not be designated as an essential service;

2.3.3 The interruption of the service must endanger life, personal safety or health. Endanger means “putting at risk”, “imperil” or “jeopardise”. 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 some future stage; and

2.3.4 The endangerment must impact on the population, being human beings (see D Pillay *“Essential Services under the new LRA”* (2001) 22 ILJ 1 and the ESC designation in the matter of the ***Road Traffic Management Corporation and Others vs. NEHAWU and Others***).

3. Analysis

3.1 This analysis is based on consideration of all submissions and observations made during the on site inspections.

- 3.2 The Applicant is a general practice health care organization, which has entered into an agreement with Toyota SA Manufacturing to provide the following services:
- a) Primary health care;
 - b) Occupational health care; and
 - c) Employee assistance program.
- 3.3 The Applicant provides the aforesaid services through its workforce of permanent employees and employees provided by a temporal employment service.
- 3.4 During the period January to June 2015, there were 20652 visits by Toyota SA employees to the Applicant's different sites, of this number 123 were emergencies which were transferred to hospital.
- 3.5 The Applicant argued that if there was a strike, employees who suffer from chronic illnesses would be endangered and there would be a risk of injuries being untreated and or even death. There would also be a risk of non compliance with the Occupational Health and Safety Act (OHSA).
- 3.6 The ESC notes that Section 83 of the OHSA provides for health and safety of employees at work. This however does not on its own mean that service rendered as part of compliance with the OHSA are essential, and or the lack of providing them endangers the life, personal safety or health of the employees.
- 3.7 It must also be noted that not all workplaces have and or are required to provide primary health care; Occupational health care; and Employee assistance program services in house. Some workplaces use external institutions for the provisioning of these services, and some rely on public institutions. It appears as more of a convenience factor to have these services

in-house and not as a factor indicating an eminent endangerment to life, personal safety and health.

3.8 The Applicant argued that knowledge of the plant is important for rendering their services as anyone who comes from the outside might battle to find the area in which an injured or sick employee is in. Further that it is difficult to get replacement labour, as they render specialized services.

3.9 On the submissions made by the Applicant, it would appear that the services are provided as a matter of convenience to Toyota SA. The Employees have at their disposal public clinics and public hospitals for the services rendered by the Applicant and therefore the interruption of the services provided by the Applicant would not endanger life, personal safety and health as a real alternative to the services exists. The argument of the knowledge of the plant applied to emergencies which are not only few and far in between but are nothing out of the ordinary because public emergency services are meant to respond expeditiously to such cases.

4. Ruling

On the strength of the submissions made, the ESC has decided that the Applicant has failed to establish a prima facie case for it to conduct a Section 71 investigation in this regard.



Luvuyo Bono - Chairperson
Essential Service Committee
4 January 2016