

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

**Case No.: ES 83**

**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**

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**DESIGNATION**

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**1. Background**

This investigation was brought about by an application from the South African Nuclear Energy Corporation SOC Limited (NECSA) on 6 July 2016. Public hearings commenced on the 31<sup>st</sup> March 2017. Submissions at the hearings were made by NECSA and NEHAWU.

At the hearings NECSA sought to have the following services declared as essential:

- (a) Safari 1 Research Reactor;
- (b) Nuclear Liabilities Management;
- (c) Industrial Engineering and Qualities;
- (d) SHEQ Department;
- (e) Facilities Management; and
- (f) Corporate Services (Telecommunication)

## **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.

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 NECSA’s main arguments can be summarised as follows:

- In terms of the Nuclear Energy Act, Act 46 of 1999, section 1 (xii) (d), the operation of the SAFARI-1 research reactor is an institutional obligation of the Republic of South Africa which (according to section 50 to the act) vests in the Minister of Energy. The operation of the SAFARI-1 Research Reactor had through this act been delegated to Necsa.
- SAFARI-1 and all nuclear facilities on site to operate within and according to the regulatory requirements as prescribed in the licensing conditions (as reflected in the latest approved revisions of the Nuclear Installation License No. NIL-02 and NIL-17, the Operating Technical Specification (OTS) and the Safety Analysis Report (SAR)) so as to ensure minimum risk to personnel, public and environment is of utmost importance for the continued safe operation and viability of the facility.

- Necsa also provides the following services:
  - Radiation and Reactor Theory (RRT) group of the Research and Development (R&D) division,
  - Solid nuclear waste management (including spent fuel dry storage) from the Nuclear Liabilities Management (NLM) department,
  - Liquid nuclear waste management from the Liquid Effluent Management Services (LEMS) department,
  - Thabana nuclear spent fuel pipe store and PEL store, storage of radioactive waste and material
  - Medical services and emergency response centre from the SHEQ department,
  - Isotope analytical laboratories from the Radio Analysis department,
  - Component manufacture from the Nuclear Manufacturing (NM) and Industrial Manufacturing groups,
  - Site maintenance and utility services,
  - Emergency Control services ECC for emergency Muster Control
  - Licencing support from the Safety Analysis and Licencing department (SA&LD),
  - Security support from the Security Services department (SSD),
  - Support in reactor utilisation and new product development from NTP, and
  - MTR Fuel department
  - Integrated Safe Guards for fissile material control as per Non Proliferation Treaty (IAEA Inspections any time)
  
- For NTP for the production of radioactive isotopes for medical diagnostic & therapy. Patients will suffer no treatment and could affect quality of life.
  
- If the services provided by the SAFARI-1 reactor, which is licenced by the National Nuclear Regulator (NNR) under NIL02 licence are to be interrupted the reactor must be shut down



and monitored by personnel to ensure no release of radiation to the environment, which could have catastrophic consequences for Necsa and the country. Radiation causes cancer and depending on the amount received by the human body, it could kill the person immediately or from days to a few years. Therefore the NNR, who are mandated under the Nuclear Energy Act to monitor and regulate nuclear installation to ensure protection of people and the environment from the effects radiation, stipulates minimum staffing requirement for the reactor to remain safe (i.e. no radiation is released). Even if the service is interrupted, i.e. reactor is shutdown, the reactor must still be monitored by personnel to ensure no radiation is released to the environment

### 3.2 NEHAWU submitted that:

- It is not opposed to a safe Necsa but it questions that after more than 50 years of existence NECSA has not felt the need to have its services designated as essential.
- In the 1990's there was a strike by Ceppawu and NECSA still did not deem it necessary to have its services as essential.
- Of all the services that NECSA seeks to have designated as essential only four, SAFARI-1, Security, emergency services (ambulance and control room), and utilities (Boiler-Pelindaba east and west) work shifts even during weekends, holidays, long weekends and company closure during festive weeks each year. The rest of the arrears work normal working hours.
- The SAFARI-1 reactor is operated in house by trained operators who have been doing excellent work for years. They maintain the reactor in a safe position when it is both in an operational or shut down position. For normal maintenance the reactor is shut down for five days and during main maintenance for ten days. When the reactor is shut down, NTP which

further process the medicine is also on shut down.

- Necsa through NTP has a working agreement with other isotope producers in the world to supply the more than 9 million patients mentioned their submission. When one producer is on shut down the others supply the market.
- In 2014 NTP was close down by the regulator NNR for more than a month because of their failure to comply with the regulator's specifications. During that time there was no production of medicine.
- if the ESC decides to initiates should be limited to the following safety arrears:
  - a) The number of staff members required for manning the reactor during shut down, because the reactor is much safer when on shut down than when operational, especially during a strike.
  - b) Emergency services – ambulance and control room.
  - c) Skeleton staff required at security services

### 3.3 Analysis

The question is whether the interruption of the service will endanger life, personal safety or health of the population. On the submissions of the parties, it is common cause that the SAFARI-1 reactor releases radiation to the environment, which could have catastrophic consequences. Radiation causes cancer and depending on the amount received by the human body, it could kill the person immediately or from days to a few years. This is the background against which even NEHAWU agreed in their submissions to a designation of the SAFARI-1 reactor services.

The SAFARI-1 reactor is continuously manned by reactor shift personnel. This is a support service to the SAFARI -1 reactor and includes emergency services. This service covers both radiological and conventional safety requirements. It is common knowledge that if this service is interrupted there would be engagement to life, health and personal safety of the employees.

Regarding the Nuclear Liabilities Management (NLM) department, this department stores Solid nuclear waste including spent fuel. There is no question as to the danger that may be caused by the stored items which are exposed to nuclear operations. NEHAWU's opposition in this regard is two fold, firstly it argues that the waste is stored in a very safe manner in line with the National Nuclear Regulatory requirements. Secondly that this department works fixed hours and therefore the department is left unattended at night and during breaks.

Nursing is declared as an essential service, this includes nurses that render primary health in clinics that operate during fixed hours like 08h00 to 16h00. Therefore the times of operation are not a determining factor on whether a service is essential or not. The question is whether the interruption of this service will endanger life, personal safety or health. There is no question as to the endangerment of life and health that may be caused by the radioactive waste managed in this department. On the submissions made the panel is convinced as to the importance of decontamination and site clean up and its threat to life and health if it is interrupted.

The facilities management department involves:

- Water and sanitation services as well as maintenance;
- Electricity services and maintenance
- Security services

NEHAWU's main argument against the designation of Security services is that NECSA has private security that could be used and because NECSA is a national key point the South African police Service can be called to stand in during a strike. It must be noted that the ESC looks at a service and not who renders the service and therefore the question is whether the interruption of the security service will endanger life, personal safety or health. The issue of replacement labour is one to be considered but is not a deciding factor on its own.

The services provided by the security includes:

- security to critical facilities;
- Guarding points of access
- Roaming / mobile security
- Investigation services
- Technical support (including managing cameras)

It is common cause that security safeguards premises and personnel and the interruption of such services exposes such.

As for water, sanitation and electricity services, including the maintenance thereof, it is common cause that these services are required 24 hours a day and 7 days a week. The provision of water and electricity is generally an essential service as the interruption thereof may cause harm to health and potentially life. I see no reason to depart from the norm.

Relating to Corporate Services, the only service that relates to nuclear services is telecommunications. This relates to the intercom system between the reactor room and all other areas in the building; the emergency phone connection between the reactor control room, reception area and emergency control centre. This service also look after the functioning of two way radios. It is common knowledge that in cases of emergencies, communication is critical to ensure the safety of the employees. If this service is interrupted

and an emergency takes place, this could endanger the life, personal safety and health of the employees.

## **Designation**

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

- (g) Services rendered at the Safari 1 Research Reactor;
- (h) Nuclear Liabilities Management Services;
- (i) Nuclear Operations and Maintenance services;
- (j) SHEQ Department Services;
- (k) Facilities Management; and
- (l) Telecommunication

Full reasons will be made available to the parties within 30 days.

Signed on this 25 January 2018



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Advocate Luvuyo Bono  
Chairperson of the ESC