

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

Case No.: ES

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

Whether radiology services rendered in public health are essential services

DESIGNATION

1. Introduction

- 1.1 On 27 March 1998, the Essential Services Committee ("the ESC") designated medical and paramedical services as essential. In April 2017, Drs Erasmus Vawda applied to the ESC to have radiology services in the public and private sector declared essential. In May 2017, they withdrew their application. The ESC after seeking clarity on whether the above designation includes radiology services decided on its own initiative in terms of Section 70B(1)(d) to investigate if the above mentioned services are in fact essential services.
- 1.2 It must be noted that the ESC decided to only investigate radiology services in the public service (including radiology services provided by the private sector to the public service) but not radiology services in private health.

2. Details of Hearings

2.1 Written submissions were received from the Department of Health in the Western Cape.

2.2 Public hearings were held at the follow venues:

- (a) CCMA George – 13 July 2017;
- (b) CCMA Cape Town – 14 July 2017;
- (c) CCMA Port Elizabeth – 17 July 2017;
- (d) CCMA East London – 18 July 2017;
- (e) CCMA Durban – 21 July 2017
- (f) CCMA National Office (Johannesburg) – 24 July 2017

3. Legal Framework

3.1 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

3.2 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."*

3.3 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."*

3.4 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

3.5 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."*

3.6 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".*

3.7 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".*

3.8 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]).

3.9 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".

3.10 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".

3.11 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.

3.12 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

3.13 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.

3.14 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.

3.15 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.

3.16 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").

- 3.17 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)).

- 3.18 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".

- 3.19 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".

4. Written and Oral Representations made to the ESC

4.1 In summary the representations made provide that over the last century radiology services have become integral to medical care. They are no longer seen as a separate entity, rather an essential component of the medical examination.

4.2 Radiology services have also expanded to include (but not limited to) fields such as:

- X-rays
- Ultrasound
- CT Scans
- Echocardiography
- Magnetic Resonance Imaging
- Nuclear Medicine
- Intervention Radiology

4.3 Radiology services are essential to prevent pain, suffering and death therefore the following:.

4.3.1 **X-rays:** A simple example is a child with a swollen elbow. The child may have a broken elbow (supracondylar fracture), requiring a “plaster cast” (splint), and possible even surgery. Without an x-ray, we would not be able to diagnose this problem. The child would not get a splint or surgery, and will be in severe pain. Without surgery, they may suffer a permanent elbow deformity.

4.3.2 **Ultrasound:** An ultrasound is useful for detecting blood surrounding the heart, usually following a stab wound to the chest. Without this test, we could not diagnose the condition and the patient could die.

4.3.3 **CT scans:** this is used to detect brain bleeds (intra-cerebral haemorrhage). Once detected, we can offer the patient life-saving surgery.

4.3.4 **Echocardiography:** this test is useful for detecting heart problems, and helps us determine appropriate treatment to improve the patient's quality of life.

4.3.5 **Magnetic Resonance Imaging** can be used to detect damage to nerves (acute nerve compression). Once diagnosed, we can intervene surgically. The absence of this test would result in the patient suffering permanent nerve damage.

4.3.6 **Nuclear Medicine:** A field of medicine where various illnesses, including cancer, are treated using radioactive material.

4.3.7 **Intervention Radiology:** This is a field of medicine where specialists use imaging to perform procedures e.g. inserting a stent into a narrowed heart blood vessel. This can prevent a heart attack

4.4 the interruption of radiology services would result in pain, suffering and loss of life.

4.5 The people who need it most will be the uninsured population who depends on public health services.

5. Survey of the Evidence and Arguments

5.1 The constitutional right to strike is well entrenched in our law. Section 23(2) of the Constitution gives effect to this right. It states:

"Every worker has the right-

(a) ...;

(b) ...; and

(c) To strike."

5.2 Section 64 of the Act sets out the procedure that must be followed when employees wish to embark on protected strike action, the provisions of which are not relevant for present purposes.

5.3 Section 36 of the Constitution allows for the limitation of the rights that are embodied in the Bill of Rights. The relevant section states:

"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."

5.4 Section 65 of the Act provides for the limitation on the constitutional right to strike. The relevant sub-section thereof for purposes of this application is section 65 (1) (d) (i), which states:

"No person may take part in a strike ...if-

- (d) that person is engaged in-*
- (i) an essential service".*

5.5 It is trite law that a court, tribunal or forum, when interpreting the Bill of Rights, must give consideration to international law (see paragraphs 4.11 to 4.19 above).

5.6 It is furthermore trite law that essential services must be restrictively defined (See *Chirwa v. Transnet Ltd and Others 2008 (4) SA 367 (CC) at paragraph [101]*).

5.7 Chaskalson *et al* (in *Constitutional Law of South Africa, Volume 4, Second Edition, Juta*) point out that having regard to the definition of essential service in the Act, the prohibition on strikes in essential services operates only in very restricted circumstances.

5.8 Similarly, 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”.

5.9 The Labour Court endorsed this view of Brassey in ***SA Police Service v Police & Prisons Civil Rights Union & Others (2007) 28 ILJ 2611 (LC)***, when it ruled that not all employees of the South African Police Service render an essential service which prohibits them from embarking on strike action. The Labour Court held that it is the service that is essential, not the industry. The suggestion that finance administrators, human resource personnel, tea ladies and cleaners render an essential service by reason only of being employed by the SAPS was, in the Court’s view, difficult to comprehend. It could not be argued, on the definition of essential service in the Act, that the interruption of the service of the above workers would *“endanger the life, personnel safety or health of the whole or part of the population”*.

5.10 The above judgment was confirmed on appeal by the Labour Appeal Court. Waglay JA held that while employees employed under the Public Service Act Proclamation 103 of 1994 provide important support and complementary functions to the SAPS, they do not form part of the SAPS that is designated as an essential service by the Act. Such employees were accordingly not prohibited from striking in terms of section 65(1) (d) of the Act. Waglay JA held that giving effect to the interpretation sought by the SAPS, to the effect that all persons employed by SAPS rendered an essential service, would unjustifiably restrict the fundamental right to strike enshrined in the Constitution.

5.11 The Labour Appeal Court judgment was confirmed on appeal by the Constitutional Court. A unanimous Constitutional Court held that the Labour Appeal Court could not be faulted in holding that not all SAPS employees are engaged in an essential service, and that the wide interpretation sought by the SAPS was incorrect. The Constitutional Court held that “a

restrictive interpretation of essential service must, if possible, be adopted so as to avoid impermissibly limiting the right to strike".

5.12 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:

5.12.1 It is the service which is essential, not the industry or the institution within which the service falls;

5.12.2 Only those employees who are truly performing an essential service, may be prohibited from striking; and

5.12.3 Essential and non-essential service workers may be found working side by side in the same institution.

5.13 Essential service is defined in section 213 of the Act as:

"a service the interruption of which endangers the life, personal safety or health of the whole or any part of the population".

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

5.14.1 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. POPCRU and Others** supra);

5.14.2 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;

5.14.3 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

5.14.4 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*).

5.15 In terms of the submissions received radiology services are an integral part to the preservation of life and health of the public.

5.16 Radiology is in the value chain of medical services provided public health.

6. Designation

The ESC therefore makes the following designation:

Radiology services in the public service (including radiology services provided by the private sector to the public health) are essential services.



Adv. Luvuyo Bono
Chairperson of the ESC