

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

**Case No: ES541**

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

**Whether the manufacture, supply and re-service of theatre drapes, and surgical  
gowns/ garments and the supply of single use of theatre drapes, and surgical  
gowns/ garments are essential services**

---

**Designation**

---

**Introduction**

1. The ESC received a request to investigate whether the service of manufacture, supply and re-service of theatre drapes, surgical gowns /garments and the supply of single use theatre drapes, and surgical gowns are essential services. The ESC concluded that the request was reasonable and published a notice of investigation in terms of section 71(1) read with section 70B (1)(d) of the Labour Relations Act 66 of 1995 as amended (LRA).

2. 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 70(B)(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 the manufacture, supply and re-service of theatre drapes, and surgical gowns/ garments and the supply of single use of theatre drapes, and surgical gowns/ garments are essential services”.  
(see Government Gazette No 47133, GN1186 of 2022, dated 29 July 2022).

### **Details of Hearings**

3. The hearings were scheduled as per the notice published in the government gazette. Viz-
  - (a) 23 August 2022
  - (b) 26 August 2022
  - (c) 29 August 2022
  - (d) 31 August 2022
  - (e) 02 September 2022
4. In the hearings the ESC received written submissions, and interested parties also made oral representations to the ESC.

### **Submissions**

5. The National Department of Health submitted that it supported the application and submitted that the disruption to manufacture, supply, and re-service of theatre drapes, and surgical gowns/garments and the supply of single use of theatre drapes, and surgical gowns/ garments can lead to adverse events. These adverse effects would lead to:
  - Substantial worsening of disease, possible death and increased overall healthcare needs, including cost of more expensive alternative therapies.

- Cross infection resulting in possible worsening of disease or possible death and increased overall healthcare needs, including cost of more expensive alternative therapies.
  - Loss of life and or setback to patients.
  - Risk of death for instance, in those patients in hospital settings, who need access to an operating theatre or sterile procedure.
6. Priontex SA (Pty) Ltd ('Priontex') made written and oral submissions. It was submitted that Priontex offers a comprehensive reusable drape and gown rental service that are designed to suit the specific needs of the customer. In this regard the customer could either be a hospital or user of these commodities.
  7. Priontex supply bulk deliveries of fully sterile and ready to use packs. With all the packs being assembled locally in South Africa, a reusable service is not only the most environmentally friendly solution but will also help its customers to reduce their carbon footprint.
  8. Priontex's reusable service takes away the responsibility from the hospitals in clinical waste disposal, incineration, distribution and sterilization. It operates Clean Room Production Facilities in Cape Town, Johannesburg, Durban and Gqeberha. It uses its own delivery vehicles number of Private and Public Hospitals nationally and maintain an emergency supply service.
  9. In relation to the service itself it was submitted that the drapes and gowns/ garments prevent contamination and infection during surgery, protecting both the patient and doctor. Further that the service was designated as an essential service in terms of the Regulations that were passed in terms of the Disaster Management Act, 2002.
  10. Mr Mosadi explained that there is one manufacturing plant in Cape Town and explained the manufacturing process. In relation to the reusable drapes and gowns he explained that they are limited in terms of the stock that they can keep due to space.

11. The witness also indicated that the re-servicing of the drapes includes the packing of the commodities. These will be delivered to the client. These are used only once, and they will be isolated in the laundry. The drivers will collect the soiled items from the hospital and take same to the facility. The Clean Room Operators are responsible for offloading, washing, folding and sterilizing the items. The dispatch operators would dispatch the orders to the hospital.
12. He further explained that these employees cannot be easily replaced. In relation to the drivers, he explained that they have to attend training and that for them to be declared competent, it will take approximately six months. Further that the drivers have to be inoculated with the Hepatitis B vaccine for their protection.
13. South African Commercial, Catering and Allied Workers Union (SACCAWU) made its submissions and at the commencement of the hearing opposed the designation of the manufacturing of the drapes and theatre gowns. During the proceedings SACCAWU accepted that the manufacture and re-service of the theatre drapes and gowns/garments is an essential service. However, SACCAWU disputed that the distribution of these items was an essential service.
14. On behalf of SACCAWU in countering the evidence of Mr Mosadi that in relation to the re-servicing Priortex is responsible to collect the used drapes and gowns /garments from the respective hospitals and clean/ re-service the same and supply them to the hospitals, it was submitted that there was an alternative in that the hospital could transport to the location where these items are cleaned or re-serviced. In essence SACCAWU disputed that the service of distribution was essential and argued that there was an alternative.

## **Legal Framework**

15. In this matter the issue that the committee has to determine is whether the manufacture, supply and re-service of theatre drapes, and surgical gowns/ garments and the supply of single use of theatre drapes, and surgical gowns/

garments are essential services.

16. An 'essential service' is defined in section 213 of the LRA 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".

17. 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."

18. 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".

19. 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".

20. From the above it is clear that for the purposes of the LRA the interruption envisaged is that which may result from strike action or lockout by the employer.

21. 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)”

22. 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]).
23. 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.
24. 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.
25. It is further trite that in view of the fact that the right that would be affected by such a designation limit 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

26. 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.
27. In this matter the service under consideration is part of 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.
28. The ESC has designated certain health care services as essential services. It is imperative in considering whether the services that are the subject of this investigation are essential to have a holistic view of medical care as a service.
29. The undisputed evidence is that in the value chain of providing clinical care, including emergency health care, it is important that the environment where such care is provided is sterile, particularly in the theatre. The services sought to be designated in this investigation are an integral part of that in that when an operation is performed on any patient the drapes used and the gowns/ garments worn by the patient and the medical staff attending to that patient must be sterile.
30. In fact, SACCAWU in its submission conceded that the manufacture and re-service of these items is an essential service. SACCAWU however, raised an issue with the distribution as a service. On the notice of investigation, the Committee did not use the word “distribution”. The question that arises is whether there is a difference between supply and distribution? The Panel is of the view that the two words may

be used interchangeably and accepts that SACCAWU disputes that the supply of the theatre drapes gowns/ garments and single use gowns is an essential service.

31. In determining the issue, the panel considered the supply of the reusable drapes, gowns and the single use drapes and gowns.
32. In relation to the reusable or re -serviceable items the evidence of Mr Mosadi which is undisputed is that the vehicles used for the supply of these items are custom made to separate waste and the clean garments. Further that this is a service that cannot be outsourced as the driver and the assistant have to be trained and also that they should be inoculated with vaccines for their own safety. The training that they undergo has to do with handling of medical waste which is hazardous in nature.
33. On the other hand, SACCAWU submitted that since the waste is already packed by hospital staff anyone can transport the waste to the site for re-servicing. Further that clean items can also be transported by courier companies. Thus, there is an alternative.
34. 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.
35. In this case the evidence before the panel is that the staff that collect the used drapes and gowns for re-servicing are trained and that there are medical precautions that have to be put in place before they perform this task, thus it is clear that courier services are not a viable option. In relation to hospital staff their training goes to the extent of isolating such waste and packing it for collection. There is no evidence that different hospitals have even the capacity to handle the work of transportation of the soiled items to Priontex for re-servicing. In fact, it would be illogical to expect hospitals to employ additional staff for this purpose if there is a strike as such deployment requires trained people.



36. Having considered the evidence the panel finds that this service is essential.
37. In relation to the supply of single use theatre drapes, surgical gowns/ garments the evidence tendered was that these can be distributed via courier or any other means of transportation. In this regard the panel accepts that there is a viable alternative for distribution. Accordingly, the distribution of single use theater drapes and surgical gowns is not designated as an essential service.
38. 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**

39. The ESC Panel therefore makes the following designation:
- a) The manufacture, supply and re-service of theatre drapes, and surgical gowns/ garments are essential services.
  - b) The manufacture of single use of theatre drapes, and surgical gowns/ garments are essential services.
  - c) The parties are hereby ordered to negotiate and conclude a Minimum Service Agreement in terms of Section 72 of the Labour Relations Act (LRA) by no later than 31 March 2023.

A handwritten signature in black ink, consisting of a stylized 'J' followed by a loop and a vertical line.

**Ms. Joyce Nkopane**  
**ESC Panel Chairperson**  
**30 September 2022**