

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

Case Number: ES68

In the matter between:

Eskom Rotek Industries Soc Limited

Applicant

and

NUM obo Members

1st Respondent

NUMSA obo Members

2nd Respondent

SATAWU obo Members

3rd Respondent

Solidarity obo Members

4th Respondent

APWU obo Members

5th Respondent

DETERMINATION

DETAILS OF THE HEARING AND REPRESENTATION

1. The matter was placed before the Essential Services Committee (ESC) in terms of section 70B and 70D(1)(a) of the Labour Relations Act 66 of 1995 ("LRA") by ESKOM ROTTEK INDUSTRIES SOC LIMITED (ERI).
2. The ESC received the referral LRA Form 4.2 of the Labour Relations Act of 1995 (as amended) on the 22nd of March 2016.
3. The 1st and the 2nd Respondents were represented by Advocate Chris Orr SC, instructed by CTH Attorneys and Ngako Attorneys. The Applicant was represented by Advocate Feroze Boda SC, and Advocate Emmanuel Sithole, instructed by CDH

Attorneys and later in the proceedings by Madhlopa & Thenga Inc. The fourth Respondent was represented by Mr Thinus Jacobs. Mr. Siyakudumisa Mnguni represented the fifth Respondent.

BACKGROUND

4. The Applicant referred a dispute seeking to confirm whether its services are fall under the designated essential service of generation, transmission, and distribution of power ("the designated essential service"); under GN R1216 GG 18276 on generation, transmission, and distribution of power (1997).

SURVEY OF EVIDENCE AND ARGUMENTS

5. For the purposes of this ruling the panel does not wish to repeat all the evidence and submissions as the same are on record and specifically recorded on the Zoom transcript. Some of the key features of the evidence referred to by both the Applicant and the Respondents respectively is herein summarised.
6. The scope/s of work/ services specified in the conditions of contract between Eskom Holdings and the Contractor in this instance ROTEK and bundles detailing the technical specifications form part of the evidence in this matter.

THE APPLICANT'S CASE

7. The evidence of ERI was essentially that it is clustered around six product groups, namely-
 - i. Bulk Material Services,
 - ii. Boiler Maintenance Services,
 - iii. Construction Services,

- iv. Logistics Services,
- v. Transformer and Switchgear Services and
- vi. Turbo Gen Services.

8. Evidence of Mr V Naidoo's (the Head of ERI's Financial Management and Reporting):

- a. Mr Naidoo testified that since 2014 until March 2022, between 98% to 99 % of ERI's revenue came from Eskom work.
- b. He provided a breakdown of the current contract values of each division with Eskom. It was his evidence that all ERI's assets are held on behalf of Eskom and Eskom compensates ERI for any losses in terms of the equalisation fund, but this will be phased out in 2023. He opined that a strike at ERI would impact on the delivery of services to Eskom.
- c. During cross-examination Mr Naidoo indicated that ERI works on the assets of Eskom that distribute and transmit electricity and that the revenue generation is read across the three Eskom divisions. "All the Eskom departments to which the services are rendered are part of the essential service designation in his view. ERI functions to "keep the supply of power active" and the failure of such a service "will affect power generation".

9. Evidence of Ms Isobel Fick (Transformers and Switch Gear Services):

- a. Ms Fick testified in her capacity as former General Manager for TSS, explained the functions of transformers and switching gears and in essence testified that these are used to regulate the power across the entire Eskom.
- b. She explained that the services provided by this division are divided between services provided at ERI head office at Rosherville, and those provided on site; Employees in the division are appointed specifically to either Rosherville or a site team.
- c. Equipment worked on at Rosherville will be out of the grid for periods of up to eight months; and when a transformer is taken to Rosherville, it is replaced with a spare or a replacement brought from somewhere else.
- d. Once a transformer is repaired, it would then either be installed in a substation

or it goes into storage.

- e. The witness further stated that an unprotected strike by the Rosherville employees affected deadlines, but argued that new deadlines were negotiated, or the original deadlines were met by working overtime. Ms Fick described the transformers as being analogous to manufacturing the blood in a human body and the switch gears would be like the valves in the arteries. The ERI transformers and switch gears are used exclusively in the electricity sector. No one else has the capacity to service Eskom in the country.
- f. It was her version that the department has planned and unplanned maintenance for Eskom countrywide daily and has a 24/7 emergency service. There are about 7 emergencies per week.
- g. The determined services to Eskom were from the start of the generation process all the way to distribution of electricity to households. The service includes outages. She indicated that TSS are essential services in all three lines divisions of Eskom. "Simply put if a transformer is lost customers would be without electricity which includes hospitals."

10. Evidence of Mr Phumlani Zulu:

- a. Mr Zulu gave evidence that this division has teams which are permanently located at all the coal stations and at Koeberg. These teams are responsible for routine maintenance and minor breakdowns of the turbines;
- b. The division also has project teams which are involved in major breakdowns and planned outages;
- c. In addition, there are employees who work from Rosherville. Some of these employees perform functions on site at the power stations, others perform their functions at the Rosherville workshops.
- d. Mr Zulu concurred with the evidence of Fick both in chief and under cross examination that transformers are used to either step down or step up the power from the power station or from the sub-station, depending on the voltage that is required through to the domestic, in terms of services. It all depends on the quantity or the volume that is required. An appropriate transformer is deployed

to be able to provide that service to that municipality, who would then give the services to the consumer.

- e. At each power station, in order for them to distribute power, they need transformers.
- f. The department operates in Eskom's entire transmission and distribution value chain and without transformers electricity cannot be generated.

11. The evidence of Mr Makari:

- a. Mr Makari gave evidence that the TGS department assists in generation of power, ensuring that there were enough megawatts to be able to sustain the grid or ensure that the grid is not pressurised.
- b. It was his evidence that they do maintenance on outages, as well as online routine running maintenance on the turbine including doing motives, commissioning of the plant, and then assisting operators. They also ensure that the plant is run healthily and then there will not be any pass-out load losses. At the same time on outages, they also refurbish and rehabilitate the manufacture of spares when the units are brought down on planned maintenance.
- c. They repair turbines that are used to generate electricity. It was his version that they operate on a 24/7 basis at the power station and teams work normal time and are on standby and can be called in at any time. They fix the plant and deal with major breakdowns. They provide emergency work to Eskom and are called out at an alarming rate in outages and the maintenance as well as in Rosherville to a normal average rate of about 80 hours a month for an employee.
- d. He explained that Eskom is very reliant on Eskom Rotek Industries because "we have to be there at any given time when we are called out to come and do something, if it is maybe after hours or even during working hours we have to ensure that whatever problem that we get we ensure that we do it in a shortest possible time to ensure that Eskom has got the ability and the capacity to ensure that the grid is sustained properly".
- e. They cannot afford to have any disturbance in terms of their work flow based on any work they do because of they are required 24/7 to be available for Eskom

because things can break at any given time, and then they also know that there are statutory inspections or statutory work that must be done which Eskom normally does after peak and then that is where they come in and assist, so if they don't have people at that particular moment machines will be shut down.

12. Evidence of Mr Sizo Myeni for Bulk Material Services:

- a. The division does not generate, transmit or distribute electricity
- b. Three broad categories of services are offered to Eskom, firstly the provision of materials, being coal and water, which will be used for the generation of electricity, Secondly the handling of ash, a by-product of generation; Thirdly the provision of electrical maintenance services at several power stations.
- c. Mr Myeni conceded under cross examination that none of these activities generated electricity but at the same time did not wish to accept that these activities did not generate electricity.

13. Evidence of Mr Bhima:

- a. Mr Bhima gave evidence as the Eskom's General Manager responsible for inter alia maintenance and outages, described TGS as an integral part of generation without which the demands of the country would not be met. He explained clearly how a strike in the Rotek service will lead to load shedding.
- b. Turbo Gen Services ("TGS") - TGS is a strategic service provider to Eskom for maintenance and related engineering services on the turbine island at Eskom's Power Stations. Its key deliverable is to provide refurbishment of turbine equipment and generators during Eskom maintenance outages either on site or in the Rosherville based workshops.
- c. Mr. Bhima testified that some services are provided on site while others cannot and provided the example the removal of blades. He described the impact on an outage delay at Rotek due to an interruption in service.
- d. It was the evidence of this witness that "having a subsidiary in Eskom where if there is something required on running infrastructure, having a subsidiary that

can assist immediately is according to him, makes it form part of those three entities that have been mentioned". The Applicant is on call and the first available to go and assist Eskom, to get that transmission back online.

14. Evidence of Mr Sitabo Moglase Logistics Division:

- a. Mr Sitabo Moglase who gave evidence on behalf of the Logistics to the effect that division provides transport services to Eskom in various weight categories. Moglase conceded that the employees in this division do not generate, transmit or distribute electricity.

15. Evidence of Mr Kannemeyer:

- a. Mr Kannemeyer gave evidence on behalf of construction. His evidence was that Construction services currently has three maintenance contracts for Duvha, Kriel and Koeberg; He conceded that in his view that when employees in his division undertake construction they are not generating, transmitting, or distributing electricity.

THE RESPONDENT'S CASE

16. It was essentially the case of the Respondents that ERI, on their own version, offer support services to Eskom, support services they categorise as indispensable, on that basis they contend that ERI is engaged in GTD.
17. The Unions argued that the LAC has explicitly rejected a similar argument in relation to the well-established principles of the SAPS case;
18. It was their case that the appropriate route for ERI "would have been to persuade the ESC that the original designation of GTD should be broadened (expanded) to include support services to GTD;" (rather than that its argument that its services fell into the

existing designation)

19. The unions were prepared to accept that a case could be made out that the on-site services provided to Eskom by this division integral to GTD in the instance of Transformer and Switchgear.
20. The unions however do not accept that a similar case has been made out in respect of the services undertaken at Rosherville for the following reasons:
21. The equipment being worked on at Rosherville has already been removed from the grid and is not involved in GTD; Repairs undertaken at Rosherville take many months; Equipment repaired at Rosherville does not necessarily go back immediately to the grid. It can end up in storage; any time lost at Rosherville can either be made up by way of overtime or agreed with the customer, being Eskom.
22. The Respondents referred to the evidence of Mr Makari on behalf of this division to the effect that :
 - a. The division has teams which are permanently located at all the coal stations and at Koeberg. These teams are responsible for routine maintenance and minor breakdowns of the turbines;
 - b. The division also has project teams which are involved in major breakdowns and planned outages;
 - c. Then there are employees who are employed at Rosherville. Some of these perform functions on site at the power stations, others perform their functions at the Rosherville workshops.
 - d. The Unions argued that "through a simple application of logic it must be accepted that while turbine components are being worked on at Rosherville that turbine is not generating any electricity".
 - e. "The turbine components which are worked on at Rosherville are taken from

turbines which are not generating electricity, nor will they do so for the period for which the work at Rosherville continues, generally speaking a significant period. Services at Rosherville could not be regarded as Essential Service”.

23. The Union referred to the evidence of Mr Phumlani Zulu wherein he:
 - a) Accepted in his interpretation that new constructions did not fit in the current designation of GTD;
 - b) stated that Construction provided maintenance services for certain power stations; and
24. Construction had a single contract to provide emergency maintenance at Camden power station.
25. The unions accept that a case can be made out that the electrical maintenance services performed by this division are integral to GTD.
26. It was the case of the Union that the employees in the Logistic division are clearly not engaged in GTD.
27. The unions accept that a case can be made out that the maintenance services performed by this division are integral to GTD, however, no case whatsoever has been made out in respect of the construction services undertaken by this division. Both Zulu and Kalamayer conceded that the employees who are engaged in construction are integral to GTD.
28. The respondent grouped the services Support Divisions or Services as follows :
 - a) Finance,
 - b) Shared Services and Procurement;
 - c) Human Capital Management;
 - d) Risk & Resilience; and
 - e) Strategic Enablement

and argued that these services are not engaged in GTD and are not integral to GTD.

THE APPLICANT'S REPLY

29. It was the case of the Applicant that the ESC is ultimately tasked with determining whether the whole or part of ERI's services form part of the existing designation. It submitted that concession made by a witness or witnesses on the basis of their lay understanding of the issues are self-evidently not binding. Erroneous concessions by a witness do not bind a party, a concession of the witnesses can in no way bind the ESC that it was the task of the ESC and not the tasks of witnesses.
30. It is trite law that questions of interpretations are not the task of witnesses but rather the tasks of Courts or legal tribunals. None of the witnesses had any qualifications or understanding of the statutory nuances in issue in this case or the statutory meanings to be assigned to the relevant provisions in issue which are elaborated upon more fully below.
31. The application in this matter was instituted on the back of a successful urgent interim order granted by the Honourable Justice Van Niekerk on 7 July 2016 - which can be found in Respondent's Bundle Volume 20, pages 1837 to 1838 - reads as follows:

"The Second and further respondents are interdicted and restrained from participating in, instigating, or promoting any unprotected strike action, gathering and protest action in pursuit of their demands pending the final determination of the dispute before the Essential Services Committee instituted by the applicant under case number ES68.

The first respondent is interdicted and restrained from promoting or encouraging any strike action or any other conduct in pursuit of the respondent's demands pending the final determination of the dispute

before the Essential Services Committee instituted by the applicant under case number ES68.

Should the respondents fail to comply with the terms of this order and any part thereof, the applicant shall be entitled to seek assistance from the SA Police Service and/or Public Order Policing Unit.

The respondents are ordered jointly and severally, the one paying the other to be absolved, to pay the applicant's costs."

Whereby , Justice van Niekerk found that:

The consequences of a strike by Rotek employees would likely compromise Rotek's ability to provide maintenance services to Eskom and thus compromise, potentially at least, the provision of electricity.

Rotek is a wholly owned subsidiary of Eskom.

98% of Rotek's revenue is generated by its services to Eskom.

Rotek's business is almost exclusively that of providing services to Eskom's generating and transmission operations.

32. The fact that the recognition agreement between Rotek and the Union recognises the right to engage in industrial action, such right is subject to the provisions of the LRA.
33. The applicant referred to the general approach of the ESC to the question of "part of" and pointed to several determinations wherein the ESC has made several rulings which reinforce these three points in which it has applied its understanding of the phrase "part of". It argued that the ESC has never required the parties ever to show that the part produces the whole.
34. Several matters were referred to which are not all repeated herein since this has been recorded and found in the Closing Arguments. Essentially the argument was

that the decisions referred to give a clear indication of how the ESC has applied and should apply the phrase “part of”.

35. It has not required that the service itself be shown to be generating transmitting or distributing electricity but rather approached its task in a more purposive manner by asking whether without the service power generation, supply or distribution will be affected. If so the service is considered part of the existing designation.
36. In *SAPS v POPCRU (CCT 89/10) [2011] ZACC 21; [2011] 9 BLLR 831 (CC); 2011 (9) BCLR 992 (CC); 2011 (6) SA 1 (CC); (2011) 32 ILJ 1603 (CC) (9 June 2011)*, the Constitutional Court confirmed that the designation of the South African Police Service as an essential service in section 71(10) only applies to its “members” and that other SAPS employees, not being essential service workers, are not prohibited from striking.
37. The applicant submitted that in the enquiry in SAPS was different to the present enquiry. In SAPS the focus was on the employees performing essential services rather than whether a service forms “part of” an existing designation. At this stage the ESC is not concerned with the employees but the service.
38. It argued that the distinction between the two stages of the enquires was recognised by the ESC when it considered the position of Eskom’s various divisions. The ESC undertook two separate enquiries. First it decided which of the services at Eskom formed “part of” the existing designation and thereafter it determined the second question and that is which employees are essential workers. It made both determinations without requiring Eskom to prove a separate support service designation.
39. The Applicant moreover argued in reference to LC in *National Union of Mineworkers v Essential Services Committee and Others (JR 1147/16) [2019]*

ZALCJHB 82 (10 April 2019) and conclude that in that these referred positions or services formed part of the essential service. As the ESC correctly held, NUM had an option of resiling from the 1997 designation through its processes and had not done so. If NUM equally seeks to resile from the agreement which was made an order of the ESC, it cannot do so through these review proceedings."

40. The applicant pointed to the fact that herein the ESC and the parties were all satisfied when determining the first leg of the enquiry that "Employees (including call out, shift and standby workers on training and spares) in Primary Energy, Group IT, Outage Management, Commercial, Customer Services, Telecommunications, Finance, Human Resources and Sustainability were all engaged in the designated essential services and were not permitted to participate in any form of industrial action."
41. The ESC determined that the primary energy component of Eskom's business was part of the generation process. In other words that the generation process starts with primary energy. If it were to be otherwise, a separate designation would have been required.
42. Secondly, and equally crucial to this case, while Primary Energy, IT, HR and Finance for example do not generate, transmit or distribute electricity on their own, the parties and the ESC did not require a separate support service designation as the ESC and the parties were satisfied that these services are "part of" the existing designation and which the LC confirmed in the above decision. The ESC did not treat any of these services as requiring a separate support service designation because they were part of the existing designation already. This approach is no doubt correct and accords with the discussion in the previous section and has in fact been confirmed by the LC.
43. Thirdly, the ESC and the parties by including all the above divisions of Eskom's

business as part of the existing designation recognized that the generation, transmission, and distribution process is not a static one but is interdependent on various facets. Indeed, it would be absurd to treat any one component in isolation and ask, does that a single component for example HR, generate, distribute, or transmit electricity. The parties did not take this blinkered approach in the Eskom dispute and cannot do so now. The process is intricate, complicated and is just that a process involving several steps with each part making up the whole.

44. Fourthly, this means that the ESC has already satisfied itself that these various divisions in Eskom reflected in the consent order are essential services and that the limitation of the right to strike is thus justified.
45. Referring to the identities of the separate corporate establishments it argued that this was irrelevant.
46. Eskom Holdings Soc Limited/ Essential Services Committee & 13 Others C662/10 (14 February 2013) unreported where the LC held that separate corporate identity of a service provider was not relevant to determining whether security services were essential. What matters was whether the service was essential. (In granting the interim interdict, Van Niekerk J followed the same approach.)
47. In Abaqhashi Babantu Recruitment & Placement (Pty) Ltd t/a Sizabantu/ National Union of Metalworkers of South Africa (NUMSA) ES18 (30 June 2016), the ESC referred to the following, in reaching its decision:

"The question is not the entity for whom the service is rendered but what the nature of the service is and what the service entails. The outsourcing issue has no bearing on the nature of the service. Had it not been for the outsourcing these functions, would have been fulfilled by Eskom"

48. It was the general proposition by the Respondents that as a matter of fact and law, there can be no basis to find that any part of ERI is engaged in GTD, given that ERI offers no more than support services to Eskom, the entity properly engaged in GTD.
49. It was argued that if the first general proposition is not accepted then the unions' submissions in respect of the specific divisions of ERI has to be considered in terms its core divisions or product groups first followed by the support services or divisions.
50. A further general proposition is made in relation to ERI and various Bargaining Councils. It is common cause that a number of its employees fall within the scope of two Bargaining Councils the Metal and Engineering Industries Bargaining Council ("the MEIBC") and the Bargaining Council for the Civil Engineering Industry ("the BCCEI") and that the applicant ERI either applies the collective agreements of these Councils or seeks exemption from the agreements;
51. A number of its employees of the applicant are engaged in the activities covered by two different Bargaining Councils, none of which includes the generation, transmission, and distribution of electricity.
52. The respondents regarded the core divisions of ERI as:
1. Transformer and Switchgear Services;
 2. Turbo Gen Services;
 3. Construction Services;
 4. Bulk Material Services;
 5. Logistics Services.
53. In respect of certain services offered by the first four core divisions the unions accept that an argument can be made out that the individuals performing those services are integral to GTD. The unions persist however, in the general proposition set out above which means that even these individuals are not engaged in GTD. While some

services offered by these divisions are integral to GTD on any argument, in Logistics Services there is absolutely no basis whatsoever for any argument that any individuals are integral to GTD.

54. On the issue of whether ERI offers support services to Eskom, the Applicant argued that this is a question of fact, and one of common cause as is the issue of the services provided by the non-core divisions.

Legal Framework

55. 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." 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".
56. Section 23 of the Constitution also provides that National legislation must be passed to give effect to the rights contained in the Bill of rights. The Labour relations Act was promulgated to give effect and regulate the right to strike (see section 64 of the LRA).
57. 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".

An '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;

(b) the Parliamentary service;

(c) the South African Police Service".

58. The Constitutional Court in *South African Police Service v Police and Prisons Civil Rights Union and Another* (2011) 32 ILJ 1603 (CC) 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"

59. 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-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]).

60. Having regard to the above, it is clear that the 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.

ANALYSIS OF THE SUBMISSIONS AND ARGUMENTS

61. In this case the issue that the panel is called on to decide is whether the services rendered by ERI as Contractor to Eskom Holdings fall within the ESC designation relating to generation transmission and distribution of power (GTD). The Applicant argued that its business forms part of the existing designation. The Respondents opposed that contention.
62. ERI contends that its entire operation forms part of the existing designation, alternatively, that at least some parts of its divisions perform essential services that form part of the existing designation.
63. At the outset it was the evidence of ERI that its services were essentially clustered around six product groups, namely:
- i. Bulk Material Services,
 - ii. Boiler Maintenance Services,
 - iii. Construction Services,
 - iv. Logistics Services,
 - v. Transformer and Switchgear Services and
 - vi. Turbo Gen Services.
64. It is common cause that ERI renders services to Eskom as a Contractor. These services are detailed in the Scope of work agreements during the commercial procurement and engagement process.
65. The panel has analysed the factual evidence provided, technical descriptions, contractual scope of work agreements, the panel has generally accepted that it is common cause that the interpretation of these services are essentially not in dispute.
66. The panel accepts that the various interpretations of these services and the status thereof is the task of the panel and indeed the very essence of this matter is to

determine whether the services rendered fall within the existing designation.

67. It must be noted that the panel is not called upon to decide if the said ERI services are essential or not. This is not a Section 71 hearing to determine such, but a Section 73 hearing to evaluate if the services fall within the specific service. It must also be noted that the designation in question only deals with GTD and at the time of rendering the designation, no support services were included. I must point out at this point that the ESC has on numerous occasions designated services and their support services where the parties have applied for such. This is however not the case in the current designation in question. The nature of this inquiry has been misunderstood on numerous occasions in this hearing and the panel tried its level best to keep parties focussed on what it had to decide, but did not always succeed.

68. The services referred to is understood to refer to:

- a. Transformer and Switchgear Services ("TSS") - TSS performs Eskom's offsite refurbishment works, maintenance and related engineering services for Eskom's transformers, excluding reticulation transformers. TSS provides on-site and workshop maintenance of all types of transformers and switchgear at Eskom's substations, from as low as 80MVA up to large transformers, such as 500MVA.
- b. Bulk Materials Services ("BMS") - BMS provides coal conveyor operation and maintenance; ash & coal handling; waste management and operation & maintenance of bulk water schemes in the primary water supply to Eskom's power stations. Its core mandate is to provide material management solutions across all Eskom power stations in a safe and cost-effective manner.
- c. Logistics Services ("LS") - LS moves the turbine, generator, and transformer equipment from operating power stations to the TGS and TSS facilities in Rosherville, as well as all the Eskom material needed across the country. It

provides road transport, warehousing, and logistics services and includes the largest multi- axle fleet in the Southern hemisphere. Its mandate is to continue to meet the logistical requirements of Eskom to ensure on-time project delivery.

- d. Construction Services ("CS") - Construction Services provides both civil and electrical construction, which allows delivery of power lines, cabling, substation, and various civil projects to Eskom's value chain. Its key mandate is to deliver the range of required construction services to Eskom quickly and cost- effectively.
- e. Centres of Excellence ("CoE") - is a team of individuals with specialist knowledge within a particular function. They promote collaboration and use best practices around a specific focus area to drive business results. CoE is customer oriented and shares accountability for performance between functions and operating units. This is made up of: Human Capital Management. Risk & Resilience, Strategic Enablement: Finance: Commercial and Shared Services.
- f. Shared Services - ERI's Product Groups' supplies and contracts from a complex structure to be regulated and managed for legal compliance and financial sustainability not only of the six product groups individually but also for the company. As part of a profit- driven business the Finance, Commercial/Supply Chain and Business unit ensures that it is accountable to its shareholders. Shared Services is designed to deal with a high volume of similar transactions. As a result, shared services are made up of Accounts Receivable, Accounts Payable, Central Stores, Fleet Services,

69. This case before the ESC is not about whether the services rendered to Eskom by ERI as a contractor are a support or core service but whether or not they are part of

generation, transmission or distribution of power, regardless of whether considered core or support.

70. Considering the demarcation of work and the scope of registration of the various bargaining councils whereunder the employees of the applicant fall: It is the service which is essential, not the industry or the institution within which the service falls; Consequently, that some employees may or may not be covered by the MEIBC and BCCEI is of no consequence.
71. Having analysed the nature of the services against the above framework, it is difficult to rely on the submission that "ERI offers no more than support services". Whether the nature of the services can be classified or termed 'support services vs core service' does not appear to assist in determining the nature of the services rendered and whether it indeed falls within the existing designation. The question to answer is whether any of the ERI services in question form part of generation, transmission or distribution.
72. The Panel is inclined to concur that the concessions made by the Respondents in their submissions supported the evidence and argument that a case has been made that certain services are integral to GTD and therefore what really has to be determined is whether the contested parts of the business form part of GTD. The panel will deal with the issue of admissions herewith below.
73. On the evidence presented it appears to be common cause that TGS at the power stations are integral to GTD, as turbo gen services refurbish all rotating equipment and related components with special focus on maintenance engineering of the power station turbine. To quote the uncontested evidence of Mr. Bhima, ERI TGS services ensures that the transmission of power is restored where there is an outage.
74. Similarly with Transformer and Switchgear services which deals with the maintenance, refurbishment, repair and modification of transformers and switchgear

which is part of the transmission of power. Ms Fick described the transformers as being analogous to manufacturing the blood in a human body and the switch gears would be like the valves in the arteries. "Simply put if a transformer is lost customers would be without electricity which includes hospitals:

75. The panel is of the view that the evidence presented in this regard is convincing that TGS and TSS services rendered on site fall within the designation of generation, transmission and distribution of power.
76. What essentially remained the issue in dispute is, whether the TGS and TSS services carried out at Rosherville in particular form part of GTD?
77. Referring to the argument that the nature of the service performed at the power station and at Rosherville does in particular, it is the considered view of the panel, which having established the nature of the service, the service does not change because of the location of the service. It must also be noted that the maintenance done at Rosherville is to ensure that there is replacement parts and services to ensure that where there is an outage the transmission of power is ensured to continue by replacing those transformers and other parts on site with the ones repaired at Rosherville.
78. Turning to the argument that services at Rosherville could not be regarded as Essential Service based on "a simple application of logic it must be accepted that while turbine components are being worked on at Rosherville that turbine is not generating any electricity" and that "The turbine components which are worked on at Rosherville are taken from turbines which are not generating electricity, nor will they do so for the period for which the (restoration) work at Rosherville continues, generally speaking a significant period.
79. Considering that transmission is a continuous process the interruption thereof results in a break down of power. What is clear from the evidence presented is that although the turbine components which are worked on at Rosherville are taken from turbines

which are not generating electricity, when they are taken from the decommissioned turbines, they are taken to turbines that have to transmit power. Therefore to keep the transmission on going the TGS and TSS services in Rocherville not only play an integral part, but they are a part of the GTD. To use Ms analogy of manufacturing the blood in a human body and switch gears being the valves in the arteries, where such is done does not discount the purpose for which it is done, nor does it change whether or not it is part of GTD or not.

80. Reference herein is made to the decision of Abaqhashi Babantu Recruitment & Placement (Pty) Ltd t/a Sizabantu/ National Union of Metalworkers of South Africa (NUMSA) ES18 (30 June 2016) whereby the ESC accepted that the services rendered by the employer to provide scaffolding and general maintenance work which included repairs on units and thermal installation work and outage work was part of the existing designation as such work was necessary to "keep the supply of power active and because the failure of such a service "will affect power generation.", this panel of the ESC, having had regard to the evidence concluded that it is against the same principle that it sees TGS and TSS services falling within the designation in question.
81. The respondents conceded that the maintenance services performed by the division are integral to GTD.
82. Turning into the Boiler Maintenance Services, (the maintenance services and electrical maintenance performed, including the services rendered at Rosherville). The same argument as levelled on TSS and TGS which is maintenance geared towards a continuous generation, transmission and distribution of power falls within the designation in question.
83. Coming to Bulk Materials Services ("BMS"); Logistics Services ("LS"); Construction Services ("CS"); and Centres of Excellence ("CoE") (support services). Eri's argument in relation to these services is that they play an important role in the services rendered by ERI to Eskom and therefore play an important part in the GTD.

The single piece of evidence that cannot be denied is that employees rendering all these service do not perform actual generation, transmission and distribution of power.

84. The panel does not intend to deal with the weight to be attached to the concessions made by the Applicant's witnesses who confirmed under oath that the above-mentioned services are not part of GTD. The panel notes the objection raised by the Applicant and the reply of the Respondent in this regard. Even if the concessions are not considered what is clear from the evidence is that employees who render these services do not, in any form, generate, transmit or distribute electricity and this is the end of the inquiry for the panel.

85. The Panel, with due regard to argument and evidence in considering whether these services or part thereof fall within the existing designation, finds that only:

86.1 Transformer and Switchgear Services (TSS);

86.2 Turbo Generation Services (TGS),

86.3 Boiler Maintenance Services, (the maintenance services and electrical maintenance performed, including the services rendered at Rosherville) form part of the current ESC designation of "the generation, transmission, and distribution of power as published in GN 1216 under GG 18278, 1997 as is gazetted.

86. Bulk Material Services (BMS), Construction Services (CS) and Logistics Services, (LS) do not form part of the current designation of generation, transmission, and distribution of power as published in GN 1216 under GG 18278, 1997 as is gazetted.

RULING

87. In the premise the panel makes the following ruling:

a. The ESC confirms that only the listed TSS, TGS and Boiler Maintenance

services as rendered by Eskom Rotek Industries SOC Limited (ERI), fall within the ESC designation of "the generation, transmission, and distribution of power as published in GN 1216 under GG 18278, 1997 as is gazetted.

- b. Bulk Material Services; Construction Services; Logistics Services; Centre of excellence (support services which include Finance, Shared Services and Procurement; Human Capital Management; Risk & Resilience; Strategic Enablement; etc) are found not to be part of the designation mentioned above in 88a.
- c. In terms of section 72 (1) of the LRA the parties are directed to conclude a minimum service agreement (MSA) within three months from the date of this ruling.

Done and signed on the 24 October 2022



Adv. Luvuyo Bono
Chairperson
Essential Services Committee