



Essential Services Committee Determination

Public Hearing: Emergency & Response Security Service

1. The Essential Services Committee (ESC) received an application from **Chub Fire & Security SA (Pty) Ltd**, the applicant to declare service of **Emergency & Response Security Service** an essential service. **South African Transport Allied Workers Union (SATAWU)**, the respondent opposed this application.
2. A notice was published by the ESC in terms of Section 71 of the Labour Relations Act, 1995 Act No 66 of 1995 as amended (the LRA), that the ESC is in the process of conducting an investigation as to whether Emergency and Response Security services are essential. Written and oral representations were made by the parties.
3. The public hearings were held in the CCMA offices on the following dates:
 - i) 4 December 2017: Johannesburg
 - ii) 11 December 2017: Cape Town
 - iii) 12 December 2017 : Witbank
 - iv) 13 December 2017: Durban
 - v) 14 December 2017: Bloemfontein
 - vi) 18 December 2017: Port Elizabeth
4. Section 71 of the LRA provides that after having considered any written and oral representations, the essential services committee must decide whether or not to designate the whole or a part of the service that was the subject of the investigation as an essential service.

Summary of the Applicant's submissions and arguments

5. The applicant submitted that it is engaged in the emergency response sector. It sought designation of its services as an essential service on the basis that if its services are interrupted there would be danger to the life, personal safety and health of the South African population.
6. The entire industry in South Africa should be declared an essential service save for those aspects of the business which are not engaged in physical guarding or emergency responses. The call centre receives calls from an emergency assistance and from there, emergency responders and resources are dispatched.
7. Chubb Fire: The applicant is also engaged in the prevention, management and control of fires however this excludes forest and veld fires. The applicant further stated that it has many contracts with hundreds of thousands of local South Africans in terms of which:
 - It is required to respond in the event of an emergency. An emergency is defined as any incident which endangers or potentially endangers the life, property, personal or health of all of its clients in South Africa.
 - It has clients with many of the listed South African banks, in particular First National Bank where, in terms of its confidential contracts, it is required to render emergency responses in the event of break-in or robbery or attempted theft. The service level agreements specify minimum response time.
8. The applicant stated that it provides services to residential premises and commercial places. South Africa has a very high crime rate, the security service it provides are of absolute necessity, as they provide safety to a portion of the population.
9. It is accepted in South Africa as a fact that the South African Police Service (SAPS) is stretched. The applicant bolsters the services of SAPS and saves lives and prevents theft and damage to property.
10. The former minister of SAPS, Fikile Mbalula, has recently requested that the South Africa National Defence Force be deployed to communities with high crime rates, such as Cape Town and Gauteng to assist the SAPS in combating crime.

11. It is evident from the conduct by the minister of SAPS that South Africa is in need of all the assistance it can get to combat crime.

Summary of the Respondent's submissions and arguments

12. The respondent averred that the parties have a collective agreement and most of their engagement are regulated as per the collective agreement. Wage negotiations are done at industry level and conditions are by large in line with the sectorial determination of the security industry.
13. On the 27th of October 2017, the respondent served the applicant with 48hours notice to strike. On 31 October 2017 the applicant served the respondent with ESC dispute which is the dispute before the committee. The applicant on receipt of the notice to strike invoked a lock out and hired replacement labour.
14. It is the conditions prevailing at the time that the designation is made with regard to endangerment not the circumstances that may occur at some future stage for example if someone loses a life due to a strike.
15. It is only a few elite that need extra protection whilst the majority of the citizens relies on the government of which the applicant's clients are not immune to, there is an alternative service offered by the government. None of the motivation of the applicant advances the definition essential services – s 213 of the LRA.
16. The industry does not have a term, "emergency and response security services" but has a similar meaning on definition of 'Armed Response Duty'. All security companies registered with PSIRA which provides security services amongst other, the product the applicant is offering. A security officer responding to an alarm activation does not amount to essential service. A once off response to an alarm does not mean a life is in danger. It can mean a number of factors including a false alarm.
17. Even where the function performed by particular workers are essential in nature that is not enough to deny them a right to strike. There is an additional test that must be applied to the facts. This test asks whether the particular workers can be replaced by the employer, in order to prevent disruption to the service. If the work can be performed by alternative labour, or subsumed into the function of other employees during the period of the strike, the declaration of the affected works as essential is inappropriate. This tests was set out in ***Eskom Holdings SOC Ltd v Essential Services Committee & others (unreported case number C662/10)***.

Analysis of evidence and submissions

18. The duty of determining is whether a service falls within the definition of 'essential service' lies with the ESC established in terms of s70 of the LRA. The ESC is charged with investigating whether a particular service should be declared essential.
19. In this matter the issue that the committee has to determine is whether the services that the applicant is rendering should be designated as essential services? In determining the matter, it is important that one should set out the legal framework.
20. Section 23(3)(c) of the Constitution gives effect to the right to strike. It states: " Every employee has the right
(c) to strike."
21. 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".
22. 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".
23. An 'essential service' is defined in section 213 of the Act 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".
24. The applicant falls within the ambit of the private security service and is thus subject to extensive system of sectorial regulation of an independent regulatory body PSIRA set up in accordance with the Private Security Industry Regulation Act 2001 and Private Security Levies Act 2002.
25. The government has the ultimate responsibility for ensuring the freedom and security of the person as per section 12 of the Constitution.
26. The South African Police Service is governed by: Chapter 11 of the Constitution of the Republic of South Africa, 1996 (Act 108 of 1996) that stipulates the South African Police Service has a responsibility to -
 - a. prevent, combat and investigate crime;
 - b. maintain public order;
 - c. protect and secure the inhabitants of the Republic and their property; and

- d. uphold and enforce the law.
- e. create a safe and secure environment for all people in South Africa.
- f. prevent anything that may threaten the safety or security of any community
- g. investigate any crimes that threaten the safety or security of any community
- h. ensure criminals are brought to justice; and
- i. participation in efforts to address the causes of crime.

27. The Constitutional Court in ***South African Police Service v Police and Prisons Civil Rights Union and Another [2011] 9 BLLR 831 (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 (footnotes excluded)”

28. After considering the above it is imperative that legislation 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.

29. The ESC has to be satisfied that 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 POPRCU* and others). In this matter the service provided by the applicant restrictively interpreted does not fall within the ambit of essential service.

30. The applicant provides an armed response service to its clients in the event of an emergency; the emergency service provided by the applicant falls within the responsibility of SAPS. As stated above, it is the responsibility of SAPS to provide safety and security to the citizens of the country. Industrial action

is unlikely to interrupt the service of applicant taking into account that it could rely on replacement labour, as stated by the respondent that when the applicant received a notice to strike it invoked a lock out and hired replacement labour.

31. The ESC is not persuaded that the interruption of the service provided by the applicant will endanger life, personal safety or health. Endanger means "putting at risk", "imperil" or "jeopardize". 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 the some further stage (see D Pillay "Essential Services under the new LRA" (2001) 22 ILJ 1). Any potential danger or risk that the clients of the applicant might encounter could be minimised by the use of replacement labour and more importantly the SAPS, traffic officials; government fire fighters; public health services.
32. We concur with the respondent's submission that only a few members of the population use the services of the applicant whilst the majority of the citizens rely on SAPS and the clients of the applicant have access to. The absence of the service does not amount to danger to life. Further the provision of emergency health services and provision of emergency health has been historically designated as essential service by the ESC in the public sector. The municipality traffic services, fire fighters and policing is declared an essential service and in an event of a strike they will provide the service to the applicant's clients.
33. 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. Considering the parties' submissions the panel is of the view that the interruption of the service provided by the applicant is unlikely to endanger life, personal safety and health of the whole or part of the population.
34. It is further trite that in view of the fact that the right that would be affected by such a designation limits or takes away a fundamental right, such designation must be reasonable and justifiable.
35. This application is further not supported by the SAPS and there is no formal co-operation agreement between the private security industry and the SAPS whereby SAPS has outsourced some of its responsibilities to the private security industry.
36. The panel accept the respondent's argument in that the right to strike is an important element of a successful 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). Such rights should thus not be lightly interfered with. It follows then that this application must fail.

Determination:

- a) The application is dismissed.

Sibongiseni Sithole: CCMA Commissioner