



DESIGNATION

ESSENTIAL SERVICES COMMITTEE

Case Number: **ES 380**
ESC Panel: **Luvuyo Bono, Annelie Gildenhuys, Aruna Ranchod, Clement Marule**
Date of Designation: **09 February 2021**

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

Whether the private security should be designated as essential services

DESIGNATION

Introduction

1. The Essential Services Committee ("the ESC") received a referral from the South African Intruder Detection Services (SAIDSA) in terms of section 71 of the Labour Relations Act, 66 of 1995 ("the LRA") on March 2020.
2. On the basis of the referral and preliminary submissions made, the ESC took a decision to conduct an investigation in terms of Section 71 read with Section 70(2) (a) of the Labour Relations Act 66 of 1995 as amended (hereinafter referred to as the Act).
3. 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(2)(a) 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 private security is an essential service. (see Government Gazette No 43514, Notice No. 374 2020, dated 10 July 2020.

Details of Hearings

4. The hearings were scheduled as per the notice published in the government gazette. In the hearings the ESC received a number of written submissions, and a number of interested parties also made oral representations to the ESC.

Submissions

5. The below submission are a summary of the submissions (oral and written) made in this application.
6. The South African National Security Employers' Association (SANSEA) made submissions opposing the application to designate private security services as essential services. In its submissions SANSEA made reference to section 23(3)(c) of the Constitution, which provides employees with the right to strike and section 36 of the Constitution, which contains the limitations clause. They also referred to section 65(1)(d)(i) of the LRA, which states that essential services employees may not take part in a strike and section 213 of the LRA, which provides the definition of an essential service.
7. SANSEA provided that registered and compliant security companies and its employees that fall within the private security sector are subject to the National Bargaining Council as well as PSiRA and have engaged in regulated collective bargaining processes for a number of substantive issues including wage negotiations as well as terms of conditions of employment. The collective agreements negotiated within the private security bargaining forum constitute a Sectoral determination which is published by the Department of Labour.
8. SAMSEA relied on the case of ***South African Police Service v Police and Prisons Civil Rights Union and Another [2011]9 BLLR 831 (CC)*** citing that the Constitutional court in this case provided that in order to ascertain the meaning of an essential service, regard must be had to the purpose of the legislation and the context in which the phrase appears. The court further provided that the relevant provisions should not be constructed in isolation, but in the context of other provisions in the LRA in order to avoid limiting the right to strike incorrectly.
9. With regards to the four-legged test that must be satisfied in order to determine if an industry falls within the scope of an essential service, SANSEA stated that security companies provide a service to its clients thus satisfying the first leg of the test. They further stated that any danger or potential risk that

their clients could face could be reduced by using replacement labour as well as the SAPS. This means that industrial action is unlikely to interrupt the service and therefore the second leg of the test is not satisfied. Only a few members of the population use private security services as most of the population relies on SAPS for their protection. This means that the interruption of this service would not endanger life and thus the third leg of the test fails. SANSEA is of the opinion that the interruption of private security services is unlikely to endanger the lives or health of the whole or part of the population therefore the fourth leg of the test fails.

10. Based on all the evidence lead SANSEA held that the private security industry cannot be determined to be an essential service.
11. The Security Association of South Africa (SASA) submitted that it concurs with SANSEA's submissions. Fidelity Guard Holdings also agreed with SANSEA's sentiments relying on the National Bargaining Council and its effectiveness.
12. SATAWU also objected to the designation of private security services as essential services on the grounds that CHUBB's services are not in line with the definition provided for in section 213 of the LRA and that SAIDSA cannot make a representation for the entire industry.
13. SATAWU cited the case of ***National Union of Metal Workers of SA and others v Bader Bop (Pty)Ltd and another 2003(3) SA 513 (CC)*** where it was stated that the right to strike is an important component of a successful collective bargaining system. They also relied on the ***SAPS v POPCRU and Another (2010) 12 BLLR 1263 (LAC)***, where it was held that employees employed under the Public Service Act Proclamation provide support to the SAPS, but they do not form part of the SAPS and accordingly those employees are not prohibited from striking. SATAWU prayed that the application to be dismissed.
14. SAIDSA and Chubb Fire & Security SA (Pty)Ltd's arguments are similar. Chubb provides system solutions for a number of different security services such as asset and people protection and access control. They provide security services to a number of large companies which in turn boosts the economy of the country.
15. There are various reasons why Chubb wishes to be designated as an essential service provider. Firstly, they argued that there is a high crime rate in the country which makes the demand for safety and security services a necessity. Secondly, there have been fire outbreaks around SA and a number of people have lost their lives due to the fires, although the government has deployed state fire fighters, the demand is too high for them to combat the loss of lives on their own.

16. SAIDSA in their arguments provided that private security services are necessary to individuals as well as businesses and that an interruption thereof would lead to an increase in criminal activity, looting of businesses and an increase the threat on lives and loss of property.
17. Afriforum argued that it sought a legal opinion whether security services should be designated as essential. Afriforum and Forum security submitted that private security services fall within the scope of the definition of an essential service provided for in section 213 of the LRA and therefore, should be declared an essential service.
18. This conclusion was reached by considering 4 requirements that the ESC considers in the process of declaring a service as an essential service namely:
 - It is a service, or part thereof, that is essential. It is not employees, or a business or industry that is essential.
 - 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, the service will not be designated as an essential service.
 - 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.
 - The endangerment must impact the population
19. Afriforum and Forum security provided that private security services are the first line of defense and protection against criminal or potential criminal activities and that the aim of private security services is similar to that of the SAPS, to combat crime and protect the safety and security of South African citizens. The minister of defense, in the annual report for 2018/19 of the private security industry regulating authority, stated that private security services are an indispensable force multiplier in crime prevention and further stated that private security services are a critical service to supplement the SAPS.
20. Afriforum and Forum security further held that not declaring private security services as essential services would be in violation of section 12(1)(c) of the Constitution therefore denying persons the right to be protected if and when private security services employees went on strike.

21. With regard to whether an interruption in the service can be prevented, Afriforum and Forum security provided that security officers cannot easily be sourced or replaced. This is because they require specific training, including commercial firearm training and they must be registered with PSiRA. They further provided that replacement labour may but the lives of their clients at risk and pose a threat in instances where long-term confidential relationships have been formed. According to Afriforum, the services rendered by private security services cannot be rendered by the SAPS as private security services are the first line of defense and protection against criminal activities.
22. Regarding whom will be endangered if the service cannot be rendered, Afriforum expressed that the disruption of private security services would endanger the lives of the population. A disruption of these services would leave various spheres of the public vulnerable, for example, businesses that rely on security for access control as well as protection of assets like cash-in-transit services etc.
23. Lastly, reference was made to the IOL and international best practices, where it was submitted that declaring private security services in South Africa is paramount to protecting the lives of citizens due to the fact that the crime statistics are among the highest in the world. In conclusion Afriforum provided that granting the employees of private security services the right to strike would infringe on the citizens right to life and safety and that private security services should be declared to be an essential service.

Legal Framework

24. In this matter the issue that the committee has to determine is whether the private security should be designated as essential services. In determining the matter, it is important that one should set out the legal framework.
25. 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."
26. 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".
27. 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".

28. 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".
29. Decision 842 of the International Labour Organization digest provides that private security services do not constitute essential services in the strict sense of the term (with the exception of public or private prison services).
30. 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)”
31. 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]**).
32. 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.

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.
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. 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

35. I must point out that the issues raised by SAIDSA on the impact on the economy do not form part of the test for designating services as essential and have thus not received much consideration.
36. The manner in which all the parties have dealt with the test for designated services is not much different.
- a. Indeed it is the service or part thereof that may be designated as essential and not employees
 - b. If there is a strike the service will indeed be interrupted. SAIDSA correctly submitted that if the interruption could be avoided (for an example using replacement labour) the service will not be designated as essential.

The first question to ask when dealing with interruption is whether there is a reasonable alternative. The argument by Afriforum that services rendered by private security services cannot be rendered by the SAPS as private security services are the first line of defense and protection against criminal activities. This argument falls short of dealing with the fact that engaging private security is a choice that an individual whether personal or business, makes.

According to Afriforum, the services rendered by private security services cannot be rendered by the SAPS as private security services are the first line of defense and protection against criminal activities. This argument is not convincing as the primary responsibility of ensuring the safety of the population is SAPS as per its own mandate and the Constitution of the Republic of South Africa. No evidence was led to suggest that SAPS is either lacking or is abdicating this responsibility.

Afriforum further argued that, the minister of defense, in the annual report for 2018/19 of the private security industry regulating authority, stated that private security services are an indispensable force multiplier in crime prevention and further stated that private security services are a critical service to supplement the SAPS. This argument contradicts the one above, that private security is the first line of defense, and is probably the more rational one that private security supplements safety and security of the population.

Despite all interested parties being notified through the government gazette, SAPS did not deem it necessary to be part of the hearings. Afriforum, SAIDSA or Forum Security did not substantiate their claims on the role or gaps of SAPS in providing security services to the population. They also did not subpoena SAPS to the hearings.

- c. The endangerment must be to the population, ie humans. Indeed it is human beings that have contracted private security services
 - d. There must be interruption of the service, whether partial or complete. The argument by SAIDSA is that it is not easy to source security officers to use as replacement labour. SANSEA, SASA and Fidelity Guard Holdings argued that any danger or potential risk that their clients could face could be reduced by using replacement labour as well as the SAPS. This means that industrial action is unlikely to interrupt the service and therefore the second leg of the test is not satisfied.
37. SANSEA, SASA and Fidelity Guard Holdings argued that a few members of the population use private security services as most of the population relies on SAPS for their protection. No numbers or averages were provided in this regard, but what is factual is that opting for private security is an individual decision, but the population at large depends on SAPS. SANSEA is of the opinion that the interruption of private security services is unlikely to endanger the lives or health of the whole or part of the population as there is SAPS and they are able to source replacement labour and therefore the fourth leg of the test fails.
38. The panel has also considered the submissions by SATAWU on the importance of the right to strike and the caution that should be exercised in limiting it.
39. 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”.

40. 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”.

41. Whilst there are two mutually destructive versions on the provision of replacement labour, the reality of SAPS being the custodian of security services for the population counts more in deciding whether or not to limit the right to strike of the employees in this sector.

42. 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”).

Designation

43. On the submissions made, the panel is not convinced that the interruption of private security services would endanger the life, or health of the population or part thereof, for reasons alluded to above. Consequently, the panel is of the view that the case made out by the parties supporting designating private security services must fail.

The matter is hereby dismissed.

Signature:

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Chairperson :

Luvuyo Bono

Sector:

ESC Panel Chairperson
