

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

Case No.: ES 577

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

**Whether the whole or part of Public Electronic Communication in accordance with
the law in South Africa is an essential services**

Designation

1. Introduction

1.1 The ESC, in line with Section 70B(1)(d) decided on its own initiative to institute an investigation as to whether the whole or part of Public Electronic Communication in accordance with the Law in South Africa is an essential service.

2. Details of Hearings

2.1 On the 11th of December 2022, the ESC advertised on the Sunday Times, and on the 09th of December 2022 the advert was placed on the government gazette, inviting all interested parties to the public hearings on the 30th of January- 10th of February 2023 and requesting

them to also make written submissions should they wish to participate in the investigation and advising them of a briefing session that the ESC will hold in respect of the investigation .

2.3 On the 19th of January 2023 the briefing session was convened and attended by the South African Broadcasting Corporation (SABC) Limited (SABC), the Broadcasting, Electronic Media and Allied Workers Union (BEMAWU), the Communication Workers Union (CWU), the State Information Technology Agency (SITA) and the Government Communication and Information System (GCIS).

2.6 At the public hearings, the following parties were in attendance: SABC, BEMAWU and CWU.

3. Legal Framework

3.1 It is necessary to set out the legislative context within which the ESC must make its designation.

The Labour Relations Act, 66 of 1995

3.2 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”.*

3.3 In the above context, I am of the view that a service is an activity rendered, and not a coordination of a service or a conglomeration of services.

3.4 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”

3.5 It is the view of the ESC that it is a service that must be interrupted, the interruption of which endangers life, personal safety or health. Consequently the services need to be viewed individually and or separately

4. Written Representations made to the ESC

SABC submissions

SABC argued that:

- a) The South African Broadcasting Corporation (SOC) Limited (SABC) is a Schedule 2 (major public entity) entity in terms of the Public Finance Management Act No. 1 of 1999 (PFMA), as amended. The Corporation is subject to a list of legislations regarding its operations and the Broadcasting Act No 4 of 1999 (the Act) is the SABC’s founding statute. In terms of the Act, the SABC’s obligations are captured in the Regulations provided by the Independent Communications Authority of South Africa (ICASA) and the licence conditions for the Corporation’s five television channels and 18 radio stations. The business of the SABC is further defined by the Act in terms of two distinct services, the Public Broadcasting Services (PBS); the Public Commercial Services (PCS). Each radio station and television channels are licensed independently by ICASA, and each is required to adhere to its respective licence conditions and the provisions of the Act.

- b) The SABC is the only Public Broadcaster in South Africa and fulfils a constitutional function to give expression to freedoms and fundamental rights contained in the Constitution, especially Section 16. Therefore, any disruptions and interruption in this service becomes a constitutional rights matter that, when balanced with other rights such as right to strike etc, outweighs any sectoral rights on a utilitarian scale.

- c) The Broadcasting Act prescribes that the SABC must provide radio and television broadcasting services throughout South Africa, with programmes of information, education and entertainment. The SABC mandate include public service announcements (PSA) made by the president and ministers. The criticality of this service was demonstrated during the Covid-19 lockdown period. An inability to provide this service can have a devastating effect on the health and safety and economic stability of the country.

- d) The SABC is the only institution in South Africa that has dedicated radio stations and dedicated news and current affairs programmes in every official language group in South Africa, and reaching millions of South Africans in real-time. Moreover, millions of indigent South Africans have no access to any other types of media due to their socio-economic conditions, and they depend on the SABC services as their sole source of news and information.

- e) It is further submitted that at the start of the coronavirus lockdown in South Africa, the Minister of Cooperative and Government Affairs published regulations which designated particular services as “essential services” during the pandemic and the broadcasting & telecommunications infrastructure and related services were accordingly included as an

essential service owing to the critical role of informing, educating & entertaining the public in order to keep the nation abreast with regard to all important matters of national interest and thereby building a well-informed and conscious nation.

- f) Whilst the SABC also understands that employees that are engaged in an essential service, may not strike, it is the SABC's belief that such employees are not prejudiced and left without the process and procedure to collective bargain with the employer as their right to recourse, especially as it pertains to disputes of interest, are not discarded since s74 of the LRA allows "any party in an essential service, precluded from participating in a strike or lockout, ... [to] refer an interest dispute for arbitration if such dispute remains unresolved after conciliation". Therefore, there is still an avenue and recourse for such employees in an essential service to realise the fruits of collective bargaining.

- g) For the above reasons, the SABC is declared a national key point (NKP) and it is recommended that the function of the SABC also be designated as an essential service

BEMAWU Argued that:

- a) The concept of essential services is based on Article 3 of Convention No. 87, which establishes the right of workers' organizations to organize their administration and activities and to formulate their programmes without interference by the public authorities. With the recognition of the Committee on Freedom of Association, some member States do however limit rights flowing from Article 3 to groups of workers that are considered essential services.

- b) The CFA (Committee on Freedom of Association) has recognized that radio and television services do not meet the requirements of essential services in the strict sense of the term or of to establish minimum services. Out of 53 ILO member states, only 9 states declared public broadcasting an essential service.
- c) The SABC is a public broadcaster, not a state broadcaster. It must remain independent and its employees should be free from state control.
- d) The SABC has a total of nineteen (19) Radio stations and three (3) FTA TV channels.
- e) There are 40 commercial and public broadcast stations and 284 community stations in South Africa.
- f) The readers who used to buy newspapers have moved online and are now getting their news from News24, Business Tech, Times Live, and IOL.
- g) Over the last decade, South Africa's most popular online publications have experienced exceptional growth Business Tech has seen the most explosive growth, increasing its readership by over 10,000%.
- h) Times Live grew by 982%, News24 increased its readership by 527%, and My Broadband attracted 441% more readers.

- i) The number of active social media users in South Africa grew almost three-fold in the last eight years, reaching 28 million in 2022. Keeping in touch with friends and family, followed by reading news, was the fundamental reason for being on social media for South African users as of the third quarter of 2021. Indeed, accounts of friends, family, and acquaintances were the primary type of followed social media accounts for 66 percent of internet users aged 16-64 years. Furthermore, over 95 percent of the online audience used WhatsApp, making the messaging app the most used social network in the country.
- j) It is disputed the interruption of the SABC's service becomes a constitutional rights issues, as there is other media that can give effect to freedom of the press and other media. Furthermore, since 4 February 1997, when the Constitution came into effect - for 26 years - this was never an issue. Why would it now be an issue?
- k) The SABC is not the only media organisation in South Africa, and the Constitution is not limited to only the SABC. It enjoins all media and press to uphold freedom of expression. With the SABC only reaching 12.6% of the population of South Africa on a daily basis, it is completely out of proportion, unjustified and unfair to limit the Constitutional Right to Strike when the SABC does not speak to 87.4% of the population. It is completely unfair to limit the constitutional right to strike when a insignificant 12.6% of the population relies on the SABC to be informed by the SABC.
- l) The Broadcasting Act cannot and does not supersede the Constitution. It was never the intention of the Broadcasting Act to limit or remove the right to strike by including a

provision of what the SABC must provide as a service. At best it enjoins the SABC to deliver a service, it did not seek to limit the right to strike.

m) The SABC submission is misplaced and misleading. The question is not who has the most radio stations. The question is would the lives and health of citizens be under threat if the SABC cannot broadcast in the event of a strike. The answer is no. If the SABC only reaches 12.6% of the population it can never be argued it will fulfil a lifesaving roll when it only reach such a small portion of the population. Furthermore, it is not considered as one of the most trusted news sources, as is clear from this finding by Reuters:

1. Between 2019 and 2022, trust in news grew from 49% to 61% and South Africa now ranks 2nd out of 46 countries in our survey. Almost all the news brands included in the SA survey have also grown their rating, with News24 the most trusted brand in all four years surveyed (jointly with BBC in 2021). City Press, Sowetan, and Daily Sun have grown by as much as six percentage points (pp) or seven percentage points (pp) this year.
2. Only 12.6% of South Africans are reached by the SABC daily. More people depend on Facebook and WhatsApp for their news.
3. Facebook (52%) and WhatsApp (43%) are still the most popular platforms as a source of news for South Africans, but are showing declines. TikTok (15%) is now on a par with Instagram, and increasingly being used by news organisations as a conduit for news.

n) BEMAWU propose, instead of declaring the SABC an essential service and curtailing the right to strike, the same approach can be taken during a national disaster. The Minister can, on an ad hoc basis, when there is a national disaster, declare the news gathering part and other essential parts of the SABC as an essential service. There is no need to

declare the SABC or parts of it an essential service at times when there is no disaster. On its own admission the SABC may only become an essential service in the event of a disaster. Unlike the Police for example, who must maintain law and order every minute of the day, the SABC does not provide a similar service. Equally, there is only one police service - there are many other sources of news, more reliable than the SABC that can inform the population.

- o) For the reasons submitted above, BEMAWU believes it would be patently unfair to limit the right of SABC employees to strike. Had the SABC reached the majority of the population on a daily basis and there was no other sources of news, there would have perhaps been merit in the argument.

- p) BEMAWU submit the SABC, in particular at times where no state of emergency exists, is not an essential service and should not be declared as such. The SABC is only reaching a small portion of the population of South Africa, is not the most credible news source and is by far not the preferred source of news for South Africans. Lives will not be endangered and safety compromised in the event of a strike. Online publications providing News and entertainment have a substantial wider reach than the SABC, where the population currently source their news from. There is simply no justification to classify the SABC as an essential service. In no previous strikes was this reported and/or raised as a concern. If it was, the SABC would have raised it on its own accord and not waited for the ESC to raise this.

CWU Argued that:

- a) There is an established body of work that suggests that one cannot just wake up one day and then state to the world that one would want the entire SABC to be declared an essential service as workers interest would still be served, as the SABC put it, “...their right to recourse...are not discarded since s74 of the LRA allows ‘any party in an essential service, precluded from participating in a strike or lockout...[to] refer an interest dispute for arbitration if such dispute remains unresolved after conciliation’.

- b) In its first argument, the SABC appears to want to ask the ESC to regard their service of such a nature that to take it away would rob the people of their right to freedom of expression which includes; freedom of the press and other media; freedom to receive or impart information or ideas; freedom of artistic creativity; and academic freedom and freedom of scientific research.

- c) In another argument, the SABC claims that its “public service announcements (PSA)” was critical during the lockdown, then goes further to explain; “An inability to provide this service can have a devastating effect on the health and safety and economic stability of the country”

- d) Workers of the SABC served the Nation during the Pandemic, and rest assured, would not hesitate to do so again, provided it is required by Law.

- e) Concerning the penultimate argument of the SABC in its submission, which we indicated we would return to - the argument which says workers are well served by the provisions

of s74 of the LRA:
Therefore, no harm is done by declaring the SABC an Essential Service; that argument appears to be misplaced, can the SABC cross the hurdle? It does not appear to be the case, and besides, we have had our strikes at the SABC to improve the terms and conditions of the workers.

- f) The SABC ends its submission with - “For the above reasons...” and one assumes it means the entire argument put forward by the SABC, “...the SABC is declared a national key point (NKP) and it is recommended that the function of the SABC also be designated as an essential service”. This appears not to be a very sound argument and we cannot fathom why the SABC cared to slip it in at the very end.

- g) It is also a well-known fact that the very influential and expert scholars serving on that internationally respected and revered body called the C.F.A. have recognized that radio and television do not meet the requirements of essential services, “in the strict sense of the term or of to establish minimum services”.

- h) CWU believes and maintains that during a National Disaster SABC workers should be patriotic and obey the law to ensure services are provided, yet it is also our firm belief that when there is no law prohibiting SABC workers to exercise their constitutional right to strike, that they should flex their muscles, as a last resort to defend, advance and consolidate their interests.

- i) We also believe that the SABC has not crossed the hurdle if we look at the definition of what an Essential Service is.

- j) Furthermore; it is not as if we had not had strikes at the SABC - yet there was no catastrophe. But what is also significant is that workers only have their labour power whilst the employer has all the power - so for us to give effect to our constitution we must balance the power - and thus the right to strike is one of the ways workers have to defend themselves, especially by advancing the terms and conditions of their employment.

- k) We cannot ignore the huge body of knowledge which exist about Freedom of Association, Collective Bargaining, and the Right to Strike, which begins to explain to us that the right to strike is a fundamental human right.

- l) What was put forward by the SABC as an argument for the justification that the service it provides falls within the ambit of Essential Services, appears not to hold water, and is not reasonable, and neither justifiable?

5. Analysis of the Evidence

5.1 I note the parties' arguments about whether or not the SABC as a public broadcaster should be designated as an essential service or not. The first point I want to make is that the ESC does not designate employers or workplaces, but it designates services.

5.2 The test in designating those services is found in the definition of essential services.

- 5.3 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;
- 5.4 The question that this panel has to answer is whether or not if the broadcasting services at the SABC are interrupted there would be an endangerment to life, personal safety or health of the population or part thereof. No evidence of this nature was put before the panel. In the written submissions made by the SABC, much was made about the fact that during covid, the SABC was regarded as rendering essential services owing to the critical role of informing, educating & entertaining the public in order to keep the nation abreast with regard to all important matters of national interest and thereby building a well-informed and conscious nation. It must be noted that the standard / test used for designating services during the state of disaster is different to what is defined in the Labour Relations Act, which is what the ESC is bound by.
- 5.5 The parties also provided valuable information about how other countries under the ILO have dealt with public/state broadcasting and how many countries have designated state broadcasting as an essential service.
- 5.6 The ESC also notes the parties arguments on the balancing of rights under the constitution, but at the center of what this panel has to decide is whether or not an interruption of the public broadcasting services, there will be an endangerment to life, personal safety or health of the population or part thereof.
- 5.7 Having applied this test, on the evidence and arguments before this panel, the panel is not convinced that the public electronic communication services in terms of the law in South Africa are an essential service.

6. Designation

On the submissions made, the ESC therefore makes the following determination:

- a) Public Electronic Communication services are not an essential service.



Luvuyo Bono

Chairperson of the ESC

31 March 2023