

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

Case No.: ES706

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

Whether the State Information Technology Agency Services should be designated as essential services

Designation

Introduction

1. The Essential Services Committee ("the ESC") received a referral in terms of Section 70B(1)(d) from the State Information Technology (SITA) on 6th of December 2023 requesting it to investigate whether or not its services should be designated as essential services. On the 22nd of January 2024, the ESC convened a meeting with the parties and following the parties' submissions, made a ruling that the referral was reasonable and that the ESC would proceed with the investigation.
2. As provided for in section 71, read with section 70(2)(a) of the Labour Relations Act, 1995 (Act No 66 of 1995 as amended), the ESC gazetted a notice that it was conducting an investigation as to whether or not the above services are essential services. (see Government Gazette No 50041, Notice No 2287, dated 26th of January 2024.

3. SITA and PSA both filed Regulation 2(2) notices that they would participate in the investigation.

Details of Hearings

4. The hearings were scheduled as per the notice published in the government gazette. In the hearings the ESC received submissions from SITA and PSA. Inspections were held as follows:
 - 09 April 2024
 - 08 July 2024
 - 11 September 2024

Submissions

5. The below submissions are a summary of the submissions (oral and written) made in this application.

SITA

6. SITA's application is premised on the following:
 - a. SITA is a National Key Point;
 - b. Certain services that SITA provides have already been designated by the ESC as essential; and
 - c. The services SITA offers are part of an integrated system which cannot be separated and thus, even services that are not per se essential are supportive of essential services.

7. Gopal Duraisamy Reddy, the Executive: Service Management Structure testified to the following service lines:
- a. Hosting and data center services. These includes mainframe hosting; midrange hosting; cloud hosting disaster recovery and hosted batch printing. These are mainly hosting and connectivity services for government information.
 - b. Wide area network service line. This includes VNP; internet connectivity; remote and unified messaging. These are services for communication between citizens and government as well as connectivity services between private networks and government network as well as controlling local and international traffic capability.
 - c. End user computing services. These are LAN and desktop services which are for managing local and end user capability through integrated management, control, operating support, monitoring and maintenance of the local area networks and end used devices.
 - d. Government ICT ecosystem and related SITA consulting services. These include the automation enabling of front-end procedures; mordenising various applications, servers, and other platforms
 - e. Security service line. These are information security services which include security strategy development, policy development and maintenance, business continuity and disaster recovery planning, risk management and security solutions.
 - f. Training service line. These are training services for government departments from the development of training material to development of solutions.

- g. Architecture, research and standards service lines. These are enterprise architecture, IT governance, ICT advisory, project management advisory and ICT plan development.
 - h. Supply chain management services. These are bid and contract management services
8. Obed Maphutha, the Lead Consultant for Employee Relations testified about the past strike that had taken place at SITA. Mr Maphutha testified that due to the nature of services that SITA renders to clients, for instance, the Department of Home Affairs, the potential of the strike action would result in a total shutdown of the working processes within the Department of Home Affairs as births and deaths cannot be registered and burials will be interrupted.

PSA

9. Hophney Mokaba, an End User computing Technician testified on behalf of PSA. Mokaba testified that clients/government departments have their own IP's and software. SITA only owns the network. Clients/government departments have capable employees who can do the work in the absence of SITA. SITA is at support level, supporting clients who owns their software. According to Mr Mokaba SASSA leadership during inspection in loco indicated they are using MTN lines, further they are using their own lines but also use SITA lines as secondary lines. Mr Mokaba indicated that when Home Affairs is offline they can still capture information on the system.
10. Johnson Matidza, a consultant: Training Manager testified that he works for SITA at the department of Defense (DOD). In all IT Systems offered by SITA, training is also given to Department staff. This includes a process called offline procedure on how to work when there's no electricity. It happens across the spectrum that there is a manual way

of doing things. Therefore, it is done to ensure that when there are no systems, government departments may not suffer because enough training is already given to department staff to conduct their business. As for DOD computer servers are kept in the military units and therefore going on strike affects no servers. In concluding Mr Matidza indicated that he knows no one who died and/or have their lives endangered by SITA strike. Moses Mngadi also supported this evidence.

Legal Framework

11. In this matter the issue that the committee has to determine is whether the services that are rendered by SITA (excluding the ones that have already been designated) should be designated as essential services. In determining the matter, it is important that one should set out the legal framework.
12. 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."
13. 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".
14. 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".
15. 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”.

16. 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)”

17. 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 par [66]).

18. 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.
19. 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.
20. 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

21. At the outset the following must be clarified:
- a. The test for designating a service is if the service is interrupted there will be an endangerment to the life, personal safety or health of the whole or any part of the population. Just because an employer is a National Key point does not mean that the service it renders is essential.
 - b. Also if the services in a past strike were not affected or there was minimal disruptions that does not mean that in future there will be no endangerment to life, personal safety or health. The test used by the ESC is an objective one and not one only limited to past incidents. The past incidents may play a role but are not the deciding factor.

- c. The fact that services are integrated does not mean that they should all be designated as essential. It is a common phenomenon in essential services that workers who render essential service may work side by side with workers who render non-essential services. The concept of restrictive interpretation of essential services means that the right to strike is limited only to employees who truly render essential services.
- d. This application excludes services designated in terms of GNR.1542 dated 21 November 1997 and as varied on 24 November 2023 under GN49757, the ESC designated portions of the activities conducted by the Central Computer Service (CCS) as essential services, stating the following:
"the services provided or supported by the Central Computer Services viz: The Persal system; the social pension system; the hospital systems; and the flood control system".

22. The evidence placed before the panel relates specifically to:

- a. Hosting and data centre services.
- b. Wide area network service line.
- c. End user computing services.
- d. Government ICT ecosystem and related SITA consulting services.
- e. Security service line.
- f. Training service line.
- g. Architecture, research and standards service lines.
- h. Supply chain management services.

23. The evidence before this panel in relation to security service line is that, they are information security services which include security strategy development, policy development and maintenance, business continuity and disaster recovery planning, risk

management and security solutions. Using the example testified to of the Department of Home Affairs where personal information of citizens is registered for births to death, it follows that the security of such information (including personal information of citizens) needs to be protected as the interruption of such protection may endanger the personal safety of the population. Equally and for the same reason the hosting of such data, the security and the recovery thereof in cases where it may be lost or damaged is an important factor to consider and one that is essential. The panel shares the same view in relation to the services that relate to the communication between citizens and government as well as connectivity services between private networks and government network as well as controlling local and international traffic capability. The interruption of these services in the view of the panel may endanger the personal safety of the population, and so does the interruption of the End user computing services as the management of local and end user capability may be compromised due to the lack of integrated management, control, operating support, monitoring and maintenance of the local area networks and end user devices.

24. The panel is not convinced that the interruption of automation: enabling of front-end procedures; modernising various applications, servers, and other platforms will endanger the life, personal safety or health of the population. Strikes must be understood as events that happen outside of the norm. It must also be understood that there are various events that take place before a strike, ie, the parties attempt to resolve whatever dispute that might lead to a strike by themselves. If this does not yield a positive result, they refer the matter to a dispute resolution institution that seeks to conciliate the matter and if not resolved, notice would be given by the employee's union that it would go on strike. There is ample opportunity for the employer in this case in relation to its government ICT ecosystem and consultancy services to ensure that a contingency is arranged. The panel is of the view that this same argument can be

levelled against Training service line; Architecture, research and standards service lines and Supply Chain Management Services. Also strikes take place for a limited period and should not be seen as events that take place months on end.

25. Much evidence was led on the fact that no one died during the last strike at SITA. What came out in evidence is that some employees still continued to ensure that the services rendered by SITA to the state departments were not interrupted during the strike, and therefore no clear picture of the past strike can be drawn on the consequences of the interruption. What was led before the panel was that departments like SASSA suffered during that strike.
26. What is clear from the evidence led and submissions made is that the capturing, holding/managing or supporting of the data which includes personal and or private information of the population must be protected at all times as the interruption of managing such data may endanger the life, personal safety or health of the population.
27. SITA currently renders services to: The Presidency; The State Security Agency; The South African Police Services (SAPS); The Office of the Chief Justice; National treasury; Government Communication and Information System; The Department of Defence; Civilian Secretariat for Police Service; Department of Health; and the Department of Justice and Constitutional Development. The Department of Health not only holds data on the health of patients but also renders health services that operate electronically.

Designation

28. On the submissions made, the panel is convinced that if Hosting and data centre services; Wide area network service line; End user computing services and Security service line are interrupted the life, personal safety or health of the population may be endangered.
29. Consequently, the panel hereby designates the following services as essential:
- a. Hosting and data centre services;
 - b. Wide area network service line;
 - c. End user computing services and
 - d. Security service line services
30. The application in so far as Government ICT ecosystem and related SITA consulting services; Training service line; Architecture, research and standards service lines and Supply chain management services, must fail and is dismissed.
31. The parties are hereby ordered to negotiate and conclude a Minimum Service Agreement covering the above-mentioned and the previously designated services (persal system; the social pension system; the hospital systems; and the flood systems) no later than 30 July 2025.



Adv. L Bono

ESC Panel Chairperson

7 March 2025