THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Case No: 840/2010

In the matter between:

ESKOM HOLDINGS LIMITED	**Appellant**
and	
NATIONAL UNION OF MINEWORKERS	**First Respondent**
NATION OF UNION OF METALWORKERS OF SOUTH AFRICA	**Second Respondent**
COMMISSION FOR CONCILIATION MEDIATION AND ARBITRATION	**Third Respondent**
COMMISSIONER M D ALLY NO	**Fourth Respondent**
SOLIDARITY UNION OF SOUTH AFRICA	**Fifth Respondent**
and	
THE ESSENTIAL SERVICES COMMITTEE	**Intervening Party**

Neutral citation: *Eskom Holdings v National Union of Mineworkers* (840/2010) [2011] ZASCA 229 (30 November 2011)

Coram: Brand, Van Heerden, Cachalia, Leach and Seriti JJA

Heard: 14 November 2011

Delivered: 30 November 2011

Summary: Labour – minimum services agreement under s 72 of the Labour Relations Act 66 of 1995 in an industry designated as an essential service – employer and employees unable to agree on the terms of such an agreement – their dispute capable of being determined by the Essential Services Committee under s 73 of the Act.

O R D E R

On appeal from: Labour Appeal Court (Davis JA, Patel JA and Hendricks AJA concurring):

The following order is made:

(1) The appeal succeeds with the first and second respondents being ordered to pay the costs of the appellant, such costs to include the costs of two counsel where so employed.

(2) The order of the Labour Appeal Court is set aside and substituted with the following:

'The appeal is dismissed, with costs.'

J U D G M E N T

LEACH JA (Brand, Van Heerden, Cachalia and Seriti JJA concurring):

[1] The crisp issue arising for decision in this appeal is whether a failure to agree on the terms of a minimum services agreement is a dispute between an employer and a trade union which can be referred to compulsory interest arbitration by the Commission for Conciliation, Mediation and Arbitration[1] (the CCMA) under the provisions of s 74 of the Labour Relations Act 66 of 1995 (the LRA). As set out more fully below, the issue came before the Labour Court which held that the CCMA lacked the necessary jurisdiction to determine such a dispute whereas, on appeal, the Labour Appeal Court held otherwise. With special leave, the appellant now appeals to this court, seeking to reaffirm the order of the Labour Court.

[2] The appellant is a private company, albeit an extremely large organisation, which generates, transmits and distributes electricity throughout this country. The first, second and fifth respondents are trade unions who represent employees of the appellant. As they have also been both applicants and appellants at various stages

1 Established under s 112 of the LRA.

of the history of this litigation, I intend to refer to them collectively as 'the unions' and to them individually by using the first respondent's acronym 'NUM', the second respondent's acronym 'NUMSA' and the fifth respondent's name 'Solidarity'.

[3] Only NUM and NUMSA have appeared to oppose the appeal. Solidarity has been cited as a respondent but it played no part in the appeals both to the Labour Appeal Court and to this court. The Commissioner whose decision was reviewed in the Labour Court, as set out below, and the CCMA were also cited as respondents due to their interest in the matter but they too played no part in the appeal. The Essential Services Committee (the ESC), established under s 70 of the LRA, was granted leave to intervene in this appeal as an interested party. In doing so, it has aligned itself with the appellant in seeking to set aside the order of the Labour Appeal Court.

[4] Although the right of workers to strike is enshrined in s 23(2)*(c)* of the Constitution, that right is not absolute[2] and may be limited in terms of a law of general application to the extent that such limitation may be reasonable and justifiable in an open and democratic society.[3] It is widely recognised, both in this country and abroad, that in certain circumstances, it will be reasonable and justifiable to limit the right to strike, particularly in times of national emergency or in services where a strike is likely to harm the public.[4] Thus the LRA provides that no person may take part in a strike if 'that person is engaged in an essential service'[5] and defines an 'essential service' as meaning:[6]

'*(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.'

[5] The task of determining which services should be regarded as essential

2 *South African Police Service v Police and Prisons Civil Rights Union & another* 2011 (6) SA 1 (CC) para 20.
3 Section 36 of the Constitution.
4 See eg Cooper 'Strikes in Essential Services' 1994 (15) *ILJ* 903-4 and Roskam *Essential and Minimum Services and the Right to Strike* (report prepared for the Employment Promotion Programme http://www.commerce.uct.ac.za/research_units/dpru/?q=node/52) at 6-8.
5 Section 65(1)*(d)*(i).
6 Section 213.

services has been entrusted by the legislature to the ESC, its functions being defined in s 70(2) inter alia as:

'*(a)* to conduct investigations as to whether or not the whole or part of any service is an essential service, and then to decide whether or not to designate the whole or part of that service as an essential service;

(b) to determine disputes as to whether or not the whole or a part of any service is an essential service.'

[6] In s 71 of the LRA the ESC's powers and procedures in designating a service as an essential service are detailed as follows:

'(1) The essential services committee must give notice in the *Government Gazette* of any investigation that it is to conduct as to whether the whole or a part of a service is an essential service.

(2) The notice must indicate the service or the part of a service that is to be the subject of the investigation and must invite interested parties, within a period stated in the notice-

(a) to submit written representations; and

(b) to indicate whether or not they require an opportunity to make oral representations.

(3) Any interested party may inspect any written representations made pursuant to the notice, at the Commission's offices.

(4) The Commission must provide a certified copy of, or extract from, any written representations to any person who has paid the prescribed fee.

(5) The essential services committee must advise parties who wish to make oral representations of the place and time at which they may be made.

(6) Oral representations must be made in public.

(7) 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.

(8) If the essential services committee designates the whole or a part of a service as an essential service, the committee must publish a notice to that effect in the *Government Gazette*.

(9) The essential services committee may vary or cancel the designation of the whole or a part of a service as an essential service, by following the provisions set out in subsections (1) to (8), read with the changes required by the context.

(10) The Parliamentary service and the South African Police Service are deemed to have been designated an essential service in terms of this section.'

[7] On 12 September 1997, by way of a notice published under s 71(8) of the LRA[7], the ESC declared the 'generation, transmission and distribution of power' (the industry in which the appellant operates) to be an essential service. That declaration still stands and was operative at all times material to this appeal.

[8] However, it is acknowledged both in this country and internationally that not all the workers employed in an industry declared to be an essential service need to be precluded from striking for that service to continue to operate at an acceptable level. This has given rise to the concept of a 'minimum service' which is intended to allow certain workers in an industry designated as an essential service to strike while at the same time maintaining a level of production or services at which the life, personal safety or health of the whole or part of the population will not be endangered. Recognising this the legislature, presumably in a bid to prevent the declaration of an industry as an essential service from impinging unnecessarily on the right to strike, provided in s 72 of the LRA that:

'The essential services committee may ratify any collective agreement that provides for the maintenance of minimum services in the service designated as an essential service, in which case

a) the agreed minimum services are to be regarded as an essential service in respect of the employer and its employees; and

b) the provisions of section 74 do not apply.'[8]

[9] There is no obligation placed upon employers and their employees to conclude minimum services agreements, and for many reasons unnecessary to detail such agreements have not proved to be popular in practice. One of the very few that have been agreed was concluded between the appellant and its employees

7 Paragraph 1(f) of Government notice No 1216 of 12 September 1997.
8 The precise meaning and effect of s 72*(b)* has been a matter of debate and confusion that is unnecessary to attempt to resolve for purposes of this judgment.

and ratified by the ESC in 1998.[9] However, the unions unilaterally cancelled that agreement with effect from 31 March 2004 and, for several years thereafter, they attempted unsuccessfully to reach consensus with the appellant on a new minimum services agreement. Although the appellant was in principle not averse to doing so, the stumbling block appears to have been in agreeing on the number of employees necessary to provide an acceptable minimum service.

[10] Finally, in April 2007, the unions referred the dispute concerning the terms of a proposed new minimum services agreement to the CCMA. In doing so, they classified the dispute as being one of 'mutual interest' and summarised the facts of the dispute in the following terms:

'(The appellant) was designated as an essential service by the Essential Services Committee. The Unions and (the appellant) have now deadlocked on the Minimum Services Agreement after more than two years of negotiations. (The appellant's) proposal is that almost 100% of employees render minimum service whereas Unions submit that 10% is a required minimum service.'

The unions then stated that they required a minimum services agreement 'that does not declare every employee in Generation, Distribution and Transmission to be a minimum service'.

[11] As appears from this, the attitude of the unions was that the CCMA should either conciliate the dispute in regard to the terms of a new minimum services agreement or, should it fail to do so, determine those terms by arbitration. This would be a process that would result in a new minimum services agreement being imposed on the parties by way of an award. However, the appellant disputed the CCMA's jurisdiction to do this, contending that s 74 of the LRA (to which I shall later refer), under which the unions had purported to act in approaching the CCMA, was of no application to a dispute concerning the terms of a minimum services agreement and that the remedy of the unions lay in approaching the ESC to narrow the designation it had made under s 70.

[12] The matter came before the CCMA on 20 June 2007. After hearing argument,

9 A brief history of the negotiations leading up to and the circumstances under which this agreement was concluded may be found in Dhaya Pillay's article 'Essential Services Under The New LRA' 2001 (vol 22) *ILJ* 1 at 29-31.

the Commissioner ruled on 29 June 2007 that the CCMA ‘has the power to conciliate any dispute that has been referred to it in terms of (the LRA)’ before going on to conclude that to answer the legal questions raised would mean that she would ‘be arbitrating on these matters without having the necessary powers to do so and that these legal questions should be dealt with at an arbitration/adjudication stage’. She then proceeded to rule that ‘the CCMA has the jurisdiction to conciliate the issue in dispute’ and referred the dispute back to the CCMA for the appointment of another Commissioner to deal with the matter.

[13] Unhappy at the outcome, and contending that there was no rational link between what the CCMA had been requested to address and its decision, the appellant applied to the Labour Court to review this ruling. The review was opposed by the unions who supported the decision that the dispute could be resolved under s 74. The essential issue which the Labour Court was called on to decide was that mentioned at the outset of this judgement, namely, whether a dispute over a failure to agree on the terms of a minimum services agreement is a dispute which may be referred to the CCMA for conciliation and arbitration.

[14] The Labour Court (AC Basson J) upheld the appellant's argument and concluded that the dispute could not be referred to the CCMA. It therefore reviewed and set aside the Commissioner‘s decision and declared ‘that the CCMA does not have the jurisdiction to deal with a dispute arising from a failure to agree on the terms of a minimum services agreement’.

[15] It was the turn of NUM and NUMSA to be unhappy at the outcome of proceedings, and they proceeded to appeal to the Labour Appeal Court (as mentioned above, Solidarity did not appeal but was cited as a respondent). On 23 August 2010, the Labour Appeal Court (Davis JA, Patel JA and Hendricks AJA concurring) upheld the appeal, set aside the order of the Labour Court and substituted in its stead an order dismissing the review of the CCMA's decision and declaring ‘that the CCMA has jurisdiction to deal with a dispute arising from a failure to agree on the terms of the minimum service agreement’. It is against against this order that the present appeal lies.

[16] At the heart of the dispute lies s 74 of the LRA, the relevant provisions of which read as follows:

'(1) Any party to a dispute that is precluded from participating in a strike or a lock-out because that party is engaged in an essential service may refer the dispute in writing to

(a) a council, if the parties to the dispute fall within the registered scope of that council; or

b) the Commission, if no council has jurisdiction.

(2) The party who refers the dispute must satisfy the council or the Commission that a copy of the referral has been served on all the other parties to the dispute.

(3) The council or the Commission must attempt to resolve the dispute through conciliation.

(4) If the dispute remains unresolved, any party to the dispute may request that the dispute be resolved through arbitration by the council or the Commission '(the Commission is of course the CCMA).

[17] The unions' contention is that once the generation, transmission and distribution of power had been declared an essential service in 1997, the appellant's employees were precluded from striking. Accordingly, once they became deadlocked with the appellant as to the terms of a minimum services agreement, that was a dispute that could be referred to the CCMA under s 74(1), and the CCMA was then obliged to attempt to resolve the dispute (namely the terms of what the minimum services agreement should be) through conciliation under s 74(3) and, should the dispute remain unresolved, to refer it to arbitration under s 74(4).

[18] The Labour Court rejected this approach. It concluded that as the legislature had entrusted the determination of essential services to the ESC, and as s 72 provided for the ratification of a 'collective agreement' and not an arbitration award, the legislature could not have intended such an award to be ratified by the ESC; and therefore could not have intended a dispute as to the terms of such an award to be submitted for arbitration by the CCMA under s 74. On the other hand the Labour

Appeal Court held that the Labour Court had 'elided'[10] past' the wording of s 74 by relying on s 72 to conclude that the CCMA lacked jurisdiction. Simply put, the view of the Labour Appeal Court was that the Labour Court had either ignored or not properly appreciated the provisions of s 74.

[19] In this court counsel for the unions sought to defend the Labour Appeal Court's order by arguing that the dispute as to the terms of a minimum services agreement could indeed be resolved by arbitration under s 74. In that regard counsel submitted, first, that it was unnecessary for an award under that section to be ratified by the ESC and, in the alternative that if ratification was necessary, the reference to a 'collective agreement' in s 72 should be construed so as to include an arbitration award under s 74(4).

[20] This first contention was tentatively advanced and, even though not specifically abandoned, counsel did not seriously persisted in advancing it. This attitude was justified as there is no merit in the point. As I have said, the determination of what is an essential service and to what extent such a declaration may be varied or pared down either under s 71(9) or under s 73 (to which I shall refer more fully below) is a task entrusted by the legislature solely to the ESC, a body equipped with specific skills and experience to determine such important issues. The legislature surely did not envisage a CCMA commissioner, probably lacking both the necessary expertise and experience, to determine a minimum services agreement which would vary the effects of a declaration made by the ESC.

[21] Turning to the question of ratification of an arbitration award under s 72, it was argued by the unions that it was necessary to interpret the LRA in such a way as to give effect to the fundamental rights conferred by s 23 of the Constitution, including the right to strike, and that if the phrase 'any collective agreement that provides for the maintenance of minimum services' in s 72 was not interpreted to include an arbitration award under s 74(4), workers employed in an essential service industry whose services were not essential for the operation of a minimum service at an acceptable level would be prevented from striking if their employer simply refused

10 The word 'elide' is not in common use. It is defined in the Shorter Oxford English Dictionary as 'to crush out', 'to destroy (the force of evidence)', 'to omit (a vowel, or syllable) in pronunciation'.

to conclude a minimum services agreement. It was therefore the unions' argument that although a collective agreement arrived at by consensus differs in nature from an arbitrator's award which is imposed upon parties unable to reach consensus, both have binding force and therefore fulfil the same function. Consequently, so it was argued, an arbitration award can be viewed as an alternative form of a collective agreement – and thus susceptible to ratification under s 72.

[22] The immediate problem that I have with this argument is that a 'collective agreement' is defined in s 213 of the LRA as meaning:

'a written agreement concerning terms and conditions of employment or any other matter of mutual interest concluded by one or more registered trade unions, on the one hand and, on the other hand

(a) one or more employers;

(b) one or more registered employers' organisations;

(c) one or more employers and one or more registered employers' organisations.'

I do not see how an arbitration award could ever be construed as being a collective agreement in terms of this definition and, indeed, counsel for the appellant conceded that it would be a 'big ask' (I adopt his phrase) for a court to do so. Moreover, s 72 envisages the ESC ratifying an agreement reached by consensus. However if it was called upon to ratify an arbitration award imposed due to a lack of consensus, any party aggrieved by the award would probably seek to oppose ratification which would lead to the ESC being called on not to ratify the award but to decide the dispute.

[23] In these circumstances I have no doubt the legislature did not intend an arbitration award under s 74 to be construed as a collective agreement as envisaged in s 72 of the LRA. That being so, and as questions as to the determination of essential services have been entrusted solely to the ESC, I do not see how a dispute between employers and their employees about the terms of a minimum services agreement (which will determine between them what is an essential service) can be construed as a dispute capable of resolution under s 74.

[24] It was argued by the unions that this could never have been intended by the

legislature as it would leave employees in a designated essential service whose services were not required to provide an acceptable minimum operation in an essential service, but who were unable to reach agreement with their employer on a minimum services agreement, high and dry and without any remedy to recover their right to strike. The ESC, however, submitted that such workers would not be without statutory protection as they could either approach the ESC to vary or cancel the designation of the whole or part of the service as an essential service under s 71(9) or invoke the provisions of s 73. The former option, although a theoretical possibility, is hardly a practical one as it would require the detailed procedures prescribed in ss 70(1) to (8) to be followed – a time-consuming, costly and involved procedure. However dispute resolution under s 73 would not. The section provides:

'(1) Any party to a dispute about either of the following issues may refer the dispute in writing to the essential services committee ─

(a) whether or not a service is an essential service; or

(b) whether or not an employee or employer is engaged in a service designated as an essential service.

(2) The party who refers the dispute to the essential services committee must satisfy it that a copy of the referral has been served on all the other parties to the dispute.

(3) The essential services committee must determine the dispute as soon as possible.'

[25] The ESC's contention in this regard is that as a minimum services agreement, as between employer and employee, deals with what is an essential service and whether any employee or category of employees should be regarded as being engaged in an essential service, it is empowered under s 73(1)*(a)* and *(b)* to determine a dispute between an employer and its employees concerning the terms of a minimum services agreement. The appellant firmly opposed this. Its counsel argued that the conclusion of the minimum services agreement was a voluntary matter so that, if agreement could not be reached on the terms thereof, its employees had no option but to 'lump it' (he apologised for the crudity of the phrase) – that being a consequence of the ESC's designation of the industry as an essential service. The unions were initially also somewhat dismissive of the ESC's suggestion, as although they were prepared to concede that the issue of whether an employee's services were to be regarded as being essential could be decided under s 73, they had difficulty in accepting that disputes in regard to what is an acceptable skeleton

staff required to work to provide a minimum service, which is the true stumbling block in the present case, are capable of being resolved under the section. However their counsel gradually warmed to the idea, stating that the unions would accept it as 'second prize'.

[26] Memories have clearly dimmed with the passage of time. Dhaya Pillay, who was the chairperson of the ESC at the time the appellant concluded the initial minimum services agreement with its employees in 1997, recounts[11] that in September 1997 a minimum services agreement concluded between Eskom and certain trade unions was submitted to the ESC for ratification under s 72. However, although the agreement would have been binding as between the appellant and those unions who had signed this agreement, the position was unsatisfactory as there were certain trade unions who had not agreed to the terms of the agreement. As the implementation of a minimum services agreement is best effected through maximum cooperation of all the parties, the ESC invited Eskom and all the trade unions to meet to discuss the issue. Eventually the parties agreed to disagree on whether a certain part of essential service was essential, and this disagreement was referred to the ESC for determination as a dispute under s 73(1)*(a)*. A hearing was convened but, as evidence about the service unfolded, the proceedings were interrupted and negotiations were resumed. At one stage the ESC pointed out that if a dispute arose as to whether a particular employee was employed in an essential service, it could be dealt with by the committee under s 73(1)*(b)*. In the light of this, the process resulted in consensus between the parties and the signing of the minimum services agreement which was then ratified by the ESC.

[27] Of course the fact that in the past the provisions of s 73 were used to negotiate the terms of a minimum services agreement does not mean that the section was correctly applied or that the legislature intended it to be used in that way. Nevertheless it is of some illustrative significance that the parties themselves at that stage successfully used those provisions for that purpose.

[28] The issue is whether, properly construed, the provisions in question are

11 See the article mentioned in footnote 9 at p 29-30.

capable of being employed as suggested by the ESC. In interpreting statutes in the light of the Bill of Rights, it is necessary to read the legislation 'in ways which give effect to its fundamental values'.[12] In regard to the LRA in particular, it is necessary to remember that:

'The statute itself requires in s 3 that it be interpreted to give effect to its primary objects, and in conformity with the Constitution (Constitution of the Republic of South Africa (Act 108 of 1996)) and South Africa's public international law obligations. Section 1 expresses the LRA's primary objects amongst others as "to give effect to and regulate the fundamental rights" conferred by s 23 of the Constitution (para *(a)*); and to promote "orderly collective bargaining" (para *(d)*(i)). "Conformity with the Constitution" entails inter alia that the provisions of the LRA must be considered against the background of the Constitution, which is the supreme law of the land and which itself requires that this court when interpreting the LRA promote the spirit, purport and objects of the Bill of Rights.'[13]

In a similar vein, in *South African Police Service v Police and Prison's Civil Rights Union & another* Nkabinde J reminded us that an important purpose of the LRA is to give effect to the right to strike and that the process of interpretation should give effect to that purpose 'so as to avoid impermissibly limiting the right to strike'. [14]

[29] Bearing the importance of the fundamental right to strike in mind, the legislature would hardly have expected employees working within a designated essential service industry whose services were not required in order to provide an acceptable minimum essential service to have no remedy should agreement not be reached with their employer on a minimum services agreement. One of the functions of the ESC is to determine disputes and alleged disputes on whether or not the whole or part of any service is an essential service – s 70(2)*(b)* – a function closely allied to that prescribed in s 73(1)*(b)* viz to determine whether or not an employer or employee is engaged in a service designated as an essential service. And while a 'minimum service' is not defined in the LRA, it is evident that s 72 had in mind a minimum service of a designated essential service whereby the ambit of the designated essential service is reduced as between employer and employees to the

12 Per Harms DP in *Minister of Safety and Security v Sekhoto* 2011 (5) SA 367 (SCA) para 15 referring to *Investigating Directorate: Serious Economic Offences and others v Hyundai Motor Distributors (Pty) Ltd & others; In re Hyundai Motor Distributors (Pty) Ltd & others v Smit NO and others* 2001 (1) SA 545 (CC) (2000 (2) SACR 349; 2000 (10) BCLR 1079) paras 21-26.
13 Per Cameron JA in *Chemical Workers Industrial Union v Plascon Decorative (Inland) (Pty) Ltd* (1999) 20 ILJ 321 (LAC) para 18.
14 Note 2 above para 30.

minimum service ─ resulting in those employees who are not required to perform the minimum service regaining the right to strike.

[30] In these circumstances, and in the context of a minimum services agreement which, if ratified, is to be regarded under s 72*(a)* as being 'an essential service in respect of the employer and its employees', a dispute as to whether or not the services of certain employees or categories of employees are required to maintain an acceptable minimum service is capable of being construed as a dispute in regard to whether such employees' services are an 'essential service' or whether they are 'engaged in a service designated as an essential service' as envisaged by s 73(1)*(a)* and *(b)*. Accordingly, for example, the issue whether the services of employees who tend the appellant's gardens is an essential service or whether such persons are engaged in a service designated as an essential service, seems readily to be capable of resolution under this section. But by the same token, a dispute as to how many employees in which particular categories are necessary to provide a minimum service at an acceptable level, seems to me to be equally capable of being construed as a dispute in regard to what service should be regarded as an essential service or the number and category of employees needed to be engaged in the service designated as an essential service – and therefore susceptible to determination by the ESC under s 73.

[31] This conclusion does no violence to the language used in the section and places the least limitation upon the fundamental right to strike as it facilitates a process under which the employees of an employer are not obliged to 'lump it' if agreement cannot be reached on the terms of a minimum services agreement in an industry in which their right to strike has been curtailed.

[32] It follows in my view that the Labour Appeal Court erred in finding that the dispute between the parties as to the terms of the minimum services agreement is a dispute which could be conciliated or arbitrated under s 74 of the LRA. It is a dispute which the only the ESC could determine under the provisions of s 73 (as it contended in this court). The order of the Labour Appeal Court thus cannot be allowed to stand.

[33] In the result the following order is made:

(1) The appeal succeeds with the first and second respondents being ordered to pay the costs of the appellant, such costs to include the costs of two counsel where so employed.
(2) The order of the Labour Appeal Court is set aside and substituted with the following:
'The appeal is dismissed, with costs.'

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L E Leach
Judge of Appeal

APPEARANCES:

For Appellant:	R Sutherland SC (with him F Boda) Instructed by: Cliffe Dekker Hofmeyr Inc, Johannesburg Naudes Inc, Bloemfontein Lovius Block, Bloemfontein
For Respondent	P Kennedy SC (with him H Barnes) Instructed by: Cheadle Thompson & Haysom, Johannesburg

McIntyre & Van der Post, Bloemfontein

For Intervening party	N Cassim SC Instructed by: Routledge Modise t/a Eversheds Johannesburg Lovius Block, Bloemfontein