IN THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable

Case no: JR 1147/16

In the matter between:

NATIONAL UNION OF MINEWORKERS **Applicant**

And

ESSENTIAL SERVICES COMMITTEE **First Respondent**

CHAIRPERSON: ESSENTIAL SERVICES COMMITTEE *N.O.* **Second Respondent**

ESKOM HOLDINGS SOC LIMITED **Third Respondent**

NATIONAL UNION OF METALWORKERS OF SOUTH AFRICA **Fourth Respondent**

SOLIDARITY **Fifth Respondent**

Delivered: 10 April 2019

JUDGMENT

TLHOTLHALEMAJE, J

Introduction

[1] The applicant (NUM) approached this Court in terms of the provisions of section 158(1)(g) of the Labour Relations Act (LRA)[1] to seek an order reviewing and setting aside the Minimum Services Determination (Determination) dated 28 April 2016, handed down by the second respondent, who is the Chairperson of the Essential Services Committee (the ESC).

[2] The ESC was called upon in terms of the provisions of section 70D(f)[2] read with section 72[3] of the LRA (which has since been amended) to determine

[1] Act 66 of 1995, as amended

[2] Section 70D**: Powers and functions of panel**

(1) The powers and functions of a panel appointed by the essential services committee are to—
(a) conduct investigations as to whether or not the whole or a part of any service is an essential service;
(b) determine whether or not to designate the whole or a part of that service as an essential service;
(c) determine disputes as to whether or not the whole or a part of any service falls within the scope of a designated essential service;
(d) determine whether or not the whole or a part of any service is a maintenance service;
(e) ratify a collective agreement that provides for the maintenance of minimum services in a service designated as an essential service; and
(f) determine, in accordance with the provisions of this Act, the minimum services required to be maintained in the service that is designated as an essential service.

(2) …

[3] Section 72: **Minimum services**

(1) When making a determination in terms of section 71, a panel of the essential services committee may issue an order—
(a) directing the parties to negotiate a minimum services agreement as contemplated in this section within a period specified in the order;
(b) if an agreement is not negotiated within the specified period, permitting either party to refer the matter to conciliation at the Commission or a bargaining council having jurisdiction.

whether five positions identified within the Human Resources department of the third respondent, Eskom Holdings (SOC) Ltd (Eskom) fell within the Minimum Service Agreement (MSA). The ESC determined that they did, and that the incumbents in those positions were precluded from embarking on any form of industrial action.

Background facts

[3] The ESC is a statutory body established in terms of the provisions of section 70[4] of the LRA and its primary function is to *inter alia,* monitor the implementation and observance of essential services determinations, minimum services agreements, maintenance services agreements and determinations, and to further promote effective dispute resolution in essential services.[5] The ESC is empowered to conduct investigations to determine whether or not the whole or a part of any service is an essential service, within the meaning of the provisions of the LRA, and the minimum services required to be maintained in the service that is designated as an essential service.[6]

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(2) If the parties fail to conclude a collective agreement providing for the maintenance of minimum services or if a collective agreement is not ratified, a panel appointed by the essential services committee may determine the minimum services that are required to be maintained in an essential service.
(3) If a panel appointed by the essential services committee ratifies a collective agreement that provides for the maintenance of minimum services in a service designated as an essential service or if it determines such a minimum service which is binding on the employer and the employees involved in that service—
  (a) the agreed or determined 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.
(4) A minimum service determination—
  (a) is valid until varied or revoked by the essential services committee; and
  (b) may not be varied or revoked for a period of 12 months after it has been made.

[4] Section 70: **Essential services committee**
The Minister, after consulting NEDLAC, must establish an essential services committee under the auspices of the Commission in accordance with the provisions of this Act.
[5] Section 70B.
[6] Section 70D.

[4] Eskom, which is opposing the review application, is a State owned entity primarily in the business of generating, transmitting and distributing (herein referred to as GTD) electricity within the Republic and its neighbouring states. It employs about 41 000 employees operating in about 600 buildings in over 440 working sites that perform different functions.

[5] The fourth respondent, the National Union of Metalworkers of South Africa (NUMSA) also has a membership at Eskom. It was initially party to the proceedings before the ESC but had subsequently withdrawn. It however obtained observer status in those proceedings. The Fifth Respondent, Solidarity also has membership in Eskom. Even though it was represented in the proceedings before the ESC, it had not filed a statement of case nor submissions, and had aligned itself with NUM's case. Like NUMSA, Solidarity is not a party to these review proceedings.

[6] On 12 September 1997, the ESC issued a notice in the Government Gazette publishing its decision to declare GTD of electricity as an essential service. During 1998, Eskom and the registered trade unions entered into a Minimum Services Agreement (MSA) which was ratified by the ESC. The agreement remained in force until it was cancelled on or about 31 March 2004. After the cancellation of the 1998 agreement, the parties were unable to conclude a new MSA.

[7] A dispute as a result of disagreements as to which forum was competent to determine it, started at the Commission for Conciliation, Mediation and Arbitration (CCMA) and found its way to the Supreme Court of Appeal (SCA). Judgment of the Supreme Court of Appeal (SCA) was delivered on 30 November 2011 and it was held that the ESC was the competent forum to determine any dispute that may arise in respect of Minimum Services Determinations.[7]

[7] See: *Eskom Holdings Ltd v National Union of Mineworkers and Others (Essential Services Committee Intervening)* [2012] 3 BLLR 254 (SCA).

[8] On 4 June 2012, NUM referred a dispute to the ESC, having framed the nature of the dispute as follows;

> 'NUM (and other unions organising at ESKOM) have been unable to agree with ESKOM on a new minimum services agreement. The Unions and ESKOM deadlocked over the issue during 2007. The unions proposed an amended minimum services agreement which ESKOM rejected'

[9] The parties having filed their respective statements of cases from 12 October 2012, the matter was initially heard on 30 October 2014 when a further issue arose as to which party had the duty to begin. The ESC issued a ruling that NUM had the duty. The matter was then heard on 17 November 2014 and was part-heard following the evidence of one witness called by NUM (Mr Ndlela John Radebe).

[10] Following further sittings, and in the light of disputes surrounding whether all of Eskom's employees were engaged in GTD, on 25 March 2015, the parties (including the other unions) concluded a settlement agreement in regards to which departments were involved in GTD. The agreement was by consent, made an order of the ESC. The essential elements of the agreement are that;

10.1 Employees (including shift, standby, call out workers and those on training or spare) who were involved in Group Security and GTD of electricity were engaged in the designated essential service, and were not permitted to participate in any industrial action.

10.2 Employees (including call out, shift and standby workers on training and spares) in Primary Energy, Group IT, Outage Management, Commercial, Customer Services, Telecommunications, Finance, Human Resources and Sustainability were all engaged in the designated essential services and were not permitted to participate in any form of industrial action.

10.3 All employees engaged in the Office of the Chief Executive (CEO) and Group Capital, were not essential services employees for the purposes of the agreement.

[11] Subsequent to the settlement agreement, the ESC was called upon to determine which positions should constitute minimum services within the Human Resources Department. The parties filed further statements of case in July and October 2015.

[12] At the proceedings on 25 November 2015, the parties reached an agreement that the proceedings before the ESC should be less adversarial and that no cross-examination should be permitted except for the purposes of seeking clarity.

The hearing before the ESC

[13] Eskom's case was that not all employees employed in the Human Resources Department were minimum services workers. It had identified the Human Resources job categories that fell outside the minimum services, and accordingly conceded that some employees employed in its Human Resources department were entitled to go on strike. It had however remained steadfast that some positions which were the subject matter of the dispute before the ESC fell within the category of minimum services.

[14] The deponent to the answering affidavit in these proceedings, Mr Albertus van Jaarsveld (Van Jaarsveld), Manager: Special Projects, was the sole witness on behalf of Eskom at the proceedings before the ESC. His evidence centred around the five Human Resources positions, which were the subject matter of

the dispute, the job profiles of each category, and his motivations as to why these positions should fall within minimum service.

[15] The evidence of van Jaarsveld before the ESC in regard to the disputed positions is summarised as follows:

15.1. The **Officer Human Resources,** is one of Senior Human Resources personnel, and is responsible for at least 300 operational employees. There were 180 Officers who were expected to develop a comprehensive Human Resources plan for a specified area for the determination of the long and short-term workforce requirements in consultation with line management and in support of the departmental business plan.

15.2. It was further the responsibility of the Officer Human Resources to evaluate/scan the environment, interpret data and to provide advice to management in respect of that data. In addition to that, the Officers also served as members of strike committees for a specified location for the duration of any industrial action that may have taken place.

15.3. The Officers' responsibility in a strike committee would include the identification and recordal of the names of employees who are considered as part of minimum service, and who might be participating in an industrial action. This is needed for purposes of any litigation during the strike.

15.4. The Officers were also responsible for capturing of data on the system for the purposes of overtime pay and other remuneration. There are at least 70% of employees of Eskom, who fall under the GTD category, who were directly serviced by these Officers.

15.5. In regards to the position of **Assistant Officer Human Resource**, van Jaarsveld's evidence was that there were approximately 80 employees who were employed as Assistants.

15.6. These were at a lower level as compared to the Officers, and were to a large extent, responsible for the collating and processing of data, which they were required to directly input into the system. Over and above that, the Assistants were responsible for the facilitation of a number of operational issues, including overtime work. The Assistants in such cases would be responsible for the administration of overtime, travelling and transportation arrangements for employees on duty.

15.7. The Assistants had the responsibility of knowing which personnel ought to be on duty at a specified power station and at a specified time, and were responsible for monitoring absenteeism during industrial action, and providing updates and reports to line managers.

15.8. The **Officer Industrial Relations** was responsible for providing specialist industrial relations advisory services, and was an integral part of assisting management as per their job profiles.

15.9. In instances where there was a work stoppage, the Industrial Relations Officer was the first point of contact with the relevant trade unions, and a channel between the trade unions and management. In the end, these employees were responsible for the management of any industrial action and liaison with senior management during industrial action in line with Eskom's policies and relevant legislation. They were further tasked with communicating with essential or minimum service workers who were obliged to attend work on other matters such as work safety.

15.10. The **Occupational Health Nurses** were responsible for comprehensive occupational and primary health care services in accordance with Eskom's health policies, procedures and other regulatory requirements. The health care services included emergency health care services to all employees. These employees were required to be on-site or at regions. They were also in charge of health clinics at specified power stations and were by implication, responsible for emergency healthcare. They were also required to

identify and report on environmental issues and occupational hazards at the workplace.

15.11. The Nurses were not shift workers, and were ordinarily on standby in an event of a serious occurrence. They could be called into action and be tasked with the responsibility of coordinating medical evacuations or for providing care in the event of injuries to employees.

15.12. The **Wellness Officers Lifestyle Management** were the first line of counselling in an event of traumatic incidents such as being locked in a building during an industrial action. They were responsible for the assessment of risk factors and identification of any threat against the safety of other employees including stress levels. They were also responsible for assessing whether employees were emotionally fit to resume their duties, and for identifying employees for further referrals to other professional services.

[16] Van Jaarsveld contended that on the whole, approximately 30% of the employees within Eskom's Human Resources Department would fall within the category of minimum services, and that the remaining 70% were thus able to participate in any industrial action.

[17] NUM called upon Mr Paris Mashego (Mashego), who was employed as its Energy Sector Coordinator. He is a former Eskom employee, having started his employment in September 1981 and resigned in May 2015. Whilst employed by Eskom, he held the positions of Plant Operator and Wellness Officer. He was also elected as a Full-Time shop steward, and at some point, as Regional Secretary for the NUM's Highveld Region.

[18] Mashego's starting point was to give his own understanding of the concept of minimum services. His view was that minimum services involved services, the retardation of which would compromise life, health and safety of employees.

NUM's position was that none of the identified positions in dispute within Human Resources Department should comprise a minimum services. His reasoning was as follows;

18.1 Eskom has since put in place, the SAP system, which is an automated system enabling it to perform Human Resources functions online. Equally, a Shared Services system was set up where all shared services throughout Eskom's power stations were brought into one centre for the purposes of processing administration matters such as leave, overtime, hours of work etc, with the result that Human Resources functions were now automated.

18.2 The only time that Human Resources personnel were to be physically involved was when they had to process absenteeism or overtime, and punch data in that regard into the system. In the light of the automated system, any industrial action or absence of Human Resources personnel would not impact on the payment of salaries.

18.3 The Human Resources function as a whole did not represent a threat to GTD, nor to life, health and safety of employees or the general public. The five positions or functions in contention had no impact at all should there be a strike, as they were not directly involved with Eskom's primary business of GTD. Those functions were merely supportive in nature, and their interruption would not inconvenience Eskom at all.

18.4 In regards to the position of **Officer Human Resources,** Mashego's contention was that it was not true that these officers provided guidance, information and instruction to line management in an event of a strike. He contended that in the event of a strike, and within the context of picketing, certain individuals were identified to be responsible for disseminating information, or to engage in negotiations and discussions between the parties. In all instances, there would ordinarily be the most senior IR personnel in a particular area. He further submitted that usually during strikes, it would also be security

personnel who monitored and observed events; and that there were surveillance monitors throughout Eskom's premises, which were controlled at a central place.

18.5 In regards to **Assistant Officers, Human Resources,** Mashego's contention was that these positions were at a very junior level, and whatever Human Resources functions that would need to be performed during a strike, which were minimal, could be performed by more senior personnel. Their absence therefore during a strike would not have any impact on the core business of Eskom.

18.6 In regards to the position of **Officer, Industrial Relations,** NUM's position was that these posts need not be part of the minimum services as employees in those positions performed the same function as **Advisors, Industrial Relations,** which was to assist employees and management in grievance hearings and other labour related matters. Their absence would not impact on Eskom's operations.

18.7 In regards to **Occupational Health Nurses,** Mashego's contention was that they were not involved in primary health care, and that their function was to check the medical conditions/status of employees and dispense with basic medication. He added that the nurses were normal shift employees, and did not work shifts nor were they required to work over weekends.

18.8 Their services were not required during night shifts. According to Mashego, in an event that employees sustained serious injuries, they could be attended to by the nurses if such injury happened during the day. Where the nurses were not available, employees needing medical attention could be attended to by other shift workers, plant operators and senior shift supervisors, who were all trained in first aid, and who were able to stabilise the injured employees whilst waiting for an ambulance. Mashego further testified that individual power stations did not have the capacity to provide injured employees with anything more than first aid.

18.9 In regards to **Wellness Officer Lifestyle Management,** Mashego's contention was that these positions were more concerned with sports and recreation, and to present employees with information. They were tasked with organising events surrounding health matters throughout the year whether on a monthly or weekly basis. Their tasks also involved going out to various sites to make presentations and looking after the financial wellness of employees. To the extent that a strike took place, Mashego's contention was that these employees would not be required at work as there would be no employees to attend to during a strike.

[19] In response to questions from the panel, Mashego submitted that strikes at Eskom normally took place over three days, and if they went beyond that period, there may be an impact as Human Resources personnel are responsible for the preparation of payroll; recordal of absenteeism; overtime payments and general payments. He further submitted that Human Resources personnel were however not involved in the rostering of shifts, as that it was an operational matter attended to by shift supervisors.

[20] To the extent that the parties had agreed as per their settlement agreement that the finance and Human Resources functions were part of essential services, and yet NUM did not accept that Human Resources Officers should form part of minimum service, Mashego was asked whether if the ESC was to find that the posts should form part of the minimum services, this would imply that all concerned employees should be affected rather than exceptions being made. His response was that all of the personnel should then be so classified. He contended that it was not for the ESC to make alternative orders in the sense of ruling that for example, two out of ten positions should form minimum service.

<u>The ESC findings</u>

[21] The ESC concluded that all the positions in dispute fell within the category of minimum services of Eskom and for these reasons, the incumbents in those positions were precluded from embarking on any form of industrial action. The conclusions of the ESC are summarised as follows:

21.1. The parties' submissions where mutually exclusive and culminated in a *"winner takes all"* approach, which had the consequences that if the ESC were to find in favour of NUM, then the disputed job categories within the Human Resources Department would be wholly excluded from the minimum services.

21.2. That approach however did not allow the ESC to make a determination that a certain number of employees within a particular department or within a job category were necessary to maintain a minimum level of service in order to ensure that no life was exposed to any hazardous situation. In the ESC's view, the evidence did not support this contention.

21.3. In accepting Eskom's contentions, the ESC held that the test to be applied in disputes such as the present was not the extent or the duration of the interruption (industrial action) to the essential service(s), but the maintenance of the essential service, to ensure that life, personal safety and health of the population was not endangered.

21.4. The ESC further opined that its function as a dispute resolution forum in the current dispute was not to abolish or invalidate the existing minimum service designation(s) but rather to determine if and how a reduction in positions designated as essential services may be reconfigured.

21.5. The ESC took into account that there was a previous designation in respect of GTD during 1997. It further took into account the terms of

the 25 March 2015 settlement agreement wherein the business units of Eskom were listed, and which gave practical and organisational effect to the 1997 essential services designation. That settlement agreement which was made an order of the ESC, determined that all Eskom employees (including call out workers, shift and standby workers on training or spare) engaged in Human Resources were engaged in the designated essential services and could not embark on any form of industrial action.

21.6. It accordingly concluded that the approach adopted by NUM would effectively lead to an abolishment of the previous essential services designation of the ESC.

21.7. The ESC noted that notwithstanding the fact that a party to a minimum service agreement could in terms of the provisions of section 71(9) of the LRA approach the ESC to either cancel or vary any existing designation handed down by it, NUM had not exercised that right. This was indeed common practice and other trade unions had in the past utilised that procedure to withdraw from the previous proceedings before the ESC.

21.8. In the ESC's view, the true dispute that ought to be resolved in the light of the evidence adduced and the submissions advanced by the parties, was, which positions if any, should remain classified as minimum services within the Human Resources Department.

21.9. Since the parties had adopted a *"winner takes all"* approach to the proceedings, there was no evidence offered by NUM that would enable the ESC to make a determination that would reduce the number of employees to be classified as minimum services, so as to create a balance of the employees who could participate in a protected industrial action.

21.10. The ESC accepted the evidence of van Jaarsveld and the accompanying job profiles, which demonstrated that the positions in dispute fell within the category of minimum services. Moreover, the

ESC was of the view that the Old Minimum Service Agreement could not be relied upon having taken into account the current circumstances in the Republic, business operations and Eskom's operational needs.

The legal framework and the test for minimum services:

[22] The starting point is the acknowledgment of the right of workers to strike as enshrined in section 23(2)*(c)* of the Constitution of the Republic[8]. The right to strike however is not absolute[9] 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.

[23] In conformity with the Constitution, the LRA confers upon every employee the right to strike, but it also imposes limitations on this right. The limitations, to the extent relevant for the purpose of this dispute are contained Section 65 (1) of the LRA[10]

[24] A determination as to whether a service falls within minimum services invariably limits employees' Constitutional right to participate in industrial

[8] 108 of 1996.

[9] See *South African Police Service v Police and Prisons Civil Rights Union and Another* [2011] 9 BLLR 831 (CC); 2011 (9) BCLR 992 (CC); 2011 (6) SA 1 (CC); (2011) 32 ILJ 1603 (CC) at para 20; *Eskom Holdings Ltd v National Union of Mineworkers and Others* 2012 (2) SA 197 (SCA); [2012] 1 All SA 278 (SCA); [2012] 3 BLLR 254 (SCA); (2011) 32 ILJ 2904 (SCA) at para 4.

[10] **65. Limitations on right to strike or recourse to lock-out**

(1) No person may take part in a *strike* or a *lock-out* or in any conduct in contemplation or furtherance of a *strike* or a *lock-out* if –
(a) that person is bound by a *collective agreement* that prohibits a *strike* or *lock-out* in respect of the *issue in dispute*.
(b) that person is bound by an agreement that requires the *issue in dispute* to be referred to arbitration;
(c) the *issue in dispute* is one that a party has the right to refer to arbitration or to the Labour Court in terms of *this Act* or any other employment law;
(d) that person is engaged in -
(i) an *essential service*; or
(ii) a maintenance service

action. It is within this context that just as with essential services, any determination regarding whether a service ought to be regarded as minimum, ought to entail a restrictive interpretation, so as not to impermissibly limit employees' Constitutional right to strike.

[25] Until the amendments to section 72 of the LRA[11], any guidance as to what truly constituted minimum services was left to the ESC to formulate. Any attempts at a statutory definition of what a minimum service entailed would have ended with a one-size-fits-all formula, which would have been unhelpful or impractical given the dynamics in the world of work in general.

[26] The amendments envisage a MSA to be one in which employees in an essential service are allowed to strike provided that an entity maintains the minimum level of production or service. Significant with the amendments is that they refer to ''*determined minimum service'* which means the minimum number of *employee*s in a designated *essential service* who may not strike in order to ensure that the life, personal safety or health of the whole or part of the population is not endangered. This guideline for a lack of a better description is only helpful in parts, as the ESC, still has to make a

[11] Act No. 8 of 2018: Labour Relations Amendment Act, 2018 (No. 42061 Government Gazette, 27 November 2018

Amendment of section 72 of Act 66 of 1995, as amended by section 13 of Act 6 of 2014.

6. Section 72 of the principal Act is hereby amended—

(a) by the substitution for subsection (5) of the following subsection:
''(5) Despite subsections (3) and (4), section 74 applies to a designated *essential service* in respect of which the essential services committee has ratified a minimum services agreement or has made a determination of minimum services if the majority of *employees* employed in the *essential services* voted in a ballot in favour of this.''; and

(b) by the addition of the following subsection:
''(9) For the purposes of this section, a 'ratified minimum service' or 'determined minimum service' means the minimum number of *employee*s in a designated *essential service* who may not strike in order to ensure that the life, personal safety or health of the whole or part of the population is not endangered.''

'determination' as to what constitutes '*minimum service that maintains a level of production or service*.'

[27] A look at other guidelines is useful. Cheadle *et al* refer to minimum service as referring to *those specific activities that are truly indispensable for the preservation of life, personal safety and health* through the provision of a service that has been designated as essential. The learned authors however contends that there is a lack of logic in the concept of minimum services, as an exercise is followed in terms of which it is concluded that a service that is essential service and, as such, employees employed in that service may not strike. However, it can thereafter be agreed or determined that the prohibition of strikes is justified in only part of the service. In their view, it follows that the entire service was not essential in the first place and only a part of it needed to be declared essential[12].

[28] Daya Pillay states that a minimum service is one t*hat is sufficient to ensure that during strikes no person's life, personal safety or health is endangered, and that any service necessary to meet this objective must be included in the MSA. Any service superfluous to meeting this objective falls outside the definition of minimum service*[13].

[29] Insofar as international standards are concerned, guidance is sought from various sources of the ILO, including the ILO labour legislation guidelines which included draft provisions for Member States regarding minimum service, and which provides that;

> "(a) the minimum service shall be such as to ensure that the life, health and personal safety of the population is adequately safeguarded".

[12] Strikes and the Law.(Lexis Nexis) at p 99.
[13] Daya Pillay. *'Essential Services: Developing Tools for Minimum Service Agreements'* (2012) 33 ILJ 801 at p 811

[30] The position of the Committee of Experts on the Application of Conventions and Recommendations regarding a minimum operational service is that;

> ”In the view of the Committee, such a service should meet at least two requirements. Firstly, and this aspect is paramount, it must genuinely and exclusively be a minimum service, that is one which is strictly necessary to meet the basic needs of the population or the minimum requirements of the service, while maintaining the effectiveness of the pressure brought to bear. Secondly, since this system restricts one essential means of pressure available to workers to defend their economic and social interest, their organisation should participate in defining such service”[14]

[31] In regards to the determination of minimum services to be maintained, the Committee on Freedom of Association further states that;

> ”The determination should involve employers and employee representatives. This not only allows a careful exchange of view-points on what in a given situation can be considered to be the minimum service that are strictly necessary, but also contributes to guaranteeing that the scope of the minimum service does not result in the strike becoming ineffective in practice because of its limited impact, and to dissipating possible impressions in the trade union organisations that the strike has come to nothing”.[15]

[32] In the *ILO Freedom of Association: Digest of the Decisions of Freedom of Association Committee of the Governing Body of the ILO*, it is suggested that;

> “The establishment of minimum services in the context of essential services in the strict sense must be distinguished from (1) agreed minimum services in respect of a service that is not essential in the strict sense, but the cessation

[14] ILO Principles Concerning the Right to Strike, Messrs Gernigon, Odero and Guidoat p 32
[15] ILO Principles Concerning The Right to Strike at p 31.

of which could nonetheless result in an acute national crisis endangering the normal living conditions of the population and (2)…"

and

"Services that are not essential but inconvenience to or longer term impact on the public when these services are not available are considered as justification for a limitation on a right to strike"[16]

[33] The approach of the Supreme Court of Appeal (SCA) in *Eskom Holdings Ltd v National Union of Mineworkers and Others (Essential Services Committee Intervening),* effectively laid the basis of the amendments to section 72 of the LRA by stating that:

"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…"[17]

[16] (5th ed 2006) at para 606.

[17] At para 8. See also at para 29, where it was held that;

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

[34] The common themes that come out of the above guidelines and the SCA are '*minimum service that maintains a level of production or service'*; *'specific activities'*; 'service *that is one which is strictly necessary to meet the basic needs of the population or the minimum requirements of the service'.*

[35] There is however a general consensus that central to minimum services, is a respect of employees' right to strike, whilst at the same time maintaining certain services in '*ensuring that the life, personal safety or health of the whole or part of the population is not endangered'*. Concepts such as '*inconvenience'*. *'acute national crisis'*; '*service that is superfluous'* or '*truly indispensable'* are in my view relative to each given circumstance, and may or may not be helpful.

[36] Flowing from the above, it can be accepted for the purposes of this dispute, and even on a general level, that the test in determining what constitutes a minimum service entails;

36.1 Taking into account employees' constitutional right to participate in industrial action, which ought to be balanced against the general public interest.

36.2 An examination of specific critical or necessary services required within an essential services designation, that must be maintained at acceptable levels during the course of industrial action, to ensure that life, personal safety or health of the whole or part of the population is not endangered.

36.3 An assessment of whether a service is superfluous or critical to the overall objective of minimum services through an examination of whether the core business of the entity/service consists of components which are/or not intertwined or interdependent.

36.4 If the business components of an entity are interdependent, an assessment needs to be made as to whether a determination of

minimum services will achieve its objectives by attaching significance to any individual business component to the exclusion of any relationship with other components, or whether a composite assessment of the components would be necessary in order achieve those objectives.

The applicable test on review

[37] NUM's contentions were that to the extent that section 72 of the LRA provides that the ESC must make determinations in respect of minimum services, it followed that any review of that determination should be brought under the provisions of section 158 (1) (g) of the LRA[18].

[38] NUM however goes further and contends that based on the proposition in *Building Industry Bargaining Council (Southern and Eastern Cape) v CCMA and Others*[19], a review under section 158 (1) (g) would include a review based on the provisions of the Promotion of Administrative Act (PAJA)[20], and that to this extent, it relied on the provisions of sections 6 (2) (d); 6 (2)(e)(iii); 6 (2) (f) (ii) and 6 (2) (h) of that Act.

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[18] '**158. Powers of Labour Court**
(1) The Labour Court may -
(g) subject to section 145, review the performance or purported performance of any function provided for in *this Act* on any grounds that are permissible in law;

[19] [2011] 4 BLLR 330 (LC), where it was held that;
"[13] In my view, there is no merit in adopting the restrictive interpretation of s 158 (1) (g) for which the applicant contends. Section158 (1) (g) is patently not limited to what is known as a legality review - the section empowers this court to review the performance of any function under the LRA 'on such grounds as are permissible in law'. This includes not only a review of the exercise of any public power under the LRA on the basis of the principle of legality but also, in appropriate circumstances, the review of administrative action under the PAJA and possibly a common law review. In other words, s 158(1) (g) establishes what might be termed a 'jurisdictional footprint' for the review of the performance of functions under the LRA – the basis for review is dependent on the nature of the decision taken. Section 7 of the PAJA, read with the definition of 'court' in s 1, certainly contemplates this that court is empowered to entertain proceedings for judicial review."

[20] Act no 3 of 2000.

[39] In the alternative, and to the extent that the Court may hold the view that despite the wording of the LRA, a determination of the ESC amounts to an arbitration award, NUM contends that the applicable test would then be that under section 145 of the LRA, which is whether the decision is one which a reasonable decision maker could not reach.

[40] To the extent that NUM sought to rely on PAJA, this was raised for the first time in the supplementary affidavit, and even then, it was reiterated that the application was brought under section 158 (1) (g), or alternatively under section 145 of the LRA.

[41] Eskom's position was that, there was no basis for a review under sections 158 (1) (g) or 145 of the LRA. It contends that when the ESC performs its functions as a specialist body, it is for it to determine whether or not the whole or part of a service falls within the scope of designated essential services in terms of section 70D of the LRA, and not the Court. It is the ESC that must determine any question of law or procedure, and must exercise a discretion and balance the competing interests. To that end, it was argued that the scope of a successful review on the grounds of mistake of fact or law was limited.

[42] Eskom further disputed that PAJA applied to the review proceedings and relied on *Minister of Labour and Another v PSA and Others*[21]*,* in arguing that

[21] (2017) 38 ILJ 1075 (LAC), where it was held that;

"[49] In respect of the first point, the cases illustrate that at times there is a fine line between administrative action under section 33, public and employment relationship issues in the public sector.

[50] The general distinguishing feature between the two is that section 23 of the Constitution deals purely with employment relationships and related issues and does not serve to protect persons outside that context, whereas section 33 of PAJA, principally, provides protection against unfair administrative action.

[51] What was established in *Gcaba* is a general principle that employment relationship issues do not amount to administrative action within the meaning of PAJA (i.e. as construed consistently with section 33 of the Constitution). The clear implication being that there could be exceptions to the principle and that certain employment relationship issues (i.e. actions) may amount to "administrative action" within the

the LRA was a specialised legislation that was enacted to give effect to section 23 of the Constitution, whilst PAJA was a general legislation that was subsequently enacted to give effect to section 33 of the Constitution.

[43] In regards to the above debate, it is accepted that the ESC is created by the LRA in terms of section 70(2) of the LRA, and its functions are outlined therein. There can be no dispute therefore that the ESC is typically a structure created to deal specifically with labour matters.

[44] Central to any determination of whether a service should be classified as minimum service is the right to strike. A determination in that regard, and to the extent that the parties had failed to agree on a MSA, entails an examination of the law and the facts, and given the competing interests at stake, it can be argued that there is clearly little room for an exercise of a discretion.

[45] In this case, and to the extent that NUM contended that the provisions of PAJA were applicable, it was correctly stated on behalf of Eskom that the submissions of NUM in that regard were merely a matter of form over substance, as the basis upon which NUM relied on each ground was no different to the substance of its LRA grounds of review.

[46] To illustrate; NUM had relied on section 6 (2) (d) of PAJA on the basis that the ESC had failed to develop a test for determining whether a position should fall within a minimum service, and further failed to develop that test in line with

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meaning of PAJA, properly construed. For example, there might be instances where grievances by State or public sector employees have implications or consequences for other citizens.

[52] Features that serve to distinguish the exception from the general are, *inter alia,* the source and nature of the action, whether the action involves, or is closely related to the formulation of policy, or to the initiation of legislation and/or whether it has to do with the implementation of legislation. In *De Villiers* the Labour Court added the existence of alternative remedies as another factor to be considered, due to the importance attached to that aspect in both the *Chirwa* and the *Gcaba* decisions."

the LRA, international instruments and the SCA judgment. That contention has no merit as shall further be elaborated later in this judgment, as the ESC had clearly developed and applied a test for the purposes of determining the dispute. To this end, reliance on these provisions is misplaced, and I will not burden this judgment with further illustrations, as these will be sufficiently dealt with in the evaluation below.

[47] What needs however to be added is that significant with the decision in *Building Industry*[22] relied upon by NUM is that in that case, the issue before van Niekerk J was whether the decision of the CCMA to *limit the accreditation* of the applicant to perform conciliation functions in respect of all employees and employers who fell within its registered scope, to a period of one year was reviewable under the provisions of section 158 (1) (g) of the LRA.

[48] The decision of the CCMA to accredit bargaining councils to perform certain statutory functions under the provisions of section 127 (4) of the LRA is distinguishable from a determination of the ESC under the provisions of section 72 of the LRA. That much at least can be gleaned from paragraph 25 of that judgment where van Niekerk J held that;

> "In short: a decision made by the CCMA under s 127, whether it is to grant or refuse accreditation or to extend accreditation on terms more limited than those sought by an applicant council, is not a decision that is infused with any of the considerations that caused the majority in Sidumo to find that while the making of a CCMA arbitration award is administrative action, the PAJA did not apply. There is no reason therefore why the PAJA ought not to have been the applicant's first resort - it is the statute that gives effect to the rights under s 33 of the Constitution, and which represents a codification of those rights (see *Bato Star* (*supra*) at para 25)."

[22] *Supra* n 19.

[49] Basson J in *Eskom Holdings (Pty) Ltd v National Union of Mineworkers and Others*[23] held that;

> "In line with the objective of the LRA which is, inter alia, to allow for the effective resolution of disputes, section 74 of the LRA provides that any party to a dispute that may not be engaged in industrial action because they are engaged in an essential service, may refer the dispute to the CCMA which must attempt to resolve the dispute through conciliation. If conciliation is successful, any party to the dispute may request the relevant body to resolve the dispute though arbitration. The outcome of the compulsory arbitration process would be an arbitration award. The commissioner will therefore effectively resolve the dispute for the parties as they are not afforded the right to enforce a resolution of the dispute by resorting to industrial action."

[50] In *Sidumo*, as correctly pointed on behalf of Eskom, the Constitutional Court held that the powers of this Court as set out in section 158 of the LRA differ significantly from the powers of a court set out in section 8 of PAJA, and that the latter provision provides that only in exceptional circumstances may a court substitute the administrative decision or correct a defect resulting from the administrative decision[24]

[51] Flowing from the above, it should be accepted as argued on behalf of Eskom, that the administrative justice provision of the Constitution suffuses the grounds of review under section 145 and 158 (1) (g) of the LRA, which in turn are suffused by the constitutional standard of reasonableness. The parties in this case having failed to agree on which positions within Eskom's Human Resources Department ought to fall under minimum services, the dispute then had to be subjected to compulsory arbitration, which resulted in the impugned award.

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[23] [2009] 1 BLLR 65 (LC) ; (2009) 30 ILJ 894 (LC) at para [31].
[24] *Sidumo and Another v Rustenburg Platinum Mines Ltd and others* 2008 (2) SA (CC) at para [98].

[52] The fact that the findings of the ESC are framed as a 'Determination' does not give it a different colour or texture for the purposes of a review under PAJA. The fact that the provisions of section 158 (3) of the LRA[25] omitted to refer to such determinations as arbitration awards does not make them less of awards. They remain awards which would ordinarily be subject to the review test under the confines of section 145 and 158 of the LRA.

Grounds of review

[53] Both parties had submitted extensive written heads of argument as also supported by the record. For the sake of convenience, I will summarise NUM's submissions, and deal with Eskom's within the context of my evaluation.

[54] The starting point for NUM in seeking a review is that four central questions should be answered by the Court, viz;

54.1 What was the ESC required to do in the proceedings relating to Eskom's Human Resources Department and in what manner was this duty carried out?

[25] (2) The reference to —arbitration in subsection (2) must be interpreted to include arbitration -

(a) under the auspices of the Commission;

(b) under the auspices of an accredited *council*;

(c) under the auspices of an accredited agency;

(d) in accordance with a private dispute resolution procedure; or

(e) if the *dispute* is about the interpretation or application of a *collective agreement*

54.2 Does the ruling give rise to a review?

54.3 If the ruling should be reviewed and set aside, should the Court substitute it?

54.4 If the ruling should be substituted, what is the test to determine whether a position should fall in or out of an MSA, and once that test is applied, do any or all of the five positions fall within the MSA?

[55] In line with the above questions, NUM's submissions were that:

55.1 The ESC was required to develop a test or provide guidelines in which manner a minimum service was to be determined, and apply the test in determining which positions ought to fall within a minimum service, and further to provide reasons in that regard.

55.2 In this regard, it was submitted that the ESC had failed to set out a test, provide guidelines, failed to apply the test, or engage at all with the five positions, and had simply accepted the evidence of van Jaarsveld that the positions should fall within a minimum service.

55.3 The ESC's failure to adopt a test culminated in a misconception of the parties' submissions advanced at the hearing, and further wrongly accepted the evidence of van Jaarsveld's in totality without it being weighed against the job profiles of the affected positions.

55.4 In the result, NUM seeks an order substituting the determination of the ESC with a finding, which holds that the test to be applied in determining whether a position should fall within a minimum service is '*whether, if that position is not filled, that would have a short term impact on the generation, transmission and distribution of electricity*.' If that test were

applied, the Court would reach a finding that none of the five Human Resources positions fell within the minimum service.

55.5 It further contends that the ESC failed to consider the parties' legal submissions and for that reason, it arrived at an irrational conclusion that the parties' submissions were mutually exclusive. NUM argues that the parties' legal submission before the ESC were identical and what differed was the factual application to the facts thereof. The ESC's failure to recognise that fact was a material error.

55.6 NUM contends that the ESC failed to develop guidelines, legal framework or approach to determine which positions fell within a minimum service and further contends that the ESC failed to determine based on the evidence before it, whether the five positions were necessary for Eskom's core business.

55.7 The ESC according to NUM adopted an adversarial approach and accepted van Jaarsveld's evidence without evaluating it against the job profiles of the five Human Resources positions, which in the result culminated in an irrational minimum service determination reviewable.

55.8 NUM contends that if the Committee applied the correct test, it would have reached a decision that holds that all the Human Resources positions would not have a short term impact on the GTD of electricity.

55.9 In regards to the evidence placed before the ESC, it was NUM's contentions that at a conceptual level, both parties viewed a minimum service in identical terms, which was that such service must be confined to all those positions which were critical to the maintenance of GTD, and that those which were not, should fall outside the minimum services designation.

55.10 It was argued that the only conceptual difference between the parties' positions was that NUM proposed a test whereby positions critical to the maintenance of GTD could be identified, and if a post was not occupied, whether this would have a short term impact.

55.11 In further attacking the determination, NUM contends that the finding that the parties' submissions were mutually exclusive and effectively came down to a '*winner takes all'* approach was irrational and bore no connection to the submissions, particularly since the submissions were identical, and further since Eskom had not postulated a test in determining whether a position was critical or not. To that end, it was contended that the ESC conflated the legal and factual submissions of the parties.

55.12 It was further submitted that the fact that NUM had not made submissions on reducing the number of employees in the five positions was entirely irrelevant to the issue before the ESC, which was whether any of the five positions should fall within a minimum service. In this regard, it was argued that both parties had accepted that if the positions should be included in the minimum services, all employees in those positions should be included in the minimum services designation.

55.13 In the end, NUM holds the view that whatever review test were to be applied to the current dispute, the fact remained that the ESC failed to proffer a test applicable to the evaluation of minimum services designations and that fact alone rendered the determination reviewable.

Evaluation

[56] The starting point in the consideration of whether the ESC's determination is reviewable is that, central to this dispute is what should constitute minimum services within the context of the 25 March 2015 settlement which was by consent, made an order of the ESC, and the 1997 essential service designation.

[57] That agreement in particular in my view should be the starting block of any determination as NUM had agreed that all employees in the Human Resources Department were engaged in the essential service and that none could strike. To this end, there is merit in Eskom's contentions that the order of a substitution as sought by NUM, to the effect that none of the job positions within Eskom's Human Resources Department fell within the minimum service is indeed bad in law and the anthesis of the 25 March 2015 ESC Order, and the 1997 essential service designation. This is further so in that the settlement agreement and the 1997 essential service designation remained legal and binding.

[58] Thus, it does not assist NUM at this belated stage to hold the view that none of the positions within the Human Resources Department should be categorised as minimum services when an agreement was already reached in that these positions or services formed part of the essential service. As the ESC correctly held, NUM had an option of resiling from the 1997 designation through its processes and had not done so. If NUM equally seeks to resile from the agreement which was made an order of the ESC, it cannot do so through these review proceedings.

[59] The next enquiry into what constitutes a minimum service in the contested positions in Eskom is a factual one, taking into account the guidelines set out elsewhere in this judgment, the applicable legislative provisions, and the overall public interests. That enquiry should discount any partisan and/or sectarian interests[26], as Eskom, as a State owned entity, invariably renders an invaluable to the general public.

[60] In this case, a factual basis was required for a proper determination to be made in regard to which positions rendering which critical services within Human Resources Department fell or should not fall under minimum services, in the sense that any cessation or interruption of those services *would* pose a

[26] *Supra* n 13 at p 12.

danger to life, personal safety or health of the whole or part of the population. That enquiry was obviously to take place within the context of an examination of Eskom's core business, which is the GTD of electricity; whether the core business constituted of interdependent components or not; and to further assess which of those positions were critical to the maintenance of that core business.

[61] NUM's contentions that the ESC failed to set out a test, or provide guidelines, or failed to apply the test, or engage at all with the five positions are unsustainable for a variety of reasons. This include *inter alia,* that the ESC accepted Eskom's contentions that the test to be applied in disputes such as the present was not the extent or the duration of the interruption (industrial action) to the essential service(s) as contended for by NUM, but the maintenance of the essential service, to ensure that life, personal safety and health of the population was not endangered. The test as accepted by the ESC is in line with international guidelines and the SCA judgment.

[62] The ESC had further held that its function as a dispute resolution forum in the current dispute was not to abolish or invalidate the existing minimum service designation(s) but rather to determine if and how a reduction in positions designated as essential service may be reconfigured.[27] I accept that these conclusions are a restatement of Eskom's submissions. However, the ESC having summarised them, had concluded in its analysis that it was in agreement with them.[28]

[63] NUM might not necessarily agree with that approach, but it does not imply that a test was neither formulated nor applied to the facts of the case. NUM had other than subscribing to the formulation of the test by the SCA, further suggested that the test to be applied in determining whether a position should fall within a minimum service was '*whether, if that position is not filled, that*

[27] At para 9.6 (b) of the Determination.
[28] At para 9.7 of the Determination.

would have a short term impact on the generation, transmission and distribution of electricity. Mashego's understanding of minimum services was further that minimum services involved *services the retardation of which would compromise life, health and safety of employees*.

[64] Clearly, the test as suggested by Mashego is off the mark as the focus is on the provision/maintenance of minimum services to ensure that the life, personal safety and health of the population or part thereof was not endangered. The focus is on services rendered by those employees, *and not on the employees* themselves as suggested by Mashego.

[65] The test proposed by NUM is equally flawed and is self-serving. This observation is made in the light of Mashego's evidence that any strikes at Eskom ordinarily took place over a maximum of three days, and it can only be assumed that any short term impact would be assessed against the duration of the strikes as anticipated. The tests as postulated by NUM also fails to take into account the evidence of Radebe, which was that the core business processes within Eskom were virtually integrated into functional structures across all areas of business operations, and the functional structures were aligned with and modelled on the value chain of GTD of electricity. This was in support of Eskom's case that its generation and distribution divisions were dependent on Human Resources services.

[66] Thus, for any determination to have been made based on a 'short term impact' when the business was virtually integrated would have been a tall order. On Mashego's testimony, and to the extent that his contention was that strikes normally took place over no more than three days, the question remains how any 'short term impact' under those circumstances could have been determined. Even more fatal to that proposition however is Mashego's concession that even if a strike lasted for or more three days, there will be an interruption to GTD of electricity.

[67] *'Short term impact'* is one of the many factors to be taken into account when making a determination. It is a relative concept that can mean anything, inclusive of endangerment to life personal safety or health of the population. It is nonetheless not panacea in the enquiry to determine what may or may not be classified as minimum services. It further cannot, by all accounts, be synonymous with '*endangerment to the life, personal safety or health of the whole or part of the population'*. In the circumstances, a determination as to whether a service within the Human Resources Department of Eskom ought to fall under minimum services cannot be made only based on the extent and duration of strike or what the short term impact of that strike may be on the core business. The enquiry into the absence of minimum services is much broader than that.

[68] The test is that as suggested elsewhere in this judgment. For the purposes of this dispute, and in the light of the consent order and the 1997 essential services designation, the issue for determination was whether it could have been reasonably expected of Eskom to continue with its core business in the absence of what it deemed to be the critical services of all the employees in its Human Resources Department who are the subject of the dispute, whilst at the same time, maintaining an acceptable level of production or services at which the life, personal safety or health of the whole or part of the population would not be endangered.

[69] An enquiry into the above as already indicated is a factual one, and this Court should thread carefully prior to interfering with such determinations, unless it can be demonstrated that the determination was unreasonable in the light of the facts and evidence placed before it, or that the ESC had failed to take into account the relevant procedural requirements and the law. The scheme of the LRA is designed to position the ESC as the specialist body expressly charged with determining what services are essential and, within an essential service, what the minimum or reduced essential service should be[29]. This Court

[29] *Supra* n 13 at p 807.

cannot therefore second-guess the thinking of the ESC as a specialist body, unless there are clear grounds for doing so.

[70] Any determination as to which services were to constitute minimum service within Eskom, would equally have factored in the public interest as already stated, particularly in the light of the consideration that at least 90% of the population of the Republic of South Africa depends on electricity generated, transmitted and distributed by Eskom.

[71] In this case, to the extent that there was a dispute in respect of the five identified positions, the advocated respective positions and submissions were to be amplified by compelling evidence. This is so in the light of the public interests and the Constitutional right (to strike) at stake, and the quest to establish whether a complete disruption of those services ***would*** not endanger life, personal safety and health of the population. This implies that all of these positions were to be placed under scrutiny for an objective assessment to be made whether or not they should fall under MSA. The job profiles of those positions were to be assessed in relation to the consequences should service in that regard be completely interrupted or not be at acceptable levels during a strike.

[72] Eskom had already conceded that some of those positions/services could be dispensed with, as their interruptions posed no danger to its core business or to life, personal safety or health of the whole or part of the population. In the light of these concessions, NUM's position that all of the services in the Human Resources Department should not fall under minimum services in the light of the settlement agreement and 1997 designation already referred to, was clearly untenable, as it clearly negated the 25 March 2015 agreement and 1997 designation.

[73] The ESC's findings and conclusions that the parties' positions were mutually exclusive and effectively came down to a *'winner takes all'* approach are reasonable in part, as it was more of NUM's approach that was *'winner takes all'.* That much came from Mashego's evidence when questioned by the panel, as his view was that should a determination be made either way, then all of the personnel in the Human Resources Department should accordingly be classified. He had stated that it was not for the ESC to make alternative orders in the sense of ruling that for example, two out of ten positions should form the minimum service. In a way, NUM's approach was all or nothing, and was averse to paring of positions in the event of a strike. Through its evidence and submissions, NUM left the ESC with no option other than to make its determination based on what the facts were.

[74] The ESC agreed with Eskom's legal approach, which was to determine minimum services that had to be maintained in the disputed job categories. Eskom through the evidence of van Jaarsveld as further supported by documentary evidence, had placed before the ESC, presentations, and the job profiles and descriptions for each of the categories. Van Jaarsveld had at the time, 25 years of service at Eskom and had played various roles within Human Resources, Industrial Relations Department, Business Partner, and Environment. He was at the time Eskom's Manager; remuneration and benefits. He had been party to processes in regards to the conclusions of previous MSAs. He had attested to the diverse nature of the business as conducted throughout the country and contended that there cannot be a standard minimum service for all areas as for instance, the one office in another area might have one Human Resources Practitioner without spares or alternatives, which implies that any strike in that office would bring Human Resources functions in that area or office to a standstill, which in turn may have consequences for core operations. He readily conceded that in some offices, there was a concentration of Human Resources personnel. His contention was that for minimum services, and given the nature of the business, what was looked at was which services were critical for the maintenance of those services or to maintain the support of the essential

services, and which service could be released. In this regard 300 out of 900 personnel/positions in the Human Resources Department were identified for minimum services. Van Jaarsveld had testified at length about the five positions and why they had to fall under the designation of minimum services.

[75] Similarly, Mashego had testified in regards to these positions, and on his version, he had experience in Human Resources as a Wellness Officer Lifestyle Management and Plant Operator. Given the nature of the proceedings, none of these witnesses were subjected to cross examination.

[76] The ESC had regard to the testimony of Mashego and reiterated Eskom's contentions with the difficulties in Mashego's evidence[30]. It came to the conclusion that van Jaarsveld's evidence as to why the positions must fall within the designated minimum services should be favoured, as there was no evidence to the contrary. There is therefore no merit in NUM's contentions that the ESC failed to properly assess and evaluate the evidence presented on its behalf. The fact that the ESC did not deal at length with the evidence and the submissions in its 'analysis' does not mean that it did not do so at all.

[77] Insofar as an assessment of these positions was concerned, it needs to be borne in mind that given the non-adversarial approach agreed to by the parties, the constraints with that approach would be self-evident. In his determination, the Chairperson of the ESC expressed misgivings with that approach, and confirmed that reliance in arriving at the determination was placed on the oral evidence and the submissions made, leading to a proper analysis of the oral evidence not being made. To the extent that the parties agreed to that procedure, NUM cannot therefore complain that the ESC had adopted an adversarial approach when favouring van Jaarsveld's evidence.

[78] The procedure agreed to was that the 'evidence' before the ESC was not tested, and what that implied is not whether the ESC was expected to believe

[30] At para 8.21

or disbelieve any version, but whether a clear case had been made for those opposing versions for an informed determination to be made. That clear case depended on the facts, and not conjecture or opinions of the parties on the matter. A statement such as one made by Mashego that a strike at Eskom might take three days, and that there may be an interruption or impact on GTD is mere conjecture. The consequences, or what endangerment may befall personal life, personal safety or health of the part or whole of the population cannot be left to fate or conjecture. The whole purpose of MSA is to guarantee (at least to a large degree), that such endangerment does not occur.

[79] NUM contends that van Jaarsveld's evidence in regards to **Officer/ Assistant Officer Human Resources and Assistant Officer Human Resources** was supposition, as these were new positions and there had been no protected strike at Eskom for over 12 years. It was argued that the role of these employees during an unprotected strike can have no bearing on whether those posts should form part of a minimum service. Van Jaarsveld's evidence is further criticised based on the contention that all the reporting functions would be functions related to protected strike; that other functions related to payments of overtime, subsistence and travel expense, and that non-payment in any event would not impact on GTD.

[80] Van Jaarsveld's evidence is further alleged to have been incoherent, and it was submitted that functions such as scanning the environment had no bearing on protected strikes, and that absenteeism of essential service personnel can be reported by shift supervisors. On the whole, it was submitted that the absence of these officers would not have short term impact on GTD, and should thus not form part of minimum services.

[81] It is my view that it is permissible to attack 'evidence' on account of it being incoherent. At the same time however, the substance of that evidence, if present and discernable, cannot be ignored. According to van Jaarsveld, and

to the extent that his evidence was coherent, Officers Human Resources were *inter alia,* responsible for supporting essential service workers who fall within the minimum services or who have been excluded from essential service designation. They provided guidance, information and instruction to line management in the event of strikes. Eskom had argued that without them, payment processes for essential services workers would not be possible, and it would not have frontline information in the event of a strike. There are 180 of these officers responsible for 300 other operational workers.

[82] In my view, it is not sufficient for NUM to simply contend that Eskom can dispense of such services and still be able to maintain acceptable levels of service or production without endangering the life, personal safety and health of the whole or part of the population. Any observation in this regard needs to be made within the context of a concession by Radebe that the core business processes within Eskom were virtually integrated into functional structures across all areas of the business. If these officers are on strike, the issue is whether Eskom, can continue with its core business at acceptable levels, and be able to process payments of essential services workers on duty, obtain front line information about the strike in respect of who is on strike or not, and ensuring that operational matters run smoothly. If employees designated as essential services are at work during a strike, their payments need to be processed by someone. The answer would have been in the affirmative, had NUM placed facts before the ESC, which pointed out specifically how Eskom could achieve those ends whilst all employees in Human Resources Department were on strike.

[83] Furthermore, the fact that those positions were new and a strike had not taken place in the last 12 years is not the test. The issue is whether those officers provided a service which could not be dispensed with in an event of a strike. If they were required to provide a minimum service during a strike, in the sense that for example that they were required to form part of the strike committee during a strike, process payments for overtime and other remuneration, and

generally service 70% of Eskom employees who fall under GTD, a defence proffered by Mashego that these Officers could be dispensed with, as security officers on duty could monitor the strike or that there were surveillance cameras to capture events at various sites where a strike may have taken place, or that Eskom had a centralised automated system or Shared Services system for the purposes of administering the functions ordinarily to be performed by these officers can hardly be persuasive.

[84] In regards to **Officer Industrial Relations**, NUM's only concession was that these officers may assist in facilitation between management and the union during a strike. Eskom's contentions were that these officers were key in the interface with the unions to facilitate handover of memoranda, picketing rules and provide input into the formulation of relevant communication to management and unions before, during and after the strike. They are on-site Industrial Relations Specialists.

[85] The importance of communication, liaison and facilitation between personnel on site and Eskom's decision makers during a strike cannot be emphasised. This is especially so in an industry designated as essential services as a whole. If there is a strike and irrespective of its duration, there would be a need for constant communication between the unions and management. If these officers are not present on the ground, how can it possibly be expected of Eskom to engage meaningfully with unions in the absence of correct information about what is taking place on the sites? The mere concession by NUM that these officers are central to facilitations between management and the unions during strikes puts any debate about their critical service to rest.

[86] The argument surrounding the positions of **Occupational Health Nurses** is equally to be swiftly disposed of. The nurses are responsible for occupational and primary health care, which includes emergency health care to all employees. The central issue with these positions is that even if they were ordinarily not shift workers but required to be on standby, there is even a

greater need for them to form part of the minimum service in that whilst other employees would be on strike, those performing essential services would need to have access to medical care where the need arises.

[87] It is thus not sufficient for NUM to simply argue that shift workers/officers, or plant operators or even shift supervisors can attend to any medical emergencies that may occur as they happen to have some basic training in first aid. Serious medical emergencies that may affect GDT may arise that needs immediate professional attention than mere basic first aid. The individuals identified by Mashego as alternatives can only administer first aid, and the prospects of them being overwhelmed and ill-equipped to deal with major medical emergencies are not remote.

[88] Mashego had readily conceded that the different sites at Eskom were not equipped to deal with medical emergencies. This makes even stronger Eskom's case that the nurses should form part of minimum services. Putting a band aid on an employee who requires urgent medical attention and thereafter wait for an ambulance as Mashego had suggested is clearly not an answer as to why nurses should not form part of minimum services.

[89] In regards to **Wellness Officers Lifestyle Management**, it can be accepted that Mashego clearly spoke from an informed position, having occupied such a position himself whilst employed by Eskom. Be that as it may, their role as attested to by van Jaarsveld was to provide counselling in an event of traumatic events taking place during a strike.

[90] To the extent that these officers provided trauma counselling, it cannot be doubted that their services would be critical as they are responsible for the wellbeing of all employees, including those in essential service. If employees in essential service cannot access their service in the event of need, the rippling effect thereof is clearly to affect GTD. There is no basis for any

conclusion to be reached that such services are superfluous to meeting the objective of minimum services.

Conclusions

[91] Eskom only required 30% of its employees within the Human Resources Department to fall within the category of minimum services, whilst 70% could go on strike. NUM's approach as concluded by the ESC was that all of the employees should not fall under minimum services. At the end however, NUM had not as correctly pointed out by the ESC, stated why it was necessary to adopt that approach. To the extent that it had attempted to do so, those attempts based on the facts as presented were not persuasive.

[92] It is accepted that a determination of a minimum services ultimately should not erode the effectiveness of a strike. At the same time however, if only 30% of the entire Human Resources component is to be classified as minimum service, it is doubted that the effectiveness of any strike would be eroded. At the same time however, if there is 0% of minimum service in the Human Resources Department during a strike, irrespective of the extent and duration of that strike, in the light of the interrelated/integrated nature of Eskom's business (a fact which NUM sought to downplay or deliberately ignore), and the fact that GTD is likely to be interrupted on Mashego's version, the prospects of endangerment to life, personal safety or health are clearly not remote.

[93] In the end, I am satisfied that the ESC, based on the material before it, developed a test and provided guidelines on the manner which minimum services were to be determined, and equally applied that test to the facts and all material placed before it. There is further no basis for making a finding that the ESC failed to consider the parties' legal submissions, unduly favoured van Jaarsveld's evidence over that of Mashego, or arrived at an unreasonable conclusion. The ESC in the light of the competing interests, also had regard to

the evidence and the material placed before it in regards to the five positions when making its determination. It had arrived at a decision that meets the standard of reasonableness. Given NUM's untenable position that all of the employees in Eskom's Human Resources Department could not be categorised as minimum services notwithstanding the 25 March 2015 agreement and the 1997 designation, the decision arrived at by the ESC ultimately created and achieved a balance between the employees' right to participate in a strike, and the maintenance of minimum services with the Human Resources Department.

[94] A decision that the positions in question did not form part of the minimum services would effectively have rendered the 25 March 2015 agreement, that was subsequently made an order of the ESC nugatory, and effectively set it aside. It is not for the ESC to make orders and then fortuitously set them aside unless certain circumstances permit it to do so. In the result, the review application ought to be dismissed.

[95] I have had regard to the issue of costs and the requirements of law and fairness. This dispute has a protracted history, which in my view ought not to have gone full circle had the parties objectively applied their minds to the issues, with the primary consideration being the public interest. In the end, upon a consideration of the requirements of law and fairness, and further given the long-standing relationship between the parties, it is my view that a costs order is not warranted in this case.

[96] Accordingly, the following order is made;

Order

1. The application to review and set aside the determination issued by the Second Respondent under the auspices of the Essential Services Committee dated 28 April 2016 is dismissed;

2. There is no order as to costs.

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Edwin Tlhotlhalemaje

Judge of the Labour Court of South Africa

Appearances:

For the Applicant:	C. Orr with Z. Ngwenya
Instructed by:	Cheadle Thompson & Haysom Incorporated
For the Third Respondent:	F.A Boda SC (Written heads of argument with V September)
Instructed by:	Cliffe Dekker Hofmeyr Incorporated