



RULING

ESSENTIAL SERVICES COMMITTEE

Case Number: **ES 710**

Chairperson of the Panel: **Joyce Nkopane**

Date of Determination: **11 February 2025**

In the matter between

DEPARTMENT OF PUBLIC SERVICE AND ADMINISTRATION (DPSA)

(Employer)

And

DENOSA, HOSPERSA, NAPTOSA, NEHAWU, PSA, POPCRU, SADTU and SAPU

(Unions)

Details of the hearing and representation

1. The matter was scheduled for hearing on 02/03 December 2024 virtually via Microsoft Teams.. The Essential Services Committee (ESC) Panel comprised of Ms Joyce Nkopane, Mr Zico Tamela and Ms Aruna Ranchod. This Committee was called upon to determine the minimum service framework.
2. The parties were represented in these proceedings as per the attendance register. Mr Mkhululi Mntuyedwa led the team representing the Employer. Mr Masemola and Mr Odendaal led organised labour in its collective submission.

Issue to be determined

3. Section 72(2) of the Labour Relations Act, 66 of 1995 (“the Act”) provides that: *“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”*.
4. The parties in this matter negotiated the terms and conditions of the framework agreement and whilst they agreed on some terms there was disagreement on other terms. As a result the parties were unable to sign the framework agreement.
5. The ESC panel is accordingly called upon to determine the framework that would govern and regulate the negotiation and or determination of the minimum service levels in the public service.

Background

6. Section 23 of the Constitution of the Republic of South Africa, Act 108 of 1996 (“the Constitution”), confers the right to strike to every employee, noting, however, that such a constitutional right may be limited in terms of section 36 of the Constitution.

7. Section 65 of the Act provides that no employee 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 that employee is engaged in an essential or maintenance service.
8. The ESC has designated the services as per annexure B to the framework as essential services. These services, if interrupted, would endanger the life, personal safety and/or health of the whole or part of the population.
9. Not all the services provided by the Employer are *per se* essential services.
10. Employees who work in essential services identified as minimum service employees, pursuant to this framework determination, are prohibited from participating in a strike and cannot be subjected to a lock-out.
11. Similarly, employees who are entitled to participate in industrial action pursuant to or following this determination may not be subjected to disciplinary action for participating in protected strike action, except in the case of misconduct committed during the course of such protected strike action as aforesaid.
12. The employer in this matter tabled the draft agreement for consideration by the unions at the Public Service Sectoral Bargaining Council (PSCBC) for consideration and negotiation with the unions in the public service. The parties engaged on the framework document and could not agree or sign the same.
13. The matter was referred to the PSCBC for conciliation and it remained unresolved. A certificate of non-resolution was issued. The employer requested the ESC to determine the framework.

Submissions by the parties

14. The ESC Panel directed the parties to file written submission on or before 29 November 2024. The employer and SAPU duly filed the arguments.

15. On the scheduled date of the hearing, organised labour indicated that it had a consolidated position and made a consolidated submission before the panel.
16. For the purposes of this ruling the panel will not repeat the submissions made by the parties and will highlight the areas of disagreement between the parties. The full submissions are part of the record and were considered by the panel in determining the issues.
17. On behalf of the employer it was submitted on clause 2.10 of the submissions that during a strike that affects the operations of the employer, a party asserts that a service or services not defined as per the list of services designated as essential services, and the service become essential due to the circumstances, the parties shall meet within 24 hours of written notice by any of them to the others calling for such a meeting in an attempt to reach an agreement on whether the service (s) in question is/are essential and if so what minimum service level is required. The duration of any such agreement shall be for the duration of the strike.
18. It was further submitted that a minimum of 80% of the workforce for every public institution rendering essential service. Further that each institution rendering essential services shall conclude its own numbers to give effect to the 80/20 principle. (clause 2.13 and 2.14). It was submitted that this approach would assist in preventing a situation where there is a plethora of agreements that may compromise the health, safety or lives of those that receive the service due to power dynamics at different institutions. The determined percentage would ensure that the institutions are “not left to their own devices”.
19. Further that since the members of the South African Police Services are precluded from striking by an Act of Parliament i.e. section 41(1) of the South African Police Act, 1995 the sector should be excluded from the determination.

20. The Employer further submitted that the PSCBC be directed to set up an Essential Services Working Group that would monitor the implementation of the determination and perform such services as required by the PSCBC.
21. Further that the parties must establish the essential services working groups at district and institutional levels. The terms of reference of these working groups shall be to monitor and evaluate the MSD done by the ESC, evaluate the effectiveness of the MSD during and after the strike. Further ensure that any amendments to the MSD are submitted to the ESC. Ensure compliance with the minimum service levels agreed or determined. Determine the employees required to provide minimum services at institutions.
22. In conclusion it was prayed that the ESC determine the national framework for minimum service levels in the public sector.
23. As indicated above organised labour made a consolidated or collective submission. In its submissions it agreed with some of the clauses that were proposed by the employer, and for the purpose of this ruling the panel highlights the submissions made in support of the different proposal made by organised labour.
24. In relation to the submission contained in Paragraph 2.10 of the employer's submissions, organised labour argued that the proposal is misguided in so far as law is concerned. It was argued that whilst the parties could agree on the minimum service levels, the same cannot be said in relation to the question of whether a service is essential. The latter determination can only be made by the ESC.
25. In relation to the list of designations organised labour took issue with the fact that the employer relied on an outdated document.

26. It was submitted that the percentage as included in the framework agreement should be removed. This proposed percentage is to be applied across the board, and such an approach is undesirable in the public service given its diverse nature. It was submitted further that in relation to certain services the minimum of 90% to 100% may be required and in others lower percentages may be required. It was further submitted that the local government stratagem should be applied as in South Africa there is no best practice to bench mark with, other than local government , which is similar in operations to the public service.

27. Further that the percentage proposed by the employer is not in line with the ESC guidelines, which requires that the exact number of employees be determined. Accordingly the Panel should determine a framework for the broader public service, however the numbers should be left for determination at sectoral/departmental level. In the event that the parties fail to reach agreement the ESC may determine the minimum numbers to be maintained in the event of a strike action.

28. In relation to the submission that employees employed in terms of the South African Police Services Act should be excluded from the determination , it was submitted that there are no cogent reasons to support the argument for such exclusion.

29. Whilst organised labour supported the formation of the working groups it was submitted that the terms of reference should not be included as some of the proposed terms may not be implementable.

Analysis of the submissions and arguments

30. In this matter the ESC panel is called upon to determine the framework that would pave the way for the negotiation of minimum services in the public service. It is common cause that the Employer presented a draft framework for discussion at the PSCBC. The parties did not reach an agreement on the document even at

conciliation. This document formed the basis of the submissions made before the ESC panel.

31. From the submissions, it is apparent that the parties are ad idem that clauses 1 to 4.5 of the draft framework submitted by the Employer may form part of the determination. Further that there is a need to have a clause that lists the services that are designated as essential services, however the attached list should be accurate and reflect the latest designations.

32. Clause 4.8 of the draft framework provides that, if during a strike a party asserts that a service has become essential due to the circumstances, the parties shall meet within 24 hours of written notice with the view of reaching agreement on whether the service is essential. If there is such an agreement the parties will negotiate and agree on the minimum service levels to be maintained. The difficulty with this clause is that it usurps the powers of the ESC. Section 71 of the LRA sets out an elaborate and exhaustive process that the ESC has to follow in designating a service as essential. In order for a designation to attract the implications of the LRA such a designation must be made by the ESC or the legislature. Thus, an agreement between the parties to the effect that a service is essential is not a designation for the purposes of section 71 of the LRA.

33. In clause 4.9 the proposal is that in the event that the parties are unable to reach agreement on whether a service is essential or agreeing on the minimum service levels the parties may approach the ESC in terms of section 73 of the LRA.

34. In determining the validity of these clauses and the legal implications, the panel considered the provisions of section 73 of the LRA. The proposal suggest that the ESC may in terms of Section 73(1)(a) designate a service as essential without following the process outlined in section 71 of the LRA. The panel gave cognisance to *inter alia*, the headings of Sections 71 and Section 73 of the Labour Relations Act. Section 71 is specifically headed "Designating a service as an

Essential Service”, Section 73 is headed “Disputes about minimum services and about whether a service is an essential service”.

35. From the headings of the two specific sections above, it must be deduced that Section 71 of the LRA is the specific section which deals with the ESC’s powers to specifically designate services as essential services and as indicated above the process is elaborate and exhaustive. The exhaustive process laid out in Section 71 of the LRA, must be understood in the context of balancing different Constitutional rights. This cannot be taken lightly or treated as such.

36. Section 73 deals with “Disputes about minimum services and about whether a service is an essential service”. The distinction between Section 73(1)(a) viz whether or not a service is an essential service and (b) whether or not an employee or employer is engaged in a service designated as an essential service is essentially the following:

-Section 73(1)(a) deals with the ESC’s power to deal with a dispute whether a particular service performed by the employer or employees is an essential service which must be understood to mean a “designated essential service”. Thus, in this case, the main question to answer is whether a particular service is or is not a designated essential service. Section 73(1)(b) is when the parties acknowledge the existence of a particular designated essential service, however dispute whether an employee and/or the employer are engaged in such a designated essential service.

37. It is highly improbable and unlikely that the LRA would have stipulated an exhaustive process including public participation when the ESC investigates a service before designating such as an essential service and then to also open another door for particular service providers to seek a determination of an essential service in terms of Section 73(1)(a) of the Labour Relations which essentially is a less exhaustive and simple process. This probability would in essence circumvent the provisions of Section 71 and also almost render the entire Section 71 process redundant. This could not have been the intention of the legislature.

38. Having considered the legal framework as set out above the panel rules that the clauses 4.8 and 4.9 should not be included in the framework in the manner proposed by the employer. The amended clauses are to be included in the determined framework.
39. The Employer in the framework also included a clause that sets the minimum service levels at a percentage of 80% of employees that should be at work and 20% should be allowed to participate in strike action. On behalf of the employer it was submitted that these numbers should cascade down to departmental and institutional levels so that they are not affected by the balance of power at different institutions. Whilst the ESC agrees that there is a need to ensure that the numbers agreed to by the parties or determined must ensure that there is no endangerment to the lives, personal safety and health of the whole or part of the population, the panel is of the view that there is a need to find a balance and adopt a restrictive approach. The numbers should not limit the right to strike unduly. Further that any limitation must be reasonable and justifiable based on the prevailing circumstances.
40. On behalf of organised labour it was submitted that the employer's approach does not acknowledge the diverse nature of the public service. The panel has considered the submissions of the parties and whilst the panel acknowledges that it may not be appropriate to include a percentage cast in stone in the framework, there is a need to develop guidelines to the negotiations of minimum service levels in the public service. The public service is not only diverse, but also huge as the state is the largest employer in the country. Further there are more services designated as essential in the public services than there are in any other sector.
41. On behalf of organised labour it was further submitted that the stratagem used in local government should be adopted for the public service because of the similarities between the two sectors. Due to the size of the public service, the number of negotiating parties in the PSCBC, including the factors mentioned above, it is important that a different and more innovative approach should be

adopted in determining the numbers. The panel , accordingly, rule that this clause should be removed from the framework, however the ESC should issue guidelines to deal with the determination of the numbers.

42. The panel has further considered the submission by the employer that members of the South African Police Services be excluded from the minimum service levels and to this end the Employer proposed a clause that deals with this aspect. On behalf of organised labour it was submitted that there are no cogent reasons submitted for this exclusion.

43. In the definition of essential services, South African Police Services is included as part of the definition and there is a further provision that the service is deemed to be designated as an essential service in terms of section 71(9) of the LRA. This means that the entire department is designated as an essential service. Further it is a fact that there are members of South African Police Services who are not performing life saving services. Accordingly, the panel is of the view that it would be inappropriate to exclude a designated essential service or a department that is rendering essential services from the whole process of determining minimum service levels through the framework.

44. The panel finds that the provisions of section 41(1) of the South African Police Services Act , 1995 would be a factor that the parties or the ESC should consider when negotiating or determining the actual minimum service levels to be maintained in that sector.

45. Having considered the submissions, the panel makes the following determination-

Determination

46. The terms and conditions of the framework on minimum services are as per Annexure A attached hereto.

47. The ESC in terms of Section 70B(1)(c) hereby issues guidelines to assist parties in the negotiation and/or determination of the minimum service levels to be maintained in the public service.

M J Nkopane
ESC Deputy Chairperson



M J Nkopane
ESC Panel Chairperson