What are essential services?

When President Jacob Zuma recently said that education was an essential service there was uproar from trade unions that saw the announcement as an attempt to take away hard-won gains including the right to strike. **Shamima Gaibie** explains what the law says about essential services and the rights to strike.

Popcru members march in Johannesburg.

THE LEGISLATIVE PROVISIONS

In South Africa the right to strike is guaranteed by section 23(2)(c) of the Constitution. However, as with all rights, this right may be limited by national legislation, and one such limitation is contained in section 65(1)(d)(i) which says that employees who provide 'essential services' cannot strike.

Such employees must refer all disputes, including 'interest' disputes for conciliation, and if necessary, arbitration – section 74(3) and (4).

Section 213 defines an essential service as a 'service the interruption of which endangers the life, personal safety or health of the whole or any part of the population.' The parliamentary service and the police services are the only services that are deemed to be essential services in terms of section 71(10). For the rest it leaves the task of determining and designating essential services to the Essential Services Committee (ESC) – section 71.

However, there is one exception to the prohibition on strikes in essential services – where an employer and a recognised trade union conclude a 'minimum services agreement' (MSA) which is ratified, all employees in that service excluding those who will render the minimum service are entitled to strike.

MSA PURPOSE

The purpose of a MSA is to enable essential services employees to embark on strike action, while their colleagues keep working so that the essential service can continue operating.

- What if the trade union seeks to negotiate a MSA and the employer refuses to do so? Or what if the parties commence discussions on such an agreement but are unable to reach an agreement?
  - Can the trade union refer the dispute to arbitration? Or does the Labour Relations Act (LRA) provide a mechanism for resolving the disputes related to minimum services? Not explicitly.
- How are disputes – in essential services – relating to 'rights' and 'interests' dealt with in terms of the LRA?
  - The dispute must be referred to compulsory arbitration. The outcome of the arbitration process, in the form of an award, is imposed on the parties by an arbitrator, without either party being able to resort to industrial action.
- Should this dispute resolution process – applicable to rights and interest disputes – apply to disputes in relation to minimum service agreements?

ESKOM MATTER

- This was the question that was before the Labour Court (LC), the LAC and most recently the SCA in *Eskom Holdings Ltd v National Union of Mineworkers & Others* (2012) 3 BLLR 254 (SCA).
- In 2007, the National Union of Mineworkers (NUM) and the National Union of Metalworkers of South Africa (Numsa), after trying in vain for some years to conclude a MSA with Eskom, referred the dispute to the Commission for Conciliation Mediation and Arbitration (CCMA).
  - Eskom, as a whole, was declared an essential service by the ESC in 1997.
  - In discussions about a MSA the parties were far apart in relation to the number of employees that were necessary to maintain a minimum service. Eskom was of the view that almost its entire workforce was required for that purpose and the unions were of the view that only 10% of the workforce was required.
  - Eskom argued that the LRA did not provide any mechanism for the resolution of such disputes and that the unions should approach the ESC to narrow the existing designation.
  - The CCMA disagreed and held that it had jurisdiction to determine the dispute, and to impose a MSA on the parties via an arbitration award.
  - The SCA agreed with the ESC's contention that it had the right to determine such disputes in terms of section 73, that section provides that: any party to a dispute about either of the following issues may refer the dispute in writing to the essential services committee –
    a. whether or not a service is an essential service; or
    b. whether or not an employee or employer is engaged in a service designated as an essential service.
  - Having regard to the obligation to interpret statutes in light of: 1) the Bill of Rights; and 2) to read legislation *'in ways which give effect to its fundamental values'*; and 3) of the injunction to interpret the LRA in such a way that preserves, rather than excludes or limits the right to strike – the SCA held that any disputes relating to a MSA must be referred to the ESC in terms of this section.

Is the SCA correct?

The SCA had to stretch the language of section 73 to give effect to the right to strike. Section 73 deals with disputes about –

a) Whether or not a service is an essential service; or
b) Whether or not an employee or employer is engaged in an essential service.

It does not explicitly include disputes concerning the conclusion of a MSA.

How will the ESC determine what is a minimum service?

None of the courts involved in this matter considered this issue. However, the SCA suggested, without determining the principle, that

Eskom employees such as those working in the company's gardens might not be rendering an essential service.

THE POPCRU MATTER

This issue received consideration in the Constitutional Court's judgment in *SAPS v POPCRU* 2011 (9) BCLR 992 (CC).

About a week after the commencement of the general public service strike in 2007, POPCRU called on its members employed in the SAPS to join the strike. The SAPS launched an urgent application and sought orders declaring that all its employees were engaged in an essential service.

The LC granted the orders in relation to POPCRU members who were employed under the SAPS Act, and not in respect of its members who were employed in terms of the Public Service Act (PSA). The Constitutional Court upheld the decision of the LC.

FUNCTIONS PERFORMED BY SAPS

The functions of the SAPS are set out in the Constitution in the following terms: ... to prevent, combat and investigate crime, to maintain public order, to protect and secure the inhabitants of the Republic and their property and to uphold and enforce the law' ('the policing functions').

WHO PERFORMS FUNCTIONS?

The Constitution read with the SAPS Act indicate that it is the 'members' who are appointed in terms of the SAPS Act who are authorised to exercise or perform such functions.

Based on the legislative distinction between those who perform the 'policing functions' and those who don't, the Constitutional Court held that it is those members who are appointed in terms of the SAPS Act, rather than those who are appointed in terms of the PSA, that perform the policing function.

FUNCTIONS BY PSA EMPLOYEES

The Constitutional Court judgment records that they perform general duties such as procurement, secretarial work, general administration and cleaning, operating emergency call centres and crime information systems, capturing data in crime intelligence administration, and other tasks normally associated with policing.

There was however no investigation as to whether these functions are integral to the policing function or whether they are supportive or ancillary thereto.

The Court was however happy to make the assumption that there existed a legislative distinction between the two types of employees and based on that distinction concluded that those appointed in terms of the PSA performed supportive functions.

OTHER PERTINENT ISSUES

In essential services, it is often the case that some or most of the employees are employed in rendering the essential service, and others are not.

In the statutory dispute resolution scheme, this must mean that essential service employees must resolve their dispute via compulsory arbitration, and non-essential employees may resolve their interest disputes by strike action.

It is possible therefore, in one establishment, for some employees to refer the same interest dispute to arbitration and for others to embark on strike action.

In *City of Cape Town v SALGBC and Others* [2011] 5 BLLR 504 (LC), the union called its 'non-essential service' members out on strike and simultaneously referred a dispute for arbitration in terms of section 74 of the LRA in respect of its members who were engaged in the essential service.

The arbitrating Commissioner, on the basis of an *limine* point raised by the city, ruled that the council had jurisdiction to entertain the claim.

On review the LC:

- Held that where a dispute has been referred for conciliation under section 64 of the LRA, the union did not have to refer a separate dispute for conciliation on behalf of essential services employees before referring a dispute on their behalf for arbitration.
- Accepted that when union members comprised both essential and non-essential employees, the union does not have to elect whether to engage in strike action or arbitration.
- Found that there was nothing in the LRA to suggest that essential service employees lose their right to refer an interest dispute for arbitration simply because their non-essential colleagues embarked on strike action.
- Also held that non-essential service employees retained their right to strike even though a dispute had been referred for arbitration by the essential service colleagues.

The above issues raised further questions such as:

- Does any agreement concluded in relation to essential services apply to non-essential service employees?
- Will such an agreement in relation to essential service employees trump an arbitration award achieved by the non-essential employees?
- If the arbitration award is issued while the strike is still in progress, would the non-essential employees be entitled to rely on the award to enforce their demands? LB

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