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## *Essential Services: Developing Tools for Minimum Service Agreements*

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### INTRODUCTION

Two judgments of our appellate courts<sup>1</sup> move me to add my voice to the debates on essential services. Another catalyst for this article is the Essential Services Committee (ESC) conference<sup>2</sup> at which I presented some of my ideas and learned of the obstacles to concluding minimum service agreements (MSAs). Furthermore, 15 years under our new essential services regime is time for reflection to preserve and improve what works and to fix what does not.

The treatment of essential services is not playing out as planned. The ESC under my watch<sup>3</sup> received only two MSAs, one from Rand Water and the other from Eskom. The Eskom agreement collapsed on 31 March 2004.<sup>4</sup> A few disputes were referred and resolved during my tenure. Since then the ESC has received no certifiable MSAs. Disputes about essential services have also been slow in coming. Instead, a disturbing trend towards litigation is developing.

In the meantime, notwithstanding the prohibition of strikes in essential services, they occur with disconcerting frequency, duration and intensity. Such strikes continue because no MSAs have been

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<sup>1</sup> *Eskom Holdings Ltd v National Union of Mineworkers & others (Essential Services Committee intervening)* (2011) 32 ILJ 2904 (SCA); *SA Police Service v Police & Prisons Civil Rights Union & another* (2011) 32 ILJ 1603 (CC); [2011] (9) BCLR 992 (CC).

<sup>2</sup> The Essential Services Committee conference in Centurion on 29 November 2011.

<sup>3</sup> Between 5 October 1996 and July 2000.

<sup>4</sup> *Eskom v NUM* para 9.

concluded. No MSAs have been concluded because strikes are allowed to continue with little risk of punishment of illegal strikers. Frustration underlying the illegal strikes has turned employers and trade unions towards litigation but with disappointing results because the substantive issue in dispute, namely, the conclusion and certification of MSAs remains unresolved.

Two cases fall under the spotlight. In *Eskom v National Union of Mine Workers* (*Eskom* case) and *SA Police Services v Police & Poisons Civil Rights Union* (*SAPS* case) the real cause of conflict was whether the services these entities render are strictly essential in all circumstances. In *Eskom*, the dispute was expressly articulated as a failure to conclude a MSA. In *SAPS*, the dispute was framed as a matter for legal interpretation in response to an application to interdict a strike; impliedly, the real cause of conflict was the lack of a MSA to hive out those who did not render essential services from those who did.

Disturbingly, both cases were resorts to litigation without exhausting the remedies available through the ESC. Employers stonewalling their trade union counterparts by adopting a 'lump it' attitude,<sup>5</sup> as *Eskom* did, is but one explanation for the lack of MSAs and the ESC being bypassed. Another is that the ESC does not have the ammunition to compel parties to conclude MSAs. Concluding and implementing MSAs is also hard work. Furthermore, litigants fail to appreciate fully how the legislative scheme for essential services operates. *Eskom* was a bizarre attempt to construe an arbitration award as a collective agreement — much like saying apples are pears.<sup>6</sup> The real impasse arose when the parties could not agree on the number of employees necessary to provide an acceptable minimum service.<sup>7</sup> *SAPS* attempted unsuccessfully to raise matters of fact in an urgent interdict when such facts should have been ventilated before the ESC in the course of either determining disputes in terms of s 73 of the Labour Relations Act 66 of 1995 (LRA) or ratifying a MSA in terms of s 72.

The current situation is a regression to times when the mechanisms for engaging and resolving disputes about essential services were non-existent. It is as if the ESC does not exist. This discussion is a refresher on essential service law and practice to reinstate the ESC as a one-stop shop on all matters pertaining to essential services. By rediscovering the definition of essential services and the legislative design for regulating them, the constitutional nudge for concluding MSAs becomes clearer. First, however, I analyse *Eskom* and *SAPS* to illustrate the pitfalls of litigating essential service disputes.

<sup>5</sup> *Eskom* para 25.

<sup>6</sup> *Eskom* para 23.

<sup>7</sup> *Eskom* para 9.

## THE LITIGATION

*Eskom*

In *Eskom*, the SCA had to decide whether the failure to agree on the terms of a MSA is a dispute between an employer and an employee that should be referred for compulsory interest arbitration to the Commission for Conciliation, Mediation & Arbitration (CCMA). The Labour Court (LC) found that the CCMA did not have jurisdiction. The Labour Appeal Court (LAC) disagreed. The Supreme Court of Appeal (SCA) upheld the LC.

Underlying the jurisdictional challenge was the substantive dispute about the number of employees who should provide minimum services. The litigation could not address the substantive dispute because it was a matter to be agreed between the parties, reduced to a MSA and certified by the ESC. The courts have no powers or jurisdiction to oversee, facilitate or certify MSAs. Helpfully, the SCA pointed the parties in the direction of s 73(1)(a) and (b) as the route to having a dispute between an employer and its employees concerning the terms of a MSA determined. Section 73 goes a long way to resolving disputes that arise in the course of concluding MSAs. But it does not go all the way.

What if an employer refuses to participate in s 73 proceedings? Or, having participated and the ESC determines the dispute, the employer resists concluding a MSA? What if the dispute is not capable of resolution under s 73? What if the employer simply adopts a 'lump it' attitude? *Eskom* does not answer these questions. Quintessentially, the question remains: how to secure MSAs which are collective agreements when collective bargaining is not compulsory.

*SAPS*

A similar frustration evident in *Eskom* underscores *SAPS* which was initiated to interdict a strike. This time the lack of a MSA ricocheted on *SAPS*. Bereft of a MSA, the *Police & Prisons Civil Rights Union (POPCRU)* was driven to raise the defence that its members who were not members of the *SAPS* as defined in the SA Police Service Act<sup>8</sup> (*SAPS Act*), were entitled to strike. *SAPS* is statutorily defined and deemed to be an essential service. *POPCRU* contended that employees engaged under the Public Service Act (Proc 103 of 1994) (*PSA*) were non-members of *SAPS*; accordingly they fell outside the definition of essential services.

The clarity sought through the litigation was whether the plain text of para (c) of the definition of 'essential services' in s 213 of the *LRA* included employees engaged under the *PSA* who worked for *SAPS*. Angled as litigation purely about statutory interpretation, the

<sup>8</sup> s 1 of Act 68 of 1995; *SAPS* paras 39–40.

Constitutional Court (CC) pronounced narrowly on the single issue it was invited to decide. Because the designation of a service as essential limits the constitutional right to strike, the court applied a typically<sup>9</sup> restrictive interpretation.<sup>10</sup> It confined the reference to 'South African Police Service' in the definition of 'essential services' to members of the SAPS as defined in the SAPS Act.

Critically, the court recognized the centrality of the right to strike to collective bargaining.<sup>11</sup> It avoided the ministerial proclamation deeming categories of personnel employed under the PSA to be members of the SAPS, holding that events outside parliament cannot constitute a guide to its interpretation of the statutory definition.<sup>12</sup> Significantly, because the SAPS Act was assented to and implemented before the LRA,<sup>13</sup> the inference follows that when promulgating the LRA the legislature intended the meaning of 'South African Police Service' in the LRA to be that assigned to it in the SAPS Act.<sup>14</sup>

Caution must prevail when applying *SAPS*. It is litigation about statutory interpretation, an ad hoc pronouncement about whether all SAPS staff fall within the definition of essential services. What it is not is a precedent that PSA employees working for SAPS do not render essential services. This is a question of fact the CC was not invited to determine and indeed could not determine because that power is entrusted exclusively to the ESC. However, unlike the SCA, the CC did not point the litigants to the ESC and the sections relevant to MSAs.

#### OBSERVATIONS

The litigation triggers eight observations.

First, *SAPS* reset the balance of forces by strengthening the bargaining position of POPCRU and the unions. It discourages a 'lump it' attitude from the SAPS when it is invited to engage about a MSA. The National Union of Metalworkers of SA (NUMSA) and the National Union of Mineworkers (NUM) were not totally vanquished by their defeat in *Eskom*. Having criticized *Eskom* for adopting a 'lump it' attitude, the court redirected the parties to ss 72 and 73 of the LRA, as the route to a MSA.

Second, the results of litigation are uncertain and therefore litigation is notoriously a risky form of dispute resolution. When socio-economic rights, such as the right to strike are at issue, the risk is of a

<sup>9</sup> *NEHAWU v University of Cape Town* (2003) 24 ILJ 95 (CC); [2002] ZACC 27; 2003 (2) BCLR 154 (CC) para 41.

<sup>10</sup> *SAPS* para 30.

<sup>11</sup> *SAPS* para 19.

<sup>12</sup> *SAPS* paras 37–39.

<sup>13</sup> *SAPS* para 25 n 39.

<sup>14</sup> *SAPS* n 39; para 32.

wrong decision prevailing, possibly for a long time until another precedent is set. Having initiated a routine strike interdict, SAPS was unprepared for a decision on essential services and the consequent paring down of its powers over some 33,000 PSA employees. Its surprise at the turn of events is evident when it attempted but wisely abandoned plans to lead new evidence at the appeal before the CC. As for *Eskom* its confidence about the procedure it adopted turned out to be a jurisdictional non-starter.

Third, litigation injects inflexibility. Precedents once set are hard to reverse. What if the appellate courts get it wrong? For instance, Professor John Grogan criticizes *SAPS* as follows:

‘The point is that the essential nature of a service cannot be determined solely by the designation of the person performing it. PSA employees performing these functions are also surely engaged in them.’<sup>15</sup>

In a field of law in which the development of the jurisprudence is entrusted to a specialist entity, namely the ESC, litigation should be the option of last resort. What the social partners enjoy now is relatively free self-regulation. Self-regulation induces the flexibility needed for a complex, disparate social set-up. Court interventions could distort this flexibility. Once the doors to litigation are opened, there is no telling in which direction the jurisprudence will develop.

Fourth, as for process, litigation has its place in the dispute-resolution pyramid. Indisputably some disputes are best resolved through litigation because they tend to settle the law on the questions raised. Statutory interpretation and declarations of rights are usually apt for resolution by litigation. However, placed almost at the apex of the dispute-resolution pyramid, litigation should be the option of last resort when disputes in essential services arise for another reason. Unlike most disputes regulated under the LRA, disputes about essential services are not preceded by consensus-seeking dispute-resolution processes that are foundational to the pyramid, such as compulsory conciliation, mediation, facilitation or fact finding. These non or less adversarial processes tend to filter out if not resolve disputes finally. They also enable the parties to look laterally at alternative outcomes not previously considered. If not resolved, a filtered dispute would emerge refined for adjudication either before the ESC in terms of s 73 or as litigation before the courts.

Fifth, angled as a question of law and statutory interpretation, *SAPS* fell within the jurisdiction of the court. However, insofar as the *SAPS* sought to delve into facts in order to bolster its interpretation that it was a single, integrated, essential service incorporating PSA personnel who rendered support services that were indispensable to the *SAPS*

<sup>15</sup> John Grogan ‘Not Necessarily Essential — Developments in Essential Services Law’ *Employment Law Journal* 2011 August.

members,<sup>16</sup> the court had no jurisdiction. This factual enquiry falls exclusively within the statutory powers of the ESC.

In the course of executing its statutory powers the ESC has to interpret and apply legislation. Therefore, the ESC could also have determined the statutory interpretation of the definition. In other words, although the ESC cannot grant interdicts, it has the power to determine both the questions of law and fact that arose in *SAPS*. Likewise, if the trade unions in Eskom had approached the ESC they would have received a ruling on jurisdiction.

Sixth, the ESC should have applied to join the proceedings because it is an interested party. As a specialist body having investigative and adjudicative powers, it must have its own interpretation of para (c) of the definition of 'essential service' in s 213. Its role in preventing illegal strikes and infringements of the right to strike itself by resolving disputes and certifying MSAs could have enriched the CC's judgment not least by pointing the litigants to their mutual obligation to one another and society to conclude MSAs. As a party to *Eskom* and *SAPS* the ESC might have persuaded the courts to issue a structural interdict in terms of which the parties could have been directed to endeavour to conclude MSAs within prescribed time-limits and, failing agreement, to revert to the court to either review any decision of the ESC made in the course of resolving disputes, or even to compel a recalcitrant party to bargain reasonably and in good faith. Recalcitrant parties might even have been held in contempt for non-compliance with a structural interdict. In fairness, the ESC might not have been aware of the litigation proceedings before judgment.

Seventh, as for substance, the abiding beacon that must guide all deliberations about essential services is the public interest and constitutional compliance. In this respect collective bargaining about wages and conditions of service differs from engaging about essential services.

Eighth, *SAPS* could have been avoided. Either party or the bargaining council for the security service industry could have requested the ESC to investigate the services rendered by PSA employees in terms of s 70(2)(a) or (3) read with s 71. Or they could have referred a dispute to the ESC for determination in terms of s 70(2)(b) or (c) read with s 73 of the LRA. Although the ESC has no powers to interdict a strike in essential services, there might have been no need for the interdict at all if the parties had approached the ESC as soon as they disagreed on the definition. Having obtained an interim order they might also have extended it pending their approach to and the decision of the ESC. As the disagreement about the definition was linked to the lack of a MSA, the ESC could also have steered the parties towards concluding a MSA.

<sup>16</sup> *SAPS* paras 11–12.

Following *Eskom* and *SAPS* a refresher on essential service law would rekindle debate and evaluation about whether the law is adequate, whether it is being applied effectively and what further steps must be taken to improve efficiencies all round. 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. Helped by the SCA pointing litigants to the ESC as the authority that has exclusive jurisdiction to resolve disputes about essential and minimum services,<sup>17</sup> the ESC has an opportunity to revitalize itself.

Concluding, executing and enforcing MSAs is hard work, which explains why they have been slow in coming. Just how hard it is, is seriously underestimated. The underestimation stems in part from the misconception that MSAs are typical collective bargaining agreements. Some of the other practical difficulties that arise in framing an agreement include implementing the 'no work no pay' rule against those who strike for those who cannot strike. The role of other trade unions and their members not party to the dispute or not participating in the strike, outsourcing and who would render an agreed minimum service require detailed, reliable information, high levels of organizational capacity, maturity and discipline. The rest of this article builds the case for MSAs and the role of the ESC.

#### DEFINITION

Everything about essential services flows from its definition. What services are essential, why they are essential, how they are determined to be essential and even who determines them to be essential flows from the definition. Minimum services are essential services reduced temporarily under certain conditions to enable industrial action. The starting-point therefore of any discussion about essential services is the definition itself.

The definition of essential services is a service, the interruption of which endangers life, personal safety or health of the whole or a part of the population.<sup>18</sup> A strict interpretation of the definition links the service with the interruption and the endangerment. The link must be a reasonable probability and not a mere possibility that, if interrupted, endangerment would ensue. A 'possibility' standard casts the net so wide as to render most services essential and minimum services a fiction. The operative word therefore is whether an interruption 'would', not 'could' or 'might' endanger life, personal safety and health.

'Endanger' also reinforces the strict interpretation to exclude inconvenience and hardship. 'Life, health and personal safety' exclude

<sup>17</sup> *Eskom*.

<sup>18</sup> s 213.

endangerment to the business or the economy. '(T)he population' refers to people, not the animal or plant population.<sup>19</sup>

'Service' is used at two levels, depending on the context.<sup>20</sup> It could mean a composite service such as correctional, hospital and police services. Or, it could mean a component or part of a composite service, such as security, cleaning, laundry, porter, administration, intensive care and nursing all of which can be found in, for example, an intensive care unit (ICU). This dual meaning is reinforced by s 71(7) which refers to the whole or part of a service, and by s 73 which mandates the ESC to determine disputes about whether a service is essential and whether particular employees are engaged in essential services. Such disputes arise in respect either of composite services or components of composite services.

Indeed, if 'service' does not have such a dual meaning then the design of the legislative scheme for essential services could be unconstitutional if not unworkable. Because the ESC's designations often incorporate essential services, MSAs and s 73 dispute resolution create opportunities for whittling away services that are not strictly essential from those that are, so that the right to strike is not prohibited unreasonably or unjustifiably.

#### DETERMINING ESSENTIAL SERVICES

Whether a service is essential is a question of fact. Therefore, designating a service as essential begins with findings of facts, a deceptively difficult task. The difficulty stems in part from the tendency to conflate the determination of facts with opinion, questions of law, rights and interest. Determining facts is distinguishable from other elements of decision making. Acknowledging this distinction is not only necessary for separating essential services from inessential services but also for diagnosing causes of conflict and channelling them into the appropriate processes for resolution. To expatiate, what the trade unions sought through *Eskom* was a determination of fact about what services should constitute the minimum service. Instead they found themselves defending a jurisdictional challenge. What SAPS sought was also a determination of fact that PSA employees render essential services and could therefore not strike. Instead it found itself embroiled in a dispute about statutory interpretation. A careful diagnosis of the issue that had to be resolved ultimately in both cases could have averted the litigation.

Although distinguishing between facts, law, rights and interests is clinical and does not reflect that in reality these elements arise and

<sup>19</sup> For a fuller discussion on the definition, see Dhaya Pillay 'Essential Services Under the New LRA' (2001) 22 *ILJ* 1 at 8-15.

<sup>20</sup> Grogan n 15 above.



overlap in adjudication, the distinction is helpful in determining and even negotiating about what services are essential and what the minimum service should be. Because determining essential and minimum services is a process of fact finding, discretion is diminished, unless inferences have to be drawn from some facts to lead to findings about other facts, or to reconcile conflicting facts. But the starting-point remains establishing the facts.

Fact finding is about observing and recording the way things are. To determine questions of fact, sufficient detailed and reliable data about the services and their components are indispensable. Gathering and compiling such data is tedious, hard work as it requires painstaking enquiries about each component of the service. It is also multidisciplinary. A plethora of research papers ensconced in universities and other research agencies are a ready source of information on health and the levels and distribution of poverty and services. Local authorities have data on the utilities they supply. Employers who are usually better equipped with information about their services can be compelled to share information that is relevant and not confidential with their trade union counterparts.

#### THE LEGISLATIVE SCHEME

Readers will recall that a list of services treated as essential under the previous labour laws were declared essential for ten months, pending the decisions of the new ESC.<sup>21</sup> The ESC had to move quickly. In broad brush strokes the ESC initially designated as essential most services it investigated, anticipating that in due course the bargaining partners responsible for providing each service would fine-tune its designations either in MSAs and, if they could not agree, then by declaring disputes about whether particular services were essential or whether particular workers were engaged in essential services.<sup>22</sup> Resolving disputes about parts of a service would incrementally conduce to MSAs. So the thinking was.

The scheme of the legislation therefore is designed to connect the investigations, MSAs and dispute resolution. Seeing them as phases instead of disparate processes unveils their interconnectedness. Graphically, disputes about essential services should be visualized as a subset of MSAs which, in turn, are a subset of investigations. They form three concentric circles with investigations being outermost and dispute resolution being innermost. The phases ebb and flow between the outmost and innermost circles to also emphasize the non-static nature of essential services.

<sup>21</sup> part g Schedule 7 to the LRA; *Gazette* 17516 dated 1 November 1996; *Gazette* 17973 dated 9 May 1997.

<sup>22</sup> Pillay n 19 above at 36.

Section 74 is expressly excluded from applying to MSAs for good reason. It relates to disputes *within* essential services about matters of mutual interest, such as remuneration and terms and conditions of service. Certifying MSAs anticipates disputes *about* whether services are essential or should be agreed as minimum. This distinction is important as it ring-fences the jurisdiction of the ESC and preserves its exclusive mandate. It also distinguishes arbitrable disputes from administrative disputes, each attracting different procedures and consequences. To allow disputes about essential services to be arbitrated under s 74 would open this field that parliament reserved for specialists to generalist arbitrators. *Eskom* prevented this eventuality.

However, unlike the CCMA which is expressly empowered to summon parties to the bargaining table to settle disputes about other rights and benefits, the ESC is not so empowered. The ESC could invite parties to its bargaining table to facilitate a resolution of a MSA impasse, provided it does not compromise its adjudicative role. However, if a party fails to attend or participate, the ESC has no power to enforce participation.

#### THE NATURE OF ESSENTIAL SERVICES

Whether a service is essential depends on a permutation of several factors, including the nature of the service, the technology available, the needs of the population, the availability of the service and service providers, the cost of the service, the timing or duration of the provision of the service, and the location in which the service is rendered, all of which, and more, go to determining the impact of the interruption of the service. Obtaining data pertaining to these factors is foundational to determining whether, as a fact, the interruption of a service will endanger life, health and personal safety. Findings of facts about each criterion and permuting them go to determining whether a service is essential or inessential.

These factors are fluid, changing from one service to the next, from one set of circumstances to the next. The fluidity of factors also implies that the designation of services is not static. With changes in the nature of services and the circumstances in which they are rendered their designations could also change. A service essential today can become inessential with changes in, say, technology, geographical location or timing. Hence the designation of services as essential and minimum services is entrusted to an administrative entity such as the ESC. Left to the courts or even parliament, this flexibility will be lost. Flexibility is vital for responding not only to the practical realities of the nature of services but also for constitutional compliance by ensuring that strikes are not unduly prohibited, for example when essential services become inessential.

The mutability of services is acknowledged in s 71(9) of the LRA which permits the ESC to vary or cancel its designations. This section

and an appreciation that essential services are dynamic fortify the ESC to undertake and fulfil what is otherwise a formidable mandate for three individuals who are expected to be knowledgeable about labour law, and little else about the services they investigate. The ESC can take comfort from the fact that it can revisit its designations once circumstances change. Its designations are obviously reviewable if, as an administrative authority, they are irrational and unjustified. None have been judicially reviewed yet.

Understanding this flexibility was critical to the way the ESC approached its task 15 years ago. It meant that its designations were not immutably written in stone to endure forever. At the same time the ESC, as a regulatory body, had to balance flexibility and change with stability and certainty about what services were essential. Consequently, not every change in circumstance necessarily invokes a review of a service. Changes, for instance, in national public health insurance policy could herald a major review of all health services, private and public, to determine what services are essential under the new policy.

#### COLLECTIVE BARGAINING FOR MSAs

Arising from the distinction between facts, opinion, law, rights and interest is the question whether the approach to collective bargaining to conclude MSAs is the same as bargaining for wages, conditions of service and other benefits. Six differences come to mind.

First, the fact that MSAs have to enjoy the approval and consequent certification of the ESC singularly distinguishes bargaining for MSAs from bargaining for other rights and interests. Collective bargaining agreements for other rights and interests do not require ratification. Mandates, not the agreements, need ratification, sometimes even from parliament. Some collective agreements have to be published and others might also have to be extended to non parties. This could influence the content of bargaining but no more so than the infinite range of socio-economic and even political factors that drive collective bargaining.

Second, not only is certification a procedural distinction but also a driver of the substantive content of MSAs. What the ESC will certify has to be truly a minimum service. A minimum service is one that is sufficient to ensure that during strikes no person's life, personal safety or health is endangered. 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. The ESC has to certify MSAs that provide for strictly minimum services otherwise its decision to include superfluous services could be reviewed on the ground of being an unjustifiable limitation on the constitutional right to strike. Bargaining for MSAs is therefore a process of discerning what the ESC would consider to be certifiable.

Third, because the content of bargaining for MSAs differs from the content of bargaining for other benefits, what is negotiable and how the negotiations should be conducted are tacitly proscribed by the definition of essential service. The definition, in turn, renders bargaining about essential and minimum services more rigorous than bargaining for other rights and benefits. Just as legal submissions are no substitute for the hard facts the ESC needs to make its decisions, facts also drive bargaining about MSAs, which consequently is infinitely more exacting than the cut and thrust of bargaining for other rights and interests.

In essence, bargaining for MSAs is aimed at agreeing a set of facts to persuade the ESC that the minimum service offered is truly essential and sufficient and that the ESC should certify the agreement. Bargaining partners should put themselves in the shoes of the ESC during bargaining to assess whether their agreement will pass muster. Because a service is essential as a matter of fact, collective bargaining for MSAs operate to realign the facts so that services are not interrupted in ways that constitute an endangerment.

An example of negotiating and realigning facts to avoid an endangerment is a concession by a trade union that 100% of the services of skilled and support staff are essential. In exchange, 50% of the support staff may only strike on condition that the skilled and remaining support staff cover for the strikers. In this example, the service is not interrupted in any way because 100% of the services continue to be rendered by 150% of the workers instead of 200%. The ESC eliminated a part of the MSA process by declaring public hospital services essential thereby relinquishing private hospitals as inessential. *SAPS* also has a similar effect in that it hives off the support services rendered by PSA employees as inessential. Similar trade-offs occur during collective bargaining.

In some services it may not be necessary to realign the facts at all. For example, disaster management services become essential in the event of a disaster. A right of recall during strikes might be sufficient.

Fourth, interruption and endangerment are central to collective bargaining about MSAs. Bargaining partners have no choice but to put public interest before their partisan and sectarian interests. These considerations are not the main drivers of collective bargaining for wages and conditions of service.

Fifth, turning to procedural matters, bargaining in essential services for any purpose does not anticipate industrial action if no agreement ensues. Bargaining in essential services for any purpose but MSAs contemplates compulsory mediation and arbitration when impasse is reached. If impasse is reached when bargaining for a MSA, no dispute-resolution process is proscribed. However, that does not have to be the end of the dispute-resolution road, as will be seen below.

Sixth, collective bargaining about wages and conditions of service is voluntary in the sense that the LRA does not dictate to the bargaining

partners what they should bargain about, with whom they should bargain, where they should bargain, when they should bargain, and indeed, whether they should bargain at all. Only if they invoke compulsory arbitration are they told what the bargain should be by the arbitrator. Mediation and arbitration are compulsory but only when any party to the dispute elects to invoke these processes.

Collective bargaining about MSAs is likewise voluntary but differs in that in addition to what is bargained for, namely, a truly minimum service, being prescribed by the LRA, compulsory mediation and arbitration is not available to any party negotiating for a MSA. As pointed out above, s 72(b) should leave no one in any doubt that s 74 which prescribes compulsory mediation and arbitration for disputes *in* (not *about*) essential services is not available to parties to resolve disputes about MSAs. And the ESC has no powers to summon participation in collective bargaining for MSAs.

#### MINIMUM SERVICE AGREEMENTS

The past 15 years of the ESC's existence have demonstrated that strikes in health, police, municipal and court services have not resulted in any reported loss of life as a result of those strikes. Frequent and sometimes prolonged electricity and water cuts have inconvenienced communities and even devastated businesses but these too have not resulted in any reported loss of life. We know from these experiences that these services can be minimized without endangerment.

Strikes are not the only cause of interruptions in essential services. Some public services either do not exist or are interrupted because the state fails to provide them. For instance Charlotte Maxeke Hospital in Johannesburg was without a renal unit for a whole week in March 2012.<sup>23</sup> Cancer patients were turned away without treatment. Allegedly, Siemens, who supplied the units, were not paid by the intermediary who contracted it to provide the units to the hospital. Therefore, when employers cause the interruptions they lose the high ground, moral and otherwise, to resist MSAs.

From these experiences it must now be common cause that while some essential services can be minimized by as much as 100% for some time, others cannot be minimized at all for any length of time. The need for the quantity and quality of services rendered in an intensive care unit is manifestly greater than, say, refuse removal.

Emphatically, the definition of 'essential service' is of service, not people, not entities, not businesses. It follows that what is minimized is the service. Only if the service can be minimized does the enquiry lead to determining who will render the minimized service.

Inevitably, services designated as essential have essential, inessential

<sup>23</sup> *Independent Online* 12 and 13 January 2012.

and not always essential components. Hence ss 72 and 73 co-exist with s 71. Without ss 72 and 73 being available to chisel out the inessential parts, then, as stated above, designating services as essential may not pass constitutional muster. Identifying the inessential components and scaling down essential services under certain conditions release employees to strike, if not for the duration of industrial action, then at least periodically for some part of it.

To overcome the resistance to MSAs employers must accept that not every interruption of essential services results in immediate endangerment. As a quid pro quo their trade union counterparts must submit to a right of recall at any time when an interruption poses an endangerment. By overcoming the hurdles at these two extremes, chiselling MSAs out of the middle ground is facilitated. The following are a set of questions to help the process along:

- 1 What are the principal parts of the service?
- 2 Is the whole or parts of the designated service essential?
- 3 In what circumstances can the service be interrupted without endangering life, health and personal safety?
- 4 For how long can the service be safely interrupted?
- 5 In which geographical areas, institutions or parts can the services be interrupted safely?
- 6 Is there a role for non-striking workers and members of other trade unions?
- 7 How should the 'no work, no pay' rule apply?
- 8 Should a strike fund be established so that those who render an essential service and cannot strike can contribute to those who strike on their behalf?
- 9 When, how, and by whom might strikers be compensated?
- 10 What will be the duration of a strike?
- 11 In what circumstances should the employer exercise the right of recall?
- 12 In those parts that are essential, what should the minimum service be?
- 13 What categories of employees should render the minimum service?
- 14 Who will render the minimum service?

To start with the last question first is to misunderstand the definition and the process. It is the service that is essential, not the service providers. The definition compels the MSA process to commence with an impartial, objective assessment as to whether an interruption of the service would be an endangerment; it is not subjective, partisan negotiations about who should render the service. The questions may vary as the circumstances require.

To answer these questions objectively, the bargaining partners must understand and accept the definition of essential and minimum services. Because the question whether a service is essential is answered by

a factual enquiry, and establishing the facts is an objective exercise, the scope for conflict is minimized. Bargaining partners are better placed to know the service than the ESC. Bilateralism and multilateralism as self-regulation mechanisms should hold better prospects for compliance with agreements because, unlike designations at the instance of the ESC, initiating and concluding MSAs are entirely at the instance of the bargaining partners. Once concluded, parties to MSAs commit individually and collectively to the agreement. Certification by the ESC as an independent oversight and regulatory authority assures the public that its interests are safeguarded in that the minimum service offered is sufficient.

Ultimately, the MSA must be sufficiently detailed and well-reasoned to persuade the ESC to certify it. Certification of MSAs is not a mere procedural rubber stamping formality. As an administrative authority the ESC applies its mind to the MSAs and all the material accompanying its application for certification. To secure certification, the bargaining partners should operate essentially as a subset of the ESC, doing all the ground work that the ESC would otherwise have to do if it investigates the service. The bargaining partners have to step into the shoes of the ESC, conduct their deliberations as independently and impartially as possible and allow the beacon of public interest to steer them to agreement.

*Can members of the ESC and the bargaining partners be truly independent and impartial?*

The short answer is that they have no option but to be so because they act in the public interest when they determine essential and minimum services. In the case of the ESC and essential public services, s 195 compels public administration to be impartial and unbiased. Furthermore, as discussed above, the definition and the process of fact finding steer the bargaining partners towards independence and impartiality, leaving little room for them to exercise discretion. Independence, impartiality and public interest call on them to sanitize their minds of their sectarian interests. Concluding MSAs requires a mind shift from a matters of mutual interest mode to clinical calculations and hard facts.

*Are MSAs entirely voluntary?*

Textually, concluding minimum service agreements is voluntary because collective bargaining and concluding collective agreements is voluntary under the LRA. Because no strike can occur in essential services, the question yet to be answered by the CC is whether an unreasonable refusal to conclude a MSA is an unjustifiable limitation on the right to strike.

*When should MSAs be concluded?*

Ideally, MSAs should be concluded as soon as a service is designated essential and in good time before a strike. Concluding MSAs requires objective and dispassionate minds, not the inflammatory climate that immediately precedes and exists during strikes. MSAs should be reviewed periodically to meet changed circumstances.

*Who should be party to MSAs?*

As an MSA is a collective agreement, parties to a MSA should be employers and representative trade unions. Ideally, all representative trade unions should be party to a single MSA, firstly because the quantity and quality of the minimum service does not change on the basis of the identity of the union that strikes. Secondly, unions not participating in the strike could undertake to cover for those who do strike. This, like everything else about MSAs, requires a high level of maturity and organization which bargaining partners have to develop.

MSAs may be concluded at national, provincial or sectoral level. Such MSAs could be either comprehensive or a framework to be supplemented with plant level agreements.

Although only employers and trade unions are party to MSAs, to secure compliance with MSAs the definition must be accepted not only between the representatives of the negotiating parties but also their respective constituencies. Inter- and intra-organizational bargaining is necessary to improve compliance. The process of adhering to the definition involves extensive education about the right to strike versus the right to life, health and personal safety. It also requires extensive information sharing about the service in order to secure agreement, commitment and compliance with a MSA.

*How does the 'no work, no pay' rule apply when minimum services are rendered?*

The rule applies. Those who strike for those who cannot are bound to be unhappy to receive deductions in their pay when their non-striking colleagues do not. Ways to minimize the burden on strikers should be agreed if not in MSAs, or addendums to MSAs, then in intra-trade union agreements. Attempts should be made to rotate the strikers so that the burden of the pay cut is also distributed more widely and evenly. Another option is that those who cannot strike should contribute an agreed portion of their salary to a fund for distribution to those who strike on their behalf.

## THE CONSTITUTIONAL NUDGE

Whether a service is essential has constitutional implications because workers rendering essential services are prohibited from striking.



Hence, the ESC applies the definition strictly, bearing in mind that as a limitation on the right to strike, it has to be reasonable and justifiable. This approach now has the endorsement of the CC.<sup>24</sup> Hence the scheme of the LRA is designed to avoid or minimize this limitation. Self-regulation through the MSAs is a vital part of that scheme to avoid unconstitutional prohibitions of the right to strike.

MSAs enable strikes to occur in services in which strikes are otherwise absolutely prohibited. They are a less restrictive limitation on the right to strike. They render the absolute prohibition of strikes constitutional. Given this instrumental function of MSAs, the freedom to contract cannot be absolute. Consequently, failure or refusal to contract could amount to an unreasonable limitation on the right to strike.

Intrinsic to the definition of essential services is the countervailing right to life, to personal security and bodily integrity. The definition of an essential service does not allow the right to strike to trump these countervailing rights. Consequently, the proportionality test cannot apply to balance the right to strike against the right to life, personal safety and bodily integrity. In the face of these rights, to speak of a balance is a misnomer because the definition of essential services always tips the scale entirely against the right to strike.

For strikes to be lawful they must also be non-violent, a requirement that reinforces the primacy of life, personal safety, health and bodily integrity, each of which are substantive, constitutional rights. Whereas workers have the right to strike, communities have the right to essential and basic services. Such rights could be impaired not only because of violence during strikes<sup>25</sup> but also because the right to strike is over-emphasized at an unreasonable cost to other rights. All rights have to be balanced against each other to pass constitutional muster.<sup>26</sup> Therefore, the proportionality test would apply to balance the right to strike lawfully against all other constitutional rights. Thus, MSAs not only enable strikes but also order strikes so that communities are protected and strikes, even lawful ones, do not trump other rights.

#### THE WAY FORWARD

From my observations above it should be clear that remedying the malaise in essential services needs a multi-pronged strategy. My observations have to be tested with the social partners as they hold the key to devising effective remedies. A multi-pronged strategy covering interventions into legislative and organizational arrangements has to be developed by the social partners through consultative processes, especially as the remedies anticipate policy changes. Hence I cannot prescribe the remedies. However, I do in this section raise a series of

<sup>24</sup> *SAPS* para 30.

<sup>25</sup> ???

<sup>26</sup> *SAPS* para 16E.

questions that could lead to developing the strategy and devising remedies.

*Are the institutional arrangements adequate?*

The formative task of the ESC was to conduct investigations into services that the Minister of Labour had deemed to be essential pending the ESC's designations.<sup>27</sup> Hence the designations that exist today. Usually, the ESC is slow to initiate an investigation if the status of the service as essential or inessential is not controversial. Besides, the ESC as a three-person committee serving on a part-time need-for basis is not resourced to investigate every service on its own. The CCMA supports the ESC financially, administratively and with research capacity. *Is the structure and capacity of the ESC sufficient to enable it to be a one stop shop on essential services? Should the labour law criteria for qualifying ESC members include extensive experience not only in labour law dispute resolution, but also administrative and constitutional law?*

Frequent changes of representatives to the ESC and bargaining partners result in the loss of institutional experience and capacity. Trust and working relationships have to be re-established with every change.

*Should the tenure of ESC members and their conditions of appointment be reviewed?*

The ESC needs the active participation of all the affected social partners to investigate a service thoroughly. During investigations the community, as recipient of the services, is a vital social partner which has an opportunity to articulate its democratic voice, especially as the mutual interests of the bargaining partners do not always coincide with community and public interest. Hence the ESC notifies the public of its investigations and findings. Thus far members of the public as organized formations and individuals have not used this opportunity to shape the ESC's decisions. The lack of public participation is a serious shortcoming not only in terms of process but also substantive outcomes. *How can the ESC cultivate public participation?*

New technology not available 15 years ago, such as blogging, Facebook and Twitter, are now available. *How can social media networks improve communication between the ESC and the public?*

*Is there a legal vacuum?*

Professor Grogan answers this question affirmatively. Following *Eskom* he takes the view that because s 72 authorizes the ESC to do no more than ratify MSAs, because the ESC lacks the power to impose a MSA and because the refusal or failure to conclude a MSA is not a

<sup>27</sup> item 24 part G schedule 7 to the LRA; *Gazette* 17516 dated 1 November 1996; *Gazette* 17973 dated 9 May 1997.

dispute that can be referred to arbitration according to the SCA, there is a legal vacuum.<sup>28</sup> This observation cannot be faulted. However, insofar as it advocates a case for adjudicating MSAs or compelling collective bargaining for MSAs, a policy shift is necessary. *Should collective bargaining for MSAs which is currently free be compelled under the LRA? If adjudication is to be prescribed then should the ESC be entrusted with the powers to adjudicate duty to bargain disputes about MSAs? Should such adjudication be prefaced by consensus seeking dispute resolution processes? Should the LRA be amended to include a requirement that the ESC be served with notice of all proceedings in essential services and be invited to participate if it so chooses? Short of such amendment, should judges issue a directive to this effect? What, if any, should be the role for private dispute resolution in essential services?*

*Is there a basis for reviewing the designation of essential services?*

Poor people in communities historically deprived of services over decades are worse off when essential services are interrupted, especially for long periods. During strikes their conditions worsen. In contrast, for most essential services rich people have alternatives. The rich can substitute essential public services with private hospitals, medical and security services, electricity generators, and tanks to save rain water. Bagging rubbish into a motor vehicle to drive weekly to the local dumpsite is a minor irritation and an inconvenience. The worst impact of strikes in essential services therefore is to poor communities without alternative services.

On the one hand this shows that services already designated as essential can be reduced without endangering life, health and personal safety. MSAs are therefore possible. On the other it also shows that the population, accustomed to few or no services, is sufficiently resilient. Bearing in mind that an inadequate minimum service devalues life and forces poor people to settle for less, *should the resilience of poor people to survive against all odds count as a factor when negotiating MSAs? If yes, what thresholds, if any, should be set to avoid violating their constitutional rights? Should the ESC put the social partners on terms to conclude MSAs failing which it would re-investigate services already designated essential? Should the ESC undertake a systematic investigation of services particularly prone to strikes?*

*Should the relationship between employers, trade unions and employees in essential services be reviewed?*

Employment in essential services, often synonymous with public services, is typically politicized. This is true in both pre- and post-

<sup>28</sup> Grogan n 15 above.

apartheid South Africa. Appointing staff who support the political party in control of the administration is good insofar as it synergizes policy with implementation. It is bad when the policy and implementation undermine basic values and principles governing efficient public administration promised in s 195 of our Constitution.

Leadership from employers and trade unions has been lacklustre and lily-livered. Strikes are prolonged and characterized by violence and intimidation. Strike breakers and replacement workers have had their homes burnt. The mere mention of the 'no work, no pay' rule usually triggers another strike. Employers and trade unions are too weak to discipline workers who strike illegally and who intimidate other workers.

For an essential service regime to succeed, compliance is vital. Compliance requires enforcement. Enforcement needs leadership. Without leadership MSAs are a non-starter. *What needs to be done to cultivate leadership in essential services?*