

IN THE ESSENTIAL SERVICES COMMITTEE

HELD AT JOHANNESBURG

Case No.: ES 233

In re: Investigation in terms of Section 71 of the Labour Relations Act, 66 of 1995:
Whether public transport services, should be designated as essential services

DESIGNATION

1. Introduction

1.1 The Applicant, National Black Consumer Council, brought an application in terms of section 71 of the Labour Relations Act, 66 of 1995, as amended ("the Act") on the 20th April 2018 to declare the public transport, particularly public services, an essential service. The Applicant filed its Request for Essential Service Investigation on the 20th April 2018.

1.2 This application was supported by the following entities:

- Nelson Mandela Bay Business Chamber, filing its written submissions on the 5th July 2018.
- Golden Arrow Bus Services (Pty) Ltd, filing its written submissions on the 11th July 2018.

- Cape Chamber of Commerce and Industry, filing its written submissions on the 6th July 2018.
- Commuter Bus Employers Organisation and South African Bus Employers Association, filing its joint written submissions on the 6th July 2018.

1.3 Notice in terms of section 71 of the Act was duly published by the Essential Services Committee (ESC) that oral submissions would be heard at the following venues:

- 11 July 2018 – Port Elizabeth
- 13 July 2018 – Durban
- 16 July 2018 – Cape Town
- 17 July 2018 – Bloemfontein
- 20 July 2018 – Johannesburg

1.4 I chaired the hearing and the Johannesburg hearing was chaired by Mr. Mohini Sonman. Mr Zwe Ndlala (Government) and Mr Ndaba (Labour), sat in as assessors.

1.5 The following parties were present at this hearing and made oral submissions on whether the public service, in particular buses, should be declared an essential service:

- National Black Consumer Council (represented by Dr Russon)
- Golden Arrow Bus Services (Pty) Ltd (represented by Edward Nathan Sonnenberg Inc)
- Commuter Bus Employers Organisation and South African Bus Employers Association (represented by Bowman Gilfillan)

The following parties presented oral submissions opposing the application to have the public service declared an essential service:

- NUMSA
- SATAWU
- TASWU

2. Submissions

National Black Consumer Council

2.1 Dr Russon indicated his dissatisfaction with the manner in which the ESC treated the NBCC as they were the last party to be notified of the hearings and were therefore unable to travel to the hearings held outside Johannesburg. They were not afforded a proper opportunity to make oral submissions in the hearings held in the other provinces.

2.2 The right to strike must be protected because it is the only weapon at the disposal of employees. The national bus strike of 2018 started on the 18th April 2018 and ended on the 14th May 2018 affecting about a million commuters around the country. Approximately 17 000 bus drivers participated in this strike. The NBCC fully supports the demands of the workers and urges both unions and employers to continue talking about improving the working conditions of employees in the industry.

2.3 However, although the strike action was justified, the NBCC supports the view that the public transport service, in particular, the bus service, be declared an essential service as it affected many consumers who were left stranded and this had added effects on other consumers in other sectors like hospitals, schools, fire and emergency services, water services, etc.

2.4 Consumers were also hurt financially by having to pay higher travelling costs to get to work using alternative means of transport, viz taxis. This also impacted on work attendance as many workers were either absent or arrived late for work. The Sowetan reported that thousands of people across the country were left stranded or were late getting to their destinations because of the strike.

2.5 Cape Town commuters complained of having to pay as much as R50.00 extra daily travelling between Khayelitsha and Claremont, in addition to the monthly bus ticket they had already purchased.

2.6 Ms Majozi from Soweto had to leave work before her children woke up and arrived back after midnight, when her children were asleep. Ouma Pieterse from Kliptown could not travel to hospital to collect her chronic medication and ended up in a coma and subsequently died.

2.7 The biggest impact was felt in the health sector. Several hospitals reported increased absenteeism and short staffing during the strike. In one hospital, a woman died after giving birth because there was only one nurse in the ward with 20 patients.

2.8 Many nurses depend on public transport to travel to work. Compounding this problem is the fact that the nurse to population rate is below the acceptable world standard [Nurse/population ration of 1:197 in 2017 in South Africa].

2.9 The strike affected the right to affordable health and the right to health is directly linked to the right of life. Any action that affects the right as enshrined in the Constitution may lead to class action against the perpetrators.

- The taxis were overwhelmed with the number of people needing transport during the bus strike resulting in long queues. The consumers have no voice and are not represented but are the most vulnerable.

Commuter Bus Employers Organisation and South African Bus Employers Association

- 2.10 They are not challenging the legal position and recognize the Constitutional right to strike in terms of section 35.
- 2.11 The heart of the matter lies with the users of the public transport service, viz pensioners, children and sick and ailing people. The NBCC showed that there was a loss of life during the strike despite SATAWU's allegation that there were no such incidents.
- 2.12 The users of the service must be considered not the drivers.

Golden Arrow

- 2.13 The ILO recognizes that the prevailing conditions must be taken into account and therefore how the poor suffer cannot be ignored. The poor cannot afford their own transport and rely heavily on subsidized public transport.
- 2.14 The strike had a direct impact on the right to health as many poor people relied heavily on buses to transport them to public hospitals in the metropolitan areas. This is further supported by the TAC report identifying a need for ambulance services in the townships and informal settlements as this is presently non-existent. Patients in these areas are therefore dependent on public transport to access health care.
- 2.15 Golden Arrow received many complaints from commuters during the 2018 bus strike about long queues, physical threats, late-coming and muggings endured because of being forced to walk long distances to access alternative transport. Numerous

complaints were also received about being forced to utilise taxi services and being subjected to unsafe conditions in this industry.

2.16 The taxis were unable to cope with the demand and the unsafe driving conditions increased placing these commuters at further risk and danger. The commuters did not face these unsafe conditions while using the public bus services.

2.17 Parties opposing NBCC's application

- NUMSA (represented by Mduzuzi Nkosi)
- SATAWU (represented by Solomon Mahlangu)
- TASWU (represented by Simmy Ramalope)

NUMSA

2.18 The Constitutional right to strike must be recognized and given effect to. Numsa represents poor workers rights and this is an attempt to take away these rights from the workers.

2.19 Statistics SA records that up to 60% of commuters use taxis, which is not subsidised. The bus passengers do not form the majority of the public transport users and the buses therefore do not transport the majority of consumers.

2.20 The long queues found at taxi ranks are prevailing on a daily basis and is not unique to the strike period. Furthermore, the hazards identified by the Applicants are daily hazards for the majority of South African consumers and are not only faced by bus commuters during the bus strike.

- 2.21 The workers only resort to strike action as a last resort. There were twenty days of negotiation preceding the last bus strike in 2018. However, a majority of their demands were not achieved, viz the issues of night shift and double drivers. These demands will remain unresolved if the bus service is declared an essential service.
- 2.22 Strikes are designed to be an interruption in providing labour to the affected employers to accede to the workers demands. The Applicants' submissions on economic basis is exactly what strikes are intended to do.
- 2.23 The Applicants must show what percentage of consumers they are representing and that they are subsidized by government.
- 2.24 Their submissions are based on economic reasons only and the conditions alluded to are still prevalent under normal conditions.

SATAWU

- 2.25 SATAWU remains committed to cost-effective, reliable, safe and integrated public transport services.
- 2.26 The public transport system is represented by taxis, buses and train services. Trains employ approximately 15 000 workers, buses about 34 200 workers and taxis about 960 000 workers. The taxi industry is not regulated and collective bargaining does not take place in this industry. The last strike for train workers took place in 2010. The bus industry has had a few strikes in the last few years, viz 2013, 2017 (2 days) and the protracted strike in 2018. Trains transport about 2 million commuters daily, buses about

9 million commuters daily and taxis about 15 million commuters daily. 66% of commuters are therefore serviced by the taxi industry, 21% by buses and 13% by trains.

2.27 It is not clear why the Applicants are only asking for the bus transport service only to be declared an essential service and not the taxi and train services. The workers achieve their demands by striking as it is not simply handed to them on a silver platter. Blame cannot be apportioned to workers simply because they are seeking to transform their economic situation.

2.28 The Applicants have failed to establish a causal link between the lady who died giving birth in hospital to the bus strike. This is a vague argument. The definition of essential services as per section 213 of the Act has not been given effect to and the Applicants have failed to show that the requirements as per the definition have been met.

2.29 The workers are only seeking to improve their working conditions and are hoping to achieve this by striking as this is the only tool they can use to achieve better working conditions and benefits like medical aid, housing allowances, etc.

2.30 The Applicants have failed to show why the service must be declared an essential service.

SATAWU representing the Rail workers

2.31 Public transport includes buses, taxis and rail services. The rail industry sits with the National Department of Transport and affects all provinces, and includes long and short distance travel.

2.32 The rail industry cannot be declared an essential service because workers going on strike are not the issue. The real issue lies with integrated transport system. This application to declare the rail industry an essential service is merely an attack on the workers rights and on collective bargaining.

2.33 The National Railways Safety Regulator has clear laws and policies on how to stabilise the rail industry.

TASWU

2.34 There is no unique reason to declare public transport an essential service. Public transport is utilized by poor people and the workers in the public transport service industry are also poor people. Collective bargaining and strikes are the only tools available to them to negotiate better working conditions.

2.35 The bus industry operates on schedules and on demand so it is hard to understand how sick people are placed at risk of death if workers embark on strike action. If a person is sick, the correct action is to call for an ambulance to transport this person to the hospital.

2.36 The Constitution grants the right to strike for a purpose and withdrawing this right leaves the workers without any rights. The proposal by the Applicant to arbitrate these disputes will not work. The Application to declare public transport an essential service is opposed.

NUMSA

- 2.37 The plight of workers must be known. They face desperation when they embark on strike action. It is also prejudicial to workers when MSA's are drafted in English and they are required to sign documents they cannot understand.
- 2.38 There were no recorded deaths during the last bus strike. The submissions made by the Applicant are rejected.
- 2.39 The workers resort to strike action as the last resort. They desire to resolve all differences in a bargaining environment but the Employers are not using this tool, especially in the bus industry but are instead looking to limit the workers right to strike.
- 2.40 The employees in the bus sector are facing real and deep challenges and these issues must be dealt with decisively. The employers in the bus industry are encouraged to deal with issues to prevent workers going on strike action.
- 2.41 He lives in a township and his children use the bus services to go to school. They continued going to school during the bus strike. There are hospitals in the townships and transport is available to these hospitals.
- 2.42 The Applicants claim is therefore unfounded because he comes from the township and he urges them to go to the township to verify their claims. The consumers are the workers who cannot afford to survive. This application cannot be supported by the workers.

3 Survey of the Evidence and Arguments

3.1 The constitutional right to strike is well entrenched in our law. Section 23(2) of the Constitution gives effect to this right. It states:

"Every worker has the right-

(a) ...;

(b) ...; and

(c) To strike."

3.2 Section 64 of the Act sets out the procedure that must be followed when employees wish to embark on protected strike action, the provisions of which are not relevant for present purposes.

3.3 Section 36 of the Constitution allows for the limitation of the rights that are embodied in the Bill of Rights. The relevant section states:

"The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including:

(a) the nature of the right;

- (b) *the importance of the purpose of the limitation;*
- (c) *the nature and extent of the limitation;*
- (d) *the relation between the limitation and its purpose; and*
- (e) *less restrictive means to achieve the purpose."*

3.4 Section 65 of the Act provides for the limitation on the constitutional right to strike. The relevant sub-section thereof for purposes of this application is section 65 (1) (d) (i), which states:

"No person may take part in a strike ...if-

- (d) *that person is engaged in-*
 - (i) *an essential service".*

3.5 It is trite law that a court, tribunal or forum, when interpreting the Bill of Rights, must give consideration to international law.

3.6 It is furthermore trite law that essential services must be restrictively defined (See *Chirwa v. Transnet Ltd and Others 2008 (4) SA 367 (CC) at paragraph [101]*).

3.7 Chaskalson *et al* (in *Constitutional Law of South Africa, Volume 4, Second Edition, Juta*) point out that having regard to the definition of essential service in the Act, the prohibition on strikes in essential services operates only in very restricted circumstances.

3.8 Similarly, Brassey (in *Commentary on the Labour Relations Act, Volume 3, Juta*) notes that an essential service is narrowly defined in our law; that the emphasis is on threats to safety

and security, and that considerations of mere expense and inconvenience fall beyond the ambit of the definition of an essential service.

3.9 Brassey notes further:

"It is the service that is essential – not, as was so under the previous Act, the industry within which such service fell. Thus essential and non-essential service workers can be found working side by side in the same institution. In a hospital for instance, doctors and nurses might be essential service workers, whereas the cleaners and gardeners would probably not be".

3.10 The Labour Court endorsed this view of Brassey in ***SA Police Service v Police & Prisons Civil Rights Union & Others (2007) 28 ILJ 2611 (LC)***, when it ruled that not all employees of the South African Police Service render an essential service which prohibits them from embarking on strike action. The Labour Court held that it is the service that is essential, not the industry. The suggestion that finance administrators, human resource personnel, tea ladies and cleaners render an essential service by reason only of being employed by the SAPS was, in the Court's view, difficult to comprehend. It could not be argued, on the definition of essential service in the Act, that the interruption of the service of the above workers would *"endanger the life, personnel safety or health of the whole or part of the population"*.

3.11 The above judgment was confirmed on appeal by the Labour Appeal Court. Waglay JA held that while employees employed under the Public Service Act Proclamation 103 of 1994 provide important support and complementary functions to the SAPS, they do not form part of the SAPS that is designated as an essential service by the Act. Such employees were accordingly not prohibited from striking in terms of section 65(1) (d) of the Act. Waglay JA held that giving effect to the interpretation sought by the SAPS, to the effect that all persons employed by SAPS rendered an essential service, would unjustifiably restrict the fundamental right to strike enshrined in the Constitution.

3.12 The Labour Appeal Court judgment was confirmed on appeal by the Constitutional Court. A unanimous Constitutional Court held that the Labour Appeal Court could not be faulted in holding that not all SAPS employees are engaged in an essential service, and that the wide interpretation sought by the SAPS was incorrect. The Constitutional Court held that *"a restrictive interpretation of essential service must, if possible, be adopted so as to avoid impermissibly limiting the right to strike"*.

3.13 Having regard to the above, it is clear that our law requires essential services to be restrictively interpreted, and that this means, *inter alia*, the following:

3.13.1 It is the service which is essential, not the industry or the institution within which the service falls;

3.13.2 Only those employees who are truly performing an essential service, may be prohibited from striking; and

3.13.3 Essential and non-essential service workers may be found working side by side in the same institution.

3.14 Essential service is defined in section 213 of the Act as:

"a service the interruption of which endangers the life, personal safety or health of the whole or any part of the population".

- 3.15 Before the ESC can designate any service as essential, it must be satisfied that:
- 3.15.1 It is a service, or part thereof, that is essential. It is not employees, or a business or industry that is essential (see *SAPS v. POPCRU and Others* supra);
 - 3.15.2 There must be an interruption, irrespective of whether it is partial or complete. If industrial action is unlikely to interrupt the service, or if the interruption can be avoided (for example by using replacement labour), the service will not be designated as an essential service;
 - 3.15.3 The interruption of the service must endanger life, personal safety or health. Endanger means "putting at risk", "imperil" or "jeopardise". This implies that the conditions prevailing at the time that the designation is made, must be considered, and not the circumstances that may occur at some future stage; and
 - 3.15.4 The endangerment must impact on the population, being human beings (see D Pillay "*Essential Services under the new LRA*" (2001) 22 ILJ 1 and the ESC designation in the matter of the *Road Traffic Management Corporation and Others vs. NEHAWU and Others*).
- 3.16 In terms of the submissions received it is clear that the Applicants are seeking for the bus services in the public transport service to be declared an essential service.

- 3.17 SATAWU presented valuable information regarding statistics of the various users of bus, taxi and rail services which will assist in determining whether there is an interruption of this service during strike action.
- 3.18 On the evidence presented I am not convinced that the transport service by busses during industrial action would be interrupted that it would endanger life personal safety or health. It is undisputed evidence that there is always an alternative of the taxis, rail and other means of transportation.
- 3.19 While the increased numbers of commuters on both the taxi and rail service does have an impact on same, there was no compelling submission on the endangerment to life, the personal safety and health of the whole or part of the population. The commuters will face the same dangers and risks using these services that prevail at any time and is not peculiar to strike periods only.
- 3.20 NUMSA's submissions that the buses run on schedule and are not a on-demand service is particularly relevant to the counter argument that the lives of critical ill commuters are endangered when bus drivers are on strike as these patients will have no choice but to wait for buses outside the strike period. Medical staff are also able to utilize taxis and rail for transport to hospitals. SATAWU's statistics on commuters using the different public transport is relevant and helpful in this regard.
- 3.21 The Applicants arguments relied more on the financial impact that the strike action in the bus transport industry had on commuters rather than the endangerment to life, personal safety and health of the commuters.

4. Designation

The Applicant's application hereby fails. On the evidence before us, public transport cannot be designated as an essential service.



Advocate Luvuyo Bono

Chairperson of the ESC

22 February 2019