THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

REPORTABLE

Case no: JR1269/2020

In the matter between:

NATIONAL EDUCATION HEALTH AND ALLIED WORKERS UNION OBO MEMBERS	Applicant

and

ESSENTIAL SERVICES COMMITTEE	First Respondent
COMMISSION FOR CONCILIATION, MEDIATION AND ARBITRATION	Second Respondent
SIBONGISENI SITHOLE *NO*	Third Respondent
INDEPENDENT ELECTORAL COMMISSION	Fourth Respondent

Heard: 19 November 2024

Delivered: 5 March 2025

Summary: Application to review and set aside ruling of the Essential Services Committee, including its jurisdictional ruling. Application for condonation for the late filing of the review. Application for condonation granted, but application for review dismissed.

JUDGMENT

DANIELS J

Introduction

[1] The National Education, Health and Allied Workers Union (hereafter the "NEHAWU") brings this application on behalf of its members. NEHAWU seeks to review and set aside the ruling of the third respondent (the "commissioner"), acting under the auspices of the Essential Services Committee (hereafter the "ESC"), handed down on 7 May 2020, under reference ES51. The applicant also seeks condonation for the late filing of its review application.

[2] These applications are opposed by the fourth respondent, cited as the Independent Electoral Commission. Nothing turns on this, but the fourth respondent ought to be referred to as the Electoral Commission (hereafter the "Commission" or the "Electoral Commission").

Background

[3] NEHAWU has a number of members in the employ of the Electoral Commission.

[4] Given that the Electoral Act No. 73 of 1998 (hereafter the "Electoral Act"): establishes the Commission as an essential service "for the purposes of the LRA", the Commission and the NEHAWU commenced negotiations, through the Electoral Commission's National Bargaining Forum, to agree on a minimum services agreement (hereafter "MSA"). These negotiations were facilitated by the ESC.

[5] NEHAWU and the Commission agreed on most of the terms of the MSA but were unable on clause 3.6; proposed by the Commission, which read as follows:

> "*[3.6] Parties agree that strike action or withholding of labour will be prohibited from the beginning of the first month of an official registration event until the end of the month in which National, Provincial or Local Elections are being conducted. Furthermore, the same timeframes and limitations will be applicable in areas where by-elections are being conducted*." (own emphasis)

[6] NEHAWU took the view that clause 3.6 would have the effect of limiting strikes, by its members, in excess of the limits imposed by the Local Government: Municipal Electoral Act 27 of 2000 (hereafter the "Municipal Electoral Act"). During the negotiations, NEHAWU and the Commission agreed that any dispute about the terms of the MSA would be determined by the ESC. NEHAWU therefore referred a dispute to the ESC.

[7] However, despite its stance during negotiations, at the ESC hearing, the Commission's representatives argued that the ESC had no jurisdiction. It argued that the concept of a "minimum service" contemplated by the Labour Relations Act No. 66 of 1995 (hereafter "the LRA") related only to the minimum number of employees necessary to ensure that there was no danger to life, personal safety or health [of the whole or part of the population] while this dispute concerned only the timing of strikes. In addition, the Commission submitted, the disruption of its services presented no danger to life, personal safety or health [of the whole or part of the population]. The services of the Commission was therefore not an "essential service" as contemplated by the LRA. Nor could it be considered a "designated essential service" because the ESC had not designated the Commission as an essential service.

[8] In an affidavit submitted to the ESC, the Commission suggested that the ESC may determine the dispute in terms of section 74(1) of the LRA. Furthermore, the Commission stated, many strikes, including those by

NEHAWU, are characterised by violence. The Commission submitted that strikes, during voter registration, could undermine its ability to comply with its constitutional mandate, as outlined by the Constitutional Court in *Electoral Commission of South Africa v Speaker of the National Assembly and others*[1].

[9] The primary argument of the NEHAWU was based on section 210 of the LRA which provides that where conflict arises (in relation to matters dealt with under the LRA) with any other law the LRA must prevail[2] save to the extent that such other law expressly amends the LRA.

[10] The ESC issued its ruling on 7 May 2020, in which it found that:

10.1 Its powers are not limited to the essential services designated by it under the LRA.

10.2 Its powers extend to all essential services including those determined to be essential services through legislation such as the Electoral Act.

10.3 The words "*for the purposes of the LRA*" in section 112(1) of the Electoral Act was intended to convey that the provisions of the LRA, which relate to essential services are incorporated, by reference, into the Electoral Act.

10.4 Because the parties had already agreed on the minimum number of employees required to maintain the minimum service, the only dispute existed in relation to the timing of strikes. The Electoral Act and the Municipal Electoral Act both limited strikes at times critical to elections, given the importance of elections proceeding without interference.

[1] 2019 (3) BCLR 289 (CC) (22 November 2018)

[2] Save for the Constitution.

10.5 The limitation on strikes contemplated in clause 3.6 of the proposed MSA was fair and reasonable because it confirms what is already contained in legislation. Clause 3.6 was therefore determined to be part of the minimum service agreement.

Condonation

[11] The applicant, dissatisfied with the ruling of the IEC, brought an application to review and set aside the ruling. The ruling was handed down on 7 May 2020, but the review application only initiated on 10 September 2020, several weeks outside the prescribed period.

[12] The explanation for the delay is that, when the ruling was issued, the COVID19 pandemic was rife, and convening physical meetings between members and officials were extremely difficult. Travel restrictions were in place, and union officials were unable to access the union's offices, photocopying and faxing facilities.

[13] In relation to prospects of success, the applicant states that it has good prospects of success because the third respondent misapplied the law and permitted other legislation to override the LRA. The applicant alleged that it was in the interests of justice to grant condonation, and it would be seriously prejudiced, if condonation were refused, because the constitutional right to engage in strike action would be unjustly curtailed.

[14] The fourth respondent opposes the application for condonation. It argues that the period of the delay is lengthy, the applicant has not explained the delay in full, the explanation is weak, and the applicant will suffer no prejudice if condonation is refused.

[15] Before considering the condonation application, it is necessary to set out the principles which govern condonation. They are conveniently summarised in

Grootboom v National Prosecuting Authority & another[3] at paras 50 and 51 where Zondo J (as he then was) held:

> *[50] In this court the test for determining whether condonation should be granted or refused is the interests of justice. If it is in the interests of justice that condonation be granted, it will be granted. If it is not in the interests of justice to do so, it will not be granted. The factors that are taken into account in that enquiry include:*
> *(a) length of the delay;*
> *(b) explanation for, or cause for, the delay;*
> *(c) prospects of success for the party seeking condonation;*
> *(d) importance of the issue(s) that the matter raises;*
> *(e) prejudice to the other party or parties; and*
> *(f) effect of the delay on the administration of justice.*
>
> *Although the existence of the prospects of success in favour of the party seeking condonation is not decisive, it is an important factor in favour of granting condonation.*
>
> *[51] The interests of justice must be determined with reference to all relevant factors. However, some of the factors may justifiably be left out of consideration in certain circumstances. For example, where the delay is unacceptably excessive and there is no explanation for the delay, there may be no need to consider the prospects of success. If the period of delay is short and there is an unsatisfactory explanation but there are reasonable prospects of success, condonation should be granted. <u>However, despite the presence of reasonable prospects of success, condonation may be refused where the delay is excessive, the explanation is non-existent and granting condonation would prejudice the other party</u>. As a general proposition the various factors are not individually decisive but should all be taken into account to arrive at a conclusion as to what is in the interests of justice.*"

[3] (2014) 35 ILJ 121 (CC)

[16] In my view, the period of the delay, though not insubstantial, cannot be described as “excessive”. In addition, though greater detail could have been provided, the chaos wrought by the COVID19 pandemic is well known and has been recognized by our courts. The explanation for the delay, though lacking in certain detail, is adequate. In addition, there are prospects of success. Indeed, the fourth respondent’s own stance at the ESC, that it had no jurisdiction, indicates that the applicant’s contentions are not completely without merit.

[17] The interests of justice weigh heavily in favour of condonation. At face value, clause 3.6 of the proposed MSA is broader than the limits imposed on strikes by the Municipal Electoral Act. Given the centrality of the right to strike, any limit on strikes is of some significance. Furthermore, the importance of the function performed by the Electoral Commission, adds further heft to the matter. The Electoral Commission suffers little or no material prejudice if condonation is granted. In these circumstances, this judgment will bring greater certainty on this important matter.

[18] In the circumstances, condonation is granted for the late filing of the review application.

Legal principles: reviews

[19] The arbitration and the outcome both constitute administrative action. Section 33(1) of our Constitution requires that all administrative action must be lawful, reasonable and procedurally fair. It was in this context that the Constitutional Court[4] fashioned the generally applicable review test in relation to CCMA arbitration awards in the following terms: is *the arbitration award is one which no reasonable commissioner could reach on the material before him or her*?

[4] *Sidumo and another v Rustenburg Platinum Mines Ltd and others* 2008 (2) SA 24 (CC); (2007) 28 ILJ 2405 (CC)

[20] However, in relation to reviews on jurisdictional matters, the appropriate test on review is not reasonableness but correctness.[5] This was explained as follows in *SA Rugby Players Association & others v SA Rugby (Pty) Ltd & others*[6]:

> *"[40] The CCMA is a creature of statute and is not a court of law. As a general rule, it cannot decide its own jurisdiction. It can only make a ruling for convenience. Whether it has jurisdiction or not in a particular matter is a matter to be decided by the Labour Court. …. This means that, in the context of this case, the CCMA may not grant itself jurisdiction which it does not have. Nor may it deprive itself of jurisdiction by making a wrong finding that it lacks jurisdiction which it actually has. There is, however, nothing wrong with the CCMA enquiring whether it has jurisdiction in a particular matter provided it is understood that it does so for purposes of convenience and not because its decision on such an issue is binding in law on the parties."* (own emphasis)

Legal Analysis

The right to strike

[21] The right to strike is a fundamental right enshrined in our Constitution.[7] One of the objects of the LRA is to regulate the right to strike. Another is to give effect to the public international law obligations of the Republic relating to labour relations.

[5] Reviews in the Labour Court (LexisNexis) by A Myburgh and C Bosch at p241

[6] (2008) 29 ILJ 2218 (LAC) at para 40

[7] In *SATAWU v Moloto* (2012) 33 ILJ 2549 (CC) the Constitutional Court said:

> "*The right to strike is protected as a fundamental right in the Constitution without any express limitation. Constitutional rights conferred without express limitation should not be cut down by reading implicit limitations into them, and when legislative provisions limit or intrude upon those rights they should be interpreted in a manner least restrictive of the right if the text is reasonably capable of bearing that meaning*." (own emphasis)

[22] South Africa has ratified the Freedom of Association and Protection of the Right to Organise Convention[8] and the Convention concerning the Application of the Principles of the Right to Organize and to Bargain Collectively.[9] Though neither convention directly refers to the right to strike, collectively the conventions recognize the rights of workers to freedom of association, and the rights of workers to undertake programmes to advance or defend their interests. Within this context, the Committee on Freedom of Association (a Committee established the Governing Body of the International Labour Organisation) recognized the importance of the right of workers to strike - with the exceptions of public servants who exercise the authority of the State,[10] and those workers within essential services in the strictest sense.[11]

Enactments relating to the Electoral Commission

[23] The Electoral Commission is governed by various legislation namely:

23.1 The Constitution of the Republic of South Africa Act 108 of 1996, which deals with the functions of the Commission in section 190. The primary functions of the Commission are to act independently, to conduct free and fair elections (at all levels - national, provincial and local) and to announce the election results.

23.2 The Electoral Commission Act 51 of 1996[12] (hereafter the "Electoral Commission Act"), which repealed the Independent Electoral Commission Act of 1993. The powers and functions of the Commission

[8] No 87 (1948)

[9] No 98 (1949)

[10] Digest of decisions and principles of the Freedom of Association Committee of the Governing Body of the ILO (2006) (Fifth Revised Edition) at para 596; see also B Gernigon in "ILO Principles Concerning the Right to Strike" International Labour Review Vol. 137 (1998) (Vol 4) at p17

[11] The Freedom of Association Committee considers essential services, in the strictest sense, to be those services the interruption of which would create and clear and imminent threat to the life, personal safety, or health of the whole or part of the population. See Digest of Decisions and Principles of the Freedom of Association Committee of the Governing Body of the ILO (2006) (Fifth Revised Edition) at para 581

[12] 51 of 1996

are dealt with in section 5 of the Electoral Commission Act. The Electoral Commission Act deals with the election of national, provincial and local legislative bodies.

23.3 The Electoral Act:

23.3.1 Applies to the elections of the National Assembly and every provincial legislature, but only applies to the elections of a municipal council (or a by election for such council) to the extent contemplated by the Local Government: Municipal Electoral Act.[13]

23.3.2 Section 112(1) provides that the "*service provided by the Commission is an essential service for the purpose of the Labour Relations Act.*[14] This provision is broad and appears to cover the entire service of the Commission, at all times.

23.3.3 Section 112(2) provides that strikes and lockouts on voting day by employees and employers in the public transport or telecommunication sector are prohibited and are not protected in terms of the LRA. These services are not declared to be essential services.

23.3.4 While section 112(1) declares the service provided by the Commission to be an essential service for the purposes of the LRA, section 112(2) merely prohibits strikes and lockouts in the public transport or telecommunication sector on the voting day. This contrast suggests that the drafters intended that the provisions of the LRA, as far as they relate to essential services, would apply to the Electoral Commission but not the public transport or telecommunication sector.

[13] See section 3(2) of the Electoral Act.

[14] Note that, subject to any minimum service agreement, all employees engaged in the "essential services" are prohibited from engaging in strike action by virtue of section 65(1)(d)(i) of the LRA.

23.4 Section 86 of the Municipal Electoral Act provides: "*the service provided by the Commission from the date the notice calling for an election is published to the date the result of the election is declared, is an essential service".*

[24] It is appropriate at this point to note that while the Electoral Act suggests that the entire service performed by the Electoral Commission is, at all times, an essential service; the Municipal Electoral Act indicates otherwise.

Relevant provisions of the LRA

[25] The following provisions of the LRA featured prominently during the ESC hearing:

25.1 Section 72(2) reads: "*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*".

25.2 Section 72(8) reads: "*Any party to negotiations concerning a minimum services agreement may, subject to any applicable collective agreement, refer a dispute arising from these negotiations to the commission or a bargaining council having jurisdiction for conciliation and, if an agreement is not concluded, to the essential services committee for determination*".

25.3 Section 72(9) reads: "*For the purposes of this section a ratified minimum service or determined minimum service means the minimum number of employees in a designated essential service who may not strike in order to ensure that the life, personal safety or health of the whole or part of the population is not endangered*". (own emphasis)

25.4 Section 73(1)(d) provides that any party to a dispute about the terms of a collective agreement, relating to the maintenance of a minimum service, may refer such dispute to the ESC for determination.

25.5 Section 74(1)(b) reads: "*Subject to section 73(1) any party to a dispute that is precluded from participating in a strike or lockout because that party is engaged in an essential service may refer the dispute to the Commission, if no council has jurisdiction*."

25.6 Section 213 reads: "*essential service means – (a) a service the interruption of which endangers the life, personal safety or health of the whole or any part of the population; (b) the Parliamentary service; (c) the South African Police Services*." There is no definition of minimum service in section 213.

Interpretation of statutes

[26] When statutes are to be interpreted, our courts are required to adopt the interpretative triad of language, context and purpose. This was explained by Wallis JA in *Natal Joint Municipal Pension Fund v Endumeni Municipality*[15] as follows:

"[18] *The present state of the law can be expressed as follows: Interpretation is the process of attributing meaning to the words used in a document, be it legislation, some other statutory instrument, or contract, having regard to the context provided by reading the particular provision or provisions in the light of the document as a whole and the circumstances attendant upon its coming into existence. Whatever the nature of the document, consideration must be given to the language used in the light of the ordinary rules of grammar and syntax; the context in which the provision appears; the apparent purpose to which it is directed and the material known to those responsible for its production.*

[15] 2012 (4) SA 593 (SCA)

Where more than one meaning is possible each possibility must be weighed in the light of all these factors. The process is objective, not subjective. A sensible meaning is to be preferred to one that leads to insensible or unbusinesslike results or undermines the apparent purpose of the document. Judges must be alert to, and guard against, the temptation to substitute what they regard as reasonable, sensible or businesslike for the words actually used. To do so in regard to a statute or statutory instrument is to cross the divide between interpretation and legislation; in a contractual context it is to make a contract for the parties other than the one they in fact made. The 'inevitable point of departure is the language of the provision itself', read in context and having regard to the purpose of the provision and the background to the preparation and production of the document." (own emphasis)

[27] The Constitution, particularly section 39(2), requires our courts to seek the interpretation least restrictive of fundamental rights. In *South African Police Services v POPCRU and another*[16] our apex court stated:

"*[29] In determining the proper meaning of essential service as defined in section 213, it is important first to consider the principles applicable to the proper interpretation of statutes. Section 39(2) of the Constitution enjoins every court, tribunal or forum, when interpreting any legislation, to "promote the spirit, purport and objects of the Bill of Rights." The interpretive process in conformity with the Constitution is limited to what the texts of the provisions in question are reasonably capable of meaning.*

[30] In order to ascertain the meaning of essential service, regard must be had to the purpose of the legislation and the context in which the phrase appears. An important purpose of the LRA is to give effect to the right to strike entrenched in section 23(2)(c) of the Constitution. The interpretative process must give effect to this purpose within the other

[16] (2011) 32 ILJ 1603 (CC)

> *purposes of the LRA as set out in section 1(a). The provisions in question must thus not be construed in isolation, but in the context of the other provisions in the LRA and the SAPS Act. For this reason, a restrictive interpretation of essential service must, if possible, be adopted so as to avoid impermissibly limiting the right to strike. Were legislation to define essential service too broadly, this would impermissibly limit the right to strike*." (own emphasis)

[28] When there is a conflict of statutory provisions, it is necessary to read the provisions in harmony, if possible. The Constitutional Court summarized this, as follows, in *Independent Institute of Education (Pty) Limited v Kwazulu-Natal Law Society and others*:[17]

> "*[38] It is a well-established canon of statutory construction that "every part of a statute should be construed so as to be consistent, so far as possible, with every other part of that statute, and with every other unrepealed statute enacted by the Legislature". Statutes dealing with the same subject matter, or which are in pari materia, should be construed together and harmoniously. This imperative has the effect of harmonising conflicts and differences between statutes. The canon derives its force from the presumption that the Legislature is consistent with itself. In other words, that the Legislature knows and has in mind the existing law when it passes new legislation, and frames new legislation with reference to the existing law. Statutes relating to the same subject matter should be read together because they should be seen as part of a single harmonious legal system*." (own emphasis)

Analysis of the grounds of review

[29] Aside from the jurisdictional ruling, which is challenged, predominantly, on the basis that the LRA conflicts with the Electoral Act, and the LRA must

[17] (CCT68/19) [2019] ZACC 47; 2020 (2) SA 325 (CC); (2020 (4) BCLR 495 (CC) (11 December 2019)

trump, the applicant also alleges that the finding of the ESC was wrong on the merits because:

> 29.1 National elections are held every five years, but elections are also held at provincial and local levels. Thus, elections could be held every year. The commissioner failed to take into consideration that by including the registration period, this limited the right to strike by anywhere from two to eight months. This amounts to a "broad denial of the right to strike".[18]
>
> 29.2 The commissioner took into consideration the Electoral Commission's submissions that strikes by the members of NEHAWU were invariably violent.[19]

[30] Section 210 of the LRA does not come into play merely because there is a difference between the LRA and any other law.[20] This section only comes into play when there is a difference, and the difference necessarily leads to conflict. Where the differing legislation can be reconciled, there is no conflict.

[31] In my view, there is no conflict between the LRA and the Electoral Act. The LRA does not state that the right to strike is without limitation. Section 65(1)(d)(i) prohibits any employee, who is engaged in an essential service, from engaging in strike action. There is no indication that subsection (1)(d) applies only to services designated as essential by the ESC. Accordingly, the prohibition applies to services designated (as essential) by the ESC, services deemed as essential under section 71(10) of the LRA, and services determined to be essential by legislation such as the Electoral Act.

[18] In the absence of a constitutional challenge, the court must accept that any limitation countenanced by the Electoral Act passes constitutional muster.

[19] This submission merits no discussion. This consideration did not appear from the analysis of the commissioner, and is not a basis for his ruling.

[20] See *Food & Allied Workers Union on behalf of Gaoshubelwe v Pieman's Pantry (Pty) Ltd* (2018) 39 ILJ 1213 (CC) at para 167

[32] While the Municipal Electoral Act defines the essential service in the Electoral Commission more narrowly that the Electoral Act, these provisions can be interpreted harmoniously. The obvious method to do this is to give effect to the broader scope of the Electoral Act.

[33] When the Electoral Commission is not engaged in providing a service related to municipal elections, the Commission is engaged in providing other services in fulfilment of its constitutional mandate, as contemplated in section 190 of the Constitution, and its functions, as contemplated in section 5 of the Electoral Commission Act.

[34] The ESC correctly gave some consideration to the importance of the function[21] performed by the Electoral Commission. There can be little doubt that free and fair elections are an essential pillar of our democracy, and the Electoral Commission serves a critical service in that respect.

[35] As explained, section 210 of the LRA does not come into play given that there is no conflict between the LRA and the Electoral Act. What remains is the jurisdictional challenge, which I tackle below.

Jurisdiction of the Essential Services Committee

[36] Section 71 of the LRA empowers the ESC to designate a service as an essential service, while section 72 of the LRA empowers the ESC to determine a minimum service within a designated essential service. In addition, section 71 empowers the ESC to ratify a minimum service agreement within a designated essential service.

[21] This approach was outlined in *South African Police Services v POPCRU and another* [2010] 12 BLLR 1263 (LAC) where the Labour Appeal Court held that, to determine the scope of section 71(10) one must first consider the function performed by the body or institution, because the essential service relates to the function. The LAC held that there was a distinction between "members" engaged under the SAPS Act and other employees engaged through the Public Service Act. The functions of the policing, set out in the SAPS Act itself, are to be performed by the "members" of the SAPS. Thus, the determination, in section 71(10) of the LRA, that the SAPS is an essential service, relates only to "members" of the SAPS.

[37] Section 72(9) of the LRA describes "minimum service" in the following manner:

> "*For the purposes of this section, a ratified minimum service or determined minimum service means the minimum number of employees in a designated essential service who may not strike in order to ensure that the life, personal safety, or health of the whole or part of the population is not endangered*." (own emphasis).

[38] Section 72(9) specifically provides that the "minimum service" relates to the minimum number of employees who may not strike to avoid a threat to life, personal safety, or health of the whole or part of the population. In the interpretive process, the Legislature is deemed not to use superfluous language. Accordingly, all words used in section 72(9) must be given meaning. In my view, the term "*For the purposes of this section*", in subsection (9), is reasonably capable of just one meaning - that the definition of minimum service in subsection (9) does not apply outside of section 72.

[39] Section 73 of the LRA contains no similar qualifications to the term "minimum service", as contained in section 72(9). Section 73 therefore finds wider application.

[40] In my view, section 73(c) and (d) includes, within its scope, "essential services" designated as such by the ESC as well as minimum services which fall outside the narrow scope of section 72(9).

[41] The language used, the context, and the purpose, all indicate that section 73 grants the ESC jurisdiction to determine disputes relating to *all* essential services, including services determined to be essential by virtue of legislation – such as Parliament, the South African Police Services, and the Electoral Commission.

Conclusion

[42] In the circumstances, condonation is granted for the late filing of the review, but the application to review and set aside the ruling of the third respondent is dismissed. There is no order as to costs.

Reynaud Daniels
Judge of the Labour Court of South Africa

Appearances:

For the Applicant
Mr S Gaju
Mdhluli, Pearce, Mdzikwa & Associates Inc

For the Fourth Respondent
Mr P Maserumule
Maserumule Attorneys