



DESIGNATION

ESSENTIAL SERVICES COMMITTEE

Case Number: ES 367

ESC Panel: Joyce Nkopane, Nomazotsho Memani, Makhubalo Ndaba

Date of Designation: 09 December 2020

In re: Investigation in terms of Section 71 of the Labour Relations Act, 66 of 1995:

Whether Aviation Maintenance Services should be designated as essential services

DESIGNATION

Introduction

1. The ESC had received a request from the Democratic Alliance as an interested party to designate certain aviation maintenance services as essential services. The request was accompanied by a motivation.
2. The ESC considered the request and concluded that it is a reasonable request, and in terms of section 71(1) read with sections 70D (1)(a) and (b) of the Labour Relations Act 66 of 1995 as

amended (LRA) decided to conduct an investigation into whether certain aviation maintenance services should be designated as essential services.

3. The gazetted terms of reference for the investigation in terms of section 71 were" Notice is hereby given in terms of section 71(1)) of the Labour Relations Act, 1995 (Act No 66 of 1995 as amended), that the Committee is in the process of conducting an investigation as to whether Aviation Maintenance Services are essential. (see Government Gazette No 44514, GN374 Of 2020, dated 10 July 2020).

Details of hearing and representation

4. The hearings were scheduled as per the notice published in the government gazette. Viz-
 - (a) 18 August 2020
 - (b) 19 August 2020
 - (c) 21 August 2020
 - (d) 24 August 2020
 - (e) 28 August 2020
5. In the hearings, the ESC received a number of written submissions, and a number of interested parties made oral representations to the ESC.

Submissions

6. Mr Michael Begraim submitted that the application was brought as a result of some observations that he made as a frequent flyer. He was concerned with the events that happened before and/or during the strike by the South Africa Airways employees. He was concerned that if the employees that performed maintenance services went on strike this would pose a serious safety risk to the users.

7. He submitted that SAA always had a fantastic maintenance service. The interruption of this service would constitute a serious threat to safety and life of the users of aeroplanes.

8. He prayed that the maintenance services in aviation should be designated as essential service.

South African Airways Technical

9. South African Airways Technical made a written and oral submission in support of the designation. In essence the submission was that each and every Aircraft is issued with an initial Certificate of Airworthiness (CofA) at end of the manufacturing process. They are required to maintain airworthiness in accordance with the Original Equipment Manufacturers'(OEM) requirements. This airworthiness is maintained through a series of scheduled maintenance checks consisting of periodic inspections performed over the aircraft period of operation.

10. For aircraft to remain serviceable, there is a requirement for their continued airworthiness to be maintained based on the respective OEM technical requirements as well as regulatory requirements mandated by the SACAA.

11. It was submitted further that for aircraft in continued active operation, aircraft maintenance is required to be performed in order to ensure the safe and serviceable condition of the various systems during flight. This means that each time an aircraft has to fly it has to be checked and the necessary maintenance has to be carried out. If this service is interrupted the results could be catastrophic if there can be a fault that is not picked up before the flight takes off.

12. For parked aircraft (as the case during the COVID-19 lockdown conditions), aircraft maintenance is also a requirement in order to maintain their continued serviceable and airworthiness condition.

13. Aircraft maintenance is an essential in that, if OEM conditions are not met, this may result in an unserviceable and unsafe aircraft. An unsafe aircraft, if operated will lead to loss or injury to persons.

14. An aircraft is considered airworthy when it meets its type design conditions and is therefore safe for flight. In the context of maintenance, this means the following:

(i) The aircraft is maintained in accordance with an approved maintenance programme

(ii) All known defects are rectified

(iii) Maintenance is performed following Continued Airworthiness Data i.e.

maintenance instructions from the OEM, the SACAA's regulations for continued airworthiness of the aircraft and/or the National Aviation Authority of the country of manufacture of the Aircraft.

15. It was further submitted that aircraft withdrawn from operation or parked for long periods are regulated by SACAR Part 43.02.21 requirements, where it stipulates the following

“Aircraft withdrawn from service for storage shall meet the preservation instructions of the aircraft's manufacturer as prescribed in the relevant maintenance manuals, service bulletins, service letters or service instructions for the inoperative period. Before such an aircraft is returned to service, any prescribed maintenance shall be carried out prior to release to service”.

16. The above renders it mandatory, albeit in long term storage or temporarily withdrawn from service, for the aircraft's airworthiness status to be maintained.

Airports Company South Africa (ACSA)

17. On behalf of ACSA a spreadsheet detailing the different maintenance section was submitted and from the document the following services could be identified, civil maintenance, mechanical maintenance, electrical maintenance, surface maintenance, infrastructure management and control, baggage handling systems, JetA1fuel and aviation fuel systems, building and structures, cleaning and hygiene, plumbing maintenance, waste management services and pest control.

18. In relation to the runways, taxiways and Apron it was submitted that without inspections, the site would be non-compliant to the SACAA regulations which would put the operating licence at risk and the airport could be closed. Also, the risk of damage not being detected, repaired and monitored could lead to fatal incident for persons involving aircrafts, machinery and property.

19. It was submitted that airside service roads, vehicle parking, landside roads and bridges that if these services are interrupted the site would be non-compliant to the SACAA regulations which would put the operating licence at risk and the airport could be closed. Also, the risk of damage not being detected, repaired and monitored could lead serious fatal road accidents. Without roads in good condition there would be no access to the airport which would affect passengers and airport community at large.

20. The services rendered at airfields should not be interrupted as this would need to non-compliance with SACAA regulations thus putting the operating licence at risk. Further that there would be a greater risk of bird strikes and collisions with wild animals which could cause

catastrophic fatal incidents. Other assets like pavements would also be affected in terms of availability.

21. ACSA submitted that the stormwater drainage if not maintained would lead to flooding during storms which in turn this would affect many other assets/structures and operations. The gardens and landscaping if not maintained would lead to ambiance and aesthetics of the airport being affected and the risk of wildlife like snakes posing risk to airport community.

22. Building structures have to be maintained as failure to do so may lead to the breakdown of infrastructure and this may cause occupational health and safety risks and may pose occupational health risks.

23. Plumbing maintenance and waste management services also have to continue without interruption as, in relation to plumbing this interruption may pose a risk that there will be high levels of unavailability on plumbing infrastructure. This will present operational challenges as ACSA may not be able to handle users, present unhygienic conditions which may have an impact on health and will impact ACSA's brand and image. In relation to waste management there is a risk that waste generated will accumulate and become a hazard on site. Further that it may affect health, may cause nuisance, may attract wildlife and pests, may affect aircraft if on the airside, may affect ACSA's brand and image. If the service of pest control is interrupted thus will lead to a situation where the airport would be infested with rodents and pests and this may impact the lives of staff and users of the airport.

24. The baggage handling system was also identified as one of the services that should be designated as an essential service and it was submitted that if the service is interrupted there will

be a risk of loading bags into aircraft that are not screened for suspicious elements. Bombs could pass through and cause fatal incidents to aircraft and passengers.

25. JetA1 fuel and airport fuel systems it was submitted that if the employees are not at work there will be risk of the fuel farm not being manned, risk of allowing jet 1 to the airport without prior sampling tests. Ensuring that fuel is onloaded to aircraft after taking into consideration all safety measures. Leak of fuel will cause fire blast and damage aircraft and lead to fatal incident to passengers onboard the aircraft.

26. The other service identified was security at the parameter fence and it was submitted that if this service is interrupted the ACSA may lose its operating licence with SACAA. Further that airport security would be compromised.

27. In relation to surface, mechanical and electrical maintenance it was submitted that without inspections, the site would be non-compliant to the SACAA regulations which would put the operation licence at risk and the airport could be closed. Also, the risk of damage not being detected, repaired and monitored could lead to fatal incident for persons involving aircrafts, machinery and building structures. Foreign debris on the airside can lead to aircraft damage and could result in fatal incidents. Further that fire Protection systems are necessary for protecting the infrastructure as well as support for the responding Fire and Rescue units in case of an aircraft incident, without them the airport would be at risk and non-compliant and could close and this is a further reason why mechanical maintenance services should be designated as essential services.

28. The Committee did not receive any submissions from labour.

Legal Framework

29. In this matter the issue that the committee has to determine is whether private maintenance services in aviation should be designated as essential services? In determining the matter, it is important to set out the legal framework.
30. Section 23(2) of the Constitution of the Republic of South Africa, 1996 (“the Constitution”) states that... “Every worker has the right ... (c) to strike.”
31. Section 36 (1) of the Constitution states inter alia that... “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”.
32. Section 65 (1) (d) (i) of the LRA states that ... “No person may take part in a strike ... if that person is engaged ... in an essential service”.
33. An ‘essential service’ is defined in section 213 of the Act as:
- (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 Service”.
34. The Constitutional Court in ***South African Police Service v Police and Prisons Civil Rights Union and Another [2011] 9 BLLR 831 (CC)*** said the following:

“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 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. For this reason, a restrictive interpretation of essential service must, if possible, be adopted so as to avoid impermissibly limiting the right to strike (footnotes excluded)”

35. It is trite that strike action is an important element of collective bargaining and it is recognised as a primary mechanism through which workers exercise collective power (See ***Ex-Part Chairperson of the Constitutional Assembly in re: Certification of the Constitution of the Republic of South Africa, 1996 (4) SA744 (CC)*** at paragraph [66]).
36. 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:
- It is the service which is essential, not the industry or the institution within which the service falls;
 - Only those employees who are truly performing an essential service, may be prohibited from striking; and
 - Essential and non-essential service workers may be found working side by side in the same institution.
37. Before the ESC can designate any service as essential, it must be satisfied that the interruption of the said service is likely to endanger life, personal safety or health of the whole or part of the population.
38. It is further trite that in view of the fact that the right that would be affected by such a designation limits or takes away a fundamental right, such designation must be reasonable and justifiable.

Thus if the ESC finds that parts of the service are not essential the Committee is obliged not to designate such services, as such a designation would be unreasonable and unjustifiable.

Analysis of submissions and arguments

39. In determining whether the service must be designated as essential the panel considered the nature of the services and the applicable legal framework. As indicated above the right to strike is a fundamental human right and this right should not be interfered with unless there is justification for such interference.
40. In this matter the service under consideration is maintenance services in aviation. The panel is indebted to SAA Technical and ACSA for the assistance provided in unpacking what maintenance services entail.
41. On behalf of SAA Technical it was submitted that, aircraft maintenance is required to be performed in order to ensure the safe and serviceable condition of the various systems during flight. This means that each time an aircraft has to fly it has to be checked and the necessary maintenance has to be carried out. It was submitted further that aircraft has to be maintained even when it is grounded in order to ensure that it is airworthy. Whilst it is so that when aircraft is grounded there is no immediate risk to life and personal safety, as there would be no passengers on board, failure to service the aircraft or to maintain the same can compromise the airworthiness of the aircraft.
42. The undisputed submission from SAA Technical was that Aircraft maintenance is an essential service in that, if OEM conditions are not met, this may result in an unserviceable and unsafe aircraft. An unsafe aircraft, if operated will lead to loss of life or injury to persons using the aircraft.

43. Having considered these submissions, the panel is persuaded that maintenance services on aircrafts is an essential and that the interruption of this service may endanger life and personal safety of the whole or part of the population.

44. The investigation was not only limited to aircraft maintenance. ACSA made submissions in relation to other maintenance services rendered in aviation space. It was submitted that the following areas require maintenance continuously and any interruption of maintenance would pose a danger to life personal safety or health of staff at the airports and the users, accordingly these services should be designated as essential.

- Runway, taxiways & Aprons
- Airside & Landside roads & bridges
- Airfield
- Storm water drainage systems
- Vegetation, gardens & landscaping
- Security Perimeter fence
- Building structures
- Baggage handling systems
- Jet A1 fuel systems
- Cleaning & Hygiene services
- Plumbing maintenance
- Waste management services and
- Pest Control

45. The panel considered the motivation provided for each of these areas and concluded that in relation to maintenance services provided on the building structures, landside roads and bridges, plumbing maintenance cleaning and hygiene services including pest control services these services are not essential. Whilst these services are important the interruption thereof does not pose an immediate threat to life, personal safety or health of the whole or part of the population. Even on the motivation submitted the emphasis is placed on compliance with SACAA regulations and the fear of the airport losing its operating licence.

46. In relation to the maintenance services rendered vegetation, garden and landscaping the primary focus is the ambiance and aesthetics of the airport that would be affected. There is then reference to the wildlife and snakes posing a risk. The endangerment to life, personal safety and health referred to in this regard is remote.
47. The panel is also not persuaded that the baggage handling system and civil maintenance rendered on the airfield should be designated as essential services as the purported risk mentioned is not supported and appears to be very remote.
48. As indicated above, essential services should be interpreted restrictively given the fact that the implication of such designation takes away the employees' right to strike, which right is pivotal for effective collective bargaining.
49. Thus the fact that there is a remote possibility of endangerment to life, personal safety and health of the population cannot justify limiting the employee's right to strike. The fact that the interruption of the service may result in the revocation of one's licence cannot justify limiting the employee's right to strike.
50. Of the services listed above the panel is of the view that the only services that meet the test to be declared as essential services are those maintenance services rendered at the airways roads, runway, taxiway, Apron and Jet fuel 1 and fuel systems.
51. The panel agrees with the submission made by ACSA that if the Airside roads, runway, taxiway and Apron are not maintained this could lead to fatal accidents as this is where the planes land and take off. In relation to surface, mechanical and civil maintenance of the airside roads runway, taxiway and Apron the panel accepts that inspections should be carried out without any interruption as such interruption could result in the risk of damage not being detected, repaired and monitored and this could lead to fatal incident for persons involving aircrafts, machinery and building structures. Foreign debris on the airside can lead to aircraft damage and could result in fatal incidents.

52. In relation to Jet fuel 1 and fuel systems it is accepted that an interruption of the maintenance services in that area may lead to a situation where the fuel farm is not manned and sampling is not done. On the submissions before the panel it is clear that if any foreign object were to contaminate the fuel and that is put in the plane there could be catastrophic consequences.

53. Waste management services and security services at airports are already designated as essential services. The only exclusion to security services is that which is rendered at parking areas.

54. Having considered the written and oral submissions of the parties, as well as the applicable law referred to above, the Panel is of the view that the following services should n be designated as essential:

Designation

The ESC Panel therefore makes the following designation:

The following maintenance services in aviation are designated as essential services:

- Aircraft maintenance services
- Civil, electrical, surface and mechanical maintenance on airside roads, runaway, taxiway and Apron.
- Maintenance services rendered at Jet fuel1 and fuel systems.

In terms of section 72(1) of the Labour Relations Act 66,1995 as amended the committee directs all parties who render the services designated herein as essential service to negotiate and conclude minimum service agreements.

A handwritten signature in black ink, consisting of a vertical line on the right side that curves to the left and then loops back to the right, forming a stylized 'J' or 'N' shape.

Ms. Joyce Nkopane
ESC Panel Chairperson
9 December 2020