DISCUSSION DOCUMENT

HEALTH CARE WORKER RIGHTS, ETHICS AND A MINIMUM SERVICE LEVEL AGREEMENT OR ALTERNATIVE MECHANISM

1. SECTION27 has been approached for advice by the Rural Doctors Association of South Africa ("RuDASA")[1] and the Rural Health Advocacy Project ("RHAP")[2] because of their concerns about the negative consequences for users of the health system caused by the strike action that took place in 2010. They are afraid that there is no agreement in the wage negotiations process and if the unions consider strike action necessary there will be a similar serious loss to life and health. They are worried about the consequences of a potential strike ensuing should the salary negotiations process currently before the Public Service Co-ordinating Bargaining Council ("PSCBC") result in a deadlock.
2. They believe that the conclusion and implementation of a Minimum Service Level Agreement ("MSLA") would assist in ensuring that rights of patients are protected during strike action.
3. They have therefore asked us to assist them in finding a solution to the current situation.
4. A meeting will be held with the Minister of Health on 22 August 2011 and all the relevant health unions and organisations representing patients to discuss the issue of essential services in the health sector, rights and ethics and the issue of a minimum service level agreement or alternative mechanisms.
5. In preparation for this meeting we have prepared this discussion document for all the organisations involved to provide a background to the issues. It includes:

    5.1 A summary of a legal opinion we obtained on labour law regarding essential services, including recent case law.

    5.2 Some comparative research on what other countries have in place in this regard.

[1] The RuDASA is a membership organisations composed of doctors and other health professionals working in the South African health system. It strives for the adequate staffing of rural health services by appropriately skilled medical staff and to be a voice for the rural doctor regarding training and working conditions.

[2] The RHAP is a not-for-profit, public-interest advocacy organisation in the field of rural health care. RHAP advocates for improved access to high quality, comprehensive health care services in rural areas with the aim of improving the health of the South African population. The RHAP is a partnership between Wits Centre for Rural Health, RuDASA and SECTION27.

INTRODUCTION

6. The dispute over essential services turns on a Notice published in the *Government Gazzette* by the Essential Services Committee in 1998 (published under Government Notice R 436 in *Government Gazette* 18761 of 27 March 1998) ("the ESC designation"), citing all designations and occupations within the public health sector as essential and that strike action is not permitted.
7. The ban on industrial actions affects several rights, including the right of workers to strike and patients' right to access health care services. As we saw with the 2007 and 2010 strikes designating the health sector as an essential service does not prevent health workers from taking action, particularly when there is a high level of anger and frustration over salaries and conditions of service. The result is an impasse between government and the unions, and people who urgently need health care services suffer, sometimes irreversibly.
8. A solution which addresses the blanket designation and ban against striking by determining essential services from non-essential services, or reaching agreement on the maintenance of some level of services during a legal dispute, is essential.
9. Addressing the essential services issue would have a two-fold effect. Firstly, those in the public health care system classified as non-essential services personnel would be able to exercise their right to strike. Secondly, patients' rights would also be protected as they would be ensured of continued access to health care services as those staff properly designated as essential staff would not be striking.
10. Recent legal developments on the issue of essential services open an opportunity to hold further discussions and explore ways of addressing the current stale-mate.

THE CURRENT LEGAL POSITION ON ESSENTIAL SERVICES

11. Over the past few years the state has adopted the position, as per the Essential Services Committee ("ESC") designation, that all employees in the public health sector are prohibited from striking. The trade unions, for their part, have adopted the position that a total prohibition is overbroad and unfair and that not all employees in the public health sector can be said to render an essential service.
    11.1 The conclusion of a MSLA has been the subject of negotiation between the state and organised labour in the Public Service Bargaining Council ("PSBC") for a number of years. Little progress, however, has been made. During 2010, the PSBC passed what

appears to have been the most substantive resolution yet in relation to the conclusion of a MSLA (Resolution 4 of 2010).

11.2 Paragraph 6 of this Resolution states:

MINIMUM SERVICE AGREEMENT

6.1 To request the Essential Service Committee to investigate and provide recommendations for:

a. Minimum Service agreements for the Public Service applicable across the relevant sectors.
b. Review the current essential services designations/declarations within the Public Service and occupations within those designations/declarations to determine whether or not such services should be deemed essential services.

6.2 A team consisting of two representatives from labour and two representatives from the Employer to be established as a reference group to assist the Essential Service Committee.

6.3 In the event that the Essential Services committee is not in a position to assist the Council with the investigation and development of recommendations, the Council to appoint a panel of 3 experts to undertake the activities as per paragraph 6.1 above.

6.4 The recommendation to be submitted to the parties by no later than 31 December 2010.

11.3 The recommendation contemplated in paragraph 6.4 of the Resolution was never produced. In 2011, the PSBC produced a draft agreement dealing with salaries and other conditions of service, including the MSLA. This has not yet been passed as a resolution of the PSBC. As far as the MSLA is concerned, the draft agreement provides as follows:

3.4 Minimum Service Level Agreement

3.4.1 Parties agree that engagement on the Minimum Service Level be elevated to party principals.

3.4.2 The outcome of this engagement will be tabled for consideration at the PSBC.

RECENT CASE LAW ON ESSENTIAL SERVICES

12. The trajectory of the case of *SA Police Service v Police and Prisons Civil Rights Union*[3] through the courts, culminating in a recent Constitutional Court judgment,[4] has established number of important principles in relation to the nature and extent of "essential services."

[3] (2007)) 28 ILJ 2611 (LC); *South African Police Service v Police and Prisons Civil Rights Union and Another* [2010] 12 BLLR (LAC).

12.1 Firstly and fundamentally "essential services" must be restrictively interpreted so as to avoid impermissibly limiting the right to strike.

12.2 Such a restrictive interpretation of essential services means *inter alia* the following:

12.2.1 it is the service which is essential, not the industry or the institution within which the service falls;

12.2.2 only those employees who are truly performing essential services may be prohibited from striking;

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

13. When assessed against these principles, the ESC designation, which, at least on the face of it, designates all medical, nursing, paramedical and support services in the public health sector as essential services, may well be overbroad and unconstitutional.

THE POSSIBILITY OF REFERRING A DISPUTE REGARDING THE PARTIES' FAILURE TO AGREE ON A MSLA TO COMPULSORY ARBITRATION

14. In 2010 the Labour Appeal Court ("the LAC") passed judgment in the matter of *National Union of Mineworkers & Another v Eskom Holdings (Pty) Ltd & Others*[5] that is extremely important to the issue. Because of the importance of this judgment, and the necessity of appreciating how it was arrived at, we take some time in setting out the process and reasoning at the various levels this case progressed through before it reached the LAC.

14.1 The matter started in the Labour Court and that judgment is reported as *Eskom Holdings (Pty) Ltd v National Union of Mineworkers & Others*.[6] Eskom was the applicant in the case. As is well known, Eskom operates in an industry which has been designated an essential service. The three recognised trade unions had requested Eskom to conclude a MSLA, and when Eskom declined to do so, referred a dispute to the Commission for Conciliation, Mediation and Arbitration ("CCMA")

[4] *South African Police Service v Police and Prisons Civil Rights Union* [2011] ZACC 21. The judgment was handed down on 9 June 2011.
[5] (2010) 31 ILJ 2570 (LAC).
[6] [2009] 1 BLLR 65 (LC)

[in terms of section 74 of the Labour Relations Act, 66 of 1995 ("LRA")], requesting the CCMA to conciliate, and if necessary arbitrate the dispute with a view to determining the terms of a MSLA for ratification by the ESC.

14.2 At the CCMA, the respondent commissioner rejected Eskom's contention that the CCMA lacked jurisdiction to entertain the dispute.

14.3 Eskom took the commissioner's jurisdictional ruling on review. Eskom contended that the dispute should have been referred to the ESC and that, since only the ESC may ratify collective agreements relating to minimum services, the CCMA lacks the power to foist such an agreement on the parties by means of an award.

14.4 The Labour Court noted that where parties engaged in an essential service are unable to resolve disputes by collective bargaining, they are required to refer the dispute for compulsory arbitration in terms of section 74 of the LRA. The result of this process can only be an "award" not a "collective agreement." Section 72 of the LRA provides that minimum service agreements may be concluded only by collective agreements.

14.5 The Labour Court noted that the LRA places no express limitation on the kinds of disputes that may be referred for compulsory arbitration in terms of section 74. The Court held that while the Legislature probably did not intend to leave essential service workers in a vacuum in respect of disputes relating to minimum services, the presumed intention of the legislature cannot override the plain meaning of the LRA (that is, that MSLAs may be concluded by collective agreement only). The Labour Court held that it therefore had to assume that the Legislature had made a deliberate policy choice not to provide for the ratification of compulsory arbitration awards relating to MSLAs.

14.6 The Labour Court accordingly concluded that the only forum that may intervene in disputes concerning minimum services is the ESC.

14.7 The Labour Court accordingly set the commissioner's award aside and replaced it with an order that the CCMA lacked jurisdiction to entertain the dispute.

14.8 The Labour Court judgment was overturned on appeal to the LAC.

14.9 The LAC noted that the constitutional right to strike should not, in the absence of express limitations, be restrictively interpreted. Section 65(1)(d) of the LRA prohibits persons from striking if they are engaged in an essential service. The very

purpose of an MSLA is therefore to exempt workers who would otherwise be classified as rendering an essential service, from the prohibition against striking. Therefore, held the LAC, the existence of a MSLA limits the categories of employees designated as rendering an essential service from the restriction imposed by section 65(1)(d) on the right to strike.

14.10 The LAC noted further that viewed in the context of the dispute before it, the inability of the unions to conclude a MSLA with Eskom meant that the legislative restriction upon striking continued for a category of employees, who, if a MSLA existed, would fall outside the agreement and could thus exercise their right to strike. The question had to be asked whether the LRA was silent about so clear a dispute relating to the scope of restriction upon the constitutionally entrenched right to strike.

14.11 The LAC found that although the court below was clearly aware of the implications of section 74, it elided past the express wording of section 74 to rely exclusively on section 72 in order to come to the conclusion that the CCMA lacked the necessary jurisdiction. The LAC held that the sections had to be reconciled.

14.12 In the case before it, the LAC found that the failure of the parties to agree to a MSLA had given rise to a dispute, the consequences of which were to preclude a category of workers from participating in a strike. The LAC found that section 74 provides for a clearly defined mechanism to deal with such an impasse.

14.13 The LAC accordingly found that the CCMA had jurisdiction to deal with the dispute arising from the failure by the parties to agree on the terms of a MSLA.

14.14 This judgment is currently on appeal to the Supreme Court of Appeal where it will likely be heard before the end of the year.

15. As a result of the LAC judgment, the law as it currently stands, allows either of the parties to refer a dispute regarding their failure to agree on a MSLA to the CCMA for compulsory arbitration in terms of section 74 of the LRA. The CCMA would then determine the terms of a MSLA for the parties. This option therefore has the potential (subject to the outcome of the appeal pending in the SCA) to provide a comprehensive solution to the problem.

COMPARATIVE INTERNATIONAL APPROACHES TO A MSLA

Position of the International Labour Organization (ILO)

16. The ILO recommends that a minimum service be required, rather than a total ban on strikes, in essential services[7]. Accordingly, the ILO advises that a minimum service:

> *"would be appropriate in situations in which a substantial restriction or total prohibition of strike action would not appear to be justified and where, without calling into question the right to strike of the large majority of workers, one might consider ensuring that users' basic needs are met and that facilities operate safely or without interruption."*[8]

17. The ILO states the following principles should apply to minimum service:
    a) That the minimum service to be maintained should be clearly defined, with participation not only from the public authorities, but also from employers' and workers' organisations. Once determined, the minimum service must be strictly applied and made known in advance to those who may be affected by it.
    b) The ILO finds it highly desirable that negotiations defining a minimum service agreement not be held during a labour dispute so that all parties can consider the matter objectively.
    c) Finally, the ILO suggests the parties establish a '*joint or independent body responsible for examining rapidly and without formalities the difficulties raised by the definition and application of such a minimum service and empowered to issue enforceable decisions'*.[9]

The right to strike and treatment of essential services in other countries

18. As you will see from our research below, democratic countries that recognise labour rights have developed systems that provide for a MSLA. Whilst the specific structure and content of the different MSLAs may differ between countries, what they have in common is to seek a

[7] The ILO refers to "essential services" in the strictest sense of the term, i.e. those the interruption of which would endanger the life, personal safety or health of the whole or part of the population. For such services, it states that restrictions or even prohibitions of strike (accompanied, however, by compensatory guarantees) may be justified.
[8] Bernard Gernigon et al., *ILO Principles Concerning the Right to Strike*, INTERNATIONAL LABOUR ORGANIZATION 1, 23 (2000), http://www.ilo.org/wcmsp5/groups/public/@ed_norm/@normes/documents/publication/wcms_087987.pdf.
[9] *Id.* at 31–32.

balance between the right to strike and the duty of government to prevent harm ensuing for patients.

19. The comparative analysis below shows how different countries have approached these issues. However, it should be noted that while their Constitutions may have similar provisions they do not necessarily have direct relevance to South Africa's unique situation where any solution in the South African context will have to recognise the right of access to health care services together with the right to strike.

Italy

20. The Italian Constitution guarantees "*the right to strike. . . within the limits of the law regulating it.*"[10] Act 146 of 1990, as amended by Act 82 of 2000, regulates the right to strike in essential public services. It states the right to strike can only be exercised after a cooling-off period and conciliation procedures have been undertaken.[11] It defines which services are "essential" and sets out that when strikes in such services occur, minimum services must be performed and must be established in advance through collective agreements. Under the Act, in the event of a disagreement about the minimum service, a guarantee committee must assess the appropriateness of the parties' proposals and if necessary, order further measures. The committee can establish temporary regulations guaranteeing certain services at certain periods and issue an "*arbitration judgment*" on the interpretation of minimum service agreements. It also has the power to take action if the minimum service rules are not met. However, either party can challenge its decisions in the Labour Court.[12]

Canada

21. The right to strike is contained within the Canada Labour Code. In terms of essential services, the code includes several provisions that deal with minimum service level agreements. For example, Maintenance of Activities s. 87.4(1) requires that

[10] *Strike Rules in the EU27 and Beyond: A Comparative Overview*, EUROPEAN TRADE UNION CONFEDERATIONS 1, 42–43 (2007), http://www.etuc.org/IMG/pdf_Strike_rules_in_the_EU27.pdf

[11] *The Right to Strike: A Comparative Perspective*, THE INSTITUTE OF EMPLOYMENT RIGHTS 1, 72–73 (2008), http://www.ier.org.uk/system/files/The+Right+to+Strike+A+Comparative+Perspective.pdf.

[12] *The Right to Strike in Essential Services: Economic Implications*, PARLIAMENTARY ASSEMBLY: COUNCIL OF EUROPE 1, 9–10 (2005), http://assembly.coe.int/Documents/WorkingDocs/doc05/EDOC10546.htm.

> "*[d]uring a strike or lockout . . . the trade union and the employees in the bargaining unit must continue the supply of services, operation of facilities or production of goods to the extent necessary to prevent an immediate and serious danger to the safety or health of the public*."[13]

22. In terms of who has the power to determine what constitutes an essential service, s. 120 of the Public Service Labour Relations Act says that

> *"[t]he employer has the exclusive right to determine the level at which an essential service is to be provided to the public, or segment of the public, at any time, including the extent to which and the frequency with which the service is to be provided*".[14]

23. If, however, the level of activity required to fulfil the requirements under s. 87.4(1) of the Canada Labour Code is such that it "*renders ineffective the exercise of the right to strike or lockout*" the Canadian Industrial Relations Board may on behalf of the employer or trade union be required to direct a "*binding method of resolving the issues in dispute between the parties for the purpose of ensuring settlement of a dispute".*[15]

<u>France</u>

24. The basic right to strike is guaranteed by the French Constitution.[16] Articles L521-1 to L524-5 of the Labour Code regulates strikes by workers in essential services. According to which the government has the power to limit or even ban any employees' right to strike if it determines that the service is necessary for public safety, the functions of parliament and maintenance of equipment. These articles provide that employees whose services are vital to public order and public interest are forbidden to strike.[17] For instance, the right to strike is not recognized for the police, prison staff, judicial authorities, or the army.[18]
25. For certain essential services, e.g. public transport and health, strikes are allowed but a minimum service must be provided. In such an event, strikers must respect the freedom to

[13] Canada Labour Code. R.S.C., 1985, s.87.4(1)c. L-2, last amended on 2010-01-01.
[14] Public Service Labour Relations Act (SC 2003, c. 22, s. 2) s.120.
[15] Canada Labour Code. RSC, 1985, s.87.4(8)c. L-2, last amended on 2010-01-01.
[16] *Supra* note 4, at 30–31.
[17] *The Impact and Constitutionality of the Right to Strike with Regards to Essential Services: A Comparative Study*, POTCHEFSTROOMSE ELEKTRONIESE REGSBLAD, Vol. 12 No. 2, 98, 130 (2009), http://www.scielo.org.za/pdf/pelj/v12n2/v12n2a05.pdf.
[18] *Working in France: Labour Disputes and Strikes*, ANGLOINFO (Mar. 2010), http://dordogne.angloinfo.com/countries/france/work16.asp.

work of non-strikers and the employer. Strikers must not hinder the work of non-strikers nor prevent them from entering the workplace. Five working days notice is required before the strike can begin.[19]

26. For health services, the director of any public medical establishment is generally responsible for designating specific hospital staff members that must stay and work in the event of a strike.[20] The Act of 18 March 2003 regarding interior security of the country gives the local administrative authority the right to requisition striking hospital staff (giving them an administrative obligation to go to work), in both the public and private sector, in order to maintain a sufficient workforce and to ensure the safety of patients and the continuity of medical care. It can only take measures that are required in an emergency and are proportionate to maintaining public order.[21]

Portugal

27. The basic right to strike is guaranteed by Portugal's 1976 Constitution and is regulated by detailed legislation.[22] When a strike is declared for one of several public service sectors, including public health, the organisers are obliged by law to provide minimum service. The definition of the minimum service required is arranged through collective negotiations or by ministerial order, depending on the circumstances. A ministerial order is generally only given when the situation is considered to be sufficiently grave.[23] The order can bring any of a wide range of activities into temporary, obligatory public service, such as: food production and distribution, public transport, pharmaceutical production, and national defence production.[24]

Spain

28. The right to strike is guaranteed in Spain's 1978 Constitution.[25] However, the Constitution also requires the maintenance of "*services essential to the community*" in the event of a strike. Thus, when a strike is held in essential public services, a minimum level of services must be ensured. The 1977 Decree on Labour Relations, approved by the Constitutional

[19] *Id.*
[20] *The Minimum Service Guarantee in Public Services*, FRANCE.FR, http://www.france.fr/en/working/ins-and-outs-employment/professional-relations/article/minimum-service-guarantee-public-services.
[21] *Supra* note 5 at 39.
[22] *Supra* note 4, at 58–59.
[23] *Supra* note 6, at 9.
[24] *Supra* note 4, at 59.
[25] *Supra* note 4, at 62–63.

Court, provides that a "*government authority*", i.e. the national government or the government of the autonomous community, will determine the measures necessary to maintaining services that are regarded as essential. Many other legislative decrees have been promulgated on specific minimum service arrangements in state hospitals, railways, and aviation.[26]

Brazil

29. The right to strike is protected by the 1988 Constitution.[27] On October 25, 2007, the Brazilian Federal Supreme Court ruled that public servants have the right to strike but that the text of the Constitution made it clear this right was subject to a particular set of rules. These rules, however, had not yet been defined by appropriate legislation. The Court then held that the same law that regulated the private sector, Law No. 7783 of 28 June 1989, must be applied to the public sector. This law protects the right to strike in a reasonable manner. It contains a list of essential services for which the right is limited, requiring that a minimum service level be upheld. It provides that the organs responsible for essential services to the population must guarantee that at least 30% of the services continue to be in operation during a strike.[28]

Kenya

30. The 2010 Kenyan Constitution provides in Article 41(2)(d) that every worker has a right to go on strike. The right to strike is also granted by the Trade Disputes Act and the Industrial Relations Charter;[29] however, workers in essential services do not have the right to strike. Article 81 of the Labour Relations Act (LRA) of 2007 defines essential services as those services "*the interruption of which would probably endanger the life of a person or health of the population or any part of the population*." The Fourth Schedule of the act lists categories of essential services, including hospital services. The act also provides that the Minister of

[26] *Supra* note 6, at 9.
[27] *Brazil: 2007 Annual Survey of Violations of Trade Union Rights*, INTERNATIONAL TRADE UNION CONFEDERATION, http://survey07.ituc-csi.org/getcountry.php?IDCountry=BRA&IDLang=EN.
[28] Eduardo Soares, *Brazil: Strike Rights Limited by the Federal Supreme Court*, LIBRARY OF CONGRESS (2007), http://www.loc.gov/lawweb/servlet/lloc_news?disp3_l2054081_text.
[29] *National Labour Law Profile: Kenya*, INTERNATIONAL LABOUR ORGANIZATION (Mar. 2011), http://www.ilo.org/public/english/dialogue/ifpdial/info/national/ken.htm.

Labour can determine which services are essential services and can amend those listed in the Fourth Schedule.[30]

31. Any dispute regarding an essential service should be resolved through a collective agreement, conciliation or arbitration. If no solution can be found, then the matter should be referred to the Minister and thereafter, if there are any objections to the Minister's findings, to the Labour Court for a final and binding decision.[31]

India

32. In India the right to strike is not a fundamental right. It is, however, a legal right qualified by the Industrial Disputes Act (IDA) of 1947 and the Essential Services Maintenance Act (ESMA) of 1981. The former requires, for example, that workers in public services must announce a strike at least fourteen days in advance. The latter enables the government to ban strikes in essential services and demand conciliation and arbitration for disputes arising in such services.[32] The ESMA gives a very broad definition of what is deemed essential services, including services like the army, police, hospitals, transportation, government, and any service or industry "*necessary for the life of the community or would result in the infliction of grave hardship on the community*". Section 3 of the ESMA provides that if the central government is satisfied that it is necessary or expedient for the public interest, it may, by general or special order, prohibit strikes in any essential service specified in the order.[33]
33. Sanctions regarding strikes by essential services are severe in India. Article 5 of the ESMA provides that participation in an illegal strike, especially in essential services, is punishable by dismissal, fine, and/or six months imprisonment. Moreover, hostile attitudes of employers– who often resort to intimidation, demotion, beatings, and in extreme cases death threats– and poor law enforcement are clearly deterrents to organising the strike in the first place.[34]

[30] Labour Relations Act, Article 81(1)–(5), (2007).
[31] *Supra* note 11, at 130–31.
[32] *India's Labour: Mostly Unorganized and Exploited*, POOREST AREAS CIVIL SOCIETY (2007), http://www.empowerpoor.org/backgrounder.asp?report=592.
[33] Essential Services Maintenance Act (1981).
[34] *India: 2007 Annual Survey of Violations of Trade Union Rights*, INTERNATIONAL TRADE UNION CONFEDERATION, HTTP://SURVEY07.ITUC-CSI.ORG/GETCOUNTRY.PHP?IDCOUNTRY=IND&IDLANG=EN.

THE SOUTH AFRICAN CONSTITUTIONAL POSITION

34. The South African constitutional position is unique in that section 23 of the Bill of Rights provides that every worker is entitled to strike. However, in the health context the right to strike would effectively limit the right that everyone has to access health care services as enshrined in section 27 of the Constitution.

35. If a court was to adjudicate in the instance where one right is limited by another right the manner it would do so is set out in section 36 of the Constitution which sets out a number of factors which will need to be considered:

> ***"36. Limitation of rights***
>
> *1. 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."*

36. Any limitation of rights must thus be reasonable and justifiable in an open and democratic society done in terms of a law of general application.

37. For a law to qualify as a law of general application it must possess the following criteria: [35]

    37.1 The law must ensure parity of treatment, where persons similarly situated are treated alike, and similar penalties are imposed on the "governed and the governors";[36]

    37.2 The law should reinforce the principle of the rule of law, and should not allow for the arbitrary exercise of state power by providing a discernable standard for citizens to confirm their behaviour to;[37]

    37.3 The law must be precise and not vaguely worded, so as to allow individuals to conform their conduct accordingly. While officials should not be left with unfettered discretion to implement the provisions of the law;[38]

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[35] S Woolman, H Botha, "Limitations", in Woolman et al *Constitutional Law of South Africa,* 2nd edition. (Cape Town: Juta) at 34-48.
[36] Id at 34-48; 34-61 – 62.
[37] Id at 34-48; 34-63 – 64.
[38] Id at 34-49; 34-64 – 65.

37.4 The law must be accessible and publically available.[39]

38. If a law has the abovementioned features it would be considered a law of general application and may take any of the following forms: legislation; regulations; subordinate legislation other than regulations; municipal by-laws; common law rules; customary law rules; rules of court or international conventions.[40]
39. The Essential Services Committee ("ESC") is authorised by section 71 of the Labour Relations Act, 66 of 1995, ("LRA") to determine the designation of a service as an essential service. Section 71 also further sets out how such a designation process is to be conducted:
    39.1 Subsection 71(1) provides that the ESC must give notice in the *Government Gazette* of any investigation that it is to conduct as to whether the whole or a part of a service is an essential service.
    39.2 While subsection 71(7) provides that the ESC must decide whether or not to designate the whole or part of the service, that was the subject of the investigation as an essential service after having considered any written and oral presentations.
    39.3 Subsection 71(8) provides that if the ESC designates the whole or part of a service as an essential service, the ESC must publish a notice to that effect in the *Government Gazette*.
40. The ESC designation Notice published in the *Government Gazette* by the Essential Services Committee in 1998[41] would meet the four criteria listed above as it is publically available having been published in the G*overnment Gazette*; it treats all those designated with parity; it is precise and is not vague in its formulation; and thereby reinforces the principle of the rule of law as it allows the state to enforce the law according to a discernable standard.[42]
41. The ESC designation Notice would fall within the category of subordinate legislation, the following authority supports this classification:
    41.1 According to Interpretation Act, 33 of 1957, and also as reiterated in the *President of South Africa and Another v Hugo and Another* a "law" is defined "*any law,*

[39] Id at 34-50; 34-65.
[40] Id at 34-51 – 53.
[41] Under Government Notice R 436 in *Government Gazette* 18761 of 27 March 1998.
[42] Id at 34-48 – 50.

proclamation, ordinance, Act of Parliament or other enactment having the force of law".[43]

41.2 More recent legislation defines subordinate legislation in its definition section, such as the National Environmental Management: Protected Areas Act 57 of 2003, to include all regulations and notices.

41.3 And the Gauteng Province has created a specific annual index of subordinate legislation which includes Regulations, Proclamations and Notices.[44]

42. A further section in the Constitution which is relevant to the ESC is section 39 which imposes an obligation on a court, tribunal or forum to have regard to the following:

39. Interpretation of Bill of Rights

1. When interpreting the Bill of Rights, a court, tribunal or forum
   a. must promote the values that underlie an open and democratic society based on human dignity, equality and freedom;
   b. must consider international law; and
   c. may consider foreign law.
2. When interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights.
3. The Bill of Rights does not deny the existence of any other rights or freedoms that are recognised or conferred by common law, customary law or legislation, to the extent that they are consistent with the Bill.

40. Thus the ESC would also need to have regard to the values underlying an open and democratic society based on human dignity, equality and freedom.

[ENDS]

[43] 1997 (4) SA 1 (CC) at para 97.
[44] Available at: www.gautengonline.gov.za .