

DEPARTMENT OF EMPLOYMENT AND LABOUR


NO. R. 2654

21 October 2022

LABOUR RELATIONS ACT, 1995 (ACT NO. 66 OF 1995)

ESSENTIAL SERVICE COMMITTEE REGULATIONS

I, THEMBELANI WALTERMADE NXESI, Minister of Employment and Labour, hereby under section 70F(1) of the Labour Relations Act, 1995 (Act No. 66 of 1995) and after consulting the Essential Service Committee, made the regulations in the Schedule.


MR TW NXESI, MP
MINISTER OF EMPLOYMENT AND LABOUR
DATE: 19/09/2022

LABOUR RELATIONS ACT 1995 (ACT NO. 66 OF 1995)
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SCHEDULE

PART A – ESSENTIAL SERVICE INVESTIGATION

1. Request for investigation

A Bargaining Council or any interested party may in writing request the Committee to investigate whether the whole or part of any service should be designated as an essential service. Such a request must state a *prima facie* case to undertake an investigation.

2. Representations to Committee

- (1) If the Committee has given notice of an investigation in terms of section 71 (1) of the Act as to whether the whole or part of any service should be designated as an essential service, any interested party may submit written representations to the Committee within the time periods specified in the notice.
- (2) An interested party submitting written representations in terms of sub-regulation (1) must -
 - (a) state the nature of its interest in the investigation;

- (b) indicate whether or not they require an opportunity to make oral representations to the Committee, as contemplated by section 71(2)(b) of the Act;
 - (c) specify the factual evidence which forms the basis of its representations to the Committee;
 - (d) identify any expert witness it intends to call and provide an affidavit containing a summary of that witness' evidence;
 - (e) provide a statement of the legal issues that arise from the material facts, containing sufficient particularity to enable other interested parties to reply;
 - (f) list any documents it intends to rely upon as part of its representations and attach a copy of those documents; and
 - (g) specify a physical, postal and electronic address at which it will receive notices and other documents.
- (3) The Committee may request interested parties to file additional written representations on issues specified by the Committee, within a period specified in the request.
- (4) The Committee may direct parties to –
- (a) serve their representations in terms of sub-regulation (1), and any additional representations in terms of sub-regulation (3), on other interested parties;
 - (b) file with the Committee proof that they have served such representations, at an address specified by such a party in terms of sub-regulation 2(g).

3. Notice of hearing

- (1) The Committee must notify all interested parties in terms of section 71(5) of the Act of the place and time at which the Committee will hold a hearing, unless no interested party has requested an opportunity to make oral representations.
- (2) Together with the notification in terms of sub-regulation (1), the Committee must at least 21 days before a hearing, publish in the same notice the place and time of the hearing. This must be published:
 - (a) in the government gazette; and/or
 - (b) the committee may, (if it so finds necessary) publish in any other format including but not limited to the national or local newspaper, social media, etc. depending on the investigation conducted
- (3) The Committee shall conduct the hearing of oral representations in a matter that it considers appropriate in order to determine the dispute fairly and quickly, and may hear oral arguments and or evidence in support of the application.

4. Pre-hearing conference

- (1) The chairperson, or in his absence the deputy chairperson person may —
 - (a) prior to holding a hearing, request all or some of the interested parties who have requested an opportunity to make oral representations to attend a pre-hearing conference; and
 - (b) at any stage, direct that a pre-hearing conference held in terms of paragraph (a) be chaired by the chairperson, the deputy chairperson or a senior commissioner

- (2) The purpose of a pre-hearing conference is to attempt to reach consensus between the parties on:
- (a) identifying facts that are common cause between some or all of the interested parties;
 - (b) identifying facts that are in dispute between some or all of the interested parties;
 - (c) identifying issues on which oral representations may be made;
 - (d) the preparation of documents for submission to the Committee and exchange of documents among interested parties;
 - (e) the necessity for on-the-spot inspections; and
 - (f) dealing with any other matter which may facilitate or expedite the conduct of the hearing.
- (3) The interested parties attending the pre-hearing conference must prepare and sign a minute of the pre-hearing conference, provided that where the conference has been convened in terms of Regulation 4(1)(b), the person mentioned in regulation 4(1)(b) may prepare a pre-hearing minute for signature by the parties.

5. Persons appointed to assist Committee conduct Investigation

- (1) A person appointed to assist the Committee in terms of section 70B(3) of the Act may be –
- (a) a senior commissioner,
 - (b) any other commissioner, with appropriate expertise (as appointed by the Chairperson or Deputy Chairperson)
 - (c) any other person, who the Committee considers to have appropriate expertise as appointed by the Chairperson or Deputy Chairperson)

- (2) The Committee must specify in writing the matters that a person who has been appointed in terms of this regulation, is expected to do and report on to the Committee.
- (3) The Committee may request a person appointed in terms of this regulation to include in their report a recommendation as to whether –
 - (a) the whole or part of a service should be designated as an essential service;
 - (b) the Committee should issue an order in terms of section 72(1)(a) of the Act directing one or more registered trade unions and employers' organisations or employers to negotiate a minimum services agreement in respect of the whole or part of a service that has been designated as an essential service.
- (4) The Committee may call any person who has prepared a report in terms of this regulation to give evidence to the Committee.

6. Inspection and copying of representations

- (1) An interested party may inspect written representations made in terms of section 71(2) at the Commission's head office.
- (2) The prescribed fee for obtaining a copy of, or extract from, a written representation is R2.50 per page or such other amount as may be determined by the Committee from time to time.

7. Hearing of evidence

- (1) An interested party may make oral representation to the Committee –

- (a) if it has filed written representations in compliance with regulation 2; or
- (b) if it has not filed written representations in compliance with regulation 2, the interested party shows good cause for its failure to do so.

(2) The Committee:

- (a) must administer an oath or accept an affirmation from any witness in accordance with section 142 (1)(e) of the Act; where evidence is to be led;
- (b) may address questions to any witness; and
- (c) may permit any other interested party to cross-examine a witness on any relevant issue in respect of which there is a dispute of fact.

8. Variation or cancellation of the whole or part of a designation of an essential service

Parts A and C of these regulations apply, with the changes required by the context, to any request for, or investigation into, the variation or cancellation of the designation of the whole or part of a service as an essential service in terms of section 71(9) and section 75 (8) of the Act.

PART B: DISPUTES AND REFERRALS

9. Disputes about whether a service is an essential service

- (1) Any party who alleges that a dispute as contemplated by section 73(1)(a) or (b) of the Act exists may refer the dispute by submitting Form "LR 4.2" (or a form as prescribed by the Committee) together with an affidavit or

submissions setting out the evidence and legal submissions on which it relies.

- (2) If the applicant in a dispute relating to section 73 of the Act alleges that the referral must be heard as soon as possible, the applicant must state in its submissions the grounds of urgency in sufficient detail for the Committee to make a determination on the issue of urgency.
- (3) The Committee may require the parties to submit any further information relevant to the dispute or application in writing within such a period as the Committee may determine, including argument on any legal issue raised by the dispute.
- (4) The Committee may request the parties to the dispute to attend a pre-hearing conference in order to expedite the hearing of the matter. In the case of an urgent matter, the Committee may give any directive regarding a pre-hearing conference, including a directive that a pre-hearing conference not be held due to the urgency of the matter.
- (5) If the Committee decides that a matter is urgent, the Committee may make an interim order in respect of the dispute or application pending a final determination
- (6) The Committee, when determining the matter is urgent, may give its decision to the parties as soon as is practically possible; however, full reasons for the decision may be given at a later stage.

10. Determination of minimum services

- (1) Any party who alleges that a dispute about minimum services as contemplated by section 73(1)(c) or (d) exists may refer the dispute by submitting Form LRA Form 4.8A (or a form as prescribed by the Committee) setting out the factual background

- (2) Regulations 9 (2) to (6) apply to any dispute referred in terms of this sub-regulation (1).
- (3) The Committee may determine the minimum services that are required to be maintained in an essential service, irrespective of whether any party has referred a dispute to it in terms of section 73(1)(d) of the Act.

11. Ratification of collective agreement providing for maintenance of minimum services

- (1) A request by parties to a collective agreement to have the agreement ratified in terms of section 72(3) of the Act must be made by attaching the collective agreement to Form LR 4.8.
- (2) The Committee may require the parties to submit further written representations in regard to any matter relevant to the request for ratification.
- (3) The Committee may require the parties to appear before it in order to deal with any matter relevant to the request.
- (4) As soon as is reasonably practical after receiving the request, the Committee must either ratify or refuse to ratify the relevant provisions of the collective agreement and notify the parties of its decision in writing.
- (5) The Committee must, within 21 days of a request by any party to a collective agreement, provide brief reasons for its refusal to ratify the provisions of the collective agreement in terms of this regulation and may provide assistance to the parties.

12. Application for maintenance service determination

- (1) An application in terms of section 75(2) of the Act must be made on Form LR 4.3 (or a form as prescribed by the Committee) setting out the factual background upon which it relies.

- (2) The provisions of regulation 9(2) to (6) apply, with the changes required by the context, to any referral in terms of this regulation.

13. Conduct of hearings in terms of section 73 or 75 of the Act

- (1) As soon as reasonably practical after receiving the referral application in terms of section 73 or 75 of the Act respectively, the Committee must notify the parties in writing of the place and time of the hearing. The place and time of the hearing must be determined with due regard to urgency.
- (2) The Committee may decide that the dispute or application is capable of determination on the written representations and that it will hear oral evidence.
- (3) If the Committee decides that the matter is capable of determination on the written submissions before it, the Committee may hear argument from the parties and then make its determination.
- (4) If the Committee decides that it requires oral evidence, it must identify the issues on which it wishes to hear evidence and notify the parties of its decision in this regard at least seven days before the hearing.
- (5) Despite the provisions of sub-regulation (3), the Committee may during a hearing, direct that oral evidence be heard in which case the provision of sub-regulation (4) will apply.
- (6) The provisions of regulation 7 apply if oral evidence is heard.
- (7) If the Committee decides that a matter is urgent, the Committee may make an interim order in respect of the dispute or application pending a final determination.
- (8) The Committee, when determining the matter is urgent, may give its decision to the parties as soon as is practically possible; however, full reasons for the decision may be given at a later stage.

PART C: GENERAL PROVISIONS**14. Appointment of panels**

- (1) The chairperson, or in his absence the deputy chairperson, has the power to appoint a senior commissioner to preside at a panel hearing in terms of section 70C(2) of the Act.
- (2) An invitation to the employer and trade union parties participating in a hearing to nominate an assessor in terms of either section 70C(4)(b) or 5(b) of the Act, must be made in writing to –
 - (a) the employer and trade union parties participating in the hearing; and
 - (b) in the case of an investigation in terms of section 70(1) of the Act, the employer and trade union parties that have made written representations in terms of section 71(2) of the Act and requested an opportunity to make oral representations

15. Condonation

The Committee may, at the request of any party to any proceedings before the Committee and on good cause shown, condone any non-compliance with the provisions of these regulations, subject to such conditions as the Committee may in the circumstances consider appropriate.

16. Service and filing of documents

- (1) Any party filing a notice, representation or other document with the Committee in terms of the Act or the regulations must file the original and three copies with the head office of the Commission, as specified from time to time in the Rules of the Commission.

- (2) If a matter is being dealt with by a panel of five members, the Committee may require interested parties to file five copies of all notices, representations or documents.
- (3) The provisions of Part One of the Rules of the Commission, read with the changes required by the context, apply to the service and filing of any notice, representation or other document in respect of proceedings before the Commission.

17. Powers of Committee

- (1) The Committee may exercise any of the powers of a Commissioner in terms of section 142(1) to (7) of the Act, read with the changes required by the context.
- (2) Contempt of the Committee is regulated by sections 142(8) to (12) of the Act, read with the changes required by the context.
- (3) No proceedings of the Committee shall be invalid by reason of the fact that any member was not present during the whole or part of any proceedings.

18. Recordings of Committee's proceedings

The provisions of Rule 36 of the Rules of the Commission, read with the changes required by the context, apply to the recording of the proceedings of the Committee.

19. A How to join or substitute parties to proceedings

- (1) The ESC Panel or a Panel Chairperson may join any number of persons as parties in proceedings if their right to relief depends on substantially the same question of law or fact.

- (2) A Panel Chairperson may make an order joining any person as a party in the proceedings if the party to be joined has a substantial interest in the subject matter of the proceedings.
- (3) A Panel Chairperson may make an order-
 - (a) of its own accord;
 - (b) on application by a party; or
 - (c) if a person entitled to join the proceedings applies at any time during the proceedings to intervene as a party.
- (4) When making an order in terms of subrule (2), a Panel Chairperson may-
 - (a) give appropriate directions as to the further procedure in the proceedings.
- (5) If in any proceedings it becomes necessary to substitute a person for an existing party, any party to the proceedings may apply to the Committee for an order substituting that party for an existing party, and a Panel Chairperson may make such order or give appropriate directions as to the further procedure in the proceedings.
- (6) An application to join any person as a party to proceedings or to be substituted for an existing party must be accompanied by copies of all documents previously delivered, unless the person concerned or that person's representative is already in possession of the documents.
- (7) Subject to any order made in terms of subrules (4) and (6), a joinder or substitution in terms of this rule does not affect any steps already taken in the proceedings.

20. How to correct the citation of a party

If a party to any proceedings has been incorrectly or defectively cited, the Panel hearing the matter may, on application and on notice to the parties concerned, correct the error or defect.

22. When the ESC may consolidate disputes

The ESC or a Panel Chairperson, on its own accord or on application, may consolidate more than one dispute so that the disputes may be dealt with in the same proceedings.

The Committee or Panel Chairperson may order consolidation of separate disputes where:

- (a) The relief sought in each of the separate disputes to be consolidated, depends on the determination of similar or substantially the same questions of law and/ fact;
- (b) there will be no substantial prejudice on the party or parties sought to be joined through a consolidation order;
- (c) the Committee has jurisdiction on all the disputes sought to be consolidated.

23. Disclosure of documents

- (1) Either party may request a Panel Chairperson to make an order as to the disclosure of relevant documents.
- (2) The parties may agree on the disclosure of documents.

24. How to postpone ESC proceedings

- (1) A hearing may be postponed:
 - (a) By agreement of the parties
 - (b) By application and on notice to the other parties
- (2) The Committee must postpone the hearing without the parties appearing if:
 - (a) All the parties to the dispute agree in writing to the postponement; and
 - (b) The written agreement for the postponement is received by the Committee more than seven (7) days prior to the scheduled date of the hearing.
- (3) If the conditions of subrule (2) are not met, any party may apply to postpone the hearing by delivering an application to the other parties to the dispute and filing a copy with the Committee before the scheduled date of the arbitration.
- (4) After considering the written application, the Committee may-

- (a) without convening a hearing, postpone the matter; or
- (b) convene a hearing to determine whether to postpone the matter.

(5) Shorter postponement timelines may be considered by the Committee for Section 73 cases.

25. How to seek condonation for documents delivered late

- (6) This rule applies to any non-compliance of the timelines prescribed in these Regulations
- (7) A party must apply for condonation, to the Committee
- (8) An application for condonation must set out the grounds for seeking condonation and must include details of the following:
 - (a) the degree of lateness;
 - (b) the reasons for the lateness;
 - (c) the party's the nature of its interest in a Section 71 investigation or prospects of succeeding in the matter and obtaining the relief sought against the other party;
 - (d) any prejudice to the other party; and any other relevant factors.
- (9) The Committee may assist a referring party to comply with this rule.

26. Definitions

In these regulations, any word defined in the Act has that meaning, unless the context indicates otherwise, and -

"Act" means the Labour Relations Act, 1995 (Act No. 66 of 1995) and any reference to a form refers to the relevant form published in the Labour Relations Regulations, 2014;

"Committee" means the Essential Services Committee established in terms of section 70 of the Act and, in these regulations, any reference to:

- (a) the chairperson or deputy chairperson is a reference to the chairperson or deputy chairperson of the Committee;

- (b) the Committee includes a panel appointed in terms of section 70C, in respect of a matter assigned to such a panel.
- (c) "Commission" means the Commission for Conciliation, Mediation and Arbitration established in terms of section 112 of the Act;
- (d) "Rules of the Commission" means the Rules for Conduct of Proceedings before the Commission, in force at any time;
- (e) "Senior Commissioner" means a senior commissioner contemplated by section 70C(3) of the Act.

27. Short title and commencement

These regulations shall be known as the Essential Service Committee Regulations.