



**THE EFFECTIVENESS OF THE MECHANISMS TO MANAGE STRIKES IN
ESSENTIAL SERVICES IN THE PUBLIC HEALTH SECTOR, WESTERN CAPE,
SOUTH AFRICA**

by

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Thesis submitted in partial fulfilment of the requirements for the degree:

Master of Technology in Human Resource Management

in the Faculty of Business and Management Sciences

at the Cape Peninsula University of Technology

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Cape Town

June 2018

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ABSTRACT

The principle of the right to strike is internationally documented, as determined by the Committee on Freedom of Association. In South Africa, the right to strike is enshrined and protected in Section 23 of the country's Constitution under its Bill of Rights. Under specific circumstances, the Constitution allows for legislation to limit a right listed in Section 23. At the same time, the Constitution guarantees that everyone has the right to life and health care services. South African industrial action is regulated by the Labour Relations Act (LRA) No. 66 of 1995, as amended, which precludes workers who are employed in essential services from striking, because interruption of these services may endanger lives. However, the LRA also provides for the conclusion of a Minimum Service Agreement (MSA), where minimum services replace essential services. No MSA has been ratified since the LRA was promulgated in 1995. It is on this premise that the author investigated the mechanisms which have been put in place to create a balance between the right to strike and the need to provide essential services in the event of a strike.

This study used a qualitative research design. Open-ended questionnaires were distributed to the target research sample. Purposive sampling was applied to a total of 30 participants who were selected from the Western Cape Department of Health's essential services. The qualitative data was analysed using theme identification to make sense of the findings.

The research results reveal that employees who are providing essential services have the right to strike only if certain conditions are met. One of these conditions is the conclusion of a Minimum Service Agreement (MSA) to ensure a balance between the rights of health workers to strike and the rights of citizens to be provided with health care services. This agreement provides the duties and responsibilities of the employer and employees for the continuation of minimum services in the event of a public sector strike to ensure that service delivery is not interrupted. Specific recommendations are made by the researcher regarding the MSA, and measures are discussed to ensure that the minimum services within essential services remain operational in the event of a public sector strike.

ACKNOWLEDGEMENTS

I wish to thank the following for their contributions to the completion of this research study:

- First and foremost, I thank GOD for granting me the strength, courage and dedication to carry out this research;
- I sincerely thank my supervisor, Dr. L. Gie, for her commitment, patience and guidance, as well as for sharing her academic knowledge with me;
- I am grateful to my colleagues from the Directorate: Labour Relations for their participation and for assisting me with the required information for this study;
- My husband, Prof. W. Mabusela, is thanked for his continued support and encouragement; and
- I thank my children, Ilitha and Likhanyile, for their patience and understanding during this research study period.

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ABBREVIATIONS

CCMA	Commission for Conciliation, Mediation and Arbitration
CFA	Committee on the Freedom of Association
DENOSA	Democratic Nursing Organisation of South Africa
ESC	Essential Service Committee
HOSPERSA	Health and Other Services Personnel Trade Union of South Africa
ILO	International Labour Organisation
LRA	Labour Relations Act No 66 of 1995, as amended
MSA	Minimum Service Agreement
MSD	Minimum Service Determination
NEHAWU	National Education, Health and Allied Workers Union
NUPSAW	National Union of Public Service Alliance Workers
POPCRU	Police and Prisons Civil Rights Union
PSA	Public Servants Association
PSA	Public Service Act
PSC	Public Service Commission
PSCBC	Public Service Co-ordinating Bargaining Council
PSR	Public Service Regulations
PHSDSBC	Public Health and Social Development Sectoral Bargaining Council
SAPS	South African Police Service
WCED	Western Cape Education Department
WCDoH	Western Cape Department of Health

CHAPTER ONE

INTRODUCTION AND BACKGROUND TO THE RESEARCH STUDY

1.1 Introduction

The “Right to Strike” is a fundamental right for all of the country’s citizens, according to Section 23 of the Constitution of the Republic of South Africa (RSA) (hereafter referred to as ‘the constitution’) (South Africa, 1996:13). The same constitution recognises the “right to life” and the “right to health care” services that should be enjoyed by all.

It is paradoxical that, on the one hand, public health care workers, as citizens of the RSA, have the right to strike while, conversely, residents of the country have the right to life and health, the provision of which right is reliant on public health care services. Finding an equilibrium between provisions of the Bill of Rights (South Africa, 1996:6-20) seems to present a challenge within the public health care system.

In a new democracy such as that of South Africa, a country which has a problematic past that entails political and legal issues, it is important that all South Africans should be aware of their rights, but also of their obligations and responsibilities. During the 2007 and 2010 national public sector strikes it became evident that public health workers had failed to consider their professional obligations when they joined the strikes. However, the government established that the right to strike cannot be universally applied and made provision in the Labour Relations Act No. 66 of 1995 (LRA) (South Africa, 1995:87) for the designation of essential services and the conclusion of a collective agreement regarding minimum service.

This research study focuses on the workers’ right to strike within the essential public service. The workers are denied the “right to strike” in accordance with Section 65 (d)(ii) of the LRA (South Africa, 1995:87), which prohibits employees who are providing essential services from taking part in an industrial action. The research explores the mechanisms that are in place to ensure continuation of public services in the event of any public service strike and develops guidelines to improve good practice in this regard.

1.2 Background of the research study

Arguably, since democratisation of the RSA in 1994, strikes, in general, have declined in frequency and intensity (Maree, 2011:17). There was a trend towards fewer working days lost owing to strikes that occurred between 1994 and 2006. Seemingly, during strikes, an average of 1.8 million working days were lost per year during this period (Maree, 2011:18) However, in

2007 there was a dramatic increase in strikes, which resulted in up to 12.9 million working days lost; and this figure escalated to 16 million work days lost in 2010. The increase in lost work days was mainly owing to massive strikes by public service unions in 2007, and again in 2010, when South Africa experienced some of the most disruptive strikes in its history (Maree, 2011: 20). These strikes were regarded as the largest public service strike in South African history in terms of the number of working days that were lost. Amazingly, the unions representing 1.3 million workers from diverse sectors worked together, regardless of their alliances, race, political affiliation or differing sectoral interests (i.e., between professional and general workers). It took place merely weeks after government spent billions of rands on the FIFA World Cup (Bekker & van der Walt, 2010). The strike affected almost all citizens, as the health professionals from different institutions were not operating, while the SAPS and security forces also wanted to join the strike. The fact that there are still no established minimum service agreements, as required by law, is an indication of failure by parties to conclude a minimum service agreement after several rounds of negotiations. This was seen as an effort to deprive all workers in the public health sector of the right to strike. Notwithstanding, there remains a need to conclude such agreement for the sake of people who are solely dependent on the services (South Africa, Public Service Commission, 2011:13).

Although strike action in South Africa is legalised, there are limitations attached to it, which are listed in Section 65 of the LRA of 1995, as amended (South Africa, 1995:87) as follows:

- a collective agreement prohibits the strike and the persons concerned are bound by the agreement;
- there is an agreement that requires the issue in dispute to be referred to arbitration;
- the issue in dispute is one that a party is entitled to refer to arbitration or to the Labour Court;
- the person is engaged in an essential service or maintenance service;
- the persons are bound by an arbitration award or collective agreement that regulates the issue in dispute; and
- the persons are bound by a determination made by the Minister of Labour, which regulates the issue in dispute.

One of the crucial limitations found in the LRA is that essential service employees are prohibited from partaking in strike action. The LRA defines essential services as those that, “when interrupted, may endanger life, as well as the personal safety or health of the whole or any part of the population, the Parliamentary service and the South African Police Services” (SAPS) (South Africa, 1995:218). The designation of the SAPS as an essential service was challenged, since there are many employees within SAPS whose work is hardly vital to

protecting “life, personal safety and health”. This was taken to Court by POPCRU, where the court ruled that Public Service Act (PSA) employees’ services are not essential, since they mainly provide support services, while those who are employed under the South African Police Service Act (SAPSA) are prohibited from striking. Analysing the Labour Appeal Court judgment in *SAPS v POPCRU and Another* 108, it became clear that only services that are provided by employees who are employed under the SAPA are regarded as being essential services (South African Police Services v Police and Prison Civil Rights Union, 2010).

Below is a list of services, which was compiled by the Essential Service Committee (ESC), whose functions include designating a service as being an essential service (South Africa, 1995:93). Services in the public sector that are designated as being essential include:

- Emergency health services and the provision of emergency health facilities to the community or part thereof;
- Nursing; and
- Medical and paramedical services.

The following are support services:

- catering;
- medical records;
- security;
- porters and reception;
- pharmaceutical and dispensary;
- medicine quality control laboratory;
- forensics;
- laundry work;
- clinical engineering;
- hospital engineering;
- waste removal;
- mortuary services; and
- pest control (South Africa, 1995:93).

The recourse for workers who are employed in essential services is discussed in Section 74 (3)(4) by means of referring the dispute to the Bargaining Council or to the Commission for Conciliation Mediation and Arbitration (CCMA) for conciliation and arbitration (South Africa, 1995:96).

Considering the list of essential services, Section 72 of the LRA (South Africa, 1995:95) makes provisions for parties to enter into a minimum service agreement (MSA), which is a collective agreement to maintain essential service at a reduced level, or the entire service with reduced staff, in the event of a strike. If such an agreement is reached, the minimum service agreed upon will become an essential service. This agreement will determine the number of employees, or a percentage of the workforce, that will continue to provide minimum services whilst other employees strike (South Africa, 1995:95).

Outside of the agreement, certain designated positions in a public service are declared to be an essential service and the incumbents are, therefore, prohibited from striking. The LRA was in the spotlight in the public service strikes of 2007 and 2010 when essential service workers participated in the strikes. This created tension between the public, the government and recognised unions with regard to essential services. The tension can be attributed to the demand by citizens for protection of their right to well-being and for its own essential functioning.

In 2007 and 2010, workers in the Public Health Department, which provides essential services, as well as in other sectors that are prohibited from striking, took part in a national public service strike. As a result, the strike was regarded as an unprotected strike. The recognised trade unions argued that the designation of those sectors was unconstitutional, since it prohibited employees who work in those sectors from striking. The LRA provides for additional mechanisms to amend what seems to be an absolute restriction against striking, and this is articulated in the regulation of the MSA (South Africa, 1995:95).

The purpose of this study is to determine the effective utilisation of the above-mentioned mechanisms to manage limitations concerning the right to strike within the public health sector in the Western Cape, South Africa, as provided for by legislation. Public health workers have a constitutional right to strike, while the citizens have a constitutional right to health care. The study also aims to provide recommendations for establishing a MSA such that there is a balance between employees' right to strike and citizens' right to health care.

1.3 Statement of the research problem

Two major public sector strikes occurred in 2007 and 2010, both of which severely disrupted public service delivery. Strike action has often been protracted and costly to the economy, peaking in 2010 with an extended public sector strike that amounted to a loss of about 16 million working days. The year 2010 saw one of the most protracted and highly charged public service strikes since this country's transition to democracy, with an estimated one million workers taking to the streets (Patel, 2011:26). Employees from the public health sector, which provides essential services, took part in these strike actions, which infringed on citizens' rights to access health services. Since there is a provision in the LRA (South Africa, 1995:97) which stipulates that, if a collective agreement regulating the maintenance of minimum service is in place, other employees within the essential service may participate in strike action. However, no collective agreement has been concluded at the Public Health and Social Development Sectoral Bargaining Council (PHSDBC) that is designed to determine which essential service workers may or may not participate in protected strike action. This results in patients usually

being left unattended during strike action. Patients may then need to be assisted outside of the public sector by way of private sector suppliers, since they have been deprived of their right to health care services. In this situation, governments will then have to consider alternative ways to deliver care. One option may be the maintenance of minimum services (essential services) during protected strike action, depending on the conclusion of a collective agreement on minimum services, which is signed between the PHSDBC and the trade unions.

1.4 Key research questions

This study's key research questions are as follows:

1. Which essential service employees may participate in strike action in the event of a public sector strike?
2. What percentage of essential services employees is required to maintain minimum services in the event of a public service strike?
3. Should the parties conclude a collective agreement on the maintenance of minimum services, how will implementation of the minimum service agreement in the public health sector be enforced?
4. To provide recommendations which will enhance the establishment of the minimum service agreement.

1.5 Research objectives

This study aims to achieve the following objectives:

1. To identify the categories of employees that may participate in strike action within the public health sector;
2. To give guidance to the number of employees that is required to maintain essential services in the event of strike action in the public health sector;
3. To ensure that the collective agreement regarding minimum services makes provision for enforcement of the agreement in order for the parties to adhere to it; and
4. To provide recommendations which will improve the establishment of a Minimum Service Agreement.

The main purpose of this study is to develop guidelines for the establishment of such a Minimum Service Agreement in essential services which will promote equilibrium between the right to strike and the right to health care within the public health sector.

1.6 Research design and methodology

Kumar, 2008 defines research as one of several means of collecting and understanding information and finding answers to questions posed. This research study applied a qualitative research design to gain insight into the effects of the absence of a collective agreement on minimum services within the South African public health sector. In-depth detail from stakeholders was required to understand the complexities of the right to strike, while maintaining the right to life and health care.

Data was collected using questionnaires comprising open-ended questions. The research participants were given a chance to respond in a manner that they would be able to express their views without restrictions. Reports pertaining to strike action in RSA were analysed.

The population for this study comprised employees (management from different occupational clusters) from the Department of Health, as well as registered and recognised trade unions (shop stewards and office-bearers) within the Western Cape Province. Purposive sampling was applied to select a target sample of 50 participants, which would represent a group of different non-probability sampling. Also known as 'judgmental', 'selective' or 'subjective' sampling, purposive sampling relies on the researcher's judgement when it comes to selecting the study units (e.g., people, cases/organisations, events, pieces of data). Usually, the sample that is studied is relatively small, once equated through the probable sample method. In other words, purposive sampling involves choosing groups of people for a particular purpose during a specific study or project.

The questionnaires were equally divided between the employees (management) and the trade unions to obtain a balanced perspective. The questionnaire contained the same questions for all participants. There were 23 open-ended questions with sufficient space to record answers. The questionnaire design was guided by the reviewed literature and was also influenced by insight into the public sector strikes of 2007 and 2010, when essential service employees participated in the respective strikes.

Upon receipt of the completed questionnaires, the researcher analysed the data based on responses to the research questions. The researcher established patterns of common responses via thematic analysis. The research findings were presented via frequency tables and were articulated via dominant qualitative themes.

1.7 Ethical considerations

The researcher was granted permission to conduct research at the Department of Health: Western Cape by the Chief Director: People Management, since the researcher observed and complied with research ethics requirements. The researcher assured participants of their privacy, anonymity and confidentiality, and no expectation of harm was anticipated. The researcher made the participants aware of the fact that their involvement in the study was not compulsory, and withdrawal would be acceptable at any stage. Before completion of questionnaires, each participant was provided with a consent form that explained the purpose of the research study, and that signing confirmed their willingness to participate in it. (e.g. see Appendix A)

The information that was received would be used solely for study purposes and no action would be taken against individuals based on such information.

1.8 Delineation of the research

This study was limited to employees who served in the Western Cape Department of Health at the time of the study, including registered trade unions which are recognised by the Western Cape Government. The focus was on exploring mechanisms to manage the restrictions on the right to strike within services that are designated to be essential. This study did not consider other government departments which also provide designated essential services such as South African Police Services.

1.9 Significance of the research

This study sought to provide guidance to the public health sector in terms of employers and recognised trade unions that enter into a collective minimum service agreement to regulate the maintenance of essential services in the event that the public sector embarks on strike action in future. This collective agreement should minimise possible strike action effects on the country's citizens who are entitled to the protection of their constitutional right to be provided with public health services. It will benefit all stakeholders and respect their constitutional rights if an equilibrium can be found between the right of every worker to strike, and the right of every citizen to basic health care, as set out in Chapter Two of the Constitution, Bill of Rights (South Africa, 1996:13, 19).

1.10 Clarification of key terms and concepts

Basic terms and key concepts which are relevant to this research study are clarified below and contextualised within South African labour relations:

(i) Strike action

“The partial or complete concerted refusal to work, or the retardation or obstruction of work, by persons who are employed or have been employed by the same employer or by different employers, for the purpose of remedying a grievance or resolving a dispute of any matter of mutual interest between employer and employee. Any reference to work in this definition includes overtime work, whether it is voluntary or compulsory” (South Africa, 1995:221).

(ii) Essential services

Section 213 of the LRA defines an essential service as a service whose “interruption may endanger the lives, personal safety or health of the whole or any part of the population, the parliamentary service and the South African Police Services” (South Africa, 1995:218).

(iii) Essential Service Committee (ESC)

This committee was formed in line with Section 70 of the LRA, and one of its functions is listed as to ratify the Minimum Service Agreement that is concluded at the Bargaining Council (South Africa, 1995:93).

(iv) Minimum Service Agreement

The parties (employers and unions) may reach consensus to provide less than the whole essential service, or to operate the entire essential service with few staff, while the ESC must ratify such agreements so that these are effective (Brand, 2013:6). It should be noted that the following phrases in this study are synonymous with Minimum Service Agreement (MSA):

- Collective agreement on minimum service
- Maintenance of minimum services
- Minimum service collective agreement

- Collective agreement on the maintenance of minimum service

(v) Trade unions

These refer to an organisation of workers whose major objective is to ensure that there are sound labour relations between employees and employer, including any employer organisations (South Africa, 1995:221).

(vi) Collective agreement

A collective agreement is a written agreement that concerns terms and conditions of employment, or any other matter of mutual interest, concluded by one or more registered trade unions on the one hand, and conversely,

- One or more employers;
- One or more registered employers' organisations; or
- One or more employers and one or more registered employers' organisations (South Africa, 2008:1).

1.11 Expected outcomes, results and contributions of the research

The expected results of this research should provide guidance for the conclusion of MSA within an essential service, including guidelines on how to ensure the effective implementation of such agreements.

1.12 Summary and chapter layout

Chapter One has introduced the research study by presenting and discussing the background of the study, providing a statement of the research problem, then listing research questions and the research objectives. The main purpose of this study was to develop guidelines to establish minimum service agreements in essential services to promote equilibrium between the right to strike and the right to health care within the public health sector. The qualitative research approach and open-ended questionnaire instrument that was applied in the context of the public health sector in the Western Cape Department of Health (WCDoH) was briefly explained. Ethical considerations ensured that research participants' privacy was protected and that no expectation of harm was anticipated. The expected results of this research should provide guidance for the conclusion of collective agreements for the maintenance of minimum services within an essential service, including guidelines on how to ensure the effective implementation of such agreements.

Chapter Two presents the research study's literature review and offers detailed theoretical grounding regarding the legislative framework that governs strike action in South Africa.

Chapter Three covers the study's research methodology with reference to the research design, population and sample, data collection techniques, as well as data analysis.

Chapter Four presents and discusses the research study's findings in the form of tables and pie charts, articulated within the context of South African strike action with linkages to the literature.

Chapter Five concludes the research study with respect to the study's objectives and offers recommendations for future remedial action.

The next chapter, Chapter 2, is a review of the literature which focuses on the legislative framework governing strikes in South Africa.

CHAPTER TWO

LEGISLATIVE FRAMEWORK GOVERNING STRIKE ACTION

2.1. Introduction

This chapter presents an analysis of reviewed secondary sources in an attempt to understand striking and strikes globally and in a South African context. Government policies and other legislative documents were consulted to understand the legislative framework which governs strike action in South Africa. Firstly, the researcher expands on the global picture regarding the concept of striking in employment relations management. Secondly, the researcher examines the International Labour Organisation (ILO) Standards on strikes in essential services. Thirdly, this chapter also provides a picture of the South African Legislative Framework pertaining to strikes in essential services and the limitations imposed. For instance, the ILO Standards, the country's Constitution and the LRA explore definitions of industrial action, including strikes in essential services and the limitations imposed, as well as the conclusion of the minimum service agreement by the LRA. The chapter also explores different theories pertaining to essential services.

Strike action has negatively impacted on public health services. During the 2007 and 2010 public sector strikes, it seemed as if public health workers did not take into consideration their obligations when exercising their constitutional right to strike. The actions of the public health workers had far-reaching consequences. Citizens' constitutional rights to health care were infringed upon and they were deprived of proper health care. As employees participated in industrial action, patients were neglected, sometimes with devastating consequences. Hence, there is a need to balance the right to strike against other fundamental rights such as dignity, freedom and security, the right to life and health (Smith, 2010).

There has been a need to negotiate and conclude a collective agreement in the Public Service Coordinating Bargaining Council (PSCBC) regarding the minimum services in an essential service designate, thus allowing some employees to participate in the strike action while others continue to provide essential minimum services to the public.

The only way to ensure that essential services are not interrupted in the event of public service strike action is to ensure that the provision to maintain minimum essential services is in place and adhered to at all times. This can be done by entering into a collective agreement on minimum services, which will stipulate that the services remain operational. The LRA makes provision for the conclusion of the minimum service agreement within an essential service (South Africa, 1995:95).

2.2 The concept of strike in Employment Relations Management

Strike action is perceived to be a result of parties that are involved in an employment relationship failing to reach agreement on terms and conditions of employment. For employees who are represented by trade unions, a strike is the only tool that places pressure on an employer to succumb to the demands of employees (Gale Group, 2004).

The parties that comprise the employment relationship are known as a tripartite relationship, which consists of the State, employers and employees (Bendix, 2015:26). Grogan (2009:15) states that the main parties in an employment relationship are the employer and the employees, based on the contract of employment into which they have entered. Bendix (2015:16) views this relationship as the primary relationship, while the one with the State is the secondary relationship. According to Bendix, this relationship does not end there: it also includes their collective associations, that is the employer's organisations and the trade unions that represent the respective parties. All three parties have different roles to play within the employment or labour relations system (Bendix, 2015:16).

In the case of the public service, the employer is the State. Internationally, the concept of public service employees differs from one country to another. Within its governance structure, Germany makes provision for a differentiation between civil servants and public servants, and the labour rights that the two groups may have. In France the military, police and prison services do not have the right to strike. In India, public servants have limited organising and collective bargaining rights. In Brazil, the police and the military do not have the right to strike, and there are no legal provisions concerning the right to strike for civil servants. This is not the case in the South African model, as the South African Constitution and National Legislation have no provisions for differentiation in the application of labour legislation in the public service and the private sector. Application of the principles of labour relations and, more precisely, that of the right to strike and the determination of essential services, must differ in public services from that of the private sector (Public Service Co-ordinating Bargaining Council - PSCBC, 2014:04).

The public service is unique because, when workers strike, it is not a purely defined labour process between an employer and employees but, rather, the public at large becomes a third actor in the process. When public servants engage in industrial action, they do not only deprive the community of certain rights, but indirectly deprive themselves of the same rights (PSCBC, 2014:04).

The LRA does not provide for the unique circumstances of the public service. The right to strike is a fundamental right for workers and, therefore, public servants will not forfeit this. Conversely, as the employer, the State has to deliver services to the public, as they are entitled to those rights, which are guaranteed by the country's Constitution (South Africa, 1995:95).

The majority of strike action in South Africa relates to economic conditions, particularly when management refuses or fails to satisfy employee demands for wage increases, service benefits and working conditions. All parties within the employment relationship have roles to play, and these are discussed in the following section.

2.2.1 Role of the State in employment relations

The State is perceived as being embodied in systems of government, causing 'the State' and 'government' being used interchangeably. In democratic systems, the government is elected by people (Bendix, 2015:43). The State is the source of legislation, which also sets the minimum level of protection for workers. Through its legislative framework, it has an impact that relates to how the labour or employment relations should function. For example, special tribunals or administrative bodies were established by government to deal with labour disputes. The State is also the employer, since it administers a vast public sector. As an employer, the State is different from the private sector. The State is regarded as a non-profit organisation, and hence receives its revenues through revenues from society and its employees. In the past, this led to the adoption of different employment relations in the public sector, and often to limitations that were placed on collective bargaining and the freedom to strike (Bendix, 2015:27).

Dundon & Rollinson, (2007 :169) states that the State's objective in intervening in employment relations is to achieve socioeconomic goals of the country, by attaining four broad economic policy objectives,

- To maintain high levels of employment
- To ensure price stability
- To maintain a balance of payment surplus
- To protect the exchange rate.

On the other hand, Hyman (2009) as quoted by Dundon & Rollinson points out broad methods of State intervention by stating the following: The state

- sets regulations, values for responsible, employment practices;

- is a law maker of incomes and prices - the State acts as controller of salaries and prices, either through direct intervention or by its management of the economy;
- is an economic manager - macro-economic policies of the State, which affect labour market demand, employment and manpower utilisation;
- is a protector of standards - an employment relations role adopted by the state, which establishes and monitors minimum standards through its agencies;
- is a rule maker and legislator - enacting legislation to create auxiliary, restrictive and regulatory rules that affect other parties in employment relations; and
- is a promoter of social citizenship guidelines ((Dundon & Rollinson 2007:172).

The extent of these interventions depends on the political ideologies of the government of the day (Dundon & Rollison 2007:172). For example, in today's era, not all the above-mentioned interventions are applicable.

2.2.2 Role of the employer and employer's organisation in employment relations

The employer is the provider of work; it plans, decides, directs and controls, while conversely, the employee executes the employer's instructions. According to Grogan (2009:47), the employment relationship between the major parties, namely the employer and employee, commences once the parties have entered into a contract of employment. The employment relationship differs and is broader than the contractual relationship, since the content thereof becomes regulated by statutes, regulations and collective agreement.

The duties of the employer are: to employ the person into his/her employment; to remunerate the employee; and to ensure that the employee works under safe working conditions (Grogan, 2009: 53).

The employer organisation is a group of employers that is established to protect, represent and guide associated employers and organisations or companies, and to strengthen their position in society at large regarding labour relations matters. Unlike trade unions, which comprise individual of persons, employer organisations comprise enterprises, or employers from the same sector of the economy (Employers' organisation Wikipedia.<http://en.m.wikipedia.org>>employer).

The right to strike was incorporated into South African legislation from 1924 in the Industrial Conciliation Act, where the courts protected employees from dismissal through unfair labour practice jurisdiction. The main purpose of the Industrial Conciliation Act (Maree, 2011: 04) was to prevent industrial unrest by providing for collective bargaining between employer

associations and trade unions, falling within the scope of the bargaining bodies known as the Industrial Council, and for conciliation mechanisms, if a dispute arose. The same Act had excluded others in its definition and was amended on numerous occasions, whilst changing its name to the Labour Relations Act. In 1995, a new LRA was agreed upon. This expanded collective bargaining rights to all employees, including public servants, and made provision for the establishment of public service bargaining structures.

2.2.3 Role of employees and trade unions in employment relations

The LRA defines an employee as any person providing services for another person or for government departments. An employee obtains a remuneration and carries out or conducts the business of the employer, excluding an independent contractor (South Africa, 1995: 200). The employee's role is to provide services that the employer entrusts to him/her, as per the employment contract. The only mechanism that employees can use to seek improvement of their conditions of services, such as wage/salary increases and fringe benefits, is through a collective bargaining process, where employees are represented by trade unions that negotiate with the employer.

The trade union is known as an alliance of workers whose primary goal is to legalise the relations among the workers and the employers, including any employer organisations. The trade unions play a significant role in the South African Labour Relations System, as they represent the interests and rights of employees in bargaining councils, as well as social and political structures (Bendix, 2015:28). Trade unions represent the voices of workers so that they have no fear of victimisation and dismissal; and the unions protect their members to ensure that their interests are protected. This is substantiated by Hyman (2001:6) who state that the core functions of unions as counteracting the vulnerability of the individual worker can speak on behalf of their members when setting their terms and conditions of employment. The collective bargaining structure was established and legalised with the aim of helping parties to resolve any collective disputes that arise between the parties. The employees are represented by trade unions in such structures.

The Public Service Collective Bargaining Council (PSCBC) was established in South Africa. It incorporates eight trade unions representing workers who have different interests, excluding the trade unions that are associated to the Congress of South African Trade Unions (COSATU), who act together and consolidate their mutual needs during negotiations in PSCBC. Should there be no agreement reached between parties on relevant matters of mutual interest, it could lead to tensions which may impact negatively on the relationship and, consequently, their capacity to conduct negotiations. Such a situation has the potential to lead

to a power play and dispute which, in turn, may be lodged by unions. Once the dispute of mutual interest is referred, the conciliation would be arranged for the parties and pursuing conciliation would be an alternative. Should conciliation fail, the trade unions can notify the employer of their intention to strike, in accordance with the LRA's requirements (except for essential and maintenance services, in which case they are obligated to refer the dispute to arbitration, as they are prohibited from participating in strike action) (South Africa, Public Service Commission - PSC, 2011:10). Strikes and lock-outs are a result of trade unions being dissatisfied with employment conditions and wage increases.

The other collective bargaining structure that was established, which focused only on matters that relate to health workers, was the Public Health and Social Development Sectoral Bargaining Council (PHSDSBC). Once the employer and the trade unions (hereafter referred to as 'parties') have negotiated successfully, they decide on resolutions, and these become the collective agreement. A collective agreement is a written agreement which contains terms and conditions of employment, or any other matter of mutual interest, that have been concluded by parties during the collective bargaining process (South Africa, 2008:1).

The purpose of this study is to consider how parties may be aided to reach agreement on the maintenance of the minimum service agreement in the event of a public service strike. This process will include determining the number of employees that may participate in a protected strike and those who must continue to provide the minimum services within an essential service.

2.2.4 Conflict in employment relationship

In an employment relationship, as in any type of relationships, disagreements are bound to occur. The employees may have demands regarding improving wages and working conditions, while the employer wishes to capitalise on shareholder's pay-outs and focus on reinvestment. There are processes and procedures that are in place to regulate the process of conflict resolution. The primary objective for the establishment of collective bargaining structures is to regulate dispute resolutions within an organisation. Failure to resolve conflict may cause employees to embark collectively on strike action. The most common strikes are those which involve economic issues, for example, when management refuses or fails to satisfy the demands of employees regarding wage increases, service benefits and working conditions.

The State passes laws to regulate employment relations, while the collective bargaining structures were established to contain conflict between parties. The development of collective bargaining entails a process of negotiations between an employer and a group of employees

(often represented by a trade union) to improve employment and income conditions. The BASIC CONDITIONS OF EMPLOYMENT ACT no. 75 of 1997 (BCEA) provides for the minimum conditions of employment, while the collective bargaining structures can negotiate for the improvement of those conditions that are provided for in the BCEA. The result of collective bargaining procedures is a collective agreement, which also regulates the terms of employment (PSCBC, n.d.). A collective agreement may include provisions regarding wages, leave/vacation time, working hours, working conditions, health insurance benefits and fringe benefits (PSCBC, n.d.).

The government realises that the other recourse to conflict resolution that would place pressure on the employer is for employees to embark on strike action; hence, the right to strike is legislated.

Strike action is regarded as one of the most important tools utilised by the workers and their trade union in pursuit of their economic and social interests. It is the most visible and controversial form of collective action in the event of a labour dispute and is often seen as the last resort for workers' organisations in pursuit of having their demands met. Strikes should not be seen in isolation from industrial relation as a whole. It is expensive and disruptive for workers, employers and society alike; and, when it occurs, it is owing to a failure in the process of addressing working conditions through collective bargaining. Indeed, more than any other aspect of industrial relations, they are often a symptom of broader and more diffuse issues, with the result that, even if a strike is prohibited by national legislation or a judicial order, this will not prevent it from occurring if the economic and social pressures are sufficiently strong (International Labour Organisation - ILO, 2001.).

The following section deals with international standards on strikes and essential services.

2.3. International Labour Organisation (ILO) standards

The Committee on Freedom of Association (CFA) was established in 1951 to study complaints arising from violation of freedom of association, whether or not the country concerned has ratified the relevant ILO conventions. The CFA is a Governing Body committee, and its composition consists of an independent chairperson and three representatives each of governments, employers, and workers (International Labour Organisation - ILO, 2014).

The Committee on Freedom of Association (CFA) declared strike action to be a right, and laid down the basic principles underlying this right, from which all others to some extent derive. It recognises the right to strike to be one of the principal means by which workers and their associations may legitimately promote and defend their economic and social interests (ILO,

1996:101). Over the years, in line with this principle, the Committee on Freedom of Association has recognised that strike action is a right and not simply a social act, and has also:

- made it clear that it is a right, which workers and their organisations (trade unions, federations and confederations) are entitled to enjoy;
- reduced the number of categories of workers who may be deprived of this right, as well as the legal restrictions on its exercise, which should not be excessive;
- linked the exercise of the right to strike to the objective of promoting and defending the economic and social interests of workers (which criterion excludes strikes of a purely political nature from the scope of international protection provided by the ILO, although the CFA makes no direct statement or indication regarding sympathy strikes other than that they cannot be banned outright; this matter is examined subsequently by the CFA; and
- stated that the legitimate exercise of the right to strike should not entail prejudicial penalties of any sort, which would imply acts of anti-union discrimination (ILO, 2000:11).

The ILO's standards on strikes and essential services arose primarily from the Interpretation of the Right to Organise and Collective Bargaining, Convention 98 of 1949, and The Freedom of Association and the Protection of the Right to organise, Convention 87 of 1948. One of the Conventions ratified by South Africa is the Freedom of Association and Protection of the Right to Organise Convention.

The principles set out in this Convention were later improved by two ILO bodies, namely the Committee of Experts on the Application and Recommendations, and the Committee on Freedom of Association. The Committee of Experts provides general supervision of compliance with ILO principles, whereas the Committee on Freedom of Association is specifically tasked with the protection of trade union rights. In assessing the application by member states of the Convention, these bodies have established various principles and guidelines regarding the regulation of essential and minimum services. Both the ILO's Committee of Experts and Freedom of Association Committee have held that strikes can be restricted or prohibited in the public service for high ranking servants exercising authority in essential services, in the strictest sense of the term; and they can also be restricted or prohibited in the event of an acute national emergency and for a limited period. This prohibition of the right to strike may include members of the judiciary and officials who work in the administration of justice (ILO, 2000:20).

The Committee on Freedom of Association and the Committee of Experts both agree that, when public servants are not granted the right to strike, they should enjoy sufficient guarantees to protect their interests, including appropriate, impartial and prompt conciliation and arbitration procedures to ensure that all parties may participate at all stages, whilst arbitration decisions are binding on both parties and are fully and promptly applied. It should also be stressed that,

while the provisions of Convention No. 151 and Recommendation No. 159 on labour relations in the public service, which were adopted in 1978, cover the settlement of disputes amongst other things, no explicit mention is made of the right to strike for public servants. It should be emphasised that, regarding the question on the right to strike in the public service, the ILO's supervisory bodies' approach is based on the fact that the concept of 'public servant' varies considerably from one country to another. It may be deduced from the statements of the Committee of Experts and those of the Committee on Freedom of Association that the concept of public servants, where their possible exclusion from the right to strike is concerned, relates to public servants who exercise authority in the name of the State (ILO, 2006:118). The implications of this approach are important, the guidelines used to determine which public servants may be excluded are no longer derived from application of the national legislation that governs the public service, but rather from the nature of the functions performed by such public servants. Those officials who work at comparatively higher levels in government structures, including their assistants, and officials who work in the administration of justice (as well as other judiciary staff), may have to live with major restrictions or even prohibitions where it concerns their right to strike. For example, in Canada, there are sections of the public servants' community within the provincial government of Alberta, who are not in positions of authority on behalf of the State, and who are not allowed to strike. Furthermore, the right to strike is subject to restrictions in the agricultural and horticultural sectors of the Province of Ontario, as well as in the railroad and harbour industries (ILO, 1998:50). Public servants who are not in positions of authority on behalf of the State, and yet perform an essential service (as understood in the strict sense of the term), may be excluded from participating in strike action (ILO, 1998:55). This concept is further discussed/interrogated in the paragraphs below. The Committee of Experts agrees with the principles of the Committee on Freedom of Association, where it concerns situations in which there are severe restrictions or even prohibitions regarding the right to strike (ILO, 1998:55).

Furthermore, the Committee of Experts has noted that "a too broad definition of the concept of public servant is likely to result in a very wide restriction or even a prohibition of the right to strike for these workers" (ILO, 2006:118). The Committee has pointed out that one of the key problems is owing to the reality that the concept itself does vary significantly, depending on the legal system from which it is being considered. For example, the terms "civil servant" and "functionaries" do not necessarily have the same meaning; on the other hand, using an identical term in the same language does not always express the same message in different countries. Lastly, there is a strict stratification of public servants according to status, obligations and rights, while the same does not apply nor have the same consequences in some systems. The Committee has taken into consideration that, while it cannot downplay the unique circumstances and legal and social practices of each country, it needs to establish reasonably

consistent criteria for assessing the compatibility of legislation with the provisions of Convention No. 87. Based on these reasons, it has deemed it unnecessary to structure a comprehensive and universally applicable list of categories of public servants to whom the right to strike could be accorded or denied, just because they are in positions of authority on behalf of the State. The Committee realises that, with the exception of groups which may be distinctly classified into one or other category, the question will always be that of the extent to which an employee falls into one level or the other, as placed by the employer. To accommodate borderline cases, it has proposed that a possible solution is “not to impose a total prohibition of strikes, but rather to provide for the maintaining by a defined and limited category of staff of a negotiated minimum service when a *total and prolonged* stoppage might result in *serious* consequences for the public” (ILO, 1998:19).

2.3.1. Definition of essential services

The Committee on Freedom of Association (CFA) proposes that the term ‘essential services’, in its strictest sense, is largely determined by the specific circumstances prevalent at the time in a country. Consequently, non-essential services may be reassessed and redefined as essential in the event of a strike lasting beyond a certain period, or exceeding its original scope to a particular level, such that personal safety, life or health of part of, or of the whole population, becomes endangered (ILO, 2006:119).

Assessment of whether services are essential or not is always a sensitive matter. A particular activity may be interrupted in many countries without it being seen as one that threatens personal safety, life or health of part of, or of the whole population, whereas the same activity may be seen as essential in other countries as determined by their unique circumstances.

Essential services in their strictest sense (i.e., where it is necessary to impose some restrictions or perhaps prohibitions on the right to strike) are considered by the CFA to be these: (a) the hospital sector; (b) electricity services; (c) water supply services; and (d) telephone services and air traffic control (ILO, 1996: 112).

On the contrary, the following have been stipulated by the CFA as generally not constituting essential services in their strictest sense and hence no prohibitions apply on the right to strike: (a) mining; (b) the electronic media; (c) banking; (d) construction; and (e) postal services and the education sector (ILO, 1996:112).

The ILO’s Core Labour Standards were designed for the protection of all workers, but there are specific provisions, as contained in the conventions, which allow government to impose

restrictions on these rights. For instance, the army and police have historically been denied the protection of the Conventions which address the right to become members of trade unions and the right to strike, as well as collective bargaining. It becomes the state's prerogative to decide the extent to which they should be protected by national laws. Furthermore, Article 6 of Convention 98 articulates that the convention is not applicable to the situation of public servants who are tasked with the administration of the State.

According to the ILO, the freedom to organise and collective bargaining constitute the basic key principles of the ILO. As soon as Conventions Nos. 87 and 98 were adopted, as they pertain to freedom and collective bargaining, the ILO concluded that the principle of freedom to organise must be further subject to supervisory procedures which will ensure compliance in countries which are not signatories to the relevant conventions. Consequently, in 1951, the CFA was established by the ILO to hear complaints concerning violations of the freedom to organise, and to find out whether the country concerned was a signatory to the relevant conventions. Employer and worker organisations could lay complaints against the affected member state. The CFA is composed of an independent chairperson and three officials who represent workers, employers and government respectively. Where the decision has been made to accept a case, the committee assembles the relevant information with assistance from the affected government. Should it be established that freedom of association standards or principles have been violated, a report is issued through the Governing Body where recommendations are advanced on how to rectify the situation (ILO, 2014).

Subsequently the government is expected to report on its implementation of such recommendations. If the country in question is a signatory to the relevant conventions, legal matters pertaining to the case may be referred to the Committee of Experts. The CFA also has the option to propose direct talks with the government in question in order to deal with the problem directly through discussions with government officials and other relevant partners.

The CFA has dealt with over 2,300 cases over a period of 50 years. Over 60 countries from five continents have responded to its recommendations and have indicated that positive outcomes were achieved concerning freedom of association during the past 25 years (ILO, 2014).

2.3.2. Definition and application of minimum service

The CFA subscribes to the principle that a "minimum safety service" must be enforced in all situations of strike action where the safety of persons, machinery and equipment, and the prevention of accidents cannot be guaranteed. Where "minimum operational services " are

concerned, i.e., those which are needed to maintain a specific level of production or services within an organisation where strike action is under way, the CFA indicates that the establishment of minimum services in the event of strike action should only be allowed in:

- (1) services where the interruption thereof would pose danger to personal safety, life, or health of part of, or of the whole population (essential services in the strictest sense);
- (2) services, which are not considered essential in the strict sense of the term, but where the nature of a strike might lead to a severe national crisis, and pose serious threat to the normal living circumstances of the nation; and
- (3) public services that are of basic importance to daily living (ILO, 2006:124).

For instance, the CFA has expressed that “minimum operational services” may be established, for the following cases:

... ferry services on islands, the services provided by the National Ports Enterprise, the underground transport service, the transportation services of passengers and commercial goods, rail transport service, postal services, banking and the oil industry (ILO, 2006:126).

Concerning the identification of minimum services which should remain in place and the minimum number of workers who should provide the same, the CFA states that this:

... should involve not only the public authorities, but also the relevant employers' and workers' organizations. This not only allows a careful exchange of view-points on what in a given situation can be considered to be the minimum services that are strictly necessary, but also contributes to guaranteeing that the scope of the minimum service does not result in the strike becoming ineffective in practice because of its limited impact, and to dissipating possible impressions in the trade union organizations that the strike has come to nothing because of over-generous and unilaterally fixed minimum services (PSCBC, 2014:18).

The CFA further highlights that it is imperative that minimum service provisions should be clearly defined, maintained, strictly applied and those concerned made aware of the same timeously.

Should there be a strike in public services, and there is no agreement between the parties concerning the appropriate number and relevant duties of the affected workers as far as minimum services are concerned, the CFA indicates that:

... the legislation should provide for any such disagreement to be settled by an independent body and not by the ministry of labour, or the ministry of public enterprise concerned (PSCBC, 2014:20).

In connection with strike action, an assessment of the minimum services to be maintained during such a strike, could reveal the excessiveness on account of the exceeding what was considered indispensable, the CFA states that the evidence and awareness will be measured towards making conclusive decisions, and these will be pronounced by the court.

The ILO requires a minimum service of this kind to be confined to operations that are essential to prevent danger to the personal safety, life or health of part of, or of the whole population. Consequently, the adoption of legal provisions which recognise the principle that strikers ought to ensure that provision of a skeleton service is in effect, appears to be in agreement with the principles of freedom of association (ILO, 2006).

2.4. Strikes in South African legislation

This section provides an analysis of legislation covering strikes and striking in South Africa. It focuses on the Constitution and the Labour Relations Act. It attempts to reveal how these legislations advise how to deal with strikes in the country.

2.4.1. The Constitution of the Republic of South Africa Act No. 108 of 1996

The Constitution of South Africa is considered to be the supreme law of the land, that lays out the judicial base for the country's presence and provides for the rights and responsibilities of its people and describes the government's structure.

Chapter 2 of the Constitution provides for the Bill of Rights that enshrines the rights of all people. Section 36 of the Bill of Rights provides for restrictions in the overall application of the Bill of Rights that are rational and substantiated in a free society. These refer to human dignity, equality and democracy, considering the applicable conditions, involving these:

- Section 11 – everyone has the right to life;
- Section 27 (1)(a) – everyone has the right to have access to health care services, including reproductive health care;
- Section 27 (3) – no one may be refused emergency medical treatment; and
- Section 23 (2)(c) – everyone has the right to strike (South Africa, 1996:14).

There is no Bill of Rights that does not in some way accommodate the conflict between entrenched rights and social interests represented by a democratic government. In the case of rights that may appear to be in conflict with each other in a certain case, for example, the right to strike and the right to healthcare facilities, a fair balance must be found between interests that are protected by each of these rights.

In terms of Section 36 of the Bill of Rights, the general application of the Bill of Rights may also be restricted in such a manner that such restriction is reasonable and justified in a free and democratic society, based on human dignity, equality and freedom, considering all relevant circumstances, involving these:

- the nature of the right;
- the importance of the purpose of the limitation;
- the nature and extent of the limitation;
- the relation between the limitation and its purpose; and
- less restrictive means to achieve the purpose (South Africa, 1996:18).

All limitations and infringements of rights are thus not unconstitutional; and, if an infringement or limitation complies with requirements set in Section 36, it will be lawful and constitutionally valid. In this case, it is clear that the government has an obligation to provide services to the public.

Public service employees are allowed to enjoy their right to strike, just like any other employees, though the high-ranking employees who exercise power under government's title could be deprived of the right to strike, as per the principle of the freedom of association (ILO, 1996:104). This exclusion can involve key officials of the justice system, as well as officials within the justice management. Nonetheless, this cannot be stretched to all public service officials who are involved in other state-owned enterprises.

Regarding the above-mentioned dissimilarity, the limitations provided by law undoubtedly ought to provide description and categorisation of the public service employees who will be affected by limitations on their right to strike. The nature, duties and responsibilities performed by such public service officials, and the probable effect of service interruption during strike action, have to be considered when defining such employees.

In the judgment of the Constitutional Court in *South African Police Services (SAPS) v Police and Prisons Civil Rights Union (POPCRU)*, the court emphasised the importance of a strict interpretation of essential services so that the right to strike would not be unnecessarily limited.

The court stated:

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 s 23(2) (c) of the Constitution. The interpretive process must give effect to this purpose within the other purposes of the LRA as set out in s 1(a). The provisions in question must thus not be construed in isolation ... 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 (Calitz, 2013).

The court found it problematic to understand that those providing support services (such as finance administrators or tea ladies) and who rendered an essential service in the sense that the disruption of such services would endanger the life, personal safety and health of the whole or part of the population. There are personnel in the SAPS who are not essential service workers, despite SAPS being defined and deemed an essential service in the LRA, there needs to be a determination or division of essential service personnel.

The judgment, though, raises several complex issues, such as equating the SAPS to an industry as well as the matter about jurisdiction. This judgment contrasts with the findings in *Eskom Holdings v NUM* in the Labour Court where the court held that the Court lacks jurisdiction because, in terms of Section 73 of the LRA, the ESC must determine whether or not an employee is engaged in a service designated as an essential service. Of course, this point must be considered in the light of Section 157(2)(a) of the LRA, which states that the Labour Court has concurrent jurisdiction with the High Court in respect of any alleged or threatened violation of any fundamental rights that arises from employment and from labour relations. "The only forum that is competent to intervene in disputes about essential services (and also disputes about minimum services) is the Essential Service Commissioner (Brassey, 2008:76).

This subject of handling disputes in essential / minimum service is controversial and requires further research. For this reason, this study sought to explore conditions within which employees engaged in essential services in the public sector (and who therefore cannot strike) can embark on strike action without infringing upon others' rights.

The Constitution states that the parties have the right to participate in collective bargaining, where national regulation may be endorsed to legalise collective bargaining to the degree that the regulation may restrict a right in accordance with the limitations which are specified in S36(1) of the Constitution (South Africa, 1995:14).

Simmons states that South African legislation acknowledges the right of employees to strike, which right is protected in several international, national and regional instruments (Simmons, 2009). Olson indicates that the law allows employees to jointly organise and come together to form trade unions for the purpose of collective bargaining (Olson, 2009), as well as other common causes such as wage negotiations, better working conditions, or mutual concerns which relate to the wellbeing of employees (Dundon et al., 2004).

In addition, the Constitution stipulates that citizens have a right to safety and health care. The rights of employees and those of citizens should be balanced, hence the right to strike has always had limitations from the onset. In this regard, South Africa is not an exception and the introduction of the LRA Section IV is a consequence of this limitation. Mason (1928:342) indicates that “neither the common law nor the Fourteenth Amendment confers the absolute right to strike in the United States of America”. Wellington and Winter (1970:806) advance this discussion by suggesting that “the interruption of most governmental services will severely inconvenience beneficiaries of those services who will, as voters, press for a settlement”.

A distinction for the case of public servants is made between general workers and those who provide essential services. The LRA prohibits essential service employees to strike, because of the types of services that they offer.

The Constitution cannot be read in isolation of the LRA, as it clearly provides for a definition of a strike, essential services and the processes that should be followed before embarking on a strike. Furthermore, it provides for the conclusion of a minimum service agreement (MSA).

When negotiating for a collective agreement on minimum service, the respective parties should ensure that the agreement provides for the constitutional rights of all, that is, for both citizens and workers. Equilibrium between the right to strike and the right to health care services should be observed at all times. The purpose of this research study was therefore to provide guidelines for the establishment of a collective agreement within the Public Health Sector to determine which employees may participate in protected strike action, and those employees who may not and must, instead, continue to provide minimum essential services.

The following piece of legislation explains the concept of an essential service and which sectors are designated essential services, while it also explains the process of being declared an essential service.

2.4.2. Labour Relations Act 66 of 1995

One of the most important primary goals of the LRA is to give effect to Section 27 & 23 of the Constitution (the right to health care, food, water and social security), and to legalise the right to strike and the recourse to lockout, according to the Constitution (South Africa, 1995:1). This means that the LRA cannot be read in isolation from the constitution.

The objective of the LRA is to advance economic development, social justice, labour peace and democratisation of the workplace. Section 1 (d) promotes:

- Sound collective bargaining;
- Collective bargaining at sectoral level;
- Worker' involvement in the executive progression in the workplace; and
- Effective dispute resolution.

The LRA clearly provides for the definition of a strike, essential services and the processes to be followed before embarking on strike action. Furthermore, it makes provision for the conclusion of a Minimum Service Agreement (MSA) (South Africa, 1995:95).

2.4.2.1. The right to strike

The LRA defines a strike in Section 213 as:

... the partial or complete concerted refusal to work, or the retardation or obstruction of work, by persons who are or have been employed by the same employer or by different employers, for the purpose of remedying a grievance or resolving a dispute in respect of any matter of mutual interest between employer and employee, and every reference to work in this definition includes overtime work, whether it is voluntary or compulsory (South Africa, 2009:221).

Conversely, a lock-out is defined as:

... the exclusion by an employer of employees from the employer's workplace, for the purpose of compelling the employees to accept a demand in respect of any matter of mutual interest between employer and employee, whether or not the employer breaches those employees' contracts of employment in the course of or for the purpose of that exclusion (South Africa, 2009:218).

Section 65 of the LRA is a typical example of the fact that the rights that the Constitution grants are not absolute and are subject to limitations.

Section 64(1) of the LRA makes provisions for every employee to have the right to strike and provides for every employer the remedy to lock-out should the requirements of a protected strike or protected lock-out have been conformed in accordance with the LRA. On the other hand, the LRA provides restrictions on the right of workers to strike and employers to lock-out, should the provisions of the LRA not have been met (South Africa, 1995:85).

The recourse for workers who are employed in essential services is discussed in Section 74 (3) (4) and it provides the means of declaring a dispute to the Bargaining Council or CCMA for conciliation and arbitration (South Africa, 2009:96).

The LRA also provides details of the dissimilarity between a protected strike and an unprotected one. The procedural requirements for a protected strike as outlined in Section 64 (1) of the LRA, are stated as follows:

- It entails that any person who is involved in the proposed strike, it could be the trade union or persons, to start by referring the matter in dispute to the proper Council or the Commission for Conciliation Mediation and Arbitration (the CCMA) for conciliation;
- During conciliation if the parties reached an agreement or settled the matter in that the dispute becomes resolved, then the projected strike action will be banned. Should the Council or Commission fail to resolve the issue in dispute, then the Commissioner will issue a certificate, stating that the issue in dispute remains unresolved in accordance with (Section 64(a) (i) of the Labour Relations Act 66 of 1995); and
- A period of 30 days from the date on which the dispute was referred to the Council or Commission must have been lapsed for the process to be in accordance with the provisions of the LRA (South Africa, 1995:85).

On receipt of the above-mentioned certificate stating that the matter in dispute remains unresolved, the trade union or persons who planned to embark on strike action must provide the employer concerned 48 hours' notice, in writing, of the pending strike. In the case of a Public Service strike, an employer must be notified in writing in a period of seven days of intention to strike, this being is in line with Section 64(b) of the LRA (South Africa, 1995:85).

If the parties intending to embark on strike action meet all the requirements outlined in the LRA, then the strike action will be legitimate and protected. Adherence to the prescriptions ensures the legality of the action and, in the case of strike action, protects employees from dismissal.

An unprotected strike occurs when the strike action does not conform with the strike requirements which are outlined in the LRA. The employees who embark on an unprotected strike may be dismissed by the employer, and it is doubtful that the court will be of assistance to these employees since it is believed that the courts are not sympathetic to these employees. (Retrenchment Assist, 2017).

During the Public Service strike of 2007 and 2010, essential service workers were not protected, since the LRA prohibits them from striking. They had embarked on an unprotected strike, hence the employer requested the court to issue the strikers with an interdict. The interdict was granted by the Labour Court, thereby prohibiting the members of POPCRU and

SAPS members and non-members from joining the Public Service Strike (South African Police Services v Police and Prison Civil Rights Union, 2011).

Section 72 of the LRA makes provision for the maintenance of minimum service within a designated essential service. The parties are tasked to conclude the collective agreement on minimum services (MSA), which will be ratified by the Essential Service Committee before its implementation (South Africa, 1995:). No collective agreement on minimum services (MSA) has been ratified by the ESC since implementation of the LRA. The matter was discussed at the collective bargaining session and a task team was nominated to lead the process but, to date, the parties have failed to conclude such an agreement (PSCBC, 2014).

The latest LRA developments that were amended in 2014 stipulate that the ESC can make Minimum Service Determination (MSD) should the parties fail to conclude an MSA, while the MSD will be operational for a period of 12 months, and determination will be reviewed after a period of 12 months once expired (South Africa, 2014:16). The researcher therefore chose to concentrate on mechanisms that will ensure the effectiveness of managing the MSA once concluded.

2.4.2.2. Essential services

Section 213 of the LRA defines an essential service as follows:

- a service whose interruption endangers the life, personal safety or health of the whole or any part of the population;
- Parliamentary service; and
- the South African Police Services (South Africa, 1995:218).

The definition is clearly similar to the ILO's description of essential services in the strict sense of the term.

According to Adams, the designation of the Parliamentary Service and the South African Police Services (SAPS) as being essential services is problematic, because there are many employees within SAPS and Parliamentary establishment whose work is hardly vital to protect "life, personal safety and health". This statement is justified in the case between *South African Police Service V Police and Prisons Civil Rights Union & Others* where the Labour Court ruled that only members and deemed members of the South African Police Services (SAPS) employed under the South African Police Service Act 68 of 1995 ('SAPSA') and engaged in police duties were actually prohibited from striking by the provisions of Section 65 read with Section 71(10) of the Labour Relations Act 66 of 1995 ('LRA'). Consequently, the personnel employed by the SAPS in terms of the Public Service Act 103 of 1994 (South Africa, 1994)),

including prison officers, are not prohibited from striking. The SAPS appealed against the decision of the Labour Court to the Labour Appeal Court. The Labour Appeal Court confirmed the decision of the Labour Court. The SAPS submitted an application to the Constitutional Court (CC) to appeal against the decision of the Labour Appeal Court upholding a decision of the Labour Court, that only members of the SAPS employed under the SAPSA are engaged in an essential service under the LRA. The issue was thus whether employees of the SAPS who are employed under the Public Service Act (PSA) are engaged in an essential service. The CC noted that, in order to ascertain the correct interpretation of essential service, regard should be had to the purpose of the LRA and the context in which the phrase appeared. It observed that an important purpose of the LRA was to give effect to the right to strike entrenched in Section 23(2)(c) of the Constitution. The CC held that a restrictive interpretation of essential service should, if possible, be adopted to avoid impermissibly limiting the right to strike. The court remarked that defining essential service too broadly would impermissibly limit the right to strike (para. [31]).

The CC also made reference to the SAPSA which does not prevent “non-members” of SAPS from participating in a strike action and ruled that the service provided by those who are not employed under the SAPSA are not regarded essential. The CC further noted that, while employees under the PSA serve an important support function, they cannot be deemed to render an *essential service*, and are therefore not prohibited from striking. They emphasised that it was the service that was essential, and not the industry. The Court therefore dismissed the appeal.

Adams (2011:19) states that the judgment rises some difficult matters, association of SAPS to an industry or possibly, as its name proposes, it is possibly a service within an industry instead. Moreover, should there be SAPS workers who are not providing an essential service, in spite of SAPS being described and deemed to be an essential service in the LRA, the question may concern jurisdiction. It is possible to argue that the Court lacks jurisdiction because in terms of Section 73 of the LRA, the ESC must determine whether an employee is engaged in a service that is designated to be an essential service. Section 157(2)(a) of the LRA, states that the Labour Court has concurrent jurisdiction with the High Court in respect of any alleged or threatened violation of any fundamental rights that arise from employment and from labour relations.

This judgment is in disparity of the findings of the *Eskom Holdings v NUM* case that was held in the Labour Court, where the court held that the Essential Service Committee (ESC) is the only forum that has jurisdiction to hear disputes concerning essential service and minimum services (Calitz 2012:441). This judgement was supported by recent LRA amendments of

2014, which states in Section 73 that any party may refer a dispute in writing to the ESC to determine the following:

- Whether a service is an essential service;
- Whether an employee or employer is engaged in a service designated as essential;
- Whether an employer and trade unions should conclude a MSA; and
- The terms of an MSA.

Disputes about essential service and minimum services are dealt with in accordance with the LRA, where it provides the ESC with jurisdiction to deal with all disputes relating to essential and minimum services (South Africa, 2014:18).

2.4.2.3. Essential Service Committee

The Essential Service Committee (ESC) was formulated in accordance with Section 70 of the LRA, which states that the Minister of Labour, after consulting with NEDLAC, must establish an Essential Services Committee under the auspices of the Commission (the CCMA) in accordance with the LRA. The following are powers and functions of the ESC, amongst others:

- Conduct investigations into whether the whole or part of a service is an essential service;
- Decide whether or not a whole or a part of a service should be designated as an essential service;
- Determine disputes in terms of whether the whole or part of a service falls within the scope of a designated essential service;
- Determine whether a whole or part of a service is a maintenance service;
- Ratify a collective agreement for an MSA or maintenance service; and
- Determine minimum services to be maintained (South Africa, 1995:14).

The ESC has designated many services as essential services. Some of these services, specifically those in the public sector, include:

- a) Emergency health services and the provision of emergency health facilities to the community or part thereof;
- b) Nursing;
- c) Medical and paramedical services.

The following services, which support the services referred to in a – c above, namely:

- catering;
- medical records;
- security;
- porters and receptionists;
- pharmaceutical and dispensary;

- medicine quality control laboratory;
- forensics;
- laundry work;
- clinical engineering;
- hospital engineering;
- waste removal;
- mortuary services; and
- pest control (South Africa, 2008:1).

It should be noted that not all employees are necessary for the essential service to continue operating at an acceptable level. It is also noted that it is only a service that is designated to be essential, not an entire industry. Hence, the LRA makes provisions for parties in collective bargaining structures to conclude a minimum service collective agreement in an essential designate.

The LRA further states that if an agreement is not concluded, the ESC has the power to determine the minimum services that should be maintained at all times, and the latter is known as a Minimum Services Determination (MSD) (South Africa, 2014).

During 2007 and 2010, the workers who provided essential services took part in strike action, which created a problem as essential services were interrupted. The trade unions claimed that, since there was no MSA in place, the designation of the above-mentioned categories was illegal. The ESC was not empowered to determine the minimum services during the period of the said strike actions. It appeared in more recent amendments of the LRA (South Africa, 2014). The LRA stipulates that as soon as the ratification of the MSA is completed by the ESC for particular service, those agreed minimum services becomes essential services, which means that employees in the minimum services are precluded from striking, whilst those outside of the minimum services have retained the right to strike.

The principle of 'no work no pay' applies to all strikers and this could be problematic and could create conflict when determining who can and who cannot strike; the situation could even lead to violence during the strike action, since the 'no work, no pay' principle will be applied to employees who embark on strike action. A thorough investigation should be conducted regarding the effectiveness of managing an MSA.

2.4.2.4. Minimum services

Section 72 of the LRA states that the Essential Services Committee may ratify any collective agreement that provides for the maintenance of minimum services in a service that is a designated essential service. The advantage of this section is that services that are declared to be minimum services become essential services, and only workers who are employed within

those designated services are prohibited from striking, whilst other employees can enjoy their right to strike (South Africa, 1995:95).

The concept of minimum services is not defined in the LRA, but it is regarded as the minimum service that an industry or workplace would require to ensure that any interruption of services would not endanger the life, personal safety or health of the whole or part of the population. This means a 'reduced' number of employees who will be required to continue working, ensuring minimum service during a strike, to ensure that the service which is normally provided does not cease entirely. Figure 2.1 is an example of minimum service within in an essential service.

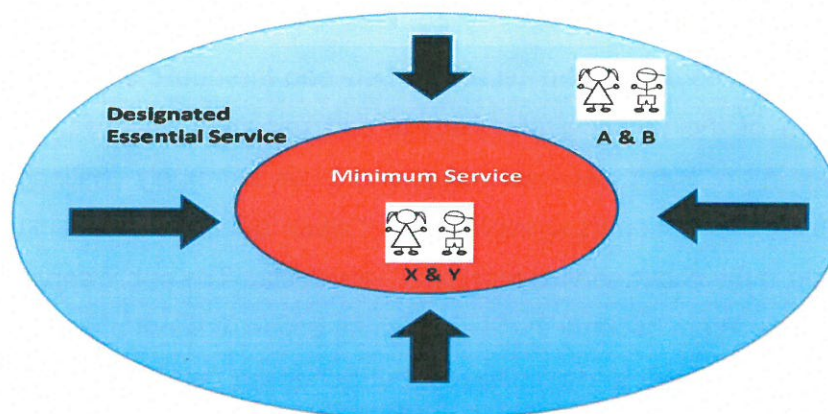


Figure 2.1: Interpreting Section 72(b) of the LRA - Essential Service and Minimum Service (Roskam, 2011)

Legislators have also been struggling with the concept of essential and minimum services. They have developed a comprehensive set of amendments, which attempts to address some of the concerns in the composition, powers and functions of the ESC. It is debatable if these proposed amendments will bring forth necessary changes to address these concerns, or if they will merely become a further bureaucratic hindrance and, owing to the extreme complexity, may even pose a limitation on the right to strike.

According to the Public Service Coordinating Bargaining Council (PSCBC, 2014), the right of essential service staff to strike and the availability of a minimum services agreement has been a matter of discussion for some time amongst relevant stakeholders. Resolution 1 of 2007 of the PSCBC makes provision for establishment of a Joint Technical Working Group (JTWG) to draft and develop a MSA (PSCBC, 2007). The JTWG was established and held several meetings in 2008 in pursuit of concluding the MSA. PSCBC then also appointed an

independent facilitator who would submit monthly reports to Council. The MSA was drafted, but parties could not reach an agreement.

This discussion paints a picture explaining why, to date, the MSA has not been signed by the relevant parties, which will enable employees providing essential services to strike. According to the LRA (1995), this category of public servants is not allowed to embark on strike action, because of the nature of their work. If they decide to do so, it would be illegal (PSCBC, 2014).

Although the LRA recognizes the fact that not all public services are essential, including in the public health sector, it also provides for the establishment of a minimum service agreement, such that sectors can continue providing minimum service in the event of strike.

Labour legislation does not differentiate between the public service and the private sector in application of the principle of essential and minimum services. Implementation of these principles in the public services has shown to be extremely challenging. The South African Constitution and National Legislation do not allow for differentiation in the application of labour legislation in the public service and the private sector. The public service is unique in the sense that, when workers become involved in strike action, it is not a purely defined labour process between an employer and employees, but rather the public at large becomes a third party in the process. When public servants participate in strike action, they do not only deny the community certain rights, but indirectly deprive themselves of the same rights (PSCBC, 2014).

The collective bargaining structure, where negotiations in respect of cost of living adjustments (salary increases) are centralised for all public services, does not allow for a separate collective bargaining structure for essential services.

The employer should obtain assurance from their negotiating partners that minimum services are provided irrespective, or that provision is made for enforcement of the collective agreement on the minimum services agreement, which will be adhered to by all parties.

In other countries that provide minimum services, their means of ensuring enforcement is by way of penalties. When a strike is prolonged, the court can rule that the strike must cease and that all concerned must report for work. It would seem that this issue is not political, but it is, since it involves citizens who are voters and those who depend solely on public health services. Hence, the MSA, it needs to include tight regulation about consequences of prolonged strikes (De Bruin, 2013:30).

During the public service strikes of 2007 and 2010, the trade unions used the power of destabilising essential services to the advantage of all workers in the absence of a MSA. Brand

(2013:08) states that employers seem not to have considered it to be important to pursue MSA on the grounds that a much bigger quantity of public sector workers are then excluded from striking. Because South Africa's essential services workers and non-essential services workers are often included in the same bargaining unit, trade unions have successfully pursued strike action across the whole bargaining unit, including essential services workers. Trade unions are aware of that, although the strikes are unprotected, strikes by essential services workers significantly increase pressure on the employer.

Should one of the parties be serious about the conclusion of a minimum service agreement, it can propose it to the other side; and, if negotiations fail, provisions are made by the LRA, which stipulates that the ESC may determine the minimum service agreement. The challenges regarding this issue are:

- How to choose which workers will remain and provide minimum services during the strike action;
- How to ensure that those workers will be at work, since workers can become ill or be subjected to unforeseen circumstances that would hinder them from being at work;
- The 'no work, no pay' principle - workers will be expected to strike and lose their salaries, while those workers who work will receive a full salary;
- How effectively the minimum services can be provided without any interruptions; and
- How to reinforce implementation of the minimum agreement.

The 2010 Public Service strike highlighted the frequency of strikes in South Africa. The strike was called only after protracted negotiations in which the trade unions' leadership bent over backwards to avoid it. In the health sector, the nursing staff, doctors and emergency services personnel from across the length and breadth of the country embarked on strike action. Strike participation was the highest in the Eastern Cape, Mpumalanga, Northern Cape, Limpopo Kwazulu-Natal and Gauteng, while strike participation in the Western Cape was lower than 33% (Patel, 2011).

Intimidation was rife. For example, in the education sector, there were marches to schools that did not participate. The strike came as a surprise to the education sector since government had plans to improve the quality of education in all schools. The trial examinations for Grade 12s were postponed or, in some provinces, not even written. There were widespread threats of violence to fellow teachers, principals and learners. Fearing violence, schools encouraged learners to stay at home.

Clause 6 of the Public Service Wage Agreement stipulates that the ESC must be requested to investigate and provide recommendations on:

- MSA for the public service applicable across all sectors; and
- Review the current essential service/declarations within the public service and occupations within those designations/declarations to determine whether or not such services should be deemed essential services (PSCBC, 2010:2).

This was a ground-breaking clause in the agreement which presented clear guidelines on how to resolve this matter. It was the first time that the parties agreed to elevate the MSA matter to the ESC. After the strike of 2010 until to date still no agreement has been reached.

There are a number of issues that should be considered to conclude the MSA. At some point, the parties should conclude the minimum service agreement, as required by law. It has been ascertained by the law makers that not everyone who is employed in an essential service performs an essential service. This was substantiated by Pillay (2012:13) who indicated that the past 15 years of the ESC's existence have demonstrated that strikes in health, police, municipal and court services have not resulted in any reported loss of life. Frequent and sometimes prolonged electricity and water cuts have inconvenienced communities and even devastated businesses, but these too have not resulted in any reported loss of life. These experiences have shown that these services can be minimised without endangerment of lives (Pillay, 2012:13).

The Labour Relations Amendment Act of 2014 makes provisions for the parties in collective bargaining structures to negotiate and mediate on MSA. The ESC will appoint a panel for validation of such agreement; and, once validity is obtained, they become binding. If no MSA is ratified, the panel is entrusted to determine the minimum services that are mandatory for the maintenance of essential services. This minimum service determination is set to be binding for a period of 12 months, though it may not be varied or revoked for a period of 12 months unless the relevant trade union and employers agree to this (South Africa, 2014:16) For the promotion of interest in arbitration and to save workers from too wide a minimum service designation, the Bill provides for workers affected to vote; and, should the majority of workers vote that they be covered by broader essential service designation, then the minimum service designation will fall away. As a result, there will be no need for the strike or lock-out in the affected service, and unresolved disputes of interest will be dealt with through compulsory arbitration (South Africa, 2014).

2.4.2.5. Disputes in essential/minimum services

Subsection (b) of section 72 creates more difficulties. This subsection refers to section 74 of the LRA. Section 74 stipulates the dispute resolution procedure to be followed concerning strike in an essential service which entails conciliation and arbitration process as a recourse

to strike, or in return for losing the right to strike. The difficulty caused by section 74 of the LRA is to establish application of the provision that is made as to whether it applies to the following employees:

- Those who fall within the scope of the essential services designate, but are still excluded from the minimum service;
- those that are within the minimum service; and
- to both groups of employees.

Different views on the interpretations are held regarding this issue:

- According to Adams (2011:23), an interest dispute, resulting in conciliation and then arbitration, could be referred by those who fall within the minimum service, while those who fall outside of the minimum service can embark on strike action.
- Opposing the above, Brassey as quoted by Adams (2011:23) is of the opinion that Section 72 is puzzling but, nevertheless, proposes that it means that minimum services employees cannot use their status as essential services to invoke arbitration, but it can be invoked by essential service workers as a whole.
- Lastly, the LRA contains a bargain clause, which states that, should many employees gain the right to strike, then those without the right to strike must support those who have the right to strike (Du Toit et al. in Adams, 2011:24).

Essential services workers cannot be without a remedy to strike action; hence they can engage in compulsory arbitration as an alternative. Section 74 of the LRA provides that any party in a dispute that is precluded from participating in a strike or a lock-out because that party is engaged in an essential service, may refer the dispute to conciliation; and if the dispute remains unresolved, the party may request that the dispute should be resolved by means of arbitration. Since employees who work in an essential service are prohibited from striking, disputes within the service can be resolved by means of conciliation. Failing this, the parties may refer the dispute to arbitration. Should the parties enter into a collective agreement, that agreement would ensure that certain minimum services will be maintained, while the other employees strike. Such agreement must be ratified by the ESC (South Africa, 1995:96).

In this case, employees in an essential service can take part in strike action; and the outcome of the dispute between the parties will depend on the outcome of the strike.

2.5. Strike actions in a public service

The public service is regarded as a service that the State provides to the citizens under its dominion, either directly through the public sector, or by sponsoring delivery of services through other organisations. This is linked with a social agreement, which is frequently

articulated during democratic elections, that government should provide some free services to the people. Whether the services are publicly provided or financed, either for social or political motives, the rules set for such services go beyond those applying to most economic sectors. Examples of public services are the fire brigade, police, army, health care (paramedics), education and so forth (Gentle, 2010).

Public service workers are known as 'public servants' and they subscribe to the Code of Conduct for the Public Service. Chapter 2, Part 1 of the Public Service Regulations provides for the Code of Conduct for the Public Service, which stipulates that an employee shall adhere to the Constitution and other laws, including the following:

- be faithful to the Republic and honour and abide by the Constitution and all other laws when performing official duties;
- place the people's interests first when performing his or her official tasks;
- faithfully execute the policies of the current Government when executing his or her official duties;
- abide by and strive to be familiar with all legislation and other lawful instructions, which are applicable to his or her conduct and official duties;
- co-operate with public institutions established under the Constitution and legislation to promote interests of the public (South Africa, 2001:33).

In addition, the Code of Conduct defines the relationship with the public. The employee -

- promotes the unity and well-being of the South African nation in performing his or her official duties;
- serves the public in an unbiased and impartial manner in order to create confidence in the public service;
- will be polite, helpful and reasonably accessible in his or her dealings with the public;
- will have regard for the circumstances and concerns of the public in performing his or her official duties and in making decisions that affect them;
- will be committed through timely service to the development and upliftment of all South Africans;
- will not abuse his or her position in the public service to promote or prejudice the interest of any political party or interest group; and
- will respect and protect the dignity of every person and his or her rights, as contained in the Constitution (South Africa, 2001:33).

Public service employees are expected to conform to the Code of Conduct in the completion of their duties. The scope of this study is confined to public service workers who are employed in terms of the Public Service Act 103 of 1994 (South Africa, 1994), as amended. It should be noted that not all public servants are employed in terms of the Public Service Act. For example,

educators are employed under the Employment of Educator's Act, while SAPS members, as well as the Defence Force, have their own Acts and regulations. Hence the differentiation was made in the judgement in the case of SA Police Services V Police & Prisons Civil Rights Union. (SA Police Services V Police & Prisons Civil Rights Union, 2011)

The Public Service Act (PSA) provides for the following: the organisation and administration of the Public Service of the Republic; regulation of the conditions of employment, terms of office, discipline, retirement and discharge of members of the Public Service, as well as matters connected therewith (South Africa, 1994:02).

The South African Constitution grants all workers the right to strike. The right to strike also applies to public servants, irrespective of the different laws governing their employment. The Constitution and National Legislation do not allow for differentiation in the application of labour legislation in the public service and the private sector. Application of the principles of labour relations, specifically that of the right to strike and the determination of essential services, differs in the public services from that of the private sector (South Africa, 1995:95).

The public service is unique because, when workers strike, it does not affect only the employer and employees, but the public at large becomes a third player within the process, since the public is deprived of services to which they are entitled. The state is then in breach of promises that have been made to the public when it fails to provide proper essential services.

The right to strike provided for by the Constitution places the duty on the State, while State employees have to take reasonable steps to ensure that citizens are protected and provided with essential services. The citizen's rights to health care services, or to be granted with emergency care services, could be jeopardised if strike action caused by disagreement between the State and its workers stopped those services. Section 72 of the LRA provides for such balance to ensure that minimum services are provided to the public in the event of a public service strike.

In the 2007 and 2010 public service strikes, the public service employees participated, irrespective of whether or not essential services were provided. These are considered to be the largest scale labour strikes embarked upon in the history of South African in the context of the number of working days lost. During these strikes, the trade unions developed unity across several unions at a level that had never been seen before. A total of 1.3 million employees in the sector participated, regardless of federation, political affiliation, race, and/or differing group interests (between general and professional workers). Workers considered this a major triumph, as their unions successfully covered some meaningful ground in mobilising significant

cooperation from unions operating in the private sector. As part of demonstrating support for public service workers, COSATU threatened to embark on a one-day general strike should the state not raise its offer. Other societal structures, such as faith-based organisations, international labour federations, as well as the public at large, also lent their support to the trade unions. In an unprecedented case, hospitals did not open their doors to the public, while the security forces and police also showed interest in participating in strike action (South Africa, Public Service Commission, 2011:24).

Employers, by their refusal to sign agreements reached, were seen as responsible for the situation where no MSA is in place, conclusion of MSA being a legal requirement. This was further seen as an infringement of the right of all workers to strike in the security and health sectors. The process needs to be expedited to ensure that truly essential services are protected, especially for the poor and working classes. The degree of advocating and militancy during the strike was exceptionally high against a background where police were perceived as using heavy-handed tactics to deal with dissent, while the State has also sought the assistance of special courts towards the criminalisation of strikers. On the other hand, the union leadership was always quick to act towards restoration of calm in cases where some strikers may have engaged in acts of violence.

The manner in which many employers handled the dispute further aggravated mistrust between the parties; the media was used to propagate misinformation; and poorly conceived and false statements made by certain Ministers had severe repercussions which probably prolonged the dispute and allowed parties to harden their positions (PSC, 2011:13). A strike is fundamentally not political as, by its nature, it interrogates existing social relations. However, in the public sector, a strike involves a challenge against the government as the employer, from the workers as employees. A constitutional failure on the part of that government to address the basic needs of workers and the poor, makes a strike political. Wellington and Winter (1970:808) advance this discussion by stating this:

... the interruption of most governmental services will severely inconvenience beneficiaries of those services who will, as voters, press for a settlement. Therefore, the public employee strike is a powerful political weapon. If it can be used as a method for breaking collective bargaining impasses, it will give employee unions a disproportionate share of political power.

From this quotation, it is clear that strikes in the public service also have political power, because citizens' rights can be affected by such a strike.

Due to the media's interference with the unions' processes for disseminating information, negotiations were compromised, as crucial information reached the media before it had been

communicated to the workers by their leadership. This aggravated the relationship between members and the leadership. It is possible for peace to prevail during strike action where there is regular communication from the leadership about what is achievable and what is not. It is critical that such information not be transmitted via the media. Involvement of the media during negotiations often creates mistrust, which may eventually compromise the negotiation process (PSC, 2011:13).

The FAC recognises that the right to strike should be enjoyed by all workers without distinction whatsoever, including hospital personnel (ILO, 2006:51). It is acceptable or recognised within the hospital sector that there are those services whose interruption may not endanger lives, for example, administration, human resources, supply chain management, communication and so forth. Paragraph 2.4.2.3 lists essential services, which largely include services which are provided by that the Department of Health. Nevertheless, during the strike action of 2007 and 2010, there were no reports that which claimed or suggested incidents of loss of life.

2.5.1. Strike actions in health care services

South Africa's health care system consists of a large public sector and a smaller, fast growing private sector. Health care varies from the most basic primary health care which the State offers free of charge to those who cannot afford it. The services that are provided by the Department of Health (DoH) are essential by their nature, with 80% of the public depending solely on the public health sector (Health Care in South Africa, n.d.).

The following are public health services, which the Department of Health provides:

1. Primary Health Care Services:

- Home and Community Based Care;
- Primary Care services (PCS) at health facilities; and
- Intermediate care.

2. Acute hospital services

3. Specialised hospitals:

- Mental Health and psychiatric services;
- Rehabilitation services;
- Tuberculosis services; and
- Oral health.

4. Specialised services:

- Emergency Medical Services (EMS) (medical and paramedical services); and

- Forensic Pathology services.

5. Support services:

- Clinical support service;
- Human Resources;
- Financial Management;
- Infrastructure and Technology; and
- Information Communication Technology (ICT) (South Africa, DOH, 2014:16).

“Catering; medical records; security; porter and reception; pharmaceutical and dispensary; medicine quality control laboratory; forensics; laundry work; clinical engineering; hospital engineering; waste removal; mortuary services; and pest control” (South Africa, 2008:1) are support services that form part of the public health services. Most of those services are designated essential services, as health workers provide services such as medical practitioners, nurses, paramedics and so forth and hence have the right to mobilise, acting jointly (collective bargain) (explain), and strike. However, owing to limitations placed on essential services, they forfeit the right to strike unless there is an MSA in place (South Africa, 1995:95).

The effective strike is compatible with being a health professional, as long as essential services are provided. The whole desertion of ill patients is seen to be unreliable with the purpose and philosophy of professional nurses and their professional organisations, as reflected in the International Council of Nurses’ (ICN) Code of Ethics for Nurses (ICN, 2004:02). ICN describes the core responsibility of the nurse as being fourfold, namely:

- to promote health;
- to prevent illness;
- to restore health; and
- to alleviate suffering (ICN, 2004:02).

In some instances, public health workers may be caught up in circumstances where industrial action could be necessary to certify the forthcoming delivery of quality care by competent and professional employees.

Chima (2013:1) states that doctors and healthcare workers’ strikes are a worldwide phenomenon which can adversely influence the quality of healthcare services, as well as the doctor-patient relationship. Doctors who embark on a strike are often conflicted between complying with the Hippocratic oath of the medical profession and their fiduciary obligation to patients. Such a conflict situation makes it difficult for doctors to express their quest for better

working conditions through strike action while at the same time providing the health services that are expected by their patients (Chima, 2013:01).

Strikes in the health services have occurred in the past and have occasionally resulted in extensive communal and intra qualified discussion. For the successful maintenance of essential services, the relevant parties should conclude a collective agreement regarding minimum service. Such an agreement allows workers to strike, except those designated to be providing the minimum service. Through collective agreement, the PSCBC has delegated the negotiations for minimum service level agreements to the relevant sectoral bargaining councils. The responsible council for the health sector is the Public Health and Social Development Sectoral Bargaining Council (PSCBC, n.d).

The negotiation and strike procedure should be assessed in terms of its application and outcomes, including the effect on stakeholders and social consequences. Support must be identified and provided for parties that are involved in each step of the action (for example, financial and emotional).

In 1997, 1999, 2004, 2007 and 2010, parties in the PSCBC failed to reach agreement around wages, and disputes were declared. Most public service employees, including nurses, teachers and police officers, embarked on national protest action (South Africa, PSC, n.d.).

However, industrial action in the public service has been minimal and this can be attributed to constructive collective bargaining and dispute resolution mechanisms, as well as to interventions by the PSCBC to return parties to the negotiating table.

According to Statistics South Africa (2012), the Western Cape Province was the only province which had fewer than 33% of their employees who participated in the public-sector strike action of 2010 (South Africa, 2012). The research has sought to ensure that, should there be another strike in future, the MSA will be in place and hence such a strike will be managed effectively to ensure quality minimum service delivery. The following section deals with collective bargaining structures in the public service.

2.6. Public Service collective bargaining structures in South Africa

Within the labour relations system, collective bargaining is the key characteristic feature which contributes to maintaining peace in the sector and to forging stronger relations between parties. It also provides a mechanism by which disputes may be prevented or resolved. Another important feature of collective bargaining arises from the common understanding that

negotiations are the preferred means of settling disputes, especially since collective bargaining minimises disruptions which may be caused by economic power posturing (South Africa, PSC, 2011:09).

According to Du Toit (2012), the Labour Relations Act is designed to ensure that, when collective bargaining is initiated, it is conducted in an orderly manner and that any labour disputes on the table are resolved effectively. In recent years some strikes, especially in the public sector, have been characterised by acts of violence, a situation which has created misgivings about the effectiveness of the LRA in this sphere. In one instance, it has been suggested that the state should be empowered to prohibit strikes under extreme circumstances – which may amount to dismissing and bypassing the provisions of the LRA. In this regard, among the amendments which were originally proposed to the LRA, one of these would have empowered the CCMA to suspend the right to strike through intervention in disputes should the director deem it in the public interest to act accordingly (Du Toit, 2012).

Collective bargaining is a process of negotiations between employer and employee (the latter through trade union officials) with the intention of reaching mutually agreeable employment conditions. Hence it is always expected that such process should lead to a Collective Agreement/Resolution (PSCBC, n.d.). Such agreement should specify the terms of employment for employees who are members of the represented union/s. It may include such provisions as wages, health insurance and fringe benefits, working hours, working conditions and leave/vacation time. In the context of the PSCBC, such agreements are referred to as Resolutions. For example, the first of these which was concluded and signed as an official agreement is referred to as Resolution No. 1 of 1998 (PSCBC, 1998:04).

The Public Service's collective bargaining structure is made up of six key bodies: the Public Service Co-ordinating Bargaining Council (PSCBC); the General Public Service Sectoral Bargaining Council (GPSSBC); the Education Labour Relations Council (ELRC); the Safety and Security Sectoral Bargaining Council (SSSBC); the Public Health and Social Development Sectoral Bargaining Council (PHSDSBC); and the Provincial Chamber level. These structures, whose members are often in dialogue with one another in order to develop a common vision, work jointly together with the State, as represented by the Department of Public Service and Administration (DPSA), towards the determination of the conditions of employment and rules that govern the employment relationship (South Africa, Public Service Commission, 2011:09).

The most crucial bargaining councils for the public health sector are the PSCBC and the PHSDSBC, and the main purpose of each council is discussed next.

2.6.1. Public Service Co-ordinating Bargaining Council – PSCBC

The main purpose of the PSCBC is to provide a platform, both nationally and provincially, for Public Service parties to do the following:

- Negotiate resolutions on transverse matters, including terms and conditions of employment for public servants;
- Prevent and resolve disputes through mediation and arbitration;
- Facilitate hearings to resolve disputes that arise in the Public Service (over which the PSCBC has jurisdiction); and
- Promote good governance, inclusive of research and strategic partnerships.

2.6.2. Public Health and Social Development Sector Bargaining Council (PHSDSBC)

The public service workers that fall under the scope of the PHSDSBC are employed within the Department of Health and Social Development Sector at national and provincial levels. The parties that are involved in collective bargaining are the employer (state), represented by management, and employees from the Department of Health and Social Development, represented by the following recognised trade unions:

- National Education and Health Workers Union (NEHAWU);
- Public Service Association (PSA);
- National Union of Public Service Workers (NUPSAW);
- Health and Other Services Personnel Trade Union of South Africa (HOSPERSA); and
- Democratic Nursing Organisation of South Africa. (DENOSA).

The Department of Health and Social Development consists of various professionals in their establishment, as shown in Table 2.1 (PSCBC, n.d).

Table 2.1: Professionals employed by the Department of Health (Public Service Coordinating Bargaining Council (PSCBC, n.d)

Clinical Photographer	Social Worker
Orthopaedic Shoemaker	Probation Officer
Management Echelon (Medical and Dental Specialists)	Medical Officer Medical/Dental Superintendent
Community Development Officer	Specialist
Clinical Psychologist	Dentist
Psychologist	Pharmacist
Supplementary Diagnostic Radiographer	Forensic Analyst
Biokineticist	Medical Physicist
Chiropodist	Air Pollution Control Officer

Dietician	Medical Natural Scientist
Health Therapist	Medicine Control Officer
Emergency Care Practitioner	Radiation Control Officer
Staff Nurse	Radiation Scientist
Nursing Assistant	Medical Orthotics and Prosthetics
Professional Nurse	Medical Technologist
Nutritionist	Clinical Technologist
Emergency Services Officer (certain categories)	Medical Technical Officer
Social Auxiliary Worker	Industrial Technician
Community Liaison Officer	Environmental Health Officer
Child and Youth (Care) Worker	Dental Technician

Some of the listed occupations form part of essential services, as discussed in paragraph 2.4.2.3, while the selection of respondents was conducted from the spectrum of occupations with necessarily targeting those that are considered to have knowledge of essential services and collective bargaining process.

2.7. History of strikes in South Africa

Strikes in South Africa are mainly based on economics, as management refuses or fails to satisfy the demands of employees regarding wage increases, service benefits and working conditions. The Public Services Commission (PSC) was established in 1912. One of its functions, among others, was to regulate the remuneration and working conditions of public servants. Then, during the period from 1989 to 1993, three trade unions, namely SADTU, POPCRU and NEHAWU, embarked on the biggest strike wave ever seen in the history of the South African public service. Their actions resulted in the introduction of a new labour relations dispensation. This is enshrined in the Public Service Labour Relations Act of 1993, wherein, for the first time, the most fundamental labour rights were extended to public servants. Thus, trade unions who organised members in the public services were given statutory recognition by the Act. The recognition of the public service trade unions by the State was followed by a rapid growth in the official membership of these unions. For example, SADTU membership increased by 425%, starting at 40,000 in 1993 to over 210,000 in 1999. By the end of 1999, the PSCBC (Public Services Coordinating Bargaining Council) comprised 19 trade unions, representing a total of 891,816 members. Union density in the public services during the same year was about 96%, significantly high compared to Britain (80%), West Germany (75%) and Japan (67%), in the 1980s (Maree, 2011:1).

Since the democratisation of South Africa in 1994, strikes have declined in frequency and intensity. There was a trend towards fewer working days lost owing to strikes after 1994 up to 2006. For example, strikes averaged 1.8 million working days lost per year from 1994 to 2006. In 2007, it increased dramatically to 12.9 million; and, in 2010, to 16 million work days lost. The increase in work days lost was mainly owing to massive strikes by public service unions in

2007 and again in 2010, when South Africa experienced some of the most disruptive strikes in its history (Maree, 2011). This was probably the biggest public service strike in South African history in terms of number of working days lost. It attained an extraordinary level of unity across several unions, representing about 1.3 million workers in the sector, irrespective of federation, race, political affiliation or differing sectoral interests (South Africa, PSC, 2011:13).

Since 2010, South Africa has experienced several strikes in different sectors. In 2010 several strikes were reported which involved both sectors, that is, public and private sectors. The public service trade unions and the employer reached a 3-year term agreement regarding salaries that was signed in 2007 and which expired in mid-2010. The government and the public service trade unions started negotiating seriously in April 2010. As a result of parties failing to reach an agreement during negotiations, the public service trade unions embarked on industrial action which affected the entire public service, with Local Government affected by labour disputes in April and the Provincial and National Government in July and August 2010. The Department of Labour (DoL) reported on major strikes that occurred in the private sector in 2010 as follows: Pick 'n Pay, Dis-Chem Pharmaceuticals, car assembly plants, Northam Platinum and businesses in the fuel and retail sectors. In addition, the DoL stated that six industrial actions caused a loss of approximately 19, 791, 189 working days, about 95.7% of the total working days lost in 2010. (South Africa, DoL, 2010:24).

The six industrial actions or work stoppages are outlined as follows:

- 1) South African Local Government Association (SALGA) vs SAMWU and IMATU: On 12 April 2010, municipal employees embarked on strike action across the country, where most cities and metropolises were affected by the work stoppage. SAMWU demanded a 60th percentile, whereas SALGA presented an offer of a 50th percentile. The argument was that this would create a balance between municipal wages and wages in other sectors of the economy. The workers also demanded an end to the utilisation of labour brokers by municipalities for some services. SAMWU's major demands involved the extension of the Job Evaluation Collective Agreement and a wage cap on the salaries of councillors, municipal managers and Section 57 employees (senior council officials).
- 2) A Transnet strike occurred on 10 May 2010 after the trade unions (SATAWU and UTATU) representing the workers rejected the offer of 11% made by Transnet while the trade unions demanded an across-the-board 15% wage increase. UTATU (United Transport and Allied Trade Union), together with SATAWU, jointly pressed for a 15% increase in wages and other benefits. The reason for SATAWU rejecting the offer was that the increase would be applied only to the basic wage and excluded other benefits, leaving workers worse off than previously.

- 3) On 17 May 2010, the employees of the Passenger Rail Agency of SA (PRASA), represented by SATAWU, participated in a wage strike. The trade unions demanded an increase of 16%, while PRASA initially offered an increase of 5%. Eventually PRASA increased the offer across the board to an 8% increase.
- 4) Dis-Chem employees also embarked on a nation-wide strike on 27 May 2010. They were represented by SACCAWU who demanded a R3 500 minimum wage for workers, a 15% annual wage increase across the board, the conversion of casual staff members to permanent status after three months, a guaranteed 13th cheque, medical aid, a housing subsidy, meaningful long-service awards and other benefits. It was reported that the company refused to bargain with SACCAWU over wages and other issues, including terms and conditions of employment.
- 5) The salary negotiations between the Department of Public Service Administration and the Public Service Unions resulted in the public service employee's country-wide national strike action in July and August 2010. An estimated 1.3 million workers represented by unions demanded an 8.6% salary increase, along with a monthly housing allowance of R1 000 backdated to 1 April 2010. The final offer of a wage increase of 6.5% was made by the employer with a housing allowance of R750 on 22 July 2010.
- 6) Northam Platinum's Zondereinde Operations entered into negotiations with the union NUM. When the union's demands were not met, most workers at Northam Platinum's Zondereinde operations in Limpopo participated on an industrial action on 5 September 2010. The strike started subsequent to the refusal by workers of the company's offer of 8%. In addition, a similar increase in a living allowance to R1 728 per month was also rejected. The union, NUM, demanded a 15% salary increase on a one-year term, with a living allowance of R3 500 per month. Northam offered 8% on a two-year term (South Africa, DoL, 2010:24).

The outcome of negotiations between parties, including lock-outs and strikes, does not affect the members of unions only but extends beyond the negotiating parties. Public service strikes often place the safety of ordinary citizens at risk and, as such, may have a negative impact on the economy (South Africa, DoL, 2010:24).

The public service strike affects service delivery significantly and causes hardship for those who depend on public services, in so much that this kind of strike obtains extensive public

attention. Private sector reimbursements are vital, since labour costs are a main aspect of economic attractiveness, while regulation influencing wages, or the probability of a labour interruption, may disturb the competitiveness of a firm relative to that of firms in other jurisdictions (South Africa, DoL, 2010:24).

Figure 2.2 illustrates working days lost per 1 000 employees. This is the only indicator of strike activity that allows for valid international comparison. Linking other indicators of strike activity on an international level poses several problems, in that disagreements can be assessed or interpreted within the context. The data from the country over a period of one year may be exaggerated by a dispute in a single major industry such as the public service strike in South Africa in 2010, while the rest of the economy may remain largely unaffected. One-day general strikes can also have a serious impact, even if there is little other strike activity apart from the single day of action. In South Africa in 2010, for every 1 000 workers, 1 593 working days were lost owing to strikes. Much like the case with the total number of working days lost, this was the biggest in the history of South African labour relations. In addition, this high time-loss ratio could be clarified by the massive public service strike that took place in July and August 2010.

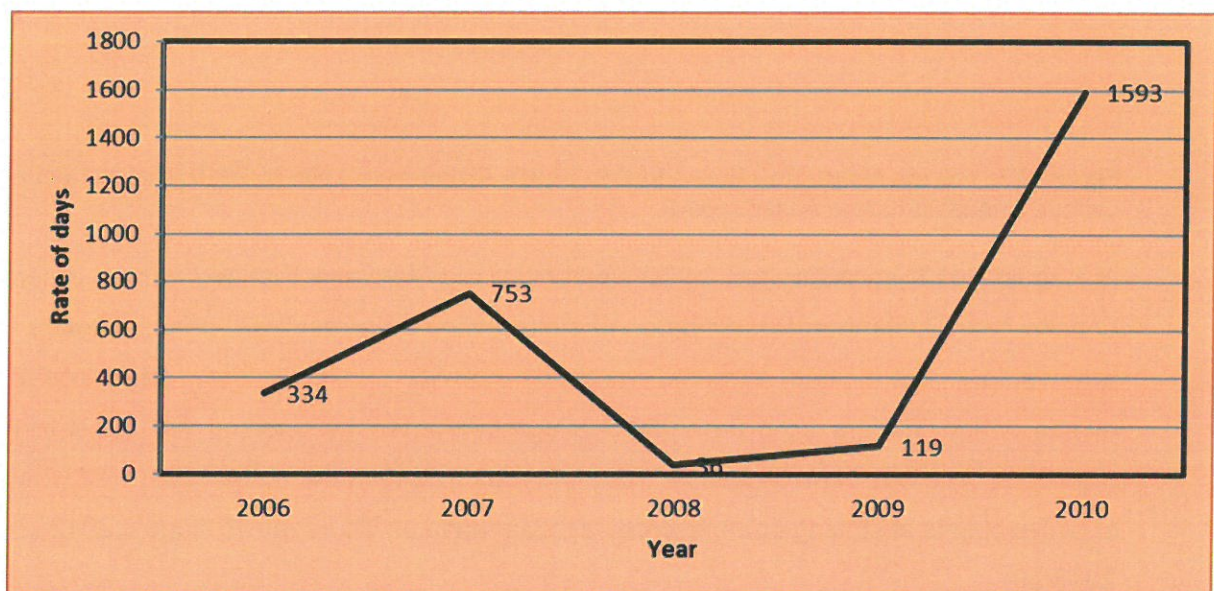


Figure 2.2: South African strike action statistics from 2006 to 2010 (Department of Labour, Annual Industrial Action report)

Figure 2.3 illustrates five-year trends in the loss of working hours as a result of strike in South Africa compared to working days lost. During 2010, approximately 161, 852, 721 working hours were reported lost, compared to a total of 11, 528, 815 working hours in 2009.

An increase in the strike of 2010 can be described as a result of the public service strike that occurred in July and August 2010. It is noted that, when the public service employees embark

on a strike, they do so in large numbers and their strike is prolonged as compared to those in other sectors.

Figure 2.3 also demonstrates that the strike of 2007 resulted in a severe loss of working days. It was the second largest up to end of 2010, due to a greater proportion of working days lost from the public service strike. Following an agreement between the parties on a three-year term wage, no public service strike occurred in 2008 and 2009.

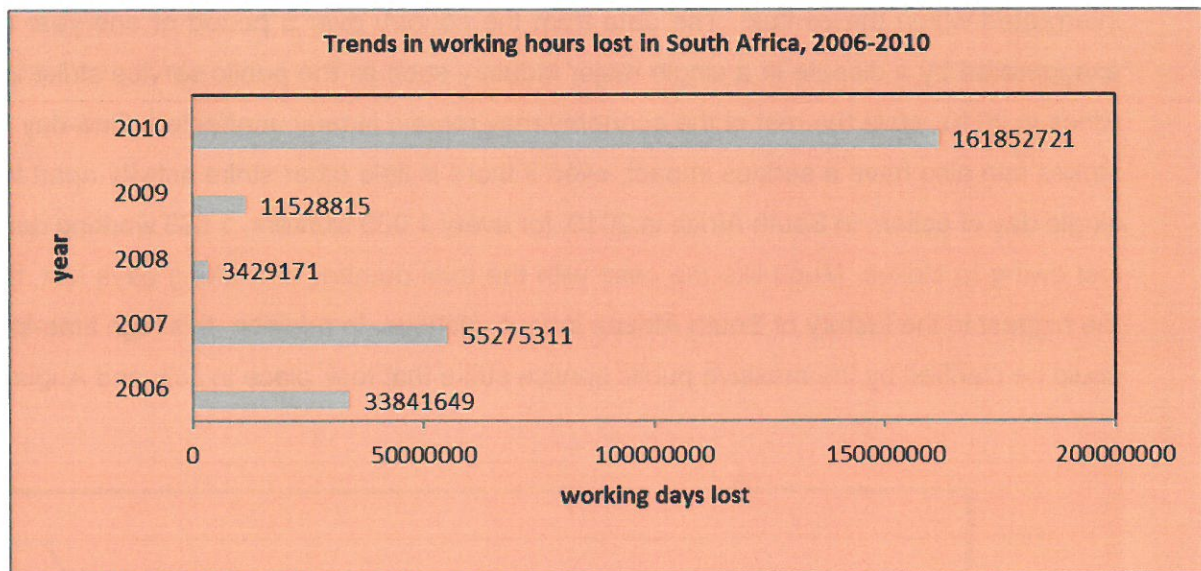


Figure 2.3: Trends in working hours lost in South Africa from 2006 to 2010 (Department of Labour, Annual Industrial Action report)

In August 2012, an estimated 3,000 workers of the Marikana Platinum mines (operated by Lonmin near Rustenburg) participated in strike action as a result of Lonmin's failure to meet with workers. The incident attracted worldwide attention subsequent to a sequence of violent events, when leaders from the AMCU allegedly started by opening fire on striking NUM members. 'The Marikana Massacre', as it was referred to in the media, occurred when police shot live bullets at striking Lonmin workers in Marikana on Thursday 16 August 2012 (Zokweni, 2013:20)

As a result, a Commission was appointed by President J.G. Zuma to probe matters of public, national and international concern following the events which occurred in this area of the North West Province between 9 and 18 August 2012. During this period, about 44 people were killed, and over 70 were injured. There were 250 arrests which were associated with the vandalising of property (South Africa, DoL, 2008:01).

In January 2014, thousands of Lonmin employees embarked on strike action, demanding a basic salary of R12,500. This is the same salary for which striking miners were shot and killed by the South African Police Service in 2012.

It was estimated that the miners lost earnings of R10.6 billion owing to their strike, which lasted more than five months, while employers forfeited revenue of approximately R24 billion during the strike (Sithole, M., Theron, J., and Vey S, 2014:01).

A three-year agreement brought an end to the strike, which involved an annual wage increase of R1000 per month for employees, whose basic wage was less than R12,500 a month for the first two years of the agreement. At Lonmin, the same increase will apply in the third year, while at the other two companies, the increase will be R950 a month in the third year (*Article - Producers reached agreement with AMCU*). South Africa is responsible for 40% of the world's platinum supply, and economists have attributed the country's worsening economy to this strike action (Sithole, M., Theron, J., and Vey S, 2014:02).

2.8. Summary

This chapter has discussed the legislative framework which governs strikes in South Africa. As the highest regulation of the country, the Constitution guarantees everyone the right to strike, but the LRA limits such a right to strike because the same Constitution guarantees the right to life, health care services, and safety and security for all South African citizens. In order for the government to provide services to its citizens, a balance of these rights should be observed. Most of the legislation that governs strikes has been discussed in this chapter, as well as the employment relationship and history of strikes in South Africa.

It is vital for parties to conclude the Minimum Services Collective Agreement to allow those essential services workers who do not provide minimum services to strike. The individual cannot be denied the right to strike within the ambit of the law. Provision for the conclusion of the MSA has been in existence since the birth of the LRA, but it has never been implemented. The parties in collective bargaining structures delayed the process of discussing the matter, although, following the 2007 strike, the need to negotiate the MSA was noted by the parties (PSCBC, 2007:01). Again, after 2010, Resolution 2 of 2014, which refers to the conclusion of the MSA, did not provide any progress in this regard (PSCBC, 2014:01). Should there be no conclusion of the MSA, this will result in essential services workers not being able to exercise their right to strike whenever the need arises. In the 2007 and 2010 round of negotiations, essential services, especially health services workers, decided to strike, although they are designated as essential services workers, while trade unions claimed that since there was no MSA in place, their members were allowed to strike. The literature that was reviewed on minimum services suggests that as soon as the MSA is approved by the ESC for a particular service, the agreed to minimum service becomes the essential service; but those who are

excluded from the definition of the minimum service will be allowed to exercise their right to strike.

The primary purpose of the current study was to make recommendations to establish continuity in essential services in the event of there being another Public Service strike. However, should the parties fail to conclude an MSA, the ESC will establish the minimum service determination that will be binding on all parties.

The following chapter deals with the research methodology that was applied in this study.

CHAPTER THREE

RESEARCH METHODOLOGY

3.1 Introduction

This chapter follows on the literature review and sketches the methodology which the research study followed. It presents the adopted research design, a description of the study population and the sampling procedure that was followed. There is a description of the data collection instrument and the data analysis methods that were utilised, as well as how validity and reliability were ensured.

3.2 Research design and methodology

Research design is considered fundamental to any research study, as it establishes the road map and research journey (Kumar, 2014:123). In addition, McMillan and Schumacher (2001:31) state that research design provides the plan and structure of the study, which are used to collect evidence which provide answers to the research questions. Furthermore, the particular design will guide the study towards answering the research questions with validity, as accurate as possible, and as economically as possible (Kumar, 2014:123). On this premise, this research was designed to plan and structure a research road map to develop guidelines that would assist in the establishment of a MSA for essential services. The road map will facilitate meeting the research objectives whose purpose is achieving equilibrium between the right to strike and the right to essential services provided by the public health sector.

A suitable research approach for this study was found to be a qualitative approach. Creswell (2006:06) indicates that qualitative research is an investigation procedure for acquiring knowledge, where an investigator develops a complex, a deeper understanding image, evaluates words and provides a detailed report of research participants' opinions, while conducting the study in a normal setting. Kothari (2004:5) stipulates that a qualitative approach to research is characterised by a subjective assessment of opinions, attitudes and behaviour. In this situation, research is influenced by the impressions and insights of the researcher. The results emanating from this approach to research are usually neither in a quantitative form nor in a form where they may be subjected to intensive quantitative analysis. Participants have the option to elaborate on their responses which is not typically expected from quantitative methods.

3.3 Research population and sample

This section deals with the population and sampling method that were identified for the study.

3.3.1 Population

Babbie (2005) states that the population for a study is that group of people from whose opinions we want to draw conclusions. It is not possible to study all the members of the population of interest and to make complete observations of all of them. With any survey, it is necessary to clearly define the target population which can be defined as 'that group which constitutes the most relevant population from a statistical viewpoint'. McBurney (2001) refers to such population as the totality of persons, events, organisation units, case records or other sampling units with which the research problem is mostly concerned. Welman and Kruger (2005) refer to the impracticality and uneconomical use of the whole population in a research study. However, a sample can be selected and the results that are obtained can be generalised to a population to have meaning beyond the limited setting in which they were obtained. e

The targeted population for the study comprised essential services employees, management, and officials, including shop stewards and office-bearers from recognised registered trade unions representing different occupational clusters in the Department of Health within the Western Cape Province. The researcher sought to draw a conclusion based on the targeted group, which comprised employees of the Department of Health and recognised trade unions by the government of the Western Cape Province (shop steward's / office bearers). The reason for choosing this sample was that the participant groups have vast knowledge of the subject and are directly involved. The participants represented included nursing personnel, employees that provide emergency medical services, as well as employees from the Directorate: Labour Relations who have vast experience in employment relations in the public service. The inclusion of all selected participants was designed to ensure the reliability and validity of the study, and the data that was collected, especially since the right to strike concerns all parties.

For this study, the researcher distributed 50 open-ended questionnaires to the targeted sample. A total of 25 questionnaires were distributed to trade union members (shop-stewards and office-bearers) in the Western Cape Province, and 25 were distributed to management. The target sample of 50 were the trade union and management representatives who are knowledgeable and some are actively engaged in the collective bargaining processes, hence they would be the ideal sample for collecting various opinions, attitudes and behaviours. Unfortunately, the final sample size was 30 and not 50, as originally projected because some members did not wish to complete the questionnaire. However, a sample size of 30 participants was deemed a suitable size to use.

3.3.2 Sampling

Arguably, a sample is a subset of the population of interest, while sampling is the process of choosing a small number from a larger group to form the basis for the estimation or prediction of the prevalence of an opinion, situation or outcome concerning the bigger group (Kumar, 2014:230). De Vos et al. (2005) stipulate that a sample is a proportion which is drawn from the targeted population.

This research used the purposive sampling method as best suited to focus on particular characteristics of the population under study. Thus, the sample does not have to be representative of the population, but for researchers pursuing a qualitative approach, this is not considered to be a weakness but a choice that is influenced by the kind of purposive sampling technique used. For example, in homogeneous sampling, selection is based on units which have similar traits because such features are of specific interest to the researcher (Statistics How To, 2018). On the contrary, critical case sampling is the method of choice used in preliminary qualitative research to assess whether or not the phenomenon in question exists. This study focused on employees who have knowledge of the topic, as well as employees who are directly involved in essential services. This would enable the writer to draw conclusive, reliable responses, which would ultimately answer the research questions (Mc Burney, 2001:246)

Purposive sampling was adopted for the research study, as it represents a group of different non-probability sampling techniques. The selection of the units (e.g. people, cases/organisations, events and data) which should be studied is dependent on the judgement of the researcher. The sample that is investigated is usually quite small, particularly in comparison with probability sampling techniques. In other words, purposive sampling consists of a researcher selecting specific people from a given population for use in a specific study or research project that best serves the purposes of that study (and which suits the current research study) (Monette et al., 2005:148; Grinnell & Unrau, 2008:153; De Vos et al., 2013:232).

3.4 Research data collection

Secondary data was accumulated by consulting relevant books, journals, articles, government publications and case studies to construct a theoretical background. Primary data was collected through a self-administered questionnaire, which consisted of 23 open-ended questions (Appendix A). The questionnaires were sent to the targeted group via emails. For those who did not have access to a computer, the questionnaires were hand delivered and

collected from participants. All participants, those with computer access and those without, were given a deadline by which to conclude and submit their respective questionnaires to the researcher.

The researcher chose to use a questionnaire owing to the fact that it is low cost, while respondents were able to answer without the interference of the researcher to minimise bias. According to Kothari (2004:101), the process of gathering information by emailing research questionnaires to respondents is utilised in many commercial businesses. He also describes the merits of this method. The researcher was, however, mindful that this method also has potential of a low percentage of return of the completed questionnaires. Bias owing to no response is often indeterminable; hence, the researcher was determined to follow up, where necessary.

The questionnaire consisted of open-ended questions that were relevant to the research questions, with a joining thread filtering through sequential questions. Preferably, the question sequence was created to conform to the respondent's perception, based on the working environment, while it was also in line with the study's objectives. The questionnaires were emailed to respondents who were both competent and confident in comprehensive reading and writing. The respondents were employees and management officials from different occupational clusters. They had knowledge about the research topic and the trade union members by virtue of the positions that they hold in the organisation, and it was obvious that they knew how to read and understand the questions. The respondents had to note their responses to questions in the space provided for that purpose on the questionnaire. The contact details of the researcher were made available to respondents for clarification of any issues, if required. No biographical information was requested, because all selected participants were from one organisation, as they were all directly employed in the public health sector and some were engaged in essential services. An indication of the different groups (occupational clusters) participating in the study was made and reported for the purpose of assessing their perceptions based on their employee category. The questionnaire was designed to suit the purpose of this study, which ensured that participants clearly addressed the research topic, the research objectives, the research questions, and presented challenges faced by the parties involved.

The questionnaire design was influenced by the contention that some public services are declared to be essential, and public service employees who provide those services are prohibited from striking. However, public service employees acted in contradiction to this when they participated in the public sector strikes of 2007 and 2010.

The questions were designed to explore employees' interpretation and understanding of the labour relations in particular the provision made by the LRA for parties to conclude an agreement on minimum services, which would allow some employees within the essential service designate to embark on strike action. To date, the parties in collective bargaining structures have failed to conclude a MSA.

The questionnaire pages were clearly numbered, and the questions were designed in a user-friendly manner to ensure easy understanding and completion.

Each respondent was issued with a consent form that they had to complete before responding to the questionnaire, which indicated their willingness to participate in the study.

3.5 Data collection procedure

The researcher distributed 50 open-ended questionnaires to the targeted sample. Some were distributed via emails, while some were hand delivered to those who did not have access to a computer. A total of 25 questionnaires were distributed to trade union members (shop-stewards and office-bearers) in the Western Cape Province (see table 3.1) for a list of recognised and registered trade unions), and 25 were distributed to management. All participants were given a deadline by which to submit questionnaires. Upon receipt of the questionnaires from participants, the researcher analysed the data and made recommendations on best practices.

The researcher envisioned analysing 50 open-ended questionnaires; however, the returned, completed questionnaires totalled 30, hence only these were analysed. This explains the number that participated in this research, representing a response rate of 60%. Grinnell and Williams (1990:127) state that 30 components that are analysed with basic statistical methods can make for a meaningful investigation. While Mouton (2008:149) proposes that a maximum of 50 cases should be sufficient for a case study, De Vos et al. (2013:225) report that useful results can still be derived from a small population of between 20 to 30 cases. Conversely, Huysamen (1991:183-190) indicates that the minimum number of units for analysis in a population sample should be 15. The distribution of the questionnaires is shown in Table 3.1.

Table 3.1 Registered and recognised trade unions

Trade Union	Membership	No. of questionnaires per union	Frequency of responses
NEHAWU	7462	5	4
DENOSA	6003	5	0
PSA	5166	5	2
NUPSAW	2186	5	2
HOSPERSA	4827	5	0
TOTAL		25	8

Table 3.1 illustrates the trade unions that are recognised by the Western Cape Government Health Department, with a total of 28,271 employees that belong to these trade unions. Table 3.2 represents the number of employees or management participants from different occupation clusters and indicates the number of completed questionnaires that were returned.

Table 3.2 Employer respondents per occupational cluster

Occupational clusters	Questionnaires	Frequency of responses
Management – Directorate Labour Relations and Human Resource Development	10	14
Nursing	5	2
Emergency Medical Services	5	0
Administrative Support	5	6
Total	25	22

To try to ensure that valid, objective and accurate answers would be received, the researcher explained the purpose of the study to participants during the process of distributing the questionnaires. Participants were duly informed of the confidentiality of the process prior to their answering the questionnaires and they were requested to complete and sign the consent form. They were told that their engagement in completing the questionnaires was valued. The due date for submission of the questionnaires was indicated on the questionnaire. If participants failed to comply with this due date, the researcher engaged in follow-up phone calls to them. Email reminders were also sent to those who failed to submit their questionnaires timeously.

3.6 Data analysis

Data for this study was gathered from questionnaires and gathered secondary data on the issue of interest by consulting relevant documents (books, Internet articles, journals and newspapers) and analysis of the secondary data found in those documents. The questionnaire was developed in English because English is one of the main official languages of communication in the Western Cape Government. Responses to the questionnaire were compared to ascertain respondents' perceptions regarding strikes in essential services versus a conclusion of the Minimum Service Agreement. Content analysis was the main method of examination; it can be used for both qualitative and quantitative data analysis purposes: "It examines words or phrases within a wide range of texts, which includes books, interviews and speeches" (Babbie & Mouton, 2001). In content analysis, research participants' words and phrases are regurgitated as they are within specified codes. These pre-determined codes are used to identify the presence of words or phrases that either confirm or discredit the participant's arguments, along with those which emerge from the literature for a particular research exercise. Repetition of phrases is considered imperative for content analysis, as it can reveal the subjective view of a contributor.

Data was analysed based on participants' responses to the research questions. The questionnaires were scrutinised individually and then comparisons were drawn. Common themes or similar answers were grouped.

Following content analysis of the responses, the data was presented in the format of a frequency table. Frequency tables were used to distinguish between the differences in responses and the identified themes. Welman et al. (2009) argue that theme identification is regarded as one of the most fundamental tasks in research.

Recommendations were then made for best practices in the health sector.

A key aspect of data analysis in a qualitative case study is the quest to find meaning via a direct interpretation of what the researcher has found, and what is reported by participants, such that patterns, concepts, themes and meanings may be revealed. In the process, the researcher concentrates on all of the data first, as a whole, and then attempts to dismantle it and then re-construct it with more meaningful insights emerging. De Vos et al. (2005) describe data analysis as a system which provides direction, structure and meaning to the collected data.

3.7 Validity and reliability

The research study should be reliable and valid. Perry and Nichols (2015) state that a reliable instrument is consistent; a valid instrument is accurate; and, usually, if an instrument is reliable, it will be valid and vice versa. Babbie and Mouton (2001) support this and state that there can be no validity without reliability ... [and] a demonstration of the former suffices to establish a presence of the latter. There are different ways in which the validity and reliability of documents or information can be tested. Babbie and Mouton (as quoted by De Vos, 2005) recommend the following techniques: comparing the information contained in the relevant document with contents from other written documents or data gathered in different ways; and, when feasible, verifying data through the interviewing of additional informants, e.g., people who play the same roles or who are conversant with the subject or who participated in the event in person. How reliable the responses are may be assessed by using instrument reliability – by evaluation of similar responses as given in two or more different instances. The reliability of the findings of this research has been verified and demonstrated by the thorough manner in which the research methodology has been applied in this study, as described and justified, particularly in this chapter. Mc Burney (2001) states that validity is an indication of accuracy in terms of the extent to which a research conclusion corresponds with reliability. The findings of this study are regarded as reliable, based on the fact that the study design was informed by, and based on, an extensive literature study, which was intended to guide the process. The research method that was used contained the most suitable questions, which were in line with the study's objectives, and this enhanced the research instrument's reliability. The targeted respondents were familiar with the topic, and some were directly involved. A comparison of the results of two or more researchers at the same points in time was also conducted.

Bhandari and Joensson (2009) mention that validity means the manner in which the instrument measures what it is intended to measure. Questions that are posed should be clear, unambiguous, and targeted to provide the information which is sought. Hence, open-ended questionnaires were drafted using questions to gain relevant answers to the research questions. Relevant documents were gathered and scrutinised in line with the reviewed literature. All the data underwent content analysis as means to improve the study's validity and reliability.

3.8 Ethical considerations

According to Neuman (2006:247), ethical rules serve as values and as bases according to which a researcher should assess their own conduct. Therefore, the researcher has to adhere to the spirit of researcher integrity. Initially, the researcher should ensure that the respondents'

confidentiality is not violated and that no harm is caused to respondents. Furthermore, the researcher should inform respondents that the research is not compulsory and that they can withdraw at any stage. Prior to their completing questionnaires and participating in interviews, the selected respondents were given clear and accurate information about the research. They were also required to complete an informed consent form.

Each participant received a consent letter that described the purpose of the study. They were informed of their freedom to choose to participate or not. They were also informed of their right to withdraw from the study at any stage if they felt uncomfortable to continue participating, and to decline to answer any questions that made them feel uncomfortable. The researcher's contact details were provided in case participants needed to ask questions about any aspects of the study which required clarity. The information was provided to them in simple English without using any confusing jargon.

No harm would be caused to participants of this study. All information that was received would be used for study purposes only. Since the targeted sample comprised employees of the Department of Health, they were assured that the information would only be used for the intended purpose, and that no action would be taken against individuals based on information that they provided, and that their identity and views would remain confidential.

3.9 Summary

This chapter has discussed the research methodology that was used in this study. A qualitative research approach was undertaken to collect data. Open-ended questionnaires and document scrutiny were utilised as a research instrument to discover employees' insights on the legislative framework that governs strikes in sectors offering essential services and minimum services.

Purposive sampling was used in the case of the essential services employees, management and officials, including shop stewards and office-bearers from recognised registered trade unions representing different occupational clusters in the Department of Health in the Western Cape Province. A total of 30 respondents participated in the study; of these, 22 were employees and managers and 8 were shop stewards from recognised trade unions.

Content analysis of the data was conducted. The data is presented in frequency table format in the next chapter. Participant responses were scrutinised individually, and comparisons made, culminating in the identification of common themes that were noted and grouped.

It is assumed that the research results could contribute effectively towards the conclusion of the minimum service agreement.

The following chapter presents data that was collected, interpreted and articulated as research findings. The data is presented using frequency tables reflecting common themes identified.

CHAPTER 4

ARTICULATION AND INTERPRETATION OF THE RESEARCH FINDINGS

4.1. Introduction

This section focuses on findings of the investigation. Data was collected by means of open-ended questionnaires which sought to address the research problem and to answer the research questions.

The research problem relates to the fact that employees from the public health sector, which provides essential services, took part in the strike actions of 2007 and 2010, when citizens' rights to access health care services were infringed. This would have not have happened if the parties had concluded the Minimum Service Agreement (MSA), since the LRA (South Africa, 1995:95) stipulates that, if a resolution regulating maintenance of minimum service is in place, other employees within the essential service can strike. However, in the absence of said agreement, employees from the essential service cannot participate in any strike action. Public health employees embarked on strike action during 2007 and 2010, and essentially participated in an unprotected strike. As a result, patients were left unattended in hospitals and clinics during the strike.

To prevent a similar occurrence in the event of a future public service strike, the parties involved should conclude a MSA to comply with the LRA, and so ensure that employees' right to strike is not forfeited and that citizens' right to receive health care is upheld. A MSA is regarded as one of the mechanisms that parties should utilise to ensure that essential services remain functional in the event of strike action.

The main purpose of the study was to determine the plan of parties regarding effective utilisation of mechanisms to manage restrictions on the right to strike within the public health sector. However, continuation of essential services during strike action depends on the conclusion of a collective agreement on minimum services.

The study's research questions, which sought to be answered, are listed here:

1. Which essential service employees may participate in strike action in the event of a public sector strike?

2. What percentage of essential services employees are required to maintain minimum services in the event of a public service strike?
3. Should the parties conclude a collective agreement on the maintenance of minimum services, how will implementation of the Minimum Service Agreement in the public health sector be reinforced?

In seeking answers to the above-mentioned research questions, open-ended questionnaires were designed and distributed to the target research sample. Participants were chosen from the Western Cape Department of Health and recognised Public Service trade unions. The Health Department and the trade unions operate within the limits of the establishment of essential services. These include health personnel whose employment falls within the scope of essential services.

This chapter presents the research study findings, which were interpreted and analysed in line with the objectives of the overall study.

4.2 Research respondents

Fifty questionnaires were distributed to the target research sample which comprised employees, management and recognised trade unions of the Western Cape Department of Health, and these were selected via purposive sampling. Of the 50 questionnaires, only 30 were received for analysis. It has been observed that valuable research results can still be produced even if a researcher works with small a sample of respondents. While Mouton (2008:149) argues that a maximum of 50 cases should be included for a case study, De Vos et al. (2013:225) report that useful results can still be derived from a small population of between 20-30 cases. In substantiation of this statement, Grinnell and Williams (1990:127) also state that 30 components that are analysed with basic statistical methods can make for a meaningful investigation (Grinnell & Williams, 1990:127). Moreover, Huysamen (1991:183-190) indicates that the minimum number of units for analysis in a population sample may be 15. Therefore, in line with most of these views, it was decided that the total of 30 completed questionnaires was sufficient to continue with analysis and interpretation for this research study.

The questionnaires did not include respondents' biographical information, since it was not necessary for the study; rather, the questions related to the research questions and objectives.

The 30 research respondents included both members of labour union and governmental employees and management, as illustrated in Table 4.1:

Table 4.1: Frequency of responses per occupational clusters

Occupational clusters	Frequency of responses
Management/Employees – Directorate Labour Relations and Human Resource Development	14
Nursing	2
Administrative support	6
Total	22

Twenty-five questionnaires were distributed to employees and management representatives from various occupational clusters, including Labour Relations, Human Resource Development, Nursing, and Administrative support. Of these 25 questionnaires, 22 completed questionnaires were returned.

The recognised trade unions within the Western Cape Department of Health include the following: the National Education and Health Allied Workers Union (NEHAWU); the National Union of Public Service Allied Workers (NUPSAW); HOSPERSA; the Public Services Association (PSA); and the Democratic Nursing Organisation of South Africa (DENOSA). Twenty-five questionnaires were allocated to trade unions and five questionnaires were distributed to the respective trade union members. Only three trade unions returned their questionnaires, as illustrated in Table 4.2:

Table 4.2: Frequency of responses per trade union

Trade union	Frequency of responses
DENOSA	0
HOSPERSA	0
NEHAWU	4
NUPSAW	2
PSA	2
Total	8

Membership status of the above-mentioned trade unions is discussed in paragraph 3.1. One of the three trade union respondents, NEHAWU, holds the majority membership, followed by DENOSA, which did not participate in the study. PSA is the third most supported union, while NUPSAW has the smallest membership. The three unions that participated in the study are the majority when their numbers are grouped together, consisting of 14,814 members, while the two that did not participate total 10,830 members jointly.

Figure 4.1 represents the total number of responses received from management and employees of the Department, and the trade union members. Of the 30 completed questionnaires, 22 (73%) were from management and 8 (27%) were from trade unions.

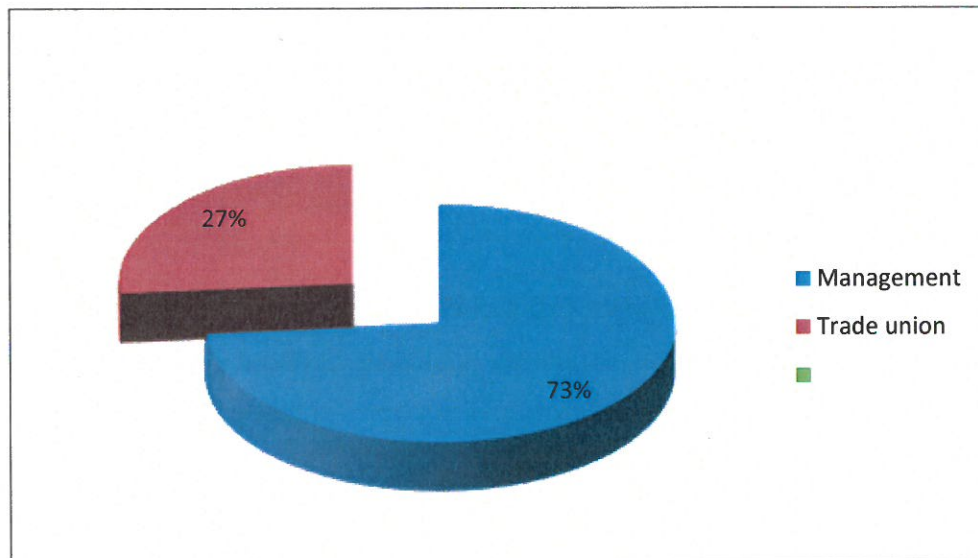


Figure 4.1: Respondents per parties

The relatively higher participation (73%) of management in this research study may suggest that management is not averse to the establishment of a MSA.

4.3 Presentation of research results

Individual responses from the research participants were scrutinised and similar responses were grouped to identify common themes. This section presents responses from the 30 completed questionnaires. First, the question and its purpose is stated, followed by the collated responses. In addition, themes that emanated from the set questions are presented.

The responses are presented in tabular format with the questions and their purposes, followed by the tallied responses.

4.3.1 Knowledge of essential services

This theme was addressed by the question which is presented below and was aimed at determining participants' level of knowledge and their awareness regarding essential services within the public sector. Table 4.3 presents their summarised responses for the question.

Table 4.3: Knowledge of essential service in public sector

Question 1: What are essential services in the Public Sector?	
Frequency of responses	Responses
1	Catering, medical records, security, porter, reception, pharmaceutical and dispensary, medicine quality control laboratory, forensics, laundry works, clinical engineering, hospital engineering, waste removal, mortuary services, pest control, the blood transfusion services.
2	Hospital services.
1	The whole of (the) health sector is designated essential services.
2	Medical Officers, Nurses, Paramedics, Porters, Hospital Administrators.
2	Nursing, Medical related services, porters, catering, cleaning, waste management, patient administration.
1	Nursing, Emergency health services, Medical and Paramedics, Central Computer services of Department of State Expenditure, Blood transfusion services, Children homes services, place of care in terms of Section 30 of the Child Care Act of 1983, and other legislated services by government.
1	South African Police Services, and Parliamentary services.
1	Defence Force / Army services.
1	Nursing and Doctors.
1	South African Police Services, Army, Nursing, Hospitals.
1	Paramedics, Hospitals, Clinics.
1	Medical Officers, Nursing, Paramedics.
1	Hospitals, Admin staff working in Hospitals and Clinics, Emergency services, Paramedics.
1	Nursing.
1	The Department of Health as a whole.
1	All services provided by the employees of the Department of Health.
1	South African Police Service, Defence Force, Parliamentary Services.
2	Hospitals.
1	Nurses, Doctors, Paramedics, Emergency services, Laundry services.
1	Medical services, Blood transfusion services, Firefighting services, sanitation (water and electricity).
3	Services provided by the Department of Health.
2	Medical Doctors, Nurses, other health workers.
1	Those services (whose) interruption may cause the patients to die.
1	The LRA describes the essential services.

Although the respondents described essential services differently, they seemed to know what this referred to in relation to the LRA and the gazetted essential services. Suffice it to state, a total of 70% (21) of the respondents indicated that essential services are hospital-related services. A total of 10% (3) of the respondents stated that the Department of Health, as a whole, is a designated essential service, while 20% (6) of the respondents mentioned the LRA as an essential service.

The above responses reveal that the respondents were certainly knowledgeable about the nature of essential services and were aware that some of the services within the Department of Health are essential services.

4.3.2 Determination of essential services

The aim of this theme was to establish whether participants were aware of who is responsible for the determination of essential services. The question and responses are presented in Table 4.4. This question had a follow-up question which aimed to establish knowledge of the process that should be followed to determine the essential service. Responses to the follow-up question are presented in Table 4.5.

Table 4.4: Determination of essential services

Question 2: Who determines what constitutes essential services and how?	
Frequency of responses	Responses
29	Essential Service Committee (ESC)
1	The employer in the health sector

In total, 97% (29) of the respondents indicated that the Essential Service Committee (ESC) determines what constitutes essential services, while the remaining 3% stated that the employer determines what constitutes essential services.

The above responses show that the majority of the respondents perceived that the ESC has the power to make such a determination. Table 4.5 provides responses to the follow-up question.

Table 4.5: Process of establishing essential services

Question 2: What process is followed to determine what constitutes essential services?	
Frequency of responses	Responses
5	Take into account the nature and type of services and if the service is not rendered, it could lead to loss of life and or harm someone.
2	Circulate an announcement in the government gazette for those who have a vested interest to make written or oral presentations, - do investigations to determine whether whole or part of a service should be declared - the notice must state those services.
1	The employer can apply to the ESC to have services to be declared essential.
4	The LRA explained the process to be followed in declaring essential services.
18	No answer.

A total of 12 (40%) responses were received, while 18 (60%) of the respondents failed to answer this question. Of the 12 responses, one response indicated that the employer should

submit an application to the ESC so that the services can be declared essential, while four respondents referred to the LRA and 2 stated that the notice regarding declaration of the essential services should be made available in a government publication, inviting interested parties to make presentations.

As the majority of the respondents failed to answer the follow-up question, it could be assumed that these respondents are not familiar with processes that should be followed in determining an essential service.

4.3.3 Types of services to be declared essential

This question tested respondents' knowledge regarding the difference between ordinary services and essential services. The question and its responses are summarised in Table 4.6:

Table 4.6 Types of essential services to be designated

Question 3: What type of services can be designated essential services?	
Frequency of responses	Responses
11	Those services (whose) interruption may endanger lives.
2	Medical services, blood transfusion services, firefighting services, sanitation (water and electricity).
9	All patient related services, patient administration and medical records.
1	"Municipal traffic services and policing, municipal security, municipal health, the supply and distribution of water, the security services of the Department of Waters Affairs and Forestry, the generation, transmission and distribution of power, firefighting, the payment of social pensions one month after they are due, the services required for the functioning of Courts, Correctional Services, and blood transfusion provided by the South African Blood Transfusion Service".
7	All health care services.

It is crucial to understand the types or categories of essential services within the public health sector, especially those services whose interruption may endanger life. The above responses identified essential services as being services that hospitals provide, as a total of 16 (see frequencies 9 and 7), namely 53% of the respondents, mentioned patient's records and administration respectively. A total of 11 (37%) of the respondents were vague in their responses, because they did not list the essential services; instead, they defined them; and 2 (7%) respondents listed medical services and other services, such as firefighting, water and sanitation.

4.3.4 Nature and functions of workers in the Public Health Sector

It was important to ascertain respondents' understanding of the nature and functions of workers in the public health sector. The question probed the nature of services that workers performed, as well as their functions. Responses are illustrated in Table 4.7:

Table 4.7: Nature and functions of Public Health Workers

Question 4: What is the nature and functions performed by workers in the public health sector?	
Frequency of responses	Responses
6	Health care services.
3	Maintenance, plant, machinery.
8	Medical services, radiation, chemotherapy, cleaning, waste management, medical records.
11	Nursing, dental & medical help.
2	Clinical, support services such as supply chain.

This table indicates that six respondents stated that the workers provide health care services, without breaking down any of those services, while 11 respondents listed nursing, dental and medical services, and eight respondents listed medical services, radiation, chemotherapy, cleaning, waste management and medical records. Two respondents indicated clinical and support services, and three mentioned maintenances, plant and machinery. However, 30% of the responses were deemed unsatisfactory, since 3 respondents mentioned machinery, plant and maintenance, and six did not answer the question meaningfully, as "health care services" is too general.

4.3.5 Prohibition to strike

This question sought to establish whether respondents were aware of the prohibition to participate in strike action. The question and the responses are listed in Table 4.8:

Table 4.8: Exclusion from participating in strike action

Question 5: In the event of a strike, who should be allowed to participate from the essential service?	
Frequency of responses	Responses
6	Only those categories that are not designated essential services – minimum services should be in place to regulate strike.
12	The LRA considers the right, However the constitution makes provisions for some of rights that are constitutionally to be restricted by national legislation, hence the restriction is found for strike in an essential service.

2	Union and management to negotiate and agree on a skeleton strike, others can join a strike even if they provide essential service.
4	Have a minimum service agreement in place, which will allow some employees from the essential service to partake in strike action.
6	No-one is allowed to strike from essential services.

While 60% of the participants agreed that essential services workers are prohibited from striking, 40% indicated that an MSA must be established to allow other employees who are part of essential services, to strike, as long as they provide the minimum service.

The respondents distinguished between employees who can participate in strike action and those who are prohibited from participating. They also showed an understanding of the importance of those who are prohibited from participating in strike action. The responses did not entirely address the question.

4.3.6 Strike contingency plan

Workers who provide essential services had previously embarked on strike action, hence, a plan or mechanisms should be established to ensure that said services are not interrupted.

Table 4.9 presents responses to Question 6:

Table 4.9 Strike contingency plan

Question 6: Should the Public Health Sector embark on strike action in future, what measures should be in place to ensure that essential services are not interrupted?	
Frequency of responses	Responses
19	Conclusion of a minimum service agreement.
4	Compulsory arbitration for essential service to avoid them from striking.
5	The department to have a strike contingency plan, staff to take plans, managers to monitor movements of strike, registers to be completed on hourly basis.
2	Make use of agency services.

A total of 19 (63%) respondents proposed conclusion of an MSA, while five (17%) respondents proposed that the Department must have a contingency plan in place; four (13%) said that compulsory arbitration would be best to avoid a strike, and two (7%) suggested the use of an agency's services.

4.3.7 Interpretation of Section 72 of the Labour Relations Act of 1995 - Minimum Services

It was imperative for this study to establish respondents' understanding and interpretation of Section 72 of the Labour Relations Act of 1995 - Minimum Services. The responses are presented in Table 4.10:

Table 4.10 Interpretation of minimum services

Question 7: How would you interpret Section 72 of the Labour Relations Act of 1995 - Minimum Services? Or what is your understanding of Section 72 of the Labour Relations Act of 1995 - Minimum Services?	
Frequency of responses	Responses
18	The LRA does not define the minimum service. However, the scope of designated essential service is shortened to provide an ongoing minimum service, a reduced number of employees is required to continue working during strike, to ensure that the service that is normally rendered does not cease entirely.
6	Minimum service can be contained in a resolution reached by parties, which will be obligatory and enforceable on employees in essential service.
6	The right to strike is legislated with limitations in so far as essential services are concerned.

The responses confirm that respondents are knowledgeable about Section 72, as a total of 18 (60%) respondents noted that there is no clear definition of Minimum Services from the LRA but gave their own definition by stating that these are services that remain in operation within essential services. A total of six (20%) respondents indicated that this can be done once the parties that are involved in collective bargaining have concluded a collective agreement in minimum services. The other six (20%) noted that the right to strike is constitutional, though with limitations.

4.3.8 Conclusion of MSA

This particular theme sought participants' views on the Question 8. This was deemed to be one of the most crucial questions, because respondents had to think about whether conclusion of an MSA would guarantee continued essential service in the event of strike action. Table 4.11 presents the responses:

Table 4.11: Conclusion of the MSA

Question 8: Do you think that conclusion of a Minimum Service Agreement through collective bargaining may be the best alternate means of ensuring continued essential services in the event of strike action?	
Frequency of responses	Responses
10	Maybe, one cannot guarantee that the striking employees will comply an agreement. The view is that the minimum service agreement may defeat the whole purpose and goal of strike action.
7	No.
13	Yes.

In total, 10 (33%) of the respondents were not sure whether conclusion of an MSA would be the best alternative to ensure continued minimum essential services in the event of strike action. A total of 13 (43%) respondents stated that the MSA would be a suitable solution, while 7 (23%) participants simply indicated that it would not.

The respondents showed their disagreement regarding the question of a Minimum Service Agreement, while 13 opined that conclusion of the agreement would assist; and 10 were unsure. A total of seven respondents were adamant that the conclusion of such an agreement was not the best alternative to ensure continued service in the event of a strike.

4.3.9 Identification of essential services

This theme aimed to establish respondents' perceptions of methods that parties should use to identify essential services, hence the theme was directly linked to a question which focused on how essential services are identified. A summary of responses is presented in Table 4.12:

Table 4.12: Identification of essential services

Question 9: How would parties identify those services whose interruption might endanger life, personal health, and safety of the whole or part of the population?	
Frequency of responses	Responses
2	Identification of those services done by ESC.
12	Identify through – categorization or classification of positions or clusters of posts that are necessary for the employer to maintain essential services. Employees that must be available during their off duties to report for duty to perform essential service.
10	Consider the nature of service in order to determine if not rendering the service will result in loss of life or harm to patients or citizens.
6	Through the bargaining process - negotiations.

A total of 12 (40%) respondents believed that the identification of essential services should be done through the occupational clusters- positions, while two (7%) stated that it is the duty of the ESC; and six (20%) mentioned that it should be done through negotiation processes. Management and employees should engage in thorough introspection to agree consciously on which services the interruption would endanger. The MSA should be able to stipulate or reveal such information.

4.3.10 Factors to be considered before concluding an MSA

During negotiations for an MSA, certain factors may be of concern to parties that would impact negatively on the public service and on workers. The question is listed in Table 4.13 with summarised responses:

Table 4.13: Factors to consider when negotiating an MSA

Question 10: What are most important factors that should be taken into account by parties that negotiate for the maintenance of minimum services during strike action?	
Frequency of responses	Responses
5	The Constitutional rights of employees and citizens.
6	Will a service be able to continue with skeleton staff?
1	Key activities to continue - full implementation of those services that the employer can do without.
2	Right to strike not be diluted by minimum service level agreement, prevent loss of life or as a result of strike action, prevent breakout of infectious diseases.
8	No work, no pay deduction to be spread over a period of time.
7	Protection of workers who will provide minimum service agreement.
1	The nature of the service, working hours of staff, trade union affiliation.

Eight respondents indicated that the issue of 'no work, no pay' should be considered, while seven referred to the protection of strikers. Six respondents referred to the continuation of service with reduced staff, while five indicated that the right to strike is Constitutional, and 2 respondents stated that the right to strike may be compromised by conclusion of a Minimum Service Agreement; they further indicated that the concern should be about those services whose interruption may endanger lives.

The negotiating parties should consider balancing the right to strike and, simultaneously, the right to health care services, as the respondents suggested. It was envisaged that employees who strike may suffer financially owing to implementation of the 'no work, no pay' rule. While

they would be acting on behalf of all, some employees stand to benefit from positive outcomes of the strike action; but the situation might cause conflict between striking workers and those who do not strike because they are providing minimum services, hence their protection should be guaranteed. Some respondents mentioned that employees have the right to strike, while citizens have the right to health care and life. Others indicated that strikes should not be weakened by an MSA. There were also concerns raised about the fact that services would need to continue and be available, with fewer employees on duty.

4.3.11 Challenges in concluding a MSA

Since the LRA was promulgated in 1995, no collective agreement on MSA has been reached by the parties (employers and trade unions) to date. It was hence important to establish what respondents perceived to be challenges that parties face in concluding such an agreement. The question and a summary of responses are presented in Table 4.14:

Table 4.14: Challenges in concluding an MSA

Question 11: What challenges do parties face to conclude such an agreement?	
Frequency of responses	Responses
1	Determination of who will render the minimum services.
1	Identification of essential services and scaling down the essential services.
1	The bargaining parties to understand and accept the definition of essential or minimum service.
2	Strike is the only effective weapon used by employees to compel employers to give in to their demands.
5	Service delivery will be seriously compromised and could lead to loss of life.
3	Interpretation of agreement and willingness to conclude it.
3	To reach consensus on various categories - what are in place, how will it be managed and enforced.
5	Division of employees.
5	No work, no pay principle.
4	Protection of non-strikers.

Five respondents mentioned that service delivery would be compromised, which could lead to loss of life; five said that 'no work, no pay' is a challenge; another five mentioned disunity among employees; one expressed concern about determination of who will render the minimum service; four respondents referred to the protection of strikers; three referred to the agreement interpretation; three stated that reaching consensus on various categories and enforcement should be considered; two respondents claimed that the strike is the only weapon that the employer understands; and two respondents did not address the question.

A challenge faced by parties that wish to conclude a collective agreement to regulate minimum services within the public services is pre-determining the number or percentage of workers that would constitute such a minimum service. Another would be to identify workers to render those services during while others are allowed to strike. This could cause conflict between the groups, especially if the principle of 'no work, no pay' is applied, since it will mean that the non-strikers would still receive a full salary. The other concern is the protection of non-strikers against possible reprisals from striking workers who might see them as sell-outs, betraying their cause; hence, it is crucial that these issues are resolved before entering into an MSA.

There are many substantive issues, such as those highlighted, which must be deliberated upon towards conclusion of an MSA. This is probably the reason why parties appear to be reluctant to enter into this agreement. The employer has a constitutional obligation to provide the public with health care services; and, conversely, trade unions use a strike as a bargaining tool to receive employers' attention in response to their demands, while they also do not wish to create divisions among their members.

There has been an apprehension about implementing provisions of minimum services within designated essential services in the public service, mainly because of the challenges in conceptualisation of the practical implementation of these services. The environment created by the LRA does not specifically provide for the unique circumstances which prevail in the public service.

4.3.12 MSA monitoring tool

This theme sought to establish what respondents thought would be effective when monitoring compliance with a signed MSA in a strike situation. Responses are shown in Table 4.15:

Table 4.15: MSA monitoring tool

Question 12: What monitoring tool should be utilised to ensure compliance with the maintenance of a Minimum Service Agreement in the event of strike action?	
Frequency of responses	Responses
12	Penalties for failure to comply with the agreement.
9	Parties to agree on implementation process to minimise misunderstanding.
2	Employ a designated official to monitor, all employees to be trained on agreement.
3	Monitoring Committee comprising employer and trade unions to be established.
4	Agreed number of workers to provide minimum service should be verified – joint sessions should be held to confirm such.

A total of 12 (40%) respondents stated that there should be penalties for offenders, while nine, three and two (14) 47% respondents respectively indicated that there must be a plan for the implementation process, and that the Monitoring Committee should be nominated to ensure compliance. Four (13%) respondents suggested that the parties should agree on the number of workers to provide minimum services. The responses did not entirely address the question.

In summary, the responses suggest that, to ensure compliance with an MSA, parties should consolidate the collective agreement. Any party that is in breach of the agreement must be subjected to a fine. The monitoring tool should be discussed by the parties and a monitoring committee should be established by management. The ESC should oversee the entire process to ensure that all the MSA requirements are met.

4.3.13 Repercussions for employers that do not have an MSA

Both employers and employees should understand the repercussions should an MSA not be instituted during strike action. Hence, it was crucial to ask respondents their views regarding why employers do not have an established MSA. A summary of their responses and the question is presented in Table 4.16:

Table 4.16: Repercussions for employers who do not have an MSA

Question 13: What are the repercussions for employers who do not have an MSA in place?	
Frequency of responses	Responses
2	In the absence of an agreement not being in place, essential services workers may go on strike again and the consequences that are associated with strikes can become unpleasant.
1	Non-compliance – unions defy and do not uphold the rule to strike.
1	Strikes may occur, uncoordinated industrial action may result in disorder. The employer may not be able to charge employees as there is no compensation for the acts as prescribed, which proves to be a challenge. Difficult to charge people as it is a right.
1	Loss of production due to strike. Lack of service delivery, the MSA will regulate the process.
1	All employees will strike if there is no minimum services agreement in place.
1	The employer will be in no position to manage employees as there are no service level agreements with employees.
1	Interruption of services, legal claims against the employer, loss of revenue.
1	There will be nobody to do the job, lives will be compromised and there may be loss of lives.
2	Services will collapse.
1	There are no repercussions as people are not permitted to go on strike. There must be a guarantee that the lives of people are protected.

1	The employer will have compromised its constitutional obligation. The trade unions will take advantage and draw people to strike.
2	The employer will not be able to establish the number of people in the workplace. With an MSA there can be a determination of the number of people in the workplace.
4	The impact on service delivery will be negative.
3	There will be the temptation of an employer to exercise their constitutional right, playing outside the perimeters of the law.
3	All staff will go on strike. It also affects the strike as only a few people are able to demonstrate.
1	You always run the risk of having the entire staff complement going on strike. There is no fall-back position. You can go on strike but have to maintain the numbers to conduct key functions.
1	Wild cat strikes that we see. Some essential services suffer, for example, medical services. Government must rethink this issue and put forward an agreement.
1	The main danger for the employer is that essential services may embark on a strike; however, this is a serious violation and is a result of being ill-disciplined.
2	People will go on strike in larger numbers. It will be difficult to distinguish the percentage of people on strike. The percentage of staff operating under less than ideal conditions cannot be determined.

Several different views were expressed, as shown in the responses. A total of 13 (43%) respondents stated that most employees would participate in strike action, including essential services workers, hence service delivery would be compromised, which would possibly result in the lives of the public being endangered. Another contention was that trade unions would take advantage of the situation and encourage all employees to join the strike. Seven (23%) respondents mentioned that service delivery would be negatively affected and would collapse, since nobody would be at work, while three stated (10%) that the employer might be tempted to exercise their constitutional right, and hence exceed the parameters of the law. It is, however, not clear how this would unfold, because the Constitution guarantees all the right to strike. Only one (3%) respondent stated that there would be no repercussions for the employer.

The 2007 and 2010 Public Service strikes are an indication that there would be repercussions for parties, since employees who provide essential services did embark on strike action in the absence of an MSA, knowing which essential services workers were not allowed to strike.

It is evident from the responses that the absence of the MSA provides an opportunity for employees to strike. For the employer, there are serious implications for service delivery, hence there is a need to conclude an MSA.

4.3.14 Repercussions for employees who do not have an MSA

The theme seeks to establish whether respondents believe the absence of a MSA would affect employees during a strike, thus probing awareness of the consequences that workers may face due to absence of the MSA. The question and responses are outlined in Table 4.17.

Table 4.17: Repercussions for employees who do not have an MSA

Question 14: What are the repercussions for employees who do not have an MSA in place?	
Frequency of responses	Responses
3	If essential service workers go on strike, then the employee may be dismissed by the employer.
1	Misconduct because it will give the employer the right to dismiss striking employees. Tension between employer and employee.
1	The employees will all be dismissed as they are not protected. The employer needs to go to the labour court to prohibit it.
1	The challenge is that there is nothing that is outlined by the employer in terms of what they are expected to deliver on.
1	They may be dismissed or lose their jobs.
2	Even those that are not rendering essential services, the right to strike by implication is affected and employees may not strike.
1	The employees may be dismissed unfairly. The process of reinstatement will be protected.
3	No implications, the right to strike can be exercised by all.
2	This is (the) opposite of employer repercussions; employees will be led to believe that they have the right to strike. We are all humans and have the right to strike.
1	The employees will demand and operate outside of the provisions of the LRA e.g., employers, by (and) large decide to leave a union in the workplace and have lost confidence (in) union recognized by the employer and become unmanageable in the long run.
2	People will do as they please and take no responsibility. Employees need to consult with their relevant trade unions. It is important to belong to a union as they are in a position to give guidance and they have a better understanding of these issues.
2	Similar to the employer, if you work for health you end up breaking the law or services are terminated/ final written warning. Maybe you will end up on the wrong side of the law.
2	The Government can take disciplinary action or fire employees or create an antagonistic work environment, due to the fact that we strike they feel that we are undermining their authority.
1	This can be positive as there is no reason to forfeit their salary. In this case no control by the outcome of discipline, determined by arbitration. The arbitration award will determine the outcome.
1	The LRA states that employees should not strike unless there is an MSA, it follows that the employee will be dismissed as it is an unprotected strike.
2	Their salaries will be negatively affected, should they embark on strike action.
2	Fines may be imposed on all unions participating in a strike.
2	They have the right to strike and it will be protected.

A total of 14 (47%) respondents shared the sentiment that, should employees engage in strike action, they would have to face the consequences of disciplinary action, and they might face dismissal. Two (7%) respondents suggested that employees' salaries would be negatively affected, while five (17%) respondents said that there would be no repercussions, since the law permits employees to strike; and one (3%) respondent said that the strike would be protected. Five (17%) respondents argued that employees would be led to believe that they have the right to strike, while people will do as they please and take no responsibility. Employees need to consult with their relevant trade unions, which further highlights that it is important to belong to a union, as they are in a position to give guidance and they have a better understanding of these issues. Conversely, one (3%) respondent stated that the employees would demand and operate outside of the provisions of the LRA by losing confidence in trade unions and by becoming unruly. This could lead to tension between employees and their respective employers. During the Public Service strike of 2010, when employees did not cooperate after being ordered to suspend a strike and report for duty, they were dismissed. Although they were reinstated following deliberations, they were disciplined and issued with final written warnings.

This shows that if there is no MSA in place, employees may not understand fully what is expected of them in terms of service delivery. They may even believe that it is their right to strike in the absence of an MSA, as their trade unions will convince them of this. This is contrary to the LRA, which states that employees should not strike unless an MSA is in place.

4.3.15 Mechanisms to ensure continued services

It was important for this study to establish what respondents believed could be done to ensure continued provision of services during a strike. The question and responses are summarised in Table 4.18:

Table 4.18: Mechanisms in place to ensure continued services

Question 15: What other mechanisms would ensure continued services during public service strikes, in particular in services that are designated to be essential?	
Frequency of responses	Responses
13	Compulsory arbitration.
3	There must be contingency plan in place.
1	Calling other agencies to assist such as the SANDF.
1	The utilisation of agency services.
1	Utilisation of admin staff to replace health workers.
1	The help of the defence force.
1	Assistance from the private sector such as ambulance services.
9	Nothing.

Of the 30 respondents, 13 (43%) proposed compulsory arbitration, while five (17%) referred to the utilisation of agency services such as the SANDF. They also suggested obtaining assistance from the private sector; and nine (30%) did not respond. Three (10%) respondents perceived that there must be a contingency plan in place.

4.3.16 Services designated to be essential

This theme examined respondents' perceptions of services that are classified as being essential. The question and its responses are presented in Table 4.19:

Table 4.19: Services designated to be essential

Question 16: Which services have been designated to be essential? Or which services should be designated as being essential?	
Frequency of responses	Responses
3	As listed in the government gazette.
12	The health sector has designated all services essential. Only service in the strictest definition - those services when not performed will lead to injury and (or) loss of life.
7	Police services, parliamentary services, Defence Force, traffic services, supply of water, nursing, medical and paramedics, Correctional Services.

Only 23 (77%) responses to this question were received; seven (23%) respondents failed to respond to the question. Three responses referred to the Government Gazette without listing those services, while 12 mentioned the health sector as a whole. Seven respondents listed the police services, parliamentary services, traffic, water supply, nursing, medical and paramedics, and Correctional Services. (Services designated to be essential within the public sector were listed earlier in paragraph 2.4.2.3 as part of the literature review.)

4.3.17 Essential services versus strikes

This question was posed to discover what respondents believe to be the conditions that would allow essential service workers to strike. Summarised responses to the question are presented in Table 4.20:

Table 4.20: Essential service vs strike

Question 17: Under what conditions can essential services employees embark on strike action?	
Frequency of responses	Responses
1	Conditions that impact on the Organisational Rights of the Institution.
7	None – compulsory arbitration.
9	Once the minimum service agreement has been concluded.
2	When the strike is protected in line with procedure outlined in the LRA.
11	No condition – not allowed to go on strike.

In total, 11 (37%) of the respondents perceived that essential service employees may not strike under any circumstances, since they are prohibited from participating in strike action. A total of nine (30%) respondents stated that, once an MSA is concluded, then essential service employees may strike, while seven (23%) indicated that a dispute between employer and employees in essential services may be resolved by means of compulsory arbitration. Two (7%) respondents stated that essential service employees may embark on a strike only if the strike is protected. Lastly, one (3%) respondent perceived that employees may not go on strike under conditions which impact negatively on the Organisational Rights Agreements.

It should be noted that the country's Constitution guarantees that all have the right to strike; however, this right is limited by the LRA, which lists the categories of employees that are prohibited from striking. The LRA stipulates that if certain provisions are first made, then some employees may strike. For example, employees who provide essential services are prohibited from striking; but, should the parties enter into a Minimum Service Agreement, then some of the employees may engage in a strike, except those that provide minimum services.

4.3.18 The impact of strike action

It was important to establish if respondents are aware of the consequences of strike action and its impact on service delivery. Responses to this question are summarised in Table 4.21:

Table 4.21: The impact of strike action

Question 18: What are the impacts on employers when services are not rendered?	
Frequency of responses	Responses
5	Loss of productivity.
2	Loss of turnover or income.
6	Under-supply of goods and services in the market, which in turn may lead to higher prices.
12	Endangering the health and life of patients.
5	The clients will suffer, ripple effect of service, which must be rendered.

Seventeen (57%) (12 and 5 frequency of responses) respondents, grouped together, stated that when services are not rendered, it will impact negatively on service delivery, and patients' lives will be endangered. Five respondents indicated that there would be loss of productivity; and eight (27%) respondents said that the loss of turnover would lead to higher prices. Some of these negative consequences became evident in the Department of Health during the Public Service strikes of 2007 and 2010, when patients were left unattended while health care workers were involved in these strikes.

4.3.19 Implementation plan for an MSA

An implementation plan is crucial once parties have concluded an agreement in this respect. Responses to the question are presented in Table 4.22:

Table 4.22: Implementation plan of the MSA

Question 19: Should the Minimum Service Agreement be agreed upon, how will it be implemented, given the fact that the employer will implement a 'no work, no pay' principle to striking workers?	
Frequency of responses	Responses
5	Striking workers should take turns in rendering minimum service so as to share the pain of no work no pain.
3	Through negotiation - monitoring tool to be in place.
2	Implementation plan as agreed by parties.
17	Minimum services should be agreed to; workers should take turns in striking.
1	The trade unions should start setting a strike fund to mitigate losses to employees. The agency fund should be used to strengthen the strike fund.
1	Explain to employees the employees likely to be affected by the agreement with ad discuss the identification minimum services; inform employees as to who is allowed and not allowed to strike or be locked out; discuss that minimum service employees are not obligated to perform the work of non-minimum service employees during a strike or lock-out; stipulate an instrument for demanding non-minimum service workers or replacement labour to complete the labour of minimum service employees if a lot of minimum service employees are not at work during a strike or lock-out for any reason, including sickness; stipulate the application of the policy of "no work, no pay" and what will happen to the wages of employees in the minimum service during the course of the strike or lock-out; explain in which manner the inside of the agreement will be made known to affected employees; offer for a procedure and tools for examination of the minimum services during that there are working or operational amendments at the enterprise or service; offer for review process after a strike has taken place to establish if the minimum services were satisfactory.

The vast majority of respondents, namely 17 and 5 respectively (73%), indicated that striking employees should take turns to do so, so that everyone could feel the effects of the 'no work, no pay' principle. One respondent indicated that the trade unions should establish a strike fund. The other respondents, totalling six, mentioned that there must be an implementation plan to which all parties agreed, while the agency fee money should be used to compensate for employees' financial losses as a result of striking. Since 73% of the employees referred to the challenge of the 'no work, no pay' principle as a threat during strike action, it shows an awareness of the gravity of this challenge for all concerned parties, particularly the trade unions. The separation of workers into those who will provide minimum services and those who can strike, would need to be done in a diplomatic manner, while all should be included in any relevant consultation to avoid conflict.

4.3.20 Impact of a strike on an individual employee

This question sought to examine respondents' understanding of the impact of the strike on individual employees. The question and accompanying responses are tabled below.

Table 4.23: Impact of a strike on individual employees

Question 20: As an essential service worker, what impact does a strike have on you personally?	
Frequency of responses	Responses
22	The loss of earnings, intimidation from the strikers leading to injury.
1	Depends on the service you need.
2	Nothing.
1	Compromising your ethical values.
4	Possible violence caused by the strikers.

A total of 22 (73%) of the respondents indicated that they might lose their earnings, since the 'no work, no pay' principle could be applied. They also mentioned that intimidation from strikers might lead to injury, suggesting the possibility of violence on the part of the strikers. Conflict in the workplace could escalate owing to the fact that some employees partake in the strike while others do not. The impact of dismissal meant a loss of income. Problems that emanated from a loss of income included a negative impact on family life (e.g., owing to an inability to pay bills and properties being repossessed). There would also be a lack of access to public facilities and healthcare.

4.3.21 Significance of essential service declaration

This question sought to gather information about whether respondents perceived that declaring essential services would have negative consequences for the parties. The question and accompanying responses are illustrated in Table 4.24:

Table 4.24: Significance of essential services declaration

Question 21: Is essential service designation bad for the union or employer?	
Frequency of responses	Responses
7	Not bad for both parties, the world works best in an environment that is controlled and has structures. There is still freedom within an essential service declaration.
8	For the union it weakens the power to strike to ensure the employer agrees to their demands.
5	Bad for the union. The strike action will not be effective as the purpose of the strike is to bring the service to a standstill in order to put pressure on the employer to accede to the demands of labour. A minimum service level agreement will ensure that the service provided by the employer continues notwithstanding minimum service.
3	Yes, takes away the Constitutional right to strike.
5	No - to continue rendering the service to the public.
2	Employer - loss of productivity; loss of turnover or income; under supply of goods and services in the market, which in turn may lead to higher prices.

The above table indicates that 16 (53%) respondents perceived that the designation of essential service is unfavourable for the union based on the fact that it infringes on the employee's Constitutional right to strike, whilst it reduces the bargaining power that the unions might have over the employer. Twelve (40%) respondents indicated that designation of essential service was not negative for all parties, since there are rules and regulations that govern the designation of essential service, and all parties are compelled to comply with these. Two (7%) employees opined that it would be negative for the employer.

4.3.22 Personal views on strike prevention

Respondents provided their views on measures that should be established to prevent strike action, and these responses are presented in Table 4.25:

Table 4.25: Personal views on strike prevention

Question 22: In your opinion, how can strike action be prevented in the public health sector?	
Frequency of responses	Responses
5	Can only be prevented if management (gives) in to the demands of labour, which is not good management.
4	Can be minimised by having a good relation with labour - trade unions, have trust relationship.
6	Employer and unions to negotiate trustful.
8	Operative collective bargaining, engage the unions honestly, conclude 3-year salary term agreements, so the negotiations can take place once in three years.
4	Through compulsory arbitration.
2	The decentralisation of salary and other conditions of employment may assist.
1	Long term and incentivised agreement will assist.

A total of eight (27%) respondents indicated that effective collective bargaining would prevent strike action within the public service, while one (3%) respondent supported a long-term incentive agreement. Five (17%) respondents stated that a strike could only be prevented if management conceded to the demands of labour. Four (13%) respondents said that trade unions should be trustworthy; and six (20%) stated that the parties should negotiate in good faith. Another four (13%) respondents mentioned compulsory arbitration as a resolution.

The long-term incentive agreement and/or 3-year salary collective agreement would place pressure on the employer, because they had to consider many factors before they could agree to increasing employees' salaries, include the country's overall economic situation.

4.3.23 Respondents' recommendations

This theme was also crucial for the study because it asked respondents to provide recommendations to achieve an MSA. Their suggestions are presented in Table 4.26:

Table 4.26: Respondents' recommendations

Question 23: Can you suggest any recommendations to achieve an MSA?	
Frequency of responses	Responses
2	All parties involved in the MSA should compromise and commit to it.
2	Negotiations should be done in good faith.
1	MSA to be legislated.
1	The state and the trade unions need to come up with a reasonable percentage of the workforce that will be able to operate during the strike, and the percentage of workers that are permitted to strike also needs to be determined.

1	For the parties to conclude the agreement, a third party's intervention is required to facilitate the conclusion of the MSA.
1	To engage with social partners and all involved and (to) develop standard operational procedures, (and) determine (the) number of employees that should participate. (At) all times prioritize service delivery. Develop a collective agreement.
1	Government needs to give this more attention to the Constitutional rights of employees and also find ways of ensuring that the essential services are not jeopardised.
1	The trade unions and the employers need to engage and give each other time to consult with their members. Both the employer and unions must negotiate truthful and must keep the well-being of the citizens at heart.
1	Full staff complement, all vacancies filled, knowledge and understanding of workload, understanding of diseases, burdens and patterns. Parties may agree if they understand all of the above conditions.
2	The minimum services agreed upon must be balanced and not favour any party. The parties must abide (with) the agreement. A benchmarking exercise must be undertaken. The facilities must be assessed and an HR audit must be conducted.
1	There needs to be a balance if there is a right to strike agreement, (as) a certain percentage of employees (should) be excluded from the strike process. Some essential services are more "essential" than others.
1	The only thing is that parties need to sit and conclude an agreement. There should be benchmarking with other countries and (they should) try not to neglect the duties that the employer has to render.
1	Employers and labourers must negotiate as to the number of people that may go on strike and those that have to remain. The risk is who is prepared to go on strike and risk the loss of a salary.
1	The employer and the employee must agree on the level of minimum services to determine the level of service that needs to be provided. The number of people that need to go on strike in order to meet organizational requirements (should) be established.
1	From the employer's point of view, (they) would prefer to do without an agreement. Maybe the issue of percentage may be negotiated. Each environment must be independently considered.
1	Allow parties to engage and to sit down and determine skeleton staff requirements. No blanket rules. Each health care facility should be analysed on an individual basis.
1	Both the employer and employee must sit together and put the needs of the public first and come to an acceptable agreement.
1	The employer and labourer need to sit down and develop terms of reference so that they can agree. The Bill of Rights (should) be balanced with the rights of essential services employees i.e. health to communities.

A total of 21 respondents (70%) provided suggestions to achieve an MSA. They demonstrated how knowledgeable they were regarding the designation of essential services, and fully supported the conclusion of a MSA. Their responses show that they all agreed that there was a need to balance the rights of public service employees which may infringe on citizens' rights, should the employees strike. Respondents recommended that there is a need for the parties to do the following:

- To show commitment and even compromise;
- To negotiate the number of employees that should provide essential services, and the number of employees that should participate in strike action;
- To identify employees that will provide the said service;
- To determine who is prepared to strike and lose an income, while others will work and earn full salaries;
- To negotiate an MSA and develop terms of reference to structure a framework to determine a mutually binding agreement. The negotiations should be in good faith;
- To determine a reasonable number or percentage of the workforce that will be able to continue working during the strike, while addressing specific needs in the workplace;
- To balance the rights of everyone involved;
- To draft terms of reference and Standard Operating procedures (SOP); and
- To prioritise service delivery.

It is important to note that some services may be viewed as being more essential than others. There should be no blanket rules: each health care facility should be addressed individually. Public needs should be taken into account when determining this agreement. There was also a view that it should be made compulsory for parties to meet under the umbrella of the Essential Services Committee, as negotiations between parties tended to take too long and were open-ended, so third party interventions might be required to facilitate or enforce an agreement.

4.4 Interpretation and articulation of main research findings

This section interprets the main research findings regarding the study objectives and contextualises the findings with RSA legislative directives and previous research.

The findings show that all the information that was collected related to the problem statement and research objectives. For reporting purposes, some of the questions were grouped together owing to their similarity and hence similar responses were given.

Respondents' profiles are discussed below, followed by a discussion of the researcher's analysis of the research findings.

4.4.1 Respondents' profiles

The targeted research sample was selected from the Western Cape Department of Health, consisting of representatives from the management, employees' team (including various occupational clusters) and trade union members from recognised registered trade unions. The respondents included personnel from the Labour Relations and Human Resource

Development Unit, Nursing, and Administration and the trade unions that work within the parameters of essential services. The relatively higher participation (73%) of management that participated in this research study may suggest that management is not averse to the establishment of a MSA.

The inclusion of a targeted research sample enhanced the validity and reliability of responses as this made possible an evaluation of similar responses, which were compared with the current legal framework and other available literature regarding the issue of the effects of a strike on essential services.

4.4.2 Analysis of research findings

Employees' knowledge of essential services versus minimum services

Questions 1, 3, 5, 9, 16 and 17 were grouped and analysed together, as the main aim of these questions was to gather the knowledge level of employees regarding the research topic. The respondents were requested to define essential services, provide examples of types of essential services, and identify public sector essential services workers who are allowed to participate in strike action. The questions were structured in a manner which focused on obtaining respondents' knowledge and awareness of essential services within the public health sector.

The findings, as captured in Tables 4.3; 4.6; 4.8; 4.12; 4.19 and 4.20, revealed that the majority (70%) of the respondents indicated that health care services such as medical services, medical records, hospitals, nursing, dental, municipal traffic, water affairs and the SAPS are regarded as essential services, while others (10%) indicated that the entire Department of Health provides essential services. A total of 20% of the respondents explained essential services as those whose disruption may endanger life, and also referred to the definition as contained in the LRA. The responses concur with the insights gleaned from the literature review, as presented in Chapter Two. The LRA subscribes to the right to strike and also provides for restrictions on the right to strike (South Africa, 1995). One of these limitations is that essential service workers are prohibited from striking. The LRA defines an essential service as a service whose "interruption may endanger the life, personal safety or health of the whole or any part of the population" (South Africa, 1995:), while it also describes Parliamentary Services and the South African Police Services as essential services.

The literature indicates that essential service employees may engage in strike action if there is a Minimum Service Agreement (MSA) in place (PSCBC, 2014). The majority, namely 60%

of the respondents, believed that essential service employees may not strike under any conditions, as indicated in Table 4.20. While 30% of the respondents stated that essential services employees may engage in strike action if an MSA is in place, 10%, a minority, suggested that dispute resolution procedures should be followed to try to resolve a dispute.

The researcher received diverse interpretations of the LRA. While there were some sections that allowed for a strike, employees in essential services are prohibited from striking unless there is an MSA in place. It was evident from the responses that essential service workers experience conflicting emotions between exercising their own fundamental right to strike and performing their duties and responsibilities in the workplace. It is, therefore, a difficult and equally uncomfortable situation, hence a MSA should be concluded as soon as possible. Without an MSA, the situation remains potentially explosive and might demotivate essential services employees, because strikes are a way for employees to break a deadlock during negotiations. Without an opportunity to exercise such a right, employees may become demotivated, since their rights may be undermined by the employer.

Essential Service Committee (ESC)

Table 4.4 shows that 97% of the respondents indicated that the Essential Service Committee (ESC) is entrusted with powers to determine what constitutes essential services, while 3% stated that it is the duty of the employer to determine the essential service. Section 71 of the LRA provides the ESC with powers to designate essential services after following due processes. The ESC's functions are listed here:

- Conduct investigations into whether the “whole or part of a service is an essential service”.
- Decide whether or not the whole or a part of a service should be designated as an essential service.
- Address disagreements where there is hesitation as to whether the “whole or part of a service” falls within the scope of a designated essential service.
- Determine whether the “whole or part” of a service is a maintenance service.
- Ratify a collective agreement for an MSA or maintenance service.
- Determine minimum services to be maintained (South Africa, 1995:14).

Section 65 of the LRA provides for the process of declaring an essential service, and this is presented in the next paragraph.

The committee issues notice of investigations and hearings in the *Government Gazette*, and in a newspaper which is circulated in the area in which the service is provided. Anyone that wishes to make written or oral submissions to the committee must state the nature of their interest in the investigation. Given the nature of the investigations, however, the term has been interpreted broadly, to be as inclusive as possible. This not only allows the committee to be informed by a wider array of public opinion, but also adds legitimacy to its decisions.

Table 4.5 shows that four respondents mentioned that the process is provided for in the LRA, while one respondent said that the employer makes representation to the ESC for the service to be declared essential; and 18 of the respondents did not respond, which may suggest that they were not familiar with the process used to determine what should be designated as an essential service.

Nature of health workers

The respondents showed awareness of the nature of work that is performed by essential service employees; hence they stipulated that essential service employees may not strike, as they are involved in providing health care services, which excludes some of them from strike action, as illustrated in Table 4.7.

Strike contingency plan

As a result of the 2007 and 2010 public service strikes, employers should have established a mechanism to ensure that essential services were never interrupted again. Table 4.9 presents responses which show a total of 19 (63%) respondents mentioning conclusion of an MSA, while five (17%) stipulated that the Department had to have a contingency plan in place; and four (13%) said that compulsory arbitration is the best way to avoid a strike, and 2 (7%) suggested the use of agency services. The literature review stipulated that minimum services had to be provided within an essential service, which must remain operational during the strike. The MSA is not defined by the LRA, but the LRA in Section 72 makes provision for conclusion of an MSA. Table 4.10 shows that most of the respondents had knowledge of what an MSA is and how it should work. Although no definition is found in the LRA, a definition should be part of the MSA itself, once concluded.

An employer and unions, acting on behalf of employees, may enter into a minimum service agreement (MSA) within the essential service, where terms and conditions are agreed upon for some employees to continue to work and provide a minimum service, while other employees can go on strike. These terms and conditions should be established with an

understanding attesting that the basic needs of the residents are fulfilled during a strike in the organisation, where the disruption thereof would be detrimental to the public and hence encourage an entire prohibition on strikes. The role of the MSA is to lessen the effects of the designation, which is made by the Essential Services Committee (ESC) (Cliff Dekker Hofmeyer, 2012:1).

In other words, employers and trade unions may consent to provide less than the whole essential service, or the entire essential service may be maintained with fewer workers, but the ESC must ratify such an agreement for it to be effective. The respondents' responses in this regard, as outlined in Table 4.11, reflect their mixed perceptions, as 13 (43%) suggested that conclusion of the MSA would be the best alternate means of ensuring continued essential service in the event of public service strike action. While 10 (33%) respondents were not sure whether conclusion of an MSA would provide such assurance, seven (23%) stated that an MSA would be a complete waste of time.

To date, over 20 years since the LRA was promulgated, the parties (employer and trade unions) in bargaining council have still failed to reach an agreement. There are possibly two reasons for this: firstly, few Minimum Service Agreements have been negotiated or agreed upon, and/or trade unions appear to have been unenthusiastic about recommending strike action that has the effect of dividing the workforce between those who must continue to work (because they are employed in essential services and, therefore, continue to earn a salary during a strike), and those who are allowed to strike, and must then suffer the consequences of the strike in terms of their salaries due to the "no work, no pay" principle. On the other hand, employers, for their part, appear not to have considered it sufficiently important to pursue conclusion of Minimum Service Agreements on the grounds that, in their absence, a larger proportion of public sector workers are precluded from striking. Paradoxically, when the strikes start, public sector employers show little willingness or ability to prevent strike action, including a strike by essential service workers (Brand, 2013:7).

Factors to be considered when concluding an MSA

The respondents were requested to mention factors that the parties need to consider prior to conclusion of an MSA. These factors would include those that concern the workers and may negatively affect and cause division amongst them. One of their main concerns, as outlined in Table 4.13, was the 'no work, no pay' principle, followed by the protection of non-striking employees. It is envisaged that employees who strike may suffer financially owing to the implications of a 'no work, no pay' rule, while the results of their strike action may well benefit

all workers. This might cause conflict towards the workers who provide minimum services and hence their safety might be at risk.

Challenges in concluding an MSA

Table 4.14 outlines challenges which parties may face in an effort to conclude a collective agreement which regulates minimum services within the public services. Among these, is the difficulty of pre-determining numbers or the percentage of workers that would render such minimum services. The division of employees, between those that will offer minimum services and those that would participate in strike action, could cause conflict based on the fact that the principle of 'no work, no pay' will apply, which means that non-strikers will receive their full salary. The two mentioned challenges are central to conceptualisation of the study's objectives, and this research aimed towards making recommendations for the effective establishment of the minimum services.

There are several substantive issues and concerns that were mentioned in responses in Table 4.14. These challenges would be faced by involved parties, should the MSA be concluded, and hence it is believed that this is why parties are reluctant to enter into this agreement. The employer has a constitutional obligation to provide the public with health care services, while conversely, trade unions use the strike as a fundamental tool to get the employer's attention in response to their demands, and they would also want to avoid creating divisions among members.

There has thus been apprehension to implement the provisions of minimum services in the designated essential services within the public service, mainly because of failure to address challenges in the conceptualisation of practical implementation of the same. The environment created by the LRA does not specifically provide for the unique circumstances of the public service. Hence, it is crucial that, before entering into an MSA, those issues must be clarified by parties. Some respondents mentioned that employees have the right to strike in as much as citizens have the right to health care and life. Others indicated that strikes should not be weakened by an MSA. There are also concerns raised about whether the services will be able to continue with fewer employees.

Ensuring continued essential services in the event of a strike

Table 4.15, in conjunction with Table 4.18, reflects findings regarding respondents' views on establishing a monitoring tool to be utilised to ensure compliance with the maintenance of a Minimum Service Agreement during strike action. A total of 12 (40%) employees stated that

there should be penalties for offenders, while 9 indicated that there must be an implementation plan in place, as well as a monitoring committee, to ensure compliance. Most responses, as shown in Table 4.18, suggested the use of compulsory arbitration, while a few responses proposed that agency services should be used, such as the SANDF.

The respondents are of the view that to ensure compliance with the MSA, parties have to establish the collective agreement. Any party that is in breach of the agreement must be subjected to a fine. The monitoring tool should be discussed by the parties and the monitoring committees should be established from top down. The ESC should oversee the process to ensure that all the MSA's requirements are met.

The main aim of Adams's (2011) study states that, because of the impact of teacher strikes on education, there has been a call to declare teaching an essential service and thus prohibit teachers from striking. In his findings or conclusion, after considering the right to strike, Adams noted that the right to a basic education and the best interests of the child had to be considered an important principle when deciding if the education sector must be declared an essential service, as the rights of the educator need to be balanced against the rights of the learner. Therefore, when it comes to exercising rights, there must always be a balance between the responsibilities of educators and the rights of learners. Many believe that, by making education an essential service, it ensures that learners' educational rights are met, and services are maintained in full. This concept is totally wrong. Adams states that the community should recognise that "quality education" is more than education without interruption. Quality education is found in a system that pays salaries that attract good qualified educators in sufficient numbers. It requires class sizes that are manageable, with safe and appropriate classrooms and outdoor sport facilities. Prohibiting teachers from striking will not only harm teachers, it would also harm the education system, as teachers also bargain for improvements in the education of the country.

The definition of essential services which was adopted by the Committee on Freedom Association was essential services, "the interruption of which would endanger the life, personal safety or health of the whole or part of the population". This definition is referred to in the ILO literature as a definition of "essential services in the strict sense of the term". It is also evident (from complaints received before the ILO's supervisory committee and its recommendations) that education should not initially be declared an essential service. Where educator strikes are prolonged and this causes a threat to life, personal safety and health, only then should education be declared an essential service.

One must then focus on which educators and learners are affected. If the educators' strike affects all learners, for example, their psychological health, or where there is a threat to their

security and safety, then all educators would be prohibited from striking. However, where only some learners (e.g., Grade 12 learners) are affected, then a minimum services agreement could be concluded with the assistance of the ESC restricting Grade 12 educators from striking. This would ensure that educators could still organise themselves and have the right to strike. This measure would balance the rights of educators to strike and the rights of learners to learn.

For all this to happen, the ESC and the ELRC will have to be properly resourced. Its research capacity will need to be developed. It also needs to engage the broader public, especially school governing bodies (in other words, parents) and train the employer and trade unions about essential services and arbitration as an alternative to strikes. Provincial education departments must be equipped to deal with the effective administration of a strike and departmental officials be equipped and empowered to enforce the minimum service agreement.

Repercussions for the parties of not having an MSA in place

Having an MSA in operation during a strike would benefit all parties, in particular the employer, as it will fulfil their constitutional right as a citizen. The impact and repercussions for an employer not having an MSA were explained and presented in Table 4.16, where respondents stated that:

- The employer has an obligation towards the public to fulfil its constitutional mandate of providing citizens with proper health care services, whilst ensuring that those services are available at all times;
- The government will not be able to deliver on its social contract, which is to provide quality service delivery to citizens, and this will cause negative publicity and multiple pressures. The result will be financial losses and people will lose faith in the government. There may be legal claims against the State for the lack of service delivery, which may result in injury or death. The community, in turn, will be unhappy, while lawlessness may result in increased criminality;
- Skilled workers may be forced to seek alternative employment, resulting in a 'brain drain' for the Government. The responses to this question were tabulated in Table 4.15. In 2007 and 2010, there were strikes within essential services because employees were tired and frustrated about working endlessly, while their rights were infringed upon;
- There may be wild cat strikes, and lack of service delivery; and

- Employers will be tempted to exercise their constitutional right, which will involve acting outside of the parameters of the law.

The absence of an MSA creates a loophole for employees to strike. One would wonder, though, how long workers would have to be concerned about the lives of others whilst their own rights are not taken upheld.

Conversely, the respondents showed awareness of the repercussions of not having an MSA, (as illustrated in Table 4.17), whilst mentioning that disciplinary action could be taken against those employees providing essential services for taking part in a strike action in absence of a MSA and the outcome of the disciplinary action could lead to the possible dismissal as consequences. This would lead to tension between employees and the employer.

The researcher surmises that, with no MSA in place, employees will not understand fully what is expected of them, nor their employer's expectations in terms of delivery. They may even believe that it is their right to strike in the absence of an MSA. The LRA states that employees should not strike unless there is a MSA; it therefore follows that the employee will be dismissed as the strike will be labelled as an unprotected strike. In the event of a strike, there may be lawlessness, because employees will act at will and many will take no responsibility for their actions.

It is important for trade unions to inform their members of the consequences of participating in strike action without an MSA so that employees can make decisions for themselves to consult with their trade unions on these issues, and so that they have a better understanding of labour related matters. This can be viewed as positive, as there should be no reason for employees to forfeit their salaries; and, in this case, the control of the dispute will be by means of dispute resolution process such as arbitration and the arbitration will determine the outcome.

From the above, it is evident that, owing to employees having to face legal challenges and possible dismissal if they strike, they cannot exercise their right to strike, which may be demotivating for them. One of the consequences is that employees could report to work merely to 'show their face', but not be dedicated to the cause, while employers have to continue to ensure that citizens receive the necessary services.

The literature indicates that the Essential Services Committee is entrusted by approving or endorsing any resolution that refers to the maintenance of minimum services as an essential service, in which case the agreed minimum services should replace essential service in respect of the employer and its employees (PSCBC, 2014). The literature also suggests that the ESC

may institute a Minimum Service Determination (MSD) as a substitute for the MSA, should no agreement be reached by the parties, while such determination will be in place for a period of 12 months.

Should the parties conclude an MSA, an implementation plan should be established, taking into account that the 'no work, no pay' principle will apply to the strikers. It was interesting to note that the vast majority of respondents (namely 22, or 73%) indicated that striking employees should rotate their involvement in the strike so that everyone will experience application of the 'no work, no pay' principle. Another employee indicated that the trade unions should establish a strike fund, while the agency fee money should be used to compensate for the employees' losses as a result of the strike. The challenge of the 'no work, no pay' principle is considered as a threat by the employer during strike action and is the greatest challenge for the concerned parties, particularly the trade unions. Hence, separation or division of workers into two groups (those who should provide minimum services and those who may strike) should be done in a tactful manner, while all should be consulted to avoid conflict.

Impact of the strike

Table 4.23 further illustrates respondents' concerns in respect of the 'no work, no pay' principle, since this will impact negatively on an employee and the impact may be dire, because of the loss of income and its related problems, such as the impact on family life, inability to pay bills, and even property being repossessed.

During a strike, some employees have to work long hours and 'double up to meet operational requirements to compensate for staff shortages in the workplace. There is also the issue of individuals' conscience, as health practitioners take oaths to protect the lives of people, yet, when striking, people's lives are jeopardised, and the practitioner's license to practice within the health sector may well be revoked. Conflict in the workplace becomes prevalent owing to some workers engaging in strike action and some not. Some workers perceive that the needs of society outweigh their personal needs. There are workers that care deeply for the community in which they operate, which creates a dilemma for them when they are not able to perform. Workers suffer emotional trauma as a result, in addition to fearing that they will lose their jobs.

Is the designation of essential services bad for the employer or trade union?

In respect of this theme, 16 (53%) of the employees mentioned that the designation of essential services is unfavourable for the union because it infringes on employees' constitutional right to strike, whilst reducing trade unions' bargaining power over the employer through using a

strike to achieve goals. Twelve (40%) participants indicated that designation of essential service is not bad for all parties, since there are rules and regulations that govern the designation of essential services, and the parties have to comply with such rules; and two (7%) respondents said that it negatively affects the employer, as illustrated in Table 4.24.

It was interesting to note, as shown in Table 4.25, that most respondents indicated that effective collective bargaining would prevent strike action within the public service, hence the trade unions should be trustworthy, and all parties should negotiate in good faith, whilst the collective agreement, which relates to salaries, should be concluded for a 3-year term. Some indicated that management should accede to employees' demands. This may be far-fetched, especially since management would have to consider a number of factors when increasing employees' salaries, especially when taking into account the country's economic development. Negotiation is usually required before employers consider or accede to employees' demands.

Respondents' recommendations

Respondents showed their knowledge regarding the designation of essential services, and also supported the conclusion of a MSA. It was noted from their responses that all agreed that there is a need to balance the rights of State employees and those of citizens if employees embark on a strike, as the fight to achieve State employees' rights may infringe on citizens' rights. Some of the recommendations that respondents made included that the concerned parties should negotiate a MSA and develop terms of reference so that they can find a way to determine a mutually binding agreement. A reasonable number (or percentage) of the workforce that will be able to continue working during a strike should be determined, and their roles clearly defined. It became clear during past strikes that some services might have been viewed as being more essential than others. Nevertheless, the view was that there should be no blanket rules, with each health care facility addressed individually. The public's needs should be considered when determining this agreement. There was also a view that it should be made compulsory for parties to meet under the umbrella of the Essential Services Committee, because negotiations amongst the respective parties may take too long. Therefore, third party intervention would probably be required to facilitate and enforce an agreement.

4.5 Summary

This chapter presented the research results that were collected from questionnaires, which contained questions that relate to the research problem and research objectives. A total of thirty (30) responses were obtained and the data analysed. The respondents provided

information based on their opinions and their understanding of the questions in the questionnaire. The responses were analysed and interpreted with a view to considering them in relation to the literature. The results were presented as frequency tables. Findings revealed that the respondents' possessed both knowledge of the topic and awareness of the fact that the rights of members of the public health sector to strike might conflict with the citizens' rights to health care, and hence there was agreement that an equilibrium of these rights should be strictly observed.

It was noteworthy that a higher number of management and employees (73%) participated in this research study, compared to the trade union members (27%), which indicated that management was probably more willing to participate in concluding a MSA compared to the trade unions. It was evident from the responses that essential service workers were caught up in conflicting emotions between exercising their own fundamental right to strike and performing their duties and responsibilities in the workplace. Interestingly, the respondents showed awareness of the repercussions of not having an MSA, as essential service employees may not strike unless there is a MSA, and if they do, could face dismissal as the strike will be labelled as unprotected. Most of the respondents supported the conclusion of an MSA. This agreement would serve as a basis for the respective parties to ensure that minimum services are not interrupted in the event of a public service strike. However, much work should be completed for all parties to be satisfied and for the rights of all who are involved to be considered.

This chapter had laid a foundation for the next and final chapter, which presents the research study's concluding remarks and recommendations.

CHAPTER 5

CONCLUDING REMARKS AND RECOMMENDATIONS

5.1 Introduction

The researcher's interpretation and articulation of the research findings were presented in the previous chapter. Implementation of the LRA of 1995 makes provision for the conclusion of an MSA for those employees that are involved in an essential service, allowing such employees to embark on strike action. An MSA has yet not been concluded by parties (employer and trade unions). In the public service strikes of 2007 and 2010, public health workers, who supposedly provide essential services, took part in strike action, hence infringing upon citizens' rights to health care services. Trade unions took advantage of the absence of an MSA by allowing their members to participate in strike action.

The literature and study findings recognise that it is both the fundamental and constitutional right of all employees to strike. Both national and international laws refer to freedom of association and the right of all employees to strike. It should further be noted that, even though all workers have the right to strike, essential service workers may be permitted to strike only if certain conditions are met and under no other circumstances.

The study, therefore, recommends that an MSA should be concluded for essential services to engage in strike activities. The agreement will outline both the duties and responsibilities of the State, as employer, and workers employed by the State to protect their respective interests and to provide quality services to the citizens.

This chapter provides a conclusive overview of the right of essential service workers to strike, as per the results and findings of the research study. It also focuses on providing a summary of the research objectives, followed by conclusions that were drawn from discussions and recommendations presented in Chapter Four.

5.2 Concluding remarks with respect to the study's objectives

The research findings revealed that there are certain services within the public health sector which are essential. The legislative framework that was discussed in Chapter Two mentioned such services and further provides for the conclusion of an MSA to protect both the rights of the employer and employees as far as the right to strike is concerned.

The study has shown that it is both the fundamental and constitutional right of all employees to strike. Both national and international laws refer to freedom of association and the right of all employees to strike. It should be further noted that, even though public service workers have the right to strike, essential service workers may be permitted to strike only if certain conditions are met and under no other circumstances. The conclusion of a Minimum Service Agreement would allow those employees who provide essential services to embark on strike action once such an agreement has been adopted.

The study equally revealed that there are certain services in the public health sector which are regarded as essential services. The legislative framework that was discussed in Chapter Two mentioned such services and further provides for conclusion of an MSA to protect both the rights of the employer and the employees as far as the right to strike are concerned.

The reviewed literature and results of the collected data from questionnaires recognise that the Constitution guarantees all employees the right to strike, and also states that national legislation may be endorsed to regulate bargaining in line with a limitation clause contained in Section 36 of the Constitution. One of the limitations on the right to strike, discussed in this study, is the prohibition of strikes in essential services. Considering the importance of the right to strike, limitations on essential services should be justified, and, in doing so, the justification should be limited. Under the LRA, employers and unions may enter into a collective agreement on minimum services (MSA) to maintain less than the entire essential service, or the entire essential service with reduced staff, but the ESC must ratify such an agreement for it to be effective. In such a case, minimum services become essential services and the remaining services are no longer considered as being essential. In other words, workers that provide minimum services are prohibited from striking, while other workers can participate in strike action.

One of the challenges that parties face in concluding a collective agreement which regulates minimum services within the public service, is the struggle of determining the number or percentage of employees that would need to maintain minimum, essential services in the event of a strike. The parties should be able to discuss whether determination is done on an approved or financed structure, taking into account the institution's vacancies and employees who are on leave. When concluding an MSA, the parties should also be able to identify those services without which citizens' lives would be endangered.

The international tendency is not to predetermine numbers or percentages for minimum services, but rather to allow parties to agree what would constitute a minimum service within a time-frame before commencement of a strike. When parties cannot agree, the matter would

be referred to the ESC which has the requisite authority to make a determination on behalf of the parties.

The purpose of this study was to determine the effective utilisation of mechanisms to manage limitations on the right to strike within the public health sector in the Western Cape in South Africa, as provided for by legislation. The objectives of this study were to:

- Identify categories of employees that may participate in strike action within the public health sector;
- Provide guidance on the number of employees that are required to maintain essential services in the event of strike action in the public health sector; and
- Ensure that the collective agreement regarding minimum services makes provision for enforcement of the agreement for parties to adhere to.
- To provide recommendations which will enhance the establishment of the minimum service agreement.

The results of this study show that the negotiating parties should conclude an MSA framework that will serve as a guiding document to be utilised at institutional level. The respective parties should not agree to a set number or percentage of workers to perform minimum services beforehand but should rather establish a framework of what services would constitute minimum services, which will allow institutions to decide, before the commencement of a strike, the number of employees that will be required to perform these functions. If parties fail to agree at institutional level on the number of employees or the specific work that should be performed, the Essential Services Committee must then make such a determination.

There is congruence between the literature and the research findings in favour of enforcing the agreement with penalties for those who do not adhere to the requirements of the agreement, while those employees who provide the minimum services and decide to join the strike should be penalised individually. In addition, the trade unions must ensure availability of staff, or their members, to provide the minimum service. The collective agreement must make provision for unions to ensure that agreed upon staffing levels of minimum services are maintained during a strike. If more than one union operates within a workplace and all the unions participate in the strike action, then they need to take collective responsibility to deliver the minimum services. Failure to comply should render the strike unprotected and employees should be subjected to disciplinary action, while participating trade unions should be penalised. Furthermore, sanctions should be imposed if parties do not adhere to the MSA's provisions.

5.3 Recommendations

The research problem was that public health sector employees who provide essential services took part in the strike actions of 2007 and 2010, and subsequently infringed on citizens' rights to access health services. The LRA (South Africa, 1997:95) stipulates that if a collective agreement, which regulates the maintenance of minimum service (MSA), is in place, then the other employees within the essential service may participate in strike action. However, there is no collective agreement at the Public Health and Social Development Sectoral Bargaining Council (PHSDBC) which would determine which essential service workers may or may not participate in protected strike action. During strike action, this situation would usually result in patients being left unattended. The maintenance of minimum services (essential services) during protected strike action depends on the conclusion of a collective agreement on minimum services signed between the PHSDBC and trade unions.

The recommendations are that involved parties should conclude an MSA to ensure a balance between the rights of health workers to strike and the rights of citizens who require health care services. To protect everyone's respective interests and provide quality services to citizens, the agreement will need to outline both the duties and responsibilities of the employer and employees.

During strike action, employers are not able to provide citizens with quality health care services owing to their employees being on strike. Citizens are consequently unable to access the public health services to which they have a right. Conclusion of an MSA will benefit all parties, since it will consider the rights of all parties involved and ensure that these rights are not violated in the event of strike action.

Regarding the conclusion of a MSA and the effective management of it to ensure its accomplishment, the study proposes the following:

- Negotiation towards conclusion of a minimum service framework should be done at PSCBC/PHWSDBC level and be filtered down to institutional level, where the designation of employees takes place.
- The minimum service framework should stipulate aspects that the employer has to deal with, such as identifying the minimum services, and identifying the number of workers who will be obliged to deliver these minimum services in various occupational categories. The employer has to ensure that those employees understand the reasons why they are not allowed to engage in strike action and be informed of the possible

disciplinary action that would be taken against them should they renege on the agreement.

- Employees that provide minimum services should realise that they will not be expected to perform the duties of non-minimum service employees in the event of a strike; but employees who do not provide minimum service may be requested to perform the duties of minimum service employees during a strike. For example, if one or two employees from a minimum service sector reported ill on the day of a strike, the employer could request any other employee (from among those who do not provide minimum service) to perform such duties usually performed by those absent.

The principle of 'no work, no pay' is applied in the event of strike resulting from the employee's inability to place his/her services as per his/her contract and decided to participate in a strike action. The employer is not obliged to pay those employees'. It must be noted that the concept of "no work, no pay" is only applied in a situation where an employee has elected not to place their services at your disposal. A concern is that all employees do benefit from the outcome of the strike this could cause a conflict among striking and non-striking employees.

If the above-mentioned recommendations are applied, there will be harmony between the provisions of the Bill of Rights (South Africa, 1996:6-20), as it currently presents a challenge within the public health care system, since public health care workers, as South African citizens, have the right to strike, while the broader society has the right to life and health, which the public health care services provide.

5.4 Study limitations, implications and suggestions for future research

The study mainly focused on the Department of Health in the Western Cape Province. The department has a staff complement of over 30,000.

It is envisaged that this study has achieved its stated objectives, and that it will contribute positively to parties that are negotiating the conclusion of a MSA. One of the problems identified through this research study is the fact that the principle of 'no work, no pay' will only affect the strikers, while those who provide services will be paid, and hence this could escalate the chances of violence during a strike. Therefore, those employees who provide minimum services should be protected in this regard.

This study recommends that the Minimum Service framework be negotiated by the parties at the bargaining councils, either by the PSCBC and/or the PHSDSBC, and it should do the following:

- Identify the ESC's designated public health sector's essential services (*Government Gazette*);
- Specify the number of employees that should be employed in the designated essential services, per post title;
- Identify the minimum services, and the number of employees that should provide minimum services;
- Identify the number of employees that should be at work as part of the minimum service in the event of a strike, in terms of specific occupations and functions;
- Identify the number of employees in the designated service who may participate in the strike;
- Identify the number of employees on the staff of the employer that perform essential services;
- Specify who is covered by the agreement;
- Confirm that employees who provide minimum services may not participate in strikes;
- Emphasise that minimum services employees will not be expected to provide the services of those employees who would not be providing minimum service during the strike;
- Provide instances that will allow those employees who fall outside the scope of minimum service to perform the duties of minimum service employees; for example, should the latter be absent from work during a strike;
- Confirm that, should minimum service employees embark on strike action, they will be subject to disciplinary action;
- Confirm that the trade unions that are party to the agreement will be expected to ensure that their members are present to perform minimum services, and that failure to do so may result in the trade union being fined;
- Stipulate how the 'no work, no pay principle will be applied;
- Establish the mechanism for a minimum services review after a strike; and
- Establish a Strike Management Committee at provincial and institutional level.

The framework must include all possible penalties that should be taken against the trade unions, employees and employers, should any of them fail to comply with the agreement. A Strike Management Team should be established and one of their functions would be to guarantee the maintenance of minimum services during the strike. Review of the minimum

services will be crucial, and the MSA should provide for such a process and mechanisms to ascertain its sufficiency. The MSA will be ratified by the ESC, as requested by the LRA.

The study was able to achieve all the set objectives, including proposing a framework that would assist to ensure the effective management of an MSA within the public health sector. However, for future research, it is advised that the research objectives should be treated individually for intensive further research. The study only focused on the Western Cape Province but has the potential to be conducted nationally and include other stakeholders, such as beneficiaries of the services that the public health sector provides.

5.5 Conclusion

This research study aimed to assist parties to reach an amicable collective agreement on minimum services (MSA). The impact of failure to settle such an agreement will be far-reaching in the event of another public service strike.

South Africans live in a country that has a Constitution which confers several rights and freedoms on its citizens. The problems begin when one person violates someone else's right in the process of practising his or her own. According to the Constitution, all citizens have the right to life; for health care services to be accessible to everyone, including reproductive health care and emergency medical treatment. Contrary to this right, the Constitution guarantees everyone the right to strike, with serious consequences. For instance, the media often reports on health care services being interrupted across the country as a result of health workers striking. This often results in an infringement of some citizens' rights, whilst other citizens practise their right to strike. As a result of what transpired during the 2007 and 2010 public service strikes, different sectors have called for the conclusion of a MSA, as provided for in the LRA, to enable those employees who do not provide an essential service within an essential service designate, to strike. The challenge that arises within the public service is balancing the right of workers to strike against other essential rights of citizens, for example, the right to food, water, health care, social assistance and the right to access the courts. Even more complicating is that, when workers decide to act on their right to strike, they indirectly also deprive themselves of their own right to, amongst others, food, water, health care, social assistance, as well as the right to access the courts.

Unions have substantially contributed towards achieving freedom in South Africa, while the 'struggle' provided them with gains such as centralised collective bargaining and the right to strike. However, these gains are not allowed for use in the application of essential and minimum services. The respective parties should find a solution to determine minimum

services within the Public Service. The proposed conceptualisation of reaching an agreement, based on the total number of employees that should be designated as minimum services employees, has not produced the required results. Public servants have an ethical responsibility to deliver services to citizens to ensure the State's optimal functioning. However, they should also exercise the right to strike to promote and defend legitimately their economic and social interests.

Finding the right balance will necessitate a paradigm shift from parties and a willingness to compromise. This can only be achieved in the creation of an environment that specifically caters for the unique needs and environment of the public service.

Respondents in this study alluded to the fact that employees that provide essential services have the right to strike, provided certain circumstances are met. The respondents also reiterated that there is a need for a MSA in the essential services sector within the Department of Health in order to strike a balance between the rights of all parties.

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APPENDIX A

Research Participant Informed Consent Form for Essential Service Questionnaire

Title of research study

The effectiveness of the mechanisms to manage strikes for essential services in the public health sector, Western Cape, South Africa

Researcher: Ms Zoliswa Rikwe

Supervisor: Ms Liiza Gie

Introduction

You are invited to complete the questionnaire regarding striking within essential services in the public health sector. Please note that taking part in this research is entirely voluntary. Should you wish to participate, please sign the form below, indicating your willingness to participate.

Purpose of the research

The purpose of these questions is to assist with the study, which deals with the right to strike within essential services in the public health sector, aiming to explore mechanisms, which are available so that essential services are not disrupted, should public service employees embark on strike action in future.

Research method

This research study is limited to the Western Cape Department of Health. The researcher will email questionnaires to participants, while some will be hand-delivered. The questions are open-ended and a brief explanation of strike in essential service will be included. In receipt of the questionnaires, the researcher will analyze the data and make recommendations. The results of this study will be shared with the Western Cape Health Department and participants, upon request. Please submit the questionnaire on or before 15 October 2015 via email Zoliswa.Rikwe@westerncape.gov.za

Potential benefits

The research outcomes will serve as guidelines for the parties to complete a minimum service agreement, which will allow other employees within an essential service establishment to participate in strike action.

Statement of confidentiality

Confidentiality of responses will be ensured and no person will be prejudiced for participating in this study, while quality control and secure storage of data will be maintained. All participants will remain anonymous and no probability of harm is expected.

Contact information for questions and concerns

For any queries about this research or clarity around questions, please contact the researcher, Zoliswa Rikwe, at (021) 483 3969 or email Zoliswa.Rikwe@westerncape.gov.za.

Signature of participant

Date

Questions

Essential service is defined as the interruption of those services that, if not rendered, may endanger life, personal safety or the health of the whole or part of the population.

Questions

Essential service is defined as the interruption of those services that if not rendered may endanger life, personal safety or health of the whole or part of the population.

1. What are essential services in the Public Sector?

2. Who determines what constitute essential services and how?

3. What type of services that can be designated essential services?

4. What is the nature and functions performed by the workers in the public health sector?

5. In the event of strike who is allowed to participate within the essential service designate?

6. Should the public health sector embark on a strike action in future, what are the measures in place to ensure that the essential services are not interrupted?

7. Section 72 of the Labour Relations Act of 1995 (Minimum services) states that:

The essential services committee may ratify any collective agreement that provides for the maintenance of minimum services in a service designated as an essential service, in which case -

- a. the agreed minimum services are to be regarded as an essential service in respect of the employer and its employees;

How would you interpret the above section? Or what is your understanding of the above-mention section?

8. Do you think that the conclusion of the minimum service agreement through collective bargaining may be the best alternate means of ensuring continued essential services in the event of a strike action?

9. How would parties identify those services that their interruption might endanger life, personal health, safety of the whole or part of the population?

10. What are most important factors that need to be taken into account by parties negotiating for the maintenance of minimum services during strike action?

11. What are the challenges faced by parties in concluding such agreement?

12. If the parties conclude the agreement, what is the monitoring tool should be utilised to ensure compliance with the maintenance of minimum service agreement in the event of the strike action?

13. What are the repercussions for the employer of not having the MSA in place?

14. What are the repercussions for the employees of not having the MSA in place?

15. What are other mechanisms that are there to ensure continued services during public service strike in particular in services designated essential?

16. Which services have been designated essential? Or which services has to be designated essential?

17. Under what conditions may essential services employees embark on a strike action?

18. What are the impacts to the employer when services are not rendered?

19. Should the minimum service agreement be agreed upon, how it will be implemented given the fact that the employer will implement a no work, no pay principle to striking workers.

20. As essential service worker what is the impact to you personally if there's a strike?

21. Is essential service designation bad for the union or employer? Substantiate your answer.

22. In your opinion how could strike action be prevented in the public health sector?

23. Any recommendations can you suggest towards achieving the MSA.

APPENDIX B



DIRECTORATE LABOUR RELATIONS

John.Barends@pgwc.gov.za
Tel: +27 21 483 3276 : 021 483 3952
4 Dorp Street, Cape Town, 8001
PO Box 2060, Cape Town, 8000
www.capegateway.gov.za

REFERENCE: 5/5

ENQUIRIES: Mr J Barends

Ms Z Rikwe

Directorate: Labour Relations

For Attention: Ms Rikwe

SUBJECT: REQUEST PERMISSION TO CONDUCT RESEARCH: MTECH DEGREE IN HRM

The above-mentioned matter refers.

Please be advised that I have considered your request and decided to grant you permission to utilise the existing Departmental information on strike actions and to collect any other information that may be of assistance to you.

It would be appreciated if you issue us with your final research document in completion of your study.

We wish you luck in this regard.

Kind regards

A handwritten signature in black ink, appearing to be 'JAA', written over a horizontal line.

CHIEF DIRECTOR: PEOPLE MANAGEMENT

DATE: 15.05.22

