Why are there so few minimum service level agreements? A case study of a metropolitan municipality.

Research dissertation presented for the approval of Senate in fulfilment of part of the requirements for the Degree of Master of Philosophy in Labour Law in approved courses and a minor dissertation paper. The other part of the requirement for this qualification was the completion of a programme of courses.

I hereby declare that I have read and understood the regulations governing the submission of Degree of Master of Philosophy in Labour Law dissertation, including those relating to length and plagiarism, as contained in the rules of this University, and that this dissertation conforms to those regulations.

Roger Ronnie
RNNROG001
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Supervisor: Dr Shane Godfrey

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Abstract

In terms of the South African Constitution, every worker has the right to strike. This right is regulated in the Labour Relations Act. Workers engaged in essential services are prohibited from striking. The prohibition does not apply if a minimum service level agreement, guaranteeing services in the event of a strike, has been concluded between employers and trade unions. The Essential Services Committee, established under the Labour Relations Act (the Act), must ratify these agreements before they become effective.

More than two decades after the LRA was promulgated, very few ratified minimum service level agreements have been concluded in the municipal sector. This study explores the reasons for this and suggests legislative and policy interventions that could be considered on a sector wide basis.

The study is by way of a single-case study of a metropolitan municipality. Data were obtained from two sources: 14 semi-structured interviews with participants and from an analysis of documents relevant to the regulation of essential services.

The study established that the legislative framework for regulating essential services in South Africa is consistent with the principles and decisions laid down by the International Labour Organisation. It however does not provide guidelines for determining minimum service levels. An apparent unevenness between the representatives of the negotiating counterparts exists in the municipal sector in South Africa. Many of the party representatives negotiating minimum service levels, do not work in designated essential services or possess relevant technical skills.

The findings of the study suggest steps that could be taken to strengthen the capacity of the Essential Services Committee to assist parties in the municipal sector to conclude minimum service agreements and build the negotiating capacity of the parties. The study also makes recommendations regarding improved participation by essential service workers and the broader community in the process.

Key words: collective bargaining; dispute; strike; essentials services; minimum services; municipal sector

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Thanks must also go to Emeritus Professor Darcy du Toit and to my good friend and comrade Mario Jacobs for keeping me enthused by allowing me to co-author journal articles and a book chapter with them about strikes and essential services. To my colleagues at the Social Law Project at UWC, thanks for always been so accommodating. I however carry full responsibility for what is in this dissertation.

To my supervisor Dr Shane Godfrey, a special word of thanks. When I was running behind the agreed schedule, you considerately listened to the reasons and provided guidance. I would also like to express my thanks to the participants who willingly gave of their time and knowledge to allow me to complete this study.

To Linda and the rest of my family, who assisted and propped up an almost senior citizen to put together a hopefully coherent piece of work, a big thank you.

Finally, I would like to dedicate this dissertation to the late Petrus Mashishi, founding president of the South African Municipal Workers Union. The strongest, but most humble, trade unionist I have known and had the pleasure of working alongside. A true giant of the workers' movement.

List of Acronyms

CC	Constitutional Court
CCMA	Commission for Conciliation Mediation and Arbitration
COGTA	Department of Cooperative Governance and Traditional Affairs
COSATU	Congress of South African Trade Unions
DLC	Directorate Labour Committee
ESC	Essential Services Committee
IMATU	Independent Municipal and Allied Trade Union
ILO	International Labour Organisation
LAC	Labour Appeal Court
LLF	Local Labour Forum
LRA	Labour Relations Act
MCA	Main Collective Agreement
MSA	Minimum Services Agreement
MSD	Minimum Services Determination
NLRF	National Labour Relations Forum
NEDLAC	National Economic Development and Labour Council
NEHAWU	National Education Health and Allied Workers Union
OLGA	Organised Local Government Act
SALGA	South African Local Government Association
SALGBC	South African Local Government Bargaining Council
SAMWU	South African Municipal Workers Union

Appendices

Tables and Figures

Table of Contents

1. CHAPTER ONE

1.1 Introduction

It is widely regarded that the right to strike is an integral part of the right to bargain collectively and is a '*legitimate and indeed essential means available to workers for furthering and defending their occupational rights*.'[1]

Convention No. 87 of the International Labour Organisation (ILO) deals with freedom of association and the protection of the right to organise in the workplace. While it does not explicitly refer to a right to strike, the supervisory bodies of the ILO[2], however, have recognised the convention as incorporating this right.[3] These supervisory committees of the ILO have however also been quite explicit that the right to strike can be curtailed in the case of public servants and workers engaged in essential services. [4]

The South African Constitution provides that 'everyone has the right to strike'.[5] It makes provision that:

> Every trade union, employers' organisation and employer has the right to engage in collective bargaining. National legislation may be enacted to regulate collective bargaining. To the extent that the legislation may limit a right in this Chapter, the limitation must comply with section 36 (1)[6]

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[1] J Servais 'The ILO law and the freedom to strike'. Paper presented to University of Toronto Symposium, 2009 at 2.
[2] The two supervisory bodies of the ILO, sub-committees of the governing body, are the Freedom of Association Committee and the Committee of Experts on the Application of Conventions and Recommendations. They consider complaints referred to the ILO in respect of alleged violations of trade union rights and monitor compliance with conventions and recommendations of the ILO.
[3] B Gernigon, A Odero and H Guido 'ILO Principles concerning the right to strike*' (*1998) 137 *International Labour Review* 4 at 442.
[4] Ibid at 448.
[5] Section 23 (2)(c) of the Constitution.
[6] Section 23(5) of the Constitution.

Collective bargaining in South Africa is regulated in the Labour Relations Act (LRA)[7]. Amongst others, the LRA, consistent with established ILO principles, prohibits strikes in essential services. Strikes are however permitted in designated essential services if a minimum service level has been agreed between employer and trade unions or determined by an Essential Services Committee (ESC) established in terms of the LRA.

The South African experience however is characterised by an absence of minimum service agreements[8]and a high incidence of often violent and prolonged strikes in designated essential services. According to Roskam, unions lay the blame for the absence of minimum service agreements at the door of the employer, claiming it is a strategy of employers to deny many workers the right to strike by refusing to enter into minimum service agreements, thereby weakening the bargaining powers of employees.[9] On the flipside, many workers engaged in essential services have shown a complete disregard for the limitation of their right to strike and have simply embarked on unprotected strikes.[10]

The general response historically has been to call for sterner action to be taken against striking public sector workers engaged in essential services. What is not considered is whether the existing regulatory framework and its application is in part to blame for the strikes in essential services.

The focus of this study is on the absence of minimum service agreements in the South African municipal sector. For this purpose, a single-case study approach is adopted. The study also examines the way the regulatory framework is understood by parties charged with concluding minimum service agreements and the ability of the parties to engage constructively in pursuance of minimum service collective

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[7] Act No. 66 of 1995. The right to strike is often included in national legislation dealing with collective bargaining. See ILO general survey of the reports on the Freedom of association and the right to organise convention (no 87) and the right to organise and collective bargaining convention (No 98), 1949 (1994) at para 144.

[8] Both the South African Local Government Bargaining Council and the Public Service Co-ordinating Bargaining Council have concluded framework agreements to guide the conclusion of minimum service level agreements at institution level, yet no agreements have been ratified.

[9] A Roskam 'Draft - Essential and minimum services and the right to strike' (2009) DPRU, UCT at 5.

[10] Ibid.

agreements. The context is dealt with in more detail in chapter 5 of this dissertation where the case study is introduced.

The primary research questions in this study are:

a. Why have employers and trade unions in the municipal sector in South Africa failed to conclude minimum service agreements as provided for in the LRA?
b. To what extent does the current regulatory provisions hinder or promote the conclusion of minimum service agreements?

Secondary questions are:

a. To what extent do parties prepare for minimum service agreement negotiations?
b. To what extent does compulsory interest arbitration compensate for the prohibition of strike rights?
c. How has the functioning of the ESC changed post the 2014 amendments?

The study seeks to contribute to the identification by stakeholder parties of the strengths and weaknesses within the current regulatory framework and its application. This, I submit, will contribute to the development of a balance between the constitutional right of workers to embark on strike action and the right of communities to receive essential municipal services. To my knowledge, there is no other empirical research on the issues covered by this study.

1.2 Dissertation Outline

The dissertation is structured as follows:

Chapter 1 introduces the research topic being undertaken. It identifies the research problem and highlights how it seeks to contribute to the understanding of essential services and minimum service agreements. Brief contextual information is provided to ensure an understanding of the setting within which the study takes place. The chapter also highlights the significance of the research to practitioners. The primary and secondary research questions are set out. The chapter concludes with the dissertation structure.

Chapter 2 provides a literature and legal analysis on the right to strike in an international context; the definition, role and consequences of strikes in essential services; and the resolutions and decisions of the ILO's supervisory bodies on strikes in essential services. It also describes the concept of a 'minimum service' and how the provision of essential services to the broader population is meant to be guaranteed without undermining the collective bargaining rights, including the right to strike, of workers.

Chapter 3 investigates the development of the right to strike in South Africa from a legal perspective. This incorporates the legal provisions in respect of strikes in essential services pre-1994, provisions introduced by the 1995 LRA, and the 2014 amendments to the essential service provisions of the LRA. It also comments on the impact of these recent amendments to increasing the number of ratified minimum service agreements and minimum services determinations. This chapter also examines the role of the Essential Service Committee pre and post the 2014 amendments and its functions and powers as provided for in the law and as interpreted by the courts. Minimum service agreements, from a South African legal and practical perspective, are also discussed.

Chapter 4 describes the methodology and research design employed by this study. The use of the case study approach is described and justified, as are the qualitative methods used to collect the data. The selection process and final sample of interviewees are presented. Analytic techniques used in the data analysis process are explained. The ethical considerations of the study have also been included.

Chapter 5 examines the constitutional and legal responsibilities and structure of municipalities as providers of services and, as employers. It also introduces the metropolitan municipality case study Ximafana (a pseudonym). The chapter also examines collective bargaining arrangements in the municipal sector under the jurisdiction of the South African Local Government Bargaining Council (SALGBC) and how the parties to the SALGBC have agreed to facilitate and guide the conclusion of minimum service agreements.

Chapter 6 presents the findings and the analysis of the case study. It describes what steps employers and trade union parties have undertaken to build the capacity of their representatives to negotiate minimum service agreements; how proposals and counter-proposals are respectively developed and whether a balance of interests can be achieved through the process of negotiated minimum service agreements and/or by the imposition of minimum service levels on the parties by the Essential Service Committee.

Chapter 7 incorporates concluding remarks. It also details suggested recommendations, based on the findings of the Ximafana case study, that could be considered to improve the way in which essential services and minimum service levels are addressed in the municipal sector. Finally, it sets out the limitations of the study and makes suggestions for further research.

1.2 Conclusion

In the next two chapters, I provide a literature and legal analysis of collective bargaining, the right to strike and, the regulatory regimes in respect of essential and minimum services, in an international and national context

2. CHAPTER TWO

2.1 Introduction

This chapter will describe the link between collective bargaining and the right to strike in an international context. It will then examine dispute resolution processes within essential services by first, explaining how an essential service has been defined and how it is intended to balance the collective bargaining rights of workers and the rights of the broader society to basic services. Second, it examines how disputes and strikes in essential services are regulated within an international and national context. Third, the chapter describes the concept of minimum services as an instrument intended to ensure that essential services are provided without undermining the collective bargaining rights of workers; their access to appropriate dispute resolution mechanisms; and the protection of their right to strike, while, at the same time, guaranteeing the rights of the broader population to essential services.

2.2 Collective bargaining and the right to strike

It is widely accepted that the right of workers to strike and their right to bargain collectively are inextricably linked. The bargaining power of workers who are prohibited from striking is diminished.[11]

2.2.1 International Principles

Article 3 of Convention 87[12] of the International Labour Organisation (ILO) [13] provides that '[w]orkers…. shall have the right to draw up their constitutions and, rules to elect their representatives in full freedom and to organise their administration

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[11] C Cooper 'Strikes in essential services' (1994) 15 *ILJ* 903 at 903.

[12] The principle ILO instruments from which the right to strike derives are the Freedom of Association and Protection of the Protection of the Right to Organize Convention, 1948 (No. 87), and the Right to Organize and Collective Bargaining Convention, 1949 (No. 98). South Africa ratified both these conventions on 19 February 1996.

[13] The ILO is a tripartite U.N. agency. Established in 1919 the ILO brings together governments, employers and workers of 187-member States to set labour standards, develop policies and devise programmes promoting decent work for all women and men. See http://www.ilo.org/global/about-the-ilo/lang--en/index.htm

and activities and to formulate their programmes.'[14] Activities and programmes are taken to include collective bargaining and a corresponding right to strike.[15]

Strike action is seen as a legitimate means through which workers are able to promote and defend their economic and social interests.[16] According to the ILO, *(t)he right to strike is an intrinsic corollary to the right to organize protected by Convention No. 87.'*[17] According to Jacobs, collective bargaining without the right to strike amounts to collective begging.[18]

The right to collective bargaining and the right to strike are necessary to serve as a counterbalancing force to the greater social and economic power of the employer.[19] The right to strike is an important component of a successful collective bargaining system.[20] It is more frequently entrenched in constitutions as a fundamental right, than the right of employers to lock out workers.[21]

The ILO considers it permissible for strikes to be restricted or completely prohibited in certain circumstances. The ILO's supervisory committees[22] have endorsed the limitation of strike action in essential services. Services defined in this way often carry with them major restrictions or even prohibitions of the right to strike.[23]

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[14] ILO C 87 Freedom of association and the protection of the right to organize convention, 1948. South Africa ratified this convention on 19 February 1996. Section 23(4)(e) of the South African Constitution has an almost identical clause providing that 'every trade union and employers' organisation has the right to determine its own administration, programmes and activities.'
[15] Servais (fn 1) at 3.
[16] ILO Digest of decisions and principles of the Freedom of Association Committee of the governing body of the ILO (2006) at para 522.
[17] Ibid at para 523.
[18] A Jacobs ' The law of strikes and lock outs ' in R Blanpain (Ed) *Comparative labour law and industrial relations in industrialised market economies* 10 ed (2010) 659 at 650.
[19] B Hepple 'The right to strike in an international context' 15 *Canadian Lab. & Emp. L.J*. 133 (2009) at 140.
[20] NUMSA and others v Bader Bop (Pty) Ltd and another 2003 (2) BCLR 182 (CC) at para 13 cited in SAPS v POPCRU and another (2011) BLLR 831(CC) at para 19.
[21] Re: Certification of the Constitution of the Republic of South Africa, 1996 (10) BCLR 1253 (CC) at para 66 cited in SAPS v POPCRU and another (2011) 9 BLLR 831 (CC) at para 19.
[22] See fn 2 for the explanation of the ILO supervisory bodies.
[23] Gernigon et al (fn 3) at 450.

2.2.2 The ILO definition of essential services

The ILO has long held the position that essential services must be interpreted in very narrow terms.[24] The right to strike would lose all meaning if national legislation defined essential services in too broad a manner.[25] The ILO Committee of Experts, as far back as 1983, defined essential services as *'services, the interruption of which would endanger the life, personal safety or health of the whole or a part of the population.'* This definition is often referred to as essential services in the strict sense. [26]

To determine situations in which a strike could be prohibited, the criterion that must be established is the existence of a clear and imminent threat to the life, personal safety or health of the whole or part of the population. Also, what is meant by essential services in the strict sense of the term depends to a large extent on the circumstances prevailing in a country.[27]

No conclusive list on what constitutes essential and non-essential services has been agreed on at the ILO. From the cases that have come before the supervisory bodies of the ILO[28], certain services have been found to be essential and others non-essential. Amongst the services deemed to be essential are hospital services; electricity services; water supply services; the telephone service; police and the armed forces; fire-fighting services; public and private prison services; and, the provision of food to pupils of school age.[29]

According to Gernigon et al, the concept of an essential service, as provided for in law, assumes different applications dependent on the circumstances in each country. In some instances, essential services are referred to in situations where strikes are not prohibited but a minimum service is required. In other cases, the

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[24] R le Roux and T Cohen 'Understanding the limitations to the right to strike in essential and public services in the SADC Region' *Per/PELJ* 2016(19) 4.
[25] ILO (fn 22)) at para 159. See also Servais (fn 1) at 5.
[26] B Gernigon et al (fn 3) at 450.
[27] ILO (fn 22) at para 581 -582. See also the ILO 'General Survey of the Reports on the Freedom of Association and the Right to Organize Convention (No 87) 1948 and the Right to Organize and Collective Bargaining Convention (No 98) 1949 (1994)' at para 159 - 160.
[28] See fn 2 for a description of the supervisory bodies of the ILO.
[29] ILO ((fn 22) at para 585.

concept of essential services is applied more restrictively including the prohibition of strikes.[30]

Services held to be non-essential and which are in some way related to the municipal sector are construction; metropolitan transport; refuse collection; and computer services for the collection of excise duties and taxes. This list is not exhaustive[31]

Four key principles[32] can be extracted from the principles established by the ILO in respect of the right to strike insofar as these relate to essential services. First, a minimum service may be imposed in instances where it is necessary to ensure the safety of persons. Second, while the use of replacement labour impinges on workers' right to strike, this is acceptable where an essential service is involved. Third, minimum services may be established in public utility services, the determination of which should be decided by trade unions and the relevant authority. Fourth, a back to work order is admissible in the event of a strike in an essential service.

Ackerman states that the use of the armed forces or other persons to deliver services that have been suspended as a result of strike action and to place these workers onto the premises of the service delivery authority is also admissible.[33]

Strikes in essential services are restricted in many countries where workers otherwise enjoy the right to strike. The restrictions can take the form of an outright ban in the case of workers providing essential services in the strict sense. The restrictions can also require much longer strike notice periods, including what is termed a 'cooling off' period, before strike action can be embarked on.[34]

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[30] See Gernigon et al (fn 3) at 450 – 452 for a fuller exposition of how this principle has been applied. See also Roskam (fn 9) 26 – 54 for a comparative study of Canada, Italy, Brazil, Denmark, India and Chile.
[31] ILO (fn 22) at para 587.
[32] Ibid at 476 and 477. The authors list a total of 13 principles on the application of the right to strike, that can be extracted from the decisions of the ILO supervisory committees.
[33] M Ackerman 'The right to strike in essential services in MERCOSUR countries' *International Labour Review* (1994) 133 *International Labour Review* 389.
[34] ILO (fn 22) at para 553 and 554.

If the right to strike is subject to restrictions or a prohibition, workers who are denied the right to strike in defence of their socio-economic interests should have access to compensatory measures. This could include expeditious conciliation and mediation procedures leading, in the event of deadlock, to compulsory arbitration. It is imperative that workers can participate in determining and implementing an impartial arbitration procedure, the outcome of which is binding on all parties and implemented speedily and in total.[35]

2.2.3 The concept of a minimum service

The ILO Committee on Freedom of Association (CFA) has determined that a minimum service may be introduced or imposed in a service that has been determined to be an essential service in the strict sense; services that are not necessarily essential in the strict sense but where an interruption of the service could result in an 'acute national crisis endangering the normal living conditions of the population'; and, the public provision of 'fundamental services'.[36] The Committee went no further in identifying what constitutes an adequate level of minimum services.

The CFA was however very explicit regarding the means by which a minimum service should be determined. It specifically held that:

> 'The determination of minimum services and the minimum number of workers providing them should involve not only the public authorities, but also the relevant employers' and workers' organizations. This not only allows a careful exchange of viewpoints 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 a strike has come to nothing because of over-generous and unilaterally fixed minimum services.'[37]

Negotiations to determine the applicable minimum service should, according to the CFA, ideally not take place during a labour dispute. This, the committee held,

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[35] ILO (fn 33) at para 164. See also Gernigon et al (fn 3) at 450.
[36] ILO (fn 22) at 606 and 607.
[37] Ibid at 612.

will contribute to the parties conducting the negotiations in an objective and detached way.[38] The CFA is equally clear that if parties are unable to reach an agreement on what constitutes a specific minimum service, legislation should make provision for any dispute to be settled by an independent body.[39]

2.4 Dispute Resolution

2.4.1 Compulsory Interest Arbitration

Compulsory interest arbitration to end a dispute has been found to be acceptable by the CFA, if strikes are prohibited in essential services in the strict sense.[40] Workers who are denied the right to strike should be provided with 'adequate, impartial and speedy conciliation and arbitration proceedings in which the parties concerned can take part at every stage and in which the awards, once made, are fully and promptly implemented.'[41] The CFA has decided that the legislative power to approve public spending should not negatively impact on or undermine compliance with the terms of any interest arbitration award.[42] Put differently, no authority responsible in law for approving government spending should, in any way, block compliance with the terms of an interest arbitration award on financial grounds. If not prescribed in the above terms or if parties do not voluntarily agree to it, then such actions have been held to be contrary to the right of trade unions to freely organise their activities.[43]

Feuille, cited in Rose, states that there are five criteria for testing the effectiveness of compulsory arbitration in respect of essential services.[44] These are:

- whether the process protects public interest by preventing strikes;
- whether it protects worker interests by providing speedy dispute resolution with outcomes that are similar to other settlements;

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[38] Ibid at 561.
[39] Ibid at 614.
[40] Ibid at 564.
[41] Ibid at 596.
[42] Servais (fn 1) at 9.
[43] ILO (fn 22) at 565.
[44] Joseph Rose 'Regulating and Resolving Public Sector Disputes in *Canada' Journal of Industrial Relations* v.50, no.4, Sept 2008 at 549-559.

- whether it balances the contesting interests by encouraging compliance with awards thereby avoiding further strive and conflict;
- whether it prevents direct interference by government in the dispute; and
- whether it inhibits genuine collective bargaining.

According to Rose, a 'considerable amount of criticism' of compulsory arbitration from both employer and employee parties is present in Canada.[45] Findings from studies that spanned different levels and institutions in the Canadian public sector reveal that compulsory arbitration is 'associated with low settlement rates' and 'higher settlement costs.'[46]

Given the findings of these studies, Rose questions why there is not greater acceptance of extending the right to strike to all public sector workers. Rose argues, that this will not lead to a greater number of strikes. Studies confirm that the number of strikes in the public sector are between 25 per cent and 50 per cent less than in the private sector.[47]

2.5 Conclusion

In this chapter, I examined the relationship between collective bargaining and the right to strike within the context of essential services at an international level. The Canadian experience, as articulated by Rose, suggests to me that the principles established by the ILO, specifically those relating to compulsory interest arbitration, are not without their problems. The next chapter examines collective bargaining and the right to strike in South Africa. It also examines dispute resolution and the regulation of essential services in the South African context.

[45] Ibid at 550.
[46] Ibid at 552.
[47] Ibid at 552.

3. CHAPTER THREE

3.1 Introduction

This chapter will examine the right to strike in essential services in South Africa as regulated by law inclusive of the amendments to the LRA promulgated in 2014; the power and functions of the Essential Services Committee (ESC); the concept of minimum services as applied in South Africa; and, the extent to which minimum service agreements have been concluded.

3.2 Collective bargaining and right to strike in South Africa

The drafters[48] of the 1995 LRA[49], on the back of the increase in strike action, were of the view that South African labour law, at the time, had failed badly in its objective to prevent and resolve disputes, thereby reducing the number of strikes. This view was shared by trade unions and employers who considered many of the strikes unnecessary. These parties claimed that the reasons for this situation were both institutional and legal.[50] The introduction of an independent dispute resolution body, the Commission for Conciliation Mediation and Arbitration (CCMA), was aimed at enhancing dispute resolution in both the private and public sectors.

The drafters of the LRA were also explicit in declaring that 'the regulation of the right to strike by the LRA…. does not pass constitutional muster.'[51] To address this, the 1995 LRA made provision for a simplified procedure for a protected strike

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[48] The government established a Ministerial Legal Task Team to review South Africa's labour legislation in order to, amongst others, ensure that legislation gave effect to South Africa's commitments as a member of the ILO and that it complied with the provisions of the South African Constitution. To this end, it drafted what was to become the 1995 LRA.

[49] Act 66 of 1995

[50] 'Explanatory Memorandum' (1995) 16 ILJ 278 at 300.

[51] Ibid

or lock-out.[52] If an issue in dispute has been referred to a bargaining council or the CCMA for conciliation and, a certificate stating that the issue in dispute has not been resolved or a period of 30 days has elapsed since the issue in dispute had been referred, a party may choose to go on strike or, in the case of an employer, apply a lock-out. Forty-eight hours written notice of a strike or lock-out must be given. The notice period applicable in situations where the State is the employer is 7 days.

The failure of labour legislation, at the time, to meet its objective of preventing strikes in essential services was another problem identified by the drafters. [53] Section 46(1), read with section 65 of the 1956 LRA, had stipulated that local authorities and their employees, and employers other than a local authority providing 'light, power, water, sanitation, passenger transportation or fire extinguishing services' were prohibited from striking.[54] The 1995 LRA, at section 65, stipulates that participation by persons engaged in an essential service in a strike or a lock-out is prohibited.

Pre-1995 legislation also did not allow for forms of self-regulation but did allow government to declare certain industries essential eg the perishable food industry, certain sections of the food and canning industry and, employers and employees engaged in the supply or distribution of petrol or other fuels used by local authorities.[55] According to Pillay, this prohibition included services that did not fit into the ILO definition of essential services in the strict sense.[56] Legislation, at the time, also allowed for criminal sanctions, including imprisonment, for any transgression of the law.[57]

Even before the adoption of the Constitution and the promulgation of the 1995 LRA, South African courts had occasion to consider the nature of the relationship between the right to bargain collectively and the right to strike. This was

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[52] Section 64 of Act 66 of 1995.
[53] Explanatory Memorandum (fn 54) at 301.
[54] Labour Relations Act No 8 of 1956 at section 46 read with section 65.
[55] Ibid at section 46(7).
[56] D Pillay 'Essential services under the new LRA' (2001) 22 *ILJ* 1 at 1.
[57] T Cohen and R Le Roux 'Limitations of the right to strike in the public sector and essential services' in B Hepple et al (eds) *Laws against strikes – The South African Experience in an international and comparative perspective (*2016) at 113.

in matters that came before the old Industrial Court under the erstwhile unfair labour practice provisions of the 1956 Labour Relations Act.[58]

The 1995 LRA however provides very significant protection to the right to strike. This right flows from section 23 of the Constitution that provides that every worker has the right to participate in the activities and programmes of a trade union. It goes further to provide that '[e]very trade union, employers' organisation and employer has the right to engage in collective bargaining' and that '[n]ational legislation may be enacted to regulate collective bargaining.' These constitutional rights are given legislative effect in the LRA.

In *NUMSA v Bader Bop*[59], the Constitutional Court (CC) held that the right to strike 'is of importance for the dignity of workers who in our constitutional order may not be treated as coerced employees' and that 'it is through industrial action that workers are able to assert bargaining power in industrial relations.'

The CC, in an *ex parte* certification judgment on whether the proposed Constitution complied with the principles enshrined in the Interim Constitution, dismissed an employer submission that an employer's right to lock-out workers is equivalent to the right of workers to strike. Collective bargaining, the CC held, is premised on the unequal nature of the relationship between an employer and an individual employee and that strike action is part of a worker's armoury.[60]

The right to strike afforded by the Constitution is however a qualified right. The Constitution allows for national legislation to be enacted to regulate collective bargaining. To the extent that legislation may limit the right to strike, the limitation must comply with the provisions section 36 (1) of the Constitution.[61]

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[58] See National Union of Mineworkers v East Rand Gold & Uranium Co Ltd (1991) 12 ILJ 1221 (A) and Food & Allied Workers Union v Spekenham Supreme (2) (1988) 9 ILJ 628 (IC).
[59] National Union of Metalworkers of SA and Others v Bader Bop (Pty) Ltd and Another (2003)24 ILJ 305 (CC) at para 13.
[60] Ex Parte Chairperson of the Constitutional Assembly: In Re Certification of the Constitution of the Republic of South Africa (1996) 17 *ILJ* 821 (CC). See para 66.
[61] Section 36 provides that:

> Limitation of rights. (1) The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account

Collective bargaining is regulated by the LRA.[62] Key purposes of the LRA are to give effect to the 'obligations incurred by the Republic as a member state of the ILO'[63] and, to 'promote orderly collective bargaining '[and] the effective resolution of labour disputes.'[64] It has been determined by the ILO that once a right to collective bargaining is recognised, implicit within it will be the right to exercise some economic power against other parties in collective bargaining.[65] The LRA goes beyond this and specifically recognises the right to strike.[66]

Granting this right to strike, in contrast to the more limited 'recourse' to lock-out, that it bestows on employers, illustrates a further means by which the LRA attempts to bring about a shift in the balance of power between employers and employees.[67] The LRA framework for regulating strikes does however, amongst other procedural and substantive regulations, prohibit strike action (and lock-outs) in services that have been designated as essential services.[68] This limitation to the right to strike has not been challenged and I would argue that, when considered against the ILO pronunciations on strikes in essential services, seems unlikely to muster the support of the South African courts.

3.3 The framework for regulating strikes in essential services

3.3.1 The regulation of essential services in South Africa

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all relevant factors, including-
(a) the nature of the right;
(b) the importance of the purpose of the limitation;
(c) the nature and extent of the limitation;
(d) the relation between the limitation and its purpose; and
(e) less restrictive means to achieve the purpose.
(2) Except as provided in subsection (1) or in any other provision of the Constitution, no law may limit any right entrenched in the Bill of Rights.

62 The LRA does exclude two groups of workers from its application and by extension, the right to strike. These are members of the South African National Defence Force and the State Security Agency.

63 Section 1 of the LRA.

64 Ibid.

65 K Selala 'The right to strike and the future of collective bargaining in South Africa: An exploratory analysis' (2014) 3 *International Journal of Social Sciences* 5 *at* 116.

66 Section 64(1), LRA.

67 D du Toit et al Labour Relations Law – A Comprehensive Guide 6 ed (2015) at 333.

68 Section 65(d)(i) of the LRA.

The 1995 LRA provides a framework for the self-regulation of essential services in the strict sense.[69] This is consistent with the 'regulated flexibility' paradigm that informed the review of South African labour laws in the 1990s.[70] The essential services framework rests on five basic premises. These are:

- that strikes in essential services are prohibited;
- interest disputes in essential services are subject to compulsory arbitration;
- essential services are defined in accordance with the ILO's definition of essential services in the strict sense;
- except for the Parliamentary Service and the South African Police Service, the LRA does not follow a list approach; and
- parties are given an opportunity to narrow the designated essential service by way of negotiating a minimum service agreement. The minimum service is then regarded as the essential service in respect of the employer and its employees.[71]

The legal framework in South Africa is similar to the regulatory framework in Italy although there was no explicit borrowing by the South African drafting team. The regulatory system in Italy, where the right to strike is also provided for in the constitution and regulated by legislation, is built on the recognition of the constitutionally protected rights of workers to strike and the rights of people to life, health, freedom, security, mobility and communication. According to Bordogna, public services are deemed essential to the extent that they deliver these services.[72]

Regulation in Italy places emphasis on the social partners recognising their responsibility to negotiate minimum service agreements to ensure that the protected rights of the broader population are balanced with the workers' right to strike.[73] So, while Italy's regulatory framework is based on the notion of 'essential public

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[69] Sections 70 – 74 of the LRA.
[70] See H Cheadle 'Regulated flexibility: Revisiting the LRA and the BCEA' (2006) 27 *ILJ* 663. See also D du Toit and R Ronnie 'Regulating the informal economy' (2014) 35 *ILJ* 1802 at 1812 for a critique of the 'regulated flexibility' model under current circumstances.
[71] Section 72(3)(a) of the LRA. See also Cohen and le Roux (fn 62) at 114.
[72] L Bordogna 'Disputes regulation in essential public services in Italy: Strengths and weaknesses of a 'pluralist approach.' (2008) 50 *Journal of Industrial Relations* 4 at 597.
[73] Ibid at 608.

services', and South Africa's on 'essential services in the strict sense', they both reflect a desire for self-regulation by means of consensus and tripartism.[74]

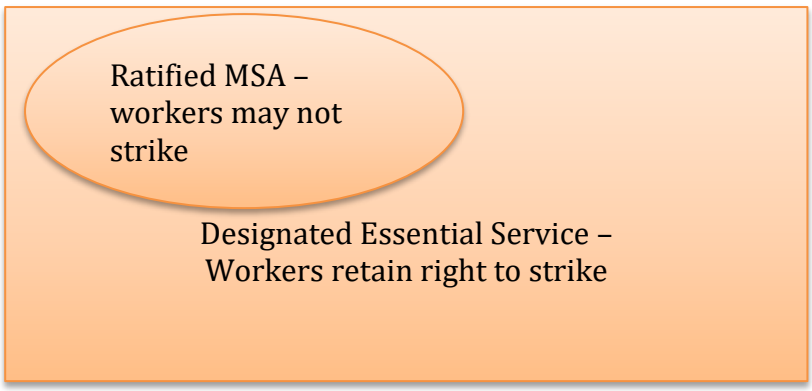
As I have already alluded, the concept of a self-regulation has not been without its problems in South Africa. This is best reflected in the absence of minimum service agreements. To address this situation, amendments were introduced to the LRA in 2014.

3.3.2 The definition of a minimum service

The LRA permits the ESC to ratify collective agreements allowing for minimum services in services that have already been designated as an essential service.[75]

A minimum service is not defined in the LRA. Roskam says that 'it is evident that what section 72 of the LRA has in mind is a minimum service of a designated essential service'. This entails the shrinking of the designated essential service so that workers, who were denied the right to strike in the essential service, now fall outside the agreed minimum service and regain their right to strike. The minimum service then becomes the essential service in respect of the parties to the ratified minimum service collective agreement.[76]

Fig. 1 The relationship between designated essential services and a minimum service



[74] Cohen and Le Roux (fn 57) at 133 and134.
[75] Section 72(3) of the LRA.
[76] Roskam (fn 9) at 21.

According to Pillay, minimum services are essential services reduced temporarily under certain conditions to enable and, I would argue, restrict industrial action.[77] A minimum service is one that is sufficient to ensure that during strikes, 'no person's life, personal safety of health is endangered'.[78] Once identified, these services have to be included in an MSA and any service that does not fit within this definition must be excluded. If non-essential services are included, the MSA stands to be reviewed on the grounds that they constitute an unjustifiable limitation of the right to strike.[79]

In the event of strike action, minimum services should only be permitted where services, if interrupted, endanger the life, personal safety or health of the whole or part of the population. Minimum services are also permitted in services that are not essential in the strict sense but where the extent and the duration of the strike could render the service essential.[80]As stated above, minimum service agreements are only permissible in services that have already been designated as essential. They must be ratified by the ESC before they become effective. This is primarily to allow the ESC to determine whether basic needs of the public would be met in the event of an interruption to the service.[81]

3.3.3 The composition and functions of the Essential Services Committee (ESC)

The 1995 LRA, at section 70, makes provision for the establishment of an Essential Services Committee (ESC). The Minister of Labour must, after consulting the National Economic Development and Labour Council (NEDLAC) establish an ESC and appoint persons that she considers fit to serve on the ESC.[82] This committee is charged with identifying and declaring essential services.[83] The parties to the

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[77] D Pillay 'Essential Services: Developing tools for minimum service agreements' (2012) 33 *ILJ* at 807. This understanding was confirmed by the Supreme Court of Appeal in Eskom Holdings v NUM and others (2011) 32 *ILJ* 2904 (SCA) at para 29.
[78] Ibid at 811.
[79] Ibid.
[80] ILO (fn 22) at 606.
[81] Pillay (fn 56) at 22.
[82] Section 70 and 70A of the LRA. NEDLAC is the primary tripartite institution in South Africa established in terms of National Economic, Development and Labour Council Act. 35 of 1994.
[83] The ESC also has the power to designate what is termed a 'maintenance service'. A maintenance service is defined in section 75(1) of the LRA to mean any '*a service, the interruption of which has the effect of material physical destruction to any working area, plant or machinery.'*

NEDLAC must each nominate two persons who the Minister must appoint to the ESC if the Minister deems them to be fit for appointment.

The ESC must also conduct investigations as to whether the whole or part of a service is an essential service; determine disputes about whether a whole or part of a service is essential and/or whether an employee is engaged in a service that has been declared essential; and vary or cancel the designation for the whole or part of a service as an essential service. Importantly, the ESC must ratify any collective agreement that provides for the maintenance of a minimum service in services that have already been designated as an essential service.[84]

Amongst the 2014 amendments to the LRA, that sought to improve the efficacy and functionality of the ESC, was one permitting the ESC to establish panels that undertake certain of the functions allocated to the ESC.[85]

This amendment, it is suggested, is meant to speed up the process of either concluding minimum service agreements or the handing down of determinations by the ESC. It stipulates that:

> (1) When making a determination in terms of section 71, a panel of the essential services committee may issue an order— (a) directing the parties to negotiate a minimum services agreement as contemplated in this section within a period specified in the order; (b) if an agreement is not negotiated within the specified period, permitting either party to refer the matter to conciliation at the Commission or a bargaining council having jurisdiction. (2) If the parties fail to conclude a collective agreement providing for the maintenance of minimum services or if a collective agreement is not ratified, a panel appointed by the essential services committee may determine the minimum services that are required to be maintained in an essential service.[86]

As I reflect in the next section, the impact and effect of these amendments have not been fully tested.

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[84] Section 70D of the LRA.
[85] Section 70C of the LRA.
[86] Sections 71(1) and 71(2).

3.4 Designating an essential service in South Africa

3.4.1 Approach to be adopted in designating an essential service

There are two main approaches generally used to identify essential services. Firstly, by way of identifying employers who are accepted to be providing essential services and secondly, by the potential consequence of an interruption in the service. The latter approach is followed in South Africa with two exceptions. The Parliamentary Service and the South African Police Service (SAPS) are explicitly declared to be essential services.[87] The CC, in *SAPS v POPCRU*,[88] held that only members of the SAPS employed in terms of the South African Police Service Act[89], were essential and not support staff employed by SAPS in terms of the Public Service Act.[90]The inclusion of the Parliamentary Service however remains questionable when considered against the definition of an essential service.[91]

According to Pillay, the definition of an essential service guides the approach to deciding whether a service is essential. Firstly, the essential nature of the service is determined by the consequence of the service being interrupted, be that partial or complete. In the event of strike action, a service that can continue in an uninterrupted manner by other means, eg readily available alternative labour or through mechanisation cannot be designated as an essential service.[92]

The costs associated with bringing in alternative labour cannot be a consideration for declaring a service essential. A cost benefit analysis of replacement labour, however, illustrates the implications for both parties of this approach. From an employer perspective, the costs for appointing replacement labour might very well compel them to settle the dispute. Alternatively, the employers may find the use of the replacement labour more cost-effective resulting in them considering dismissals on the grounds of operational requirements.[93]

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[87] Du Toit et al (fn 67) at 372 and 373
[88] (2011) 9 BLLR 831 (CC)
[89] Act No. 68 of 1995.
[90] Proclamation 103 of 1994
[91] Du Toit et al (fn 67) at 373
[92] Pillay (fn 56) at 10.
[93] Ibid.

The criteria for arriving at the determination of an essential service, is the existence of 'a clear and imminent threat to the life, personal safety or health of the whole or part of the population.[94] Drawing from the meaning of 'endanger', ie 'put at risk, imperil' or 'jeopardise', and the fact that the word is used in the present tense, Pillay asserts that it is the conditions or circumstances prevailing 'at the time the designation or determination is made [that] must be considered and not circumstances that may obtain at some stage in the future.'[95] She goes further to say that, 'the operative word therefore is whether an interruption 'would', not 'could' or 'might' endanger life, personal, safety and health.'[96] According to Pillay, '[e]ndanger also reinforces the strict interpretation to exclude inconvenience and hardship. Life, health and personal safety exclude endangerment to the business or economy. Further, '[t]he population refers to people, not the plant or animal population.'[97]

The obligations of the state to provide certain basic services that impact on the life, personal safety and health of all or a part of the population must be considered by the ESC when making a determination.[98]

Many other factors must be considered in determining whether a service can be deemed to be essential. While the nature of the service is important, consideration must also be had for, amongst others, available technology, the needs of the population, the availability of the service, the cost of providing the service, the service providers, and the location in which the service is delivered. These factors all go towards determining what impact the interruption of a service would have. Any determination about whether a service is essential would therefore have to be based on the collection of data and a finding on fact.[99] These factors are fluid. As the circumstances within which services are provided change, so the essential or 'inessential' nature of services change.[100]

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[94] Servais (fn 1) at 4.
[95] Pillay (fn 56) at 11.
[96] Pillay (fn 77) at 807.
[97] Ibid at 809.
[98] Pillay (fn 56) at 9.
[99] Pillay (fn 77) at 810.
[100] Ibid at 810.

3.4.2 The first essential service determinations

The first ESC, appointed in 1996, designated, after convening public hearings, several services as essential services. These were all published in the Government Gazette during 1997 and 1998.[101]Designated essential services specifically related to the municipal sector were:

- municipal traffic services and policing;
- municipal health;
- municipal security;
- the supply and distribution of water;
- the generation; transmission and distribution of power;
- firefighting; and
- the following parts of sanitation services:
    - the maintenance and operation of water-borne sewerage systems, including pumping stations and the control of discharge of industrial effluent into the system;
    - the maintenance and operation of sewerage purification works;
    - the collection of refuse of an organic nature;
    - the collection of infectious refuse from medical and veterinary hospitals or practices;
    - the collection and disposal of refuse at a disposal site; and
    - the collection of refuse left uncollected for 14(fourteen) days or longer, including domestic refuse and refuse on public roads and open spaces.

As is evident from the contents of the gazettes, the initial determinations by the ESC did not follow the narrow definition of an essential service as set out in the LRA. The ESC 'instead, tended to identify sectors or sub-sectors within which essential services are performed rather than the essential services themselves'. This 'was not accidental' but was intended to allow employers and trade unions the opportunity of narrowing or fine-tuning these designations by way of concluding minimum service level agreements.[102]

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[101] See GN 784 of 6 June 1997, GN 1216 of 12 September 1997, GN 1542 of 21 November 1997 and GN 436 of 27 March 1998.

[102] Du Toit et al Chapter 13: South Africa in M Mironi and M Schlachter (eds) in *Regulating strikes in essential services: A comparative 'law in action' perspective* (2019) at 390

It has been the failure of the parties to conclude minimum service level agreements, as anticipated by the LRA and prompted by the ESC by way of its initial determinations, that has remained a major stumbling block to the promotion of orderly collective bargaining and the balancing of contesting rights in certain sectors.

3.4.3 Essential and Minimum Services: Compulsory interest arbitration

In terms of the LRA, any party that is prohibited from engaging in a strike or lock-out because they are in a designated essential service, may refer a dispute to the CCMA or a bargaining council having jurisdiction for conciliation and, if the dispute remains unresolved, for compulsory arbitration.[103] The LRA also provides at section 139 (1) that:

> If a dispute about a matter of mutual interest proceeds to arbitration and any party is engaged in an essential service…within 30 days of the date of the certificate referred to in section 136(1)(a), or within a further period agreed to between the parties to the dispute, the commissioner must complete the arbitration and issue an arbitration award with brief reasons signed by the commissioner.

This provision is aimed at providing parties in essential services with a speedy dispute resolution process.

The LRA provisions are generally in line with long-established ILO principles and decisions on disputes in essential services. The access to an expedited and impartial conciliation and arbitration process is key amongst these decisions and principles. The one exception being section 74(5) of the 1995 LRA. This section stipulates that an award against the State that has financial implications only becomes binding 14 days after the award has been issued. The Minister of Labour is, however, entitled to table this award before Parliament within this period. This has the effect of suspending the binding nature of the award for a further 14 days. Parliament, when it considers the matter, has the power to declare the award to be non-binding. The dispute would then have to be referred again to the parties for

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[103] Section 74(1) – (4) of the LRA.

conciliation and, if necessary, arbitration. The LRA is however silent on whether the second award would be subject to the same restrictions. The courts have yet to clarify this issue.[104]

Some indication of how the courts would approach this issue can be gleaned from an earlier Labour Appeal Court (LAC) judgment. The LAC, in 2012,[105] upheld an arbitration award in which the arbitrator had held that an award in the public sector requiring the application of unbudgeted funds would have to be presented to Parliament. The authority and jurisdiction of Parliament to approve unbudgeted funds in order to comply with an award would, however, not be undermined if an arbitrator made such an award. The arbitrator had relied on section 74 for arriving at his finding. He stated that he had the authority to make the award and Parliament had the authority to reverse that award. This approach, it is posited, would run contrary to the ILO principle that the legislative intervention should not affect on compliance with the terms of any compulsory arbitration award.[106] Based on this judgment, it does appear that any second award would be subjected to the same process. This, I suggest, is at odds with the approach adopted by the CC in *NUMSA v Bader Bop* [107]on the relationship between freedom of association, the right to strike, and orderly collective bargaining.

Notwithstanding the high number of strikes in the South African public sector, compulsory arbitration does not appear to be a favoured dispute resolution mechanism. This may be due to the complexity of conducting an interest arbitration. The only major interest arbitration conducted in South Africa occurred in the public service in 1999, dragged on for 7 months, and ended inconclusively.[108] There is however a further complicating factor that aggravated against more disputes being referred to compulsory arbitration. I deal with this issue next.

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[104] Du Toit et al (fn 102) at 394.
[105] *Public Servants Association obo members v National Prosecuting Authority and Another* (2012) 8 BBLR 765 (LAC).
[106] Servais (fn 1) at 9.
[107] NUMSA v Bader Bop (fn 30)
[108] Du Toit et al (fn 102) at 394. See *PSA and others and the Government of the RSA* (case no. PSBC 1 1999-2000).

3.4.4 The interpretation and application of sections 72(3) of the LRA

If parties reach an agreement regarding minimum service levels that is ratified by the ESC, the minimum service then becomes the essential service in respect of the employer and employees covered by the agreement. The workers delivering the minimum service are then prohibited from striking.[109] All other workers within the initial essential service designation may strike. [110] Section 72(3)(b), as it was prior to the 2014 amendments, specifically stipulated that in the event of a ratified minimum service level agreement or a minimum service determination by the ESC, the right to compulsory arbitration as provided for in section 74 did not apply. Uncertainty however existed as to the correct interpretation and application of section 72(3)(b), with conflicting views emerging.

According to Pillay, in the event of such a minimum service agreement, the entire designated essential service would not be able to invoke the compulsory arbitration provision. Workers not included in the minimum service would have to strike for those who must provide the minimum service.[111] Roskam posited three views on this issue. The first was set out by Pillay above. The second, Roskam argued, permitted those workers not in the minimum service to retain their right to strike, while those in the minimum service retained their right to interest arbitration. The third position he advanced, was that all the workers in the designated essential service may exercise a right to either invoke strike action or refer a dispute to interest arbitration. If the strike option is preferred, then those workers within the minimum service would not be allowed to strike.[112] This issue had never come before the courts by the time the time amendments to section 72 were promulgated in 2014 and 2018 respectively.

An amendment to section 72 was introduced in 2014 that sought to clarify the uncertainty that had emerged in relation to section 72 (3)(b). This clarification was intended to promote interest arbitration and not leave workers in a minimum service

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[109] Section 72(b) of the LRA prior to the 2014 amendments.
[110] Cohen and Le Roux (fn 57) at 116.
[111] Pillay (fn 56) at 25.
[112] Roskam (fn 9) at 23-24.

with no means to resolve their dispute. The amendment[113] provides that section 74, ie the right to refer an interest dispute to compulsory arbitration, would apply to employees involved in a designated essential service if a majority of the employees engaged in the essential service voted in a ballot in favour of interest arbitration. Section 74 would however not apply if the notice of a strike or a lock-out had been issued prior to the holding of a ballot. The net effect of these amendments is that, if so decided, there would be no strike or lock-out in the essential service concerned and that all the workers within the essential service would retain the right to refer their dispute to compulsory interest arbitration.

The 2014 amendment, I would suggest, did not have the desired effect of enhanced dispute resolution within essential services. A key reason for this was that the new section 72(5) only referred to instances where a minimum service had been determined by the ESC. No reference was made to ratified minimum service level agreements. The clause specifically read as follows:

> 'Despite subsections (3) and (4), section 74 applies to a designated essential service in respect of which the essential services committee has made a determination of minimum services if the majority of employees employed in the essential services voted in a ballot in favour of this.'

The 2014 formulation led to a change in the way in which parties to the SALGBC approached the conclusion of minimum service level agreements. I return to this issue and to consider more of the 2014 amendments in section 3.6.

A 2018 amendment to section 72 (5) appears to have covered up this loophole. The section now provides as follows:

> 'Despite subsections (3) and (4), section 74 applies to a designated essential service in respect of which the *essential services* committee has ratified a minimum services agreement or has made a determination of minimum services if the majority of *employees* employed in the *essential services* voted in a ballot in favour of this.'

[113] Sections 72(5) and (6) of the LRA.

Here again, as with the 2014 amendment to section 72(5), it is far too soon to be in position to determine whether the amendment will have a positive effect on regulating essential service disputes within the municipal sector.

3.5 The prevalence of strikes in essential services

Strikes by essential service workers in South Africa such as medical staff, municipal workers, and workers engaged in electricity distribution and generation are a common occurrence. Between 2007 to 2013, 28 245 974 working days were lost due to strikes in the broadly defined public sector. In 2015 and 2016, members of the National Education Health and Allied Workers (NEHAWU), the South African Municipal and Allied Workers Union (SAMWU) and the Independent Municipal and Allied Trade Union (IMATU) were involved in strikes totalling 205 488 and 156 480 work days respectively. Unfortunately, no empirical data is however available on how many workers engaged in essential services were involved, but anecdotally it does appear that many essential service workers were involved in these strikes[114]. Strikes in the public sector are also often characterised by violence.[115]

In response to the violence in strikes involving essential service workers, it has been argued that strikes could be completely prohibited in essential services without undermining the collective bargaining rights of workers. Brand has suggested that 'by eliminating the right to strike in essential services (i.e. not only in minimum services) and requiring all disputes to be referred to arbitration, it would be possible to create a collective bargaining structure with appropriate bargaining units for essential service workers by means of interest arbitration. This would have to be accompanied by 'an overriding duty to bargain provided for by the law in the broader public sector'.[116] However, Du Toit and Ronnie are not convinced that 'a move away

[114] D duToit et al Revisiting strikes in essential services (2018)39 *ILJ* 2131 at 2142.
[115] R le Roux and T Cohen (fn 24) at 3.
[116] J Brand 'Strikes in essential services.' Seminar paper delivered to SASLAW 22 September 2010 available at http://accountabilitynow.org.za/strikes-essential-services/ (Accessed on 12 December 2017) at section on Structural Problems.

from the minimum services approach to a total ban on strikes by essential service workers would pass constitutional muster.'[117]

According to a 2013 Public Sector Co-ordinating Bargaining Council report strikes in services such as health services, police services, municipal services and court services have not resulted in any reported loss of life.[118] Communities have been inconvenienced and 'business devastated by frequent and prolonged interruptions in services like electricity and water.'[119] This situation changed dramatically in 2018 with the strike by health care workers in the North West province. According to reports, at least 64 people are alleged to have died as a result of the strike. Thousands more patients, it is claimed, were seriously compromised due to being denied access to chronic treatment and medication.[120]

Pillay claims that essential services can be minimised without any endangerment to the life and safety of the whole or part of the population. In many instances, services are interrupted because the state has failed to provide them.[121] Essential services are also interrupted when authorities resort to the suspension of services as part of their credit control mechanisms. Electricity and water cut-offs are a regular feature of the lives of millions of South Africans.[122] This brings into question the constitutional obligations of the authorities to maintain minimum levels of basic services.

3.6 The 2014 amendments to the LRA

The increasing number of strikes in essential services led, in 2014, to the first major amendments to sections 70 to 74 of the LRA. These amendments were aimed at improving the efficiency and effectiveness of the procedures for designating essential

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[117] D du Toit and R Ronnie 'The necessary evolution of strike law' in R Le Roux and A Rycroft (eds) *Reinventing labour law: Reflecting on the first 15 years of the Labour Relations Act and future challenges* (2012) at 211.
[118] Public Service Coordinating Bargaining Council *Draft Report – Minimum Services* November (2013) at 28.
[119] Ibid.
[120] See https://www.dailymaverick.co.za/article/2018-05-20-health-e-news-how-to-stop-strikes-from-killing-patients/ (accessed on 20 November 2018)
[121] Pillay (fn 77) at 813.
[122] D McDonald and J Pape 'Cost Recovery and the Crisis of Service Delivery' (2002) at 162

services and the conclusion of minimum service arrangements. The amendments reflected many of the recommendations contained in two reports by Roskam.[123] Roskam's initial report concluded that the regulatory system, as it stood at the time, was dysfunctional in that 'on the one hand it does not discourage strikes taking place in essential services and, on the other hand, employees in these services do not have confidence in other ways of remedying their disputes and grievances.'[124]

The Roskam reports were compiled following desktop studies of national and international systems as well as interviews with key persons in the labour relations arena. These included representatives from the CCMA, the Department of Labour and, members of the ESC. The ESC interviewees included those members who had been nominated by organised business and labour.

In introducing these amendments, government, concurring with much of what was in the Roskam reports, noted that numerous problems had been identified under the arrangement as it stood at the time. These included the broad scope of the existing essential service designations and the small number of MSAs that had been ratified by the ESC.[125]

As a further means to ensure that minimum service levels are in place in designated essential services, an amendment was introduced permitting the ESC to direct parties to conclude a minimum service agreement within a specified period. Failure to conclude an agreement would allow the ESC to determine the minimum service that would be required in the event of a strike. Roskam, with reference to the Canadian determination system, warns of the problem with such determination of minimum services. Determinations by a third party often tend to err on the side of caution by including high numbers of employees to constitute the minimum service. This has the potential of rendering a strike ineffective.[126] The ILO itself has warned

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[123] See Roskam (fn 9) and A Roskam and N Howard *A new model for the regulation of essential services* (2011).
[124] Roskam and Howard (fn 123) at 5
[125] RSA 'Memorandum of Objects Labour Relations Amendment Bill' (2012) at 6.
[126] Roskam (fn 9) at 69.

of this practice in that it 'restricts one of the essential means of pressure available to workers to defend their economic and social interests.'[127]

A further amendment aimed at bolstering the capacity of the ESC is to be found in section 70E. This provision compels the Director of the CCMA to allocate 'adequate resources' to allow the ESC to carry out its functions. The Director may also appoint additional staff to support the work of the ESC.

3.7 A review of the ESC after the 2014 amendments

The ESC, first appointed in 1996, was reconstituted in April 2015 shortly after the 2014 amendments took effect.[128] In the period between 2015 and 2018, the ESC met on 17 occasions. A focus of the work of the ESC in the period immediately after the promulgation of the amendments was to reach out to employer and employee parties in order to create an awareness of the new amendments. This initiative reached 503 stakeholder representatives, at an average of 45 persons per session.[129]

This has consequently seen an increase in the number of section 71, 72 and 73 proceedings before the ESC. Section 71 sets out the procedure to be adopted by the ESC in deciding whether a service or a part of a service is an essential service. Any investigation carried out by the ESC in this regard can be self-initiated or 'at the reasonable request of an interested party'.[130] Section 72 covers the determination of minimum services, with section 73 providing for the referral of disputes in respect of essential and minimum services. In the 2015/2016 financial year, no section 71 investigations were undertaken and a limited number of section 72 and 73 proceedings came before the ESC.[131] The focus during this period was on advocacy, outreach and interventions aimed at facilitating minimum service agreements. In the 2016/2017 annual year the numbers increased quite significantly in respect of section

[127] ILO (fn 22) at para 161.
[128] CCMA Annual Report 2016/17.
[129] CCMA Annual Report 2015/2016 at 71.
[130] Section 70B(1)(d) of the LRA.
[131] CCMA Annual Report 2015/2016 at 73 and 74.

71, 72 and 73 matters.[132] This momentum has not been maintained in the 2017/2018 financial year.

Table 1: Section 71, 72 and 73 matters dealt with by the ESC

	2015/2016	2016/2017	2017/2018
Section 71	0	11	11
Section 72	20	121	7
Section 73	7	10	7

Source: CCMA Annual Reports

While there has been an increase in the activity of the ESC since the introduction of the 2014 amendments, a complete review of all existing determinations, with the possible narrowing down of these determinations in order to facilitate the conclusion of minimum service agreements, remains a challenge. This, I suggest, impacts on the extent to which minimum service agreements can be concluded at municipal level given the initial designations focused mainly on sectors and sub-sectors where essential services were to be found rather than the essential service itself.

The interventions made by the ESC to facilitate minimum services agreements in the municipal sector have led to an increase in the number of agreements and minimum service determinations although many municipalities remain unregulated. There are 278 municipalities in South Africa.[133] Targets set by the ESC for the sector in 2018 were the conclusion of 60 minimum service agreements.[134]

Recent figures provided by the ESC indicate that as at 27 November 2018, 14 MSAs had been ratified and a further 34 MSDs handed down. I will return to the reason for the growth in the number of MSDs in chapter five.

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[132] CCMA Annual Report 2016/2017 at 65 and 57.
[133] South African Government at https://www.gov.za/about-government/government-system/local-government accessed on 10 November 2018.
[134] CCMA presentation to the 2nd ESC Stakeholder Conference, March 2018.

3.8 The service or number approach to determining minimum services

The approach adopted by the ESC for determining minimum services is currently based on the minimum number of employees required to deliver an essential service rather than a focus on a specific operation within a designated essential service.[135] The request for ratification of a minimum service agreement, as prescribed by the ESC in LRA form 4.8, appears to favour the latter approach. The referral form requires the parties to provide:

a) The details of the designated essential service as recorded in the relevant government gazette;
b) The number of workers who many who fall within the designated essential service;
c) The number of workers who fall within the proposed minimum service;
d) A description of the work performed by employees who fall within the minimum service;
e) The description of the work performed by employees within the essential service but who do not fall within the proposed minimum service; and
f) A motivation in support of the ratification of the proposed minimum service agreement.

So, while the ESC currently adopts a very broad approach when issuing determinations, parties negotiating a MSA must focus on discrete operations within the designated essential service. The task of the negotiating parties would be eased if the initial determinations focused more on the actual essential service, rather than a sector or sub-sector where essential services are located.

3.9 The difference between negotiating MSAs and negotiating ordinary collective agreements

[135] LRA form 4.8 must accompany a request for the ratification of a minimum service agreement.

There appears to be a misconception amongst employer and employee parties that negotiating MSAs are the same as negotiating ordinary collective agreements over terms and conditions of employment. Pillay identifies six differences between negotiating minimum service agreements and agreements in respect of matters of mutual interest. [136]

a) MSAs require ratification by an independent body, the ESC;
b) The ratification process is not simply a matter of certification but the driver of what is contained in the MSA;
c) MSA negotiations are proscribed by the definition of the essential service;
d) Interruption and endangerment are two factors central to MSA negotiations;
e) Industrial action is not anticipated in the event of a deadlock in MSA negotiations; and
f) Negotiations in respect of terms and conditions are voluntary in respect of what items are to be negotiated whereas MSA negotiations allow no such voluntarism.

3.10 Factors that inform bargaining on minimum services

Agreement on what constitutes a minimum service is based on fact. 'Service' must be considered at two levels, both or in the alternative. First, at a broader service level e.g. hospitals and police services, and second, at a discrete component of the service e.g. cleaning and administration. These latter services can all be found within a broader service. This fact-finding, states Pillay, is all about observing and recording how services are delivered in order that enough detail and data can inform the negotiations. It is tedious and tiring work of a multi-disciplinary nature.[137]

Some designated essential services can be cut back by a 100%, while others may not be able to cut back for any length of time. The emphasis is on 'service' in the first instance, and not on people or workers, entities or businesses. Once it has been determined that the service can be minimised, the enquiry then moves on to who and the number of people that would be required.[138]

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[136] Pillay (fn 77) at 811 – 812.
[137] Ibid at 809.
[138] Ibid at 813.

Balancing the 'no work, no pay' rule for those who strike against those who must work and get paid is another issue that can be dealt with in a MSA. The rule applies in respect of those essential service workers who are not bound by the minimum service agreement and are free to engage in strike action. Options such as rotation or contribution of a portion of wages earned during a strike to a strike support fund could be considered and written into a MSA.[139]

Some further issues that need to be considered when negotiating a minimum service agreement are: [140]

- Is the whole or part of the service essential?
- For how long can the service be safely interrupted without endangering life, health and personal safety?
- Is there a role for non-striking members or members of other trade unions in determining the minimum service at any point?

Pillay asserts that 'facts' drive bargaining about MSAs. This, she states, makes MSA negotiations more exacting than negotiations over other terms and conditions of employment.[141] In addition, parties must put public interest above 'partisan and sectarian' interests. The latter are normally what drives negotiations on other terms and conditions of employment.[142] It is very clear from the discussion, that an MSA is distinct from an ordinary collective agreement regarding terms and conditions of employment.

3.11 The slow progress in concluding and ratifying MSAs

Brand puts forward two primary reasons why progress has been very slow in concluding and ratifying minimum service agreements. First, the trade unions do not appear too keen to endorse limited strike action that has the effect of dividing the workforce between those who may strike and those who must continue to work in

[139] Ibid at 817.
[140] Ibid at 817.
[141] Ibid at 812.
[142] Ibid at 812.

terms of a minimum service agreement. Second, employers have no incentive to conclude a minimum service agreement as all workers, within a designated essential service, are prevented, by law, from striking. It is in the employers' interest to maintain all employees in the designated essential service as a means of limiting the impact of any strike action. At the time of writing, more than 14 years after the LRA had come into effect, Brand noted that no minimum service agreements had been ratified by the ESC. A further complexity is that essential and non-essential workers are often located within the same bargaining unit and identifying those who would constitute a minimum service is an onerous task.[143]

This has not prevented trade unions from embarking on strike action across the whole bargaining unit conscious of the fact that the strike involves workers in essential services.[144] In certain cases, these strikes were even preceded by the issuing of a strike notice. Whilst this may have been the case, such action would in any event render the strike unprocedural and stand to be interdicted even before it begins, as the strike notice would not have specifically excluded essential service workers.[145]

Roskam has suggested that it might be more useful for NEDLAC to develop a Code of Good Practice, as provided for in section 203 of the LRA, to guide the conclusion of minimum service level negotiations. Importantly, this code should include that:

> 'the parties negotiating or body determining the minimum service should acquaint themselves **thoroughly** (own emphasis) with knowledge about the structure and functioning of the enterprises and the establishments concerned and the real impact of the strike action.'[146]

Other issues, Roskam suggests, to be included in the code, are:[147]

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[143] Brand (fn 116) at section on minimum service agreements.
[144] Ibid.
[145] Based on personal experience as the former General Secretary and Collective Bargaining Officer of SAMWU.
[146] Roskam (fn 9) at 67.
[147] Ibid at 68.

a) The parties must specify how the ‘no work, no pay’ rule would operate and what would happen to the wages of workers who are required to work during the strike;
b) How the details of the agreement would be conveyed to the affected workers;
c) Discourage a reliance on percentages to determine the number of workers required to maintain a minimum service. Local organograms for ‘each service must be studied in detail to determine the exact numbers of employees and the employees themselves who are part of the minimum service; and
d) Negotiations must take place at local level.

While the situation has improved since the introduction of the 2014 amendments, much more still needs to be done to facilitate minimum service agreements, including the promulgation of the suggested Code of Good Practice.

3.12 Conclusion

Negotiating and concluding minimum service agreements is a complicated and onerous task requiring detailed information. A clear gap in the literature exists regarding the analysis of the ability and capacity of employer and employee representatives to engage on and conclude minimum service agreements. This is what my study is seeking to address. In the next chapter I describe the research methodology and design.

4. CHAPTER FOUR

4.1 Introduction

This chapter describes the methodology and research design employed by this study. The use of the case study approach and the data analysis process is explained. Finally, I set out the ethical considerations of the study.

4.2 Research Methodology and Design

4.2.1 Research Approach

I sought to answer the research questions through a single-case study. The reason for choosing the case study approach was related to the research questions and 'what' and 'who' I wanted to draw certain conclusions from. The unit of analysis in my research was a metropolitan municipality.

A case study is 'an in-depth examination of a single instance of some social phenomenon.' Case studies may be either descriptive or exploratory.[148] They are useful when the strategy of the research is exploratory rather than to confirm or disprove a hypothesis and when internal validity is given preference over external validity.[149] The city of Ximafana (a pseudonym) is a metropolitan municipality as provided for in the Municipal Systems Act No. 44 of 2000. Municipalities are prime 'sectors' where essential services are located. According to Yin[150], case studies can be either explanatory, exploratory or descriptive. This study is primarily exploratory in nature in that I sought to develop a better understanding of why there were no ratified minimum service level agreements in Ximafana. The case study approach

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[148] E Babbie *'Social Research Counts'* Int Ed (2013) at 149.
[149] J Gerring 'What is a case study and what is it good for' (2004) 98 No.2 American Political Science Review 341
[150] R. K. Yin Case study research: Design and methods (2003)

allowed me to develop a holistic sense of what is happening in Ximafana, in a way that could elucidate the features of the municipal sector.[151]

4.2.2 Data Collection

The research took a predominantly qualitative approach utilising semi-structured interviews with key participants. The participants were drawn from amongst negotiators of the employer and the two trade unions recognised by the Ximafana municipality. The two trade unions are the South African Municipal Workers Union (SAMWU) and the Independent Municipal and Allied Trade Union (IMATU) (see appendices A and B for the interview schedules for trade union and employer participants respectively).

The research also incorporated a desktop study of the literature on collective bargaining, the right to strike, dispute resolution and, the regulation of essential services in the municipal sector. Additional data were also sourced from the South African Local Government Bargaining Council (SALGBC) and the Essential Service Committee (ESC). I also drew on my own experience from having been employed in the municipals sector for more than two decades.

4.2.3 Selection of the sample

The study took a purposive approach to sampling. The selection of the interviewees was based on their involvement in essential service and minimum service negotiations within the employer. Appendix C is the letter sent to the trade unions and the employer requesting their co-operation in identifying persons who met the criteria I had chosen.

It was not easy to secure the number of people I had intended to interview. Instead of the cohort I wanted to interview, only 14 interviews were held. This decision was based on practical considerations like timing and availability. I decided to continue with this number as it was not my intention to use a sufficiently

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[151] ES Adler and R Clark '*An invitation to social research*' 5ed (2015) at 172.

representative sample to prove a hypothesis but rather to gain an in-depth understanding of the situation within the employer in respect of essential and minimum services. For this purpose, I considered 14 interviews to be sufficient.[152]

4.2.4 The profile of the interviewees[153]

Interviews were conducted with eight representatives from the two trade unions recognised by the employer and, six managers from the employer. Of the eight trade union representatives, one was a full-time trade union organiser, five were full-time shop stewards[154] and two were ordinary shop stewards. The full-time trade organiser had worked for the Ximafana municipality for 18 years before taking up employment with the trade union. Four of the other trade union representatives had more than twenty years work experience in the municipal sector (see appendix D).

Of the employer representatives, two had in excess of twenty years work experience in the municipal sector and three had between ten and eighteen years. They were all senior managers responsible for human resource and industrial relations issues in their relevant sections of the employer (see appendix E).

4.2.5 Data Analysis

All interviews were recorded with the prior consent of the interviewees (see annexure F). The research questions and the interview schedules suggested how the content of the interviews could be classified and analysed. I used a thematic approach to analyse the data. Eight themes emerged from the interview data. I reported the general prevalence and individual responses to reflect the views amongst the participants.

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[152] See G Guest, A Bunce and L Johnson How Many Interviews Are Enough? An Experiment with Data Saturation and Variability Field Methods (2006) Vol. 18, No. 1, 59–82. The results of a study revealed that data saturation point is reached after 12 interviews.

[153] For purposes of maintaining anonymity the employer interviewees are described as E1 to E6. The trade union interviewees are described as TU1 to TU8.

[154] A full-time shop steward is a 'trade union representative' as defined in the LRA but released from his occupational duties, on a fully paid basis, to work full time within the trade union for an agreed period.

4.2.5 Role of the researcher

I must declare that I am very familiar with the municipal sector as I had been employed at the South African Municipal Workers' Union (SAMWU) between 1989 and 2012. Twelve of these years was as the General Secretary of the union. The period of my employment from 1992 to 2012, included representing the union at wage and conditions of service negotiations in the SALGBC. I was also involved in negotiations that led to the first essential services framework agreement at SALGBC level. I also represented COSATU at NEDLAC negotiations prior to the promulgation of the 2014 LRA amendments. Notwithstanding, I have attempted to remain objective in the research design, data collection and analysis processes of this study. My understanding of and familiarity with the case within its context and specific circumstances did assist in recording and analysing the data that I obtained in the study.

4.2.6 Ethics Approval

Ethics approval to conduct the study was formally obtained from the Law Faculty's Research Ethics Committee in accordance with UCT policy. Permission was also obtained, after lengthy engagement, from Ximafana to conduct research within the organisation. However, organisation approval to conduct research came with certain conditions.

Key conditions were a requirement to anonymise the case study details; not using the municipality's name, logo and branding; and obtaining the municipality's permission to publish the research. I considered the latter condition the most problematic as it would compromise the objectivity and integrity of the study. Further consultation with the municipality culminated in what I considered to be an appropriate compromise. The municipality would not interfere with the requirement of submission for purposes of examination but that any subsequent intention on my part to publish my study in a peer-reviewed journal or as a chapter in a book would need to be reviewed by the municipality to ascertain whether the findings and analysis were consistent with the permission that had initially been granted.

Prior consent was also sought and obtained from all individual participants prior to conducting the interviews. Anonymity and confidentiality were ensured (see appendix G).

4.3 Conclusion

This chapter described the approach and methods used to gather the data in the study. In the next chapter, I examine the connection between collective bargaining and the right to strike and the regulation of disputes and strikes in essential services within the municipal sector and introduce the case study.

5. CHAPTER FIVE

5.1 Introduction

This chapter examines the constitutional and legal responsibilities and structure of municipalities. I also examine municipalities as employers, and as members of an employers' organisation. The chapter then looks at collective bargaining arrangements in the local government sector, and how the parties to the South African Local Government Bargaining Council (SALGBC) have agreed to facilitate and guide the conclusion of minimum service agreements. Finally, I introduce my case study and the minimum service level proposals developed by the employer in Ximafana.

5.2 The Constitutional and legal responsibilities of a municipality

The Constitution of South Africa stipulates that government is constituted as national, provincial and local spheres of government. These spheres are 'distinctive, interdependent and interrelated.'[155]Municipalities are in the local sphere of government. Three types of municipalities are provided for in the Municipal Structures Act.[156] These are metropolitan, local and district municipalities referred to as category A, B and C municipalities respectively. In terms of sections 2 and 3 of the Municipal Structures Act:

> An area must have a single category A municipality if that area can reasonably be regarded as—
>
> (a) a conurbation featuring—
>
> (i) areas of high population density:
>
> (ii) an intense movement of people. goods. and services:
>
> (iii) extensive development: and
>
> (iv]multiple business districts and industrial areas;
>
> (b) a centre of economic activity with a complex and diverse economy:

[155] Constitution of the Republic of South Africa No 108 of 1996 at section 40.
[156] Act No 117 of 1998.

(c) a single area for which integrated development planning is desirable: and
(d) having strong interdependent social and economic linkages between its constituent units.'

Category B and C municipalities do not display any of the characteristics of a category A municipality.

It is also prescribed that local government must ensure that services are provided to communities in a sustainable manner.[157]The constitutional prescripts of local government in respect of service delivery are regulated primarily in the Municipal Systems Act (the Act).[158] The Act provides that municipalities must ensure that 'all members of the local community have access to at least the minimum level of service.'[159]

5.3 Municipalities as employers and as members of the South African Local Government Association (SALGA)

The Act does not compel a municipality to be a member of a municipal association or employers' organisation. It does however place certain responsibilities on a Municipal Manager in respect of staff matters.[160] The execution of these responsibilities, the Act provides, is subject to any applicable labour legislation. 'Labour legislation', as defined in the Act, includes collective agreements in terms of the LRA.

The Act does however provide for the recognition of a single organisation, having a majority of municipalities as members and established in terms of the Organised Local Government Act (OLGA),[161]to represent local government nationally. In 1998, the government recognised SALGA as such an organisation.[162] OLGA also requires that municipalities must comply with any collective agreements concluded by organised local government 'within its mandate on behalf of local

[157] Section 152(E) of the Constitution.
[158] Act 32 of 2000.
[159] Section 73 of the Municipal Systems Act.
[160] Section 66 of the Municipal Systems Act.
[161] Act 52 of 1997.
[162]GNR 175 30 January 1998: Recognition of Organised Local Government.

government in the bargaining council established for municipalities.'[163]To this end, SALGA, in accordance with clause 3.10 of its constitution, has been registered as an employers' organisation, and is a party to the South African Local Government Bargaining Council (SALGBC).[164]

5.4 The South African Local Government Bargaining Council (SALGBC)

Unlike in the public service, the LRA does not prescribe the establishment of a national bargaining council for the municipal sector. The employer and trade union parties have voluntarily established such an institution in accordance with section 27 of the LRA.

The SALGBC was registered on 1 May 2001 in terms of section 29(15)(a) of the LRA.[165] The registration followed a period of negotiation amongst the founding parties, namely the South African Local Government Association (SALGA), the South African Municipal Workers Union (SAMWU) and the Independent Municipal and Allied Trade Union (IMATU). Many of the smaller regional unions that had been part of the National Labour Relations Forum negotiations had merged with either IMATU or SAMWU by the time the SALGBC was established.

The parties to the SALGBC concluded several stand-alone collective agreements on various matters of mutual interest. These included agreements on an agency shop; levels of bargaining; essential services; conditions of service; grievance and disciplinary procedures; and organisational rights. These agreements were all consolidated in 2005 into the Main Collective Agreement (MCA). The parties to the MCA subsequently renegotiated and concluded a new MCA on 9 September 2015.

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[163] Section 71 of the Municipal Systems Act.
[164] See Constitution of SALGA available at https://www.salga.org.za/Documents/About%20Us/Final%20SALGA%20Constitution%20(as%20Amended%20by%20National%20Conference).pdf. (accessed on 15 November 2018).
[165] The registration of the SALGBC had been preceded by the establishment of what was known, at the time, as the National Labour Relations Forum for Local Government (NLRF) in 1994. The NLRF was the outcome of negotiations that consolidated the pre-existing industrial councils and local negotiating forums. The negotiating counterparts were nine trade unions and three municipal employers' organisations.[165] This was followed by an agreement on 7 September 1997 establishing an Interim SALGBC.

There are two other registered national unions currently organising in the sector. These are the Democratic Municipal and Allied Workers Union of South Africa (DEMAWUSA) and the Municipal and Allied Trade Union of South Africa (MATUSA). Both unions are breakaways from SAMWU. It is apparent from employee figures for the sector and founding trade union party figures that these two unions do not meet the threshold for admission to the SALGBC. Admission to the SALGBC is regulated by section 4 of the SALGBC Constitution. This section provides that any registered employers' organisation or trade union may be admitted as a party to the SALGBC if they represent at least 15 per cent of the total number of employers and employees in the sector respectively.[166]

5.5 Structure of the SALGBC

The SALGBC comprises a Central Council with 60 seats equally divided between the employer and trade union parties. It also has thirteen metropolitan and provincial divisions.[167] The Constitution allows for an Executive Committee of 10 persons divided equally between SALGA and the trade unions. The individual trade union representation on the structures of the SALGBC is determined on a proportional basis.[168] The Executive Committee manages the SALGBC on a day-to-day basis and is empowered to take all decisions on behalf of the Central Council unless a decision is specifically reserved for the Central Council.

Provision is also made for a Bargaining Committee that may negotiate and conclude agreements on matters of mutual interest referred to it by the Executive Committee.[169]

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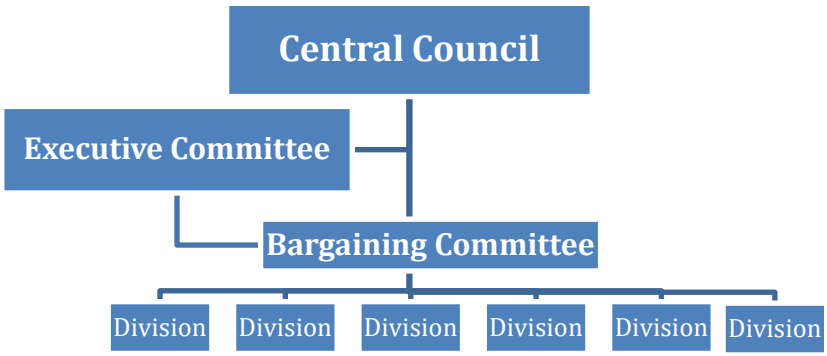
166 This provision does not however prohibit a trade union from seeking organisational rights at municipality level in terms of the LRA.
167 SALGBC Constitution at clauses 5 and 6. Available at https://www.salgbc.org.za/central-council/salgbc-constitution/ (accessed on 15 November 2018).
168 Ibid at clause 7.
169 Ibid at clause 9.

According to the SALGBC, there are just in excess of 250 000 employees[170] in local government. The trade union parties to the SALGBC represent approximately 94% of these employees.

Fig.4 SALGBC Structure



The MCA makes provision for what is termed a Local Labour Forum (LLF). Each municipality must establish a LLF. The parties to a LLF are the same parties as to the SALGBC. The LLF has the power to negotiate and/or consult on any matter of mutual interest that does not fall to be dealt with in the Central Council or the Bargaining Committee. The MCA specifically makes provision for minimum service agreements to be concluded at LLF level.[171]

5.6 Parties to the SALGBC

5.6.1 South African Local Government Association (SALGA)

SALGA is a national association comprising 257 municipalities out of a total of 278 municipalities in the country. [172] According to the Department of Cooperative

[170] Written communication from the General Secretary of the SALGBC.
[171] Section 11.8.2.1 of the SALGBC Main Agreement available at https://www.salgbc.org.za/collective-agreements/main-collective-agreement/ (accessed on 15 November 2018).
[172] SALGA Website available at http://www.salga.org.za/About%20Us%20W.html (accessed on 15 November 2018). There is a discrepancy between the number of municipalities referred to on the SALGBC website and the number as reflected on the Government website.

Governance and Traditional Affairs (COGTA) there are 278 municipalities in South Africa.[173] This is comprised of 8 metropolitan, 44 district municipalities and 226 local municipalities. Membership of SALGA is voluntary. As mentioned above, SALGA is also a registered employers' organisation and may, as provided for in the LRA, enter into binding collective agreements on behalf of its members. Ximafana is a member of SALGA.

5.6.2 South African Municipal Workers Union (SAMWU)

SAMWU, an affiliate of the Congress of South African Trade Unions (COSATU), is the larger of the two union parties to the SALGBC. It was formed in 1987. According to SALGBC records, SAMWU's membership in the municipal sector stood at 142 584[174] as at 31 January 2018.

5.6.3 Independent Municipal and Allied Workers Union (IMATU)

IMATU was formed in 1996. IMATU's membership, as 31 January 2018, stood at 92 432.[175] IMATU is not affiliated to any of the trade union federations in the country.

5.7 Essential services in the municipal sector

The initial determinations made by the ESC in 1997[176], in respect of the municipal sector, were very broad and identified 'in broad brush strokes' services within which essential services were located. It was intended that parties would unpack these designations and reach agreement on minimum services for essential services in the strict sense.[177] The ESC did not identify 'part of a sector' as an essential service as provided for in section 70 (2)(a) of the LRA at the time.[178] Instead it mainly focused on a service as a whole. Cohen and Le Roux are of the view that this approach was

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[173] See https://www.gov.za/about-government/government-system/local-government (accessed on 15 November 2018).
[174] Written communication from the General Secretary of the SALGBC, dated 10 August 2018.
[175] Ibid.
[176] See GN R1216 (12 Sept 1997).
[177] Pillay (fn 56) at 36.
[178] Cohen and Le Roux (fn 57) at 120.

taken for the sake of '*expediency and in the mistaken belief that the ambit of these designations would be reduced by minimum service agreements.*'[179] In the event that parties could not reach an agreement, the matter would be referred as a dispute.[180] The designated services in the municipal sector are:

a) Municipal traffic services and policing;
b) Municipal health;
c) Municipal security;
d) The supply and distribution of water;
e) The transmission and distribution of power;
f) Firefighting;
g) The maintenance and operation of water-borne sewerage systems, including pumping stations and the control of discharge of industrial effluent into the system;
h) The maintenance and operation of sewage purification works;
i) The collection of refuse of an organic nature;
j) The collection of infectious refuse from medical and veterinary hospitals and practices;
k) The collection and disposal of refuse at a disposal site; and\
l) The collection of refuse left uncollected for 14 days or longer, including domestic refuse and refuse on public roads and open spaces.

The designations in the public service went a bit further to disaggregate emergency health, nursing and medical and paramedical services by listing support services. This was however only for the purpose of declaring these support services as essential themselves.[181]

Following an intervention by the ESC, the parties to the SALGBC amended their template for recording minimum services. The template now broadly reflects what is required in LRA form 4.8. This has however not resolved the challenges confronting the parties in arriving at a minimum service agreement in a municipality.

[179] Ibid at 120.
[180] Pillay (fn 77) at 809.
[181] GN R1216 (12 Sept 1997).

The geographic scope of a municipality, the number of depots, and the high number of job designations are major complicating factors. The unbundling of the non-essential jobs from the essential jobs is a further challenge. These issues are dealt with more fully in the next section.

5.8 SALGBC regulations in respect of essential services and the conclusion of minimum service level agreements

5.8.1 Context

The issue of essential services was on the agenda of the NLRF and the SALGBC since their inception. An agreement regulating essential services within the sector was signed in the NLRF in June 1997.[182] While the LRA does not specify where negotiations in respect of minimum services must be conducted, the MCA specifically provides that these will be dealt with in LLFs.

The regulation of essential services is found at section 12 of the MCA. The Council has developed a set of guidelines, inclusive of a proforma framework agreement, that form an annexure to the MCA[183]. The parties must consider these guidelines when concluding MSAs. Clause 12.2.1 of the MCA also specifically states that *'the employers hereby waive and abandon the right to take on replacement labour in order to provide a service in addition to the minimum service levels agreed in respect of any service determined to be an essential service.'*

5.8.2 The framework agreement

The framework agreement that forms part of the MCA provides that, in the absence of an MSA, '*all employees in the designated essential service are prohibited in law from striking or participating in a strike.'* The agreement also directs the employer on the steps to be followed when invoking any agreed minimum service. It specifically requires that, *'in the event of a strike, the employer shall in the first*

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[182] SALGBC *Fragmentation to unification: The development of collective bargaining in local government* 1st Ed (2011) at 26.

[183] Annexure 4 to the SALGBC Main Collective Agreement.

instance have regard for the number of workers who have declined to participate in the strike to determine whether or not the agreed minimum service as set out in the agreement has been met.' If the number of workers who are not participating in the strike does not allow the minimum service level to be reached, then the employer would be required to inform the unions of the occupations and number of employees that are required in order to maintain the agreed minimum service.

The framework agreement incorporates a set of four forms, all of which the negotiating parties would need to complete when concluding the MSA. These forms are intended to provide the information necessary to allow the ESC to consider the agreement prior to ratification.

Annexure 4.1 of the framework agreement requires the following information:

Designated essential service (as per the government gazette)	Number of employees on the staff structure (organogram) of the employer that perform essential services (per designated service)	Post designations of the employees that perform the essential services	Number of employees in the designated essential service (per post designation)

Annexure 4.2 of the framework agreement requires the following:

Designated essential service in terms of the government gazette	Department/Section that the employee performing essential services is employed in.	Post designations of employees performing the essential service in the department/service	Number of employees, per post designation, who perform essential services	Number of employees that have to be at work as part of the minimum service in the event of a strike	Number of employees in the designated essential service who may participate in the strike

Annexure 4.3 of the framework requires the following information:

Designated essential service in terms of the government gazette	Post designations/categories of employees performing essential services	Motivation: (The parties are required to motivate the agreed to minimum service, per category of employee, to the satisfaction of the Essential Services Committee.) Parties have to clearly demonstrate that despite this agreement and in the event of a protracted strike, there shall be no endangerment to the life, personal safety or health of any person affected by the service.

Annexure 4.4 of the framework, under the heading 'Format for Recording Minimum Service Agreements' simply states that '[a]s a result of the amendments to the Act, this matter will be dealt with by the Council who will provide guidance to the municipalities.'

On 12 November 2015, the executive committee of the SALGBC met to give effect to what had been stipulated in Annexure 4.4 of the MCA. A circular was subsequently sent to all municipal managers, all human resource directors or managers, the chairperson of the LLFs, LLF members, the chairpersons of IMATU and SAMWU shop steward committees, regional managers of IMATU, provincial secretaries of SAMWU and the program manager of SALGA. The circular contained a new framework agreement with relevant annexures and, detailed the steps to be *'undertaken to conclude the Minimum Service Collective Agreement.'*[184] Although the old Annexures 4.1- 4.3 remained as is, a seven-step process was now introduced.

The process required the municipality to prepare a draft MSA, by completing the 'five (5) prescribed forms (annexures 4, 4.1, 4.2,4,3, 4.5).[185] Municipalities were required to submit the draft MSA to the LLF secretary by 25 November 2015, with copies to the local structures of the respective unions. The LLF would then have to meet by 30 November 1995 to negotiate and conclude an MSA. The concluded agreement must then be forwarded to the relevant regional secretary of the SALGBC who would in turn have to forward same to a divisional essential service working group (ESWG). The ESWG would then have to check if the agreement complies with the requirements of the ESC. A member of the ESC may assist the ESWG in this process. Once completed, the MSA would be returned to the LLF for signature after which it would be forwarded to the general secretary of the SALGBC. If the parties were unable to conclude an MSA, a report would be submitted to the relevant SALGBC regional secretary who would set up a facilitation meeting conducted by either a SALGBC panellist or a member of the ESC. Facilitations were meant to be

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[184] SALGBC Circular No.12/2015 dated 13 November 2015 at https://www.salgbc.org.za/circulars/#194-2015-1500624847. (accessed on 2 December 2018).

[185] Only the old annexures 4.1, 4.2 and 4.3 were attached. The circular did however include a copy of CCMA form 4.8.

concluded by 14 February 2016 and could involve more than one municipality at a time. If the facilitation ended inconclusively, any party would be entitled to submit a dispute in terms of section 72(2) and Section 73 for determination by the ESC.

The draft framework agreement was fundamentally different to the one that was annexed to the MCA. It listed all the municipal services that had been designated as such by the ESC in 1997. It now also specifically provided that:

> 'Notwithstanding the above designation, employees engaged in a designated essential services and who perform non-essential functions, the interruption of which do not directly endanger the life, personal safety or health of the whole or any part of the population, such as administrative functions, non-essential support functions and the like, shall not be deemed as essential in terms of this agreement.'[186]

This inclusion, it is suggested, was to provide greater guidance to the parties when identifying designations that could be incorporated into the minimum service. This has not been taken up aggressively by the parties. In the interviews, none of the participants raised this issue.

The agreement also provides that section 74 of the LRA would *'apply to all employees who may not participate in strike action in terms of this agreement*[187] [the Minimum Service Collective Agreement], *subject to the provisions of section 72(6) of the Act.'* It further provides that all parties to the agreement must ensure that *'all affected employees are informed and made aware of the contents of the agreement in a manner that is accessible to all occupational levels of employees.'*[188]

The data emerging from the interviews and information provided by the ESC suggest that the SALGBC circular of 13 November 2015, did not have the intended effect.

5.8.3 Capacity building

[186] Clause 3.2 of Annexure 4.
[187] Section 5 of Annexure 4.
[188] Section 9 of Annexure 4.

Reference is made in the SALGBC circular of 13 November 2015 about LLF training that had been conducted. This training specifically included a section on concluding minimum service agreements. This training referred to in the circular,[189]was a follow up to LLF training first held in 2011. Even though the training manual included, at section six, a section on essential services, and was aimed at building the capacity of LLF representatives to fully understand the concept and, to guide parties on how to conclude minimum service agreements, it was not one of the ten workshop objectives listed in the manual.[190]

The manual set out a series of requirements[191]that the negotiating parties would need to adhere to when concluding an MSA. These included that the use of percentages to decide on the number of workers required to work in the event of a strike should be avoided. It also required the post designations of employees that must be available during off-duty hours to report to work post-haste to perform essential services in the event of a strike. A provision would also have to be included in the MSA that allows for employees not forming part of the minimum service or replacement labour to perform essential services if too many of the workers forming part of the minimum service are absent during a strike for whatever reason, including sickness.

This constitutes the only capacity building initiatives undertaken by the SALGBC regarding essential services and the conclusion of MSAs. The reach and effectiveness of this initiative has not been evaluated.

5.8.4 The shift from MSAs to MSDs and possibly back to MSAs

As mentioned above, parties did not respond to the prompting by the SALGBC to conclude MSAs. This compelled the Executive Committee to once again review the applicable procedures regulating MSAs. This took place at an Executive Committee meeting held on 15 November 2016. After this meeting, a circular was sent on 18

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[189] SALGBC 'Local Labour Forum Workshop for Municipalities, SAMWU and IMATU' (2014) at 129-160.
[190] Ibid at 10.
[191] Ibid at 138 and 139.

November 2016[192] to the same parties that had received circular 12/2015. The decisions taken at this meeting, I would suggest, have contributed to the increase in the number of referrals to the ESC for determinations of minimum service levels rather than the conclusion of MSAs.

The Executive Committee informed parties that a legal opinion had been obtained that stated that once an MSA had been signed and ratified, all workers in the essential service, including those in the minimum service, are prohibited from having an interest dispute resolved by way of interest arbitration. The parties to the Council were however keen to retain these rights on behalf of their member constituencies without any limitations. The parties to the Council were of the view that a determination of a minimum service as envisaged in section 72 (2) of the LRA would be a better option for any of the parties because, as the LRA stood at the time, section 72(5) only allowed for interest arbitrations, where the ESC has made a minimum service determination, in the event that a majority of employees employed in the essential service voted by ballot in favour of following the arbitration route.

It was then suggested, rather confusingly, to the parties that they continue with negotiations and, in the event the negotiations are successfully finalized, to refer the matter to the ESC, not for ratification but as a dispute requiring the ESC to make a determination on the minimum service on the terms provided for in the 'agreement'. This would be initiated by submitting a referral to the ESC on LRA form 4.2A.[193]The referral would also be accompanied by existing annexures 4.1, 4.2 and 4.3. of the SALGBC framework agreement.

ESC data indicates that more municipalities have followed this route. What is unclear however, from both the case study interviews and available ESC data, is whether parties had concluded an agreement before the 4.2A referral or whether determinations have been requested on the basis that parties are in dispute.

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[192] SALGBC Circular 4/2016 18 November 2018.

[193] LRA form 4.2A is a referral form for a dispute arising from negotiations concerning minimum service agreement for determination.

The Labour Relations Amendment Bill, gazetted in November 2017, proposed further changes to the essential service provisions of the LRA. Specifically, it proposed an amendment (underlined) to section 72(5) and a new section 72(9).[194]

> 72(5) Despite subsections (3) and (4), section 74 applies to a designated essential service in respect of which the essential services committee has ratified a minimum services agreement or has made a determination of minimum services if the majority of employees employed in the essential services voted in a ballot in favour of this.

The inclusion of a new section 72(9), flowing from the proposed change to section 72(5), was intended to clarify what was meant by the terms 'ratified minimum service" and 'determined minimum service'

> (9) For the purposes of this section, a ''ratified minimum service'' or ''determined minimum service'' means the minimum number of employees in a designated essential service who may not strike in order to ensure that the life, personal safety or health of the whole or part of the population is not endangered.

These amendments were passed by both the National Assembly and the National Council of Provinces, the latter on 7 August 2018.[195] The President has yet to assent to these Acts. These amendments would appear to resolve the concerns raised by the parties to the SALGBC. Participants from all the parties indicated an ignorance of these amendments and were unsure as to whether the formal position of their organisation would change as a result of these amendments.

5.9 The case study - Ximafana Metropolitan Municipality

In this section I set out the details of the metropolitan municipality case study which is the focus of this study.

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[194] Available at http://www.labour.gov.za/DOL/downloads/legislation/bills/proposed-amendment-bills/lrabill_nov2017.pdf (accessed on 20 November 2018).
[195] See https://pmg.org.za/committee-meeting/26791/ (accessed on 20 November 2018).

5.9.1 A metropolitan municipality

Ximafana is one of 8 metropolitan or category A municipalities declared in terms of the Municipal Structures Act by the Minister of Cooperative Governance and Traditional Affairs.

5.9.2 Ximafana in numbers

Ximafana covers an area of 2 461km² and has a population of 4 004 793 and has recorded that there are 1 264 849 households within its area of jurisdiction.[196]

5.9.3 Organisational structure and staffing complement

Ximafana is comprised of nine Directorates. Of these, five cover a total of 15 direct service departments and branches that fall within the scope of the designated essential services (see appendix H).

As at 27 July 2018, Ximafana employed a total of 26 331 people on a permanent basis of which 17 634 are employed in essential services.[197] This constitutes 70 per cent of the total staff complement. The breakdown of this number is as follows:

Table 2. Number of employees engaged in essential services

Directorate	Organisational Unit		Number of Employees
Social Services	Health		1 683
Informal Settlements, Water and waste	Water and Sanitation		3 735
	Bulkwater		691
	Wastewater		344
	Reticulation		1 503

[196] Information obtained from the municipality's Integrated Development Plan. It was accessed on 15 November 2018, but the URL has been omitted to maintain anonymity.
[197] This is according to figures supplied by the employer from its central data bank.

	Water Demand Management		114
	Engineering and Asset Management		371
	Catchment and Stormwater Management		27
	Solid Waste Management		3 172
Safety and Security	Metropolitan Police Services		602
	Fire Services		1 123
	Disaster Management Risk Centre		76
	Public Emergency Communications Centre		81
	Traffic Services		1 134
	Law Enforcement Services		661
Energy	Electricity Generation and Distribution		2 317
	Total		17 634

Source: Employer

5.9.4 Union membership in Ximafana

SAMWU and IMATU are both recognised for purposes of representation and bargaining by the employer. SAMWU and IMATU's membership, as 25 July 2018, stood at 10 838 and 13650 respectively. There were also 2 500 employees who did not belong to either union but contributed to the agency shop that is in place within the sector.[198]

5.9.5 Bargaining arrangements

Ximafana falls within the jurisdiction of a Metropolitan Division of the SALGBC. The division, in the main, deals with disputes referred to the SALGBC by the employer or employee parties from Ximafana. The division has from time to time

[198] The small discrepancy between the total number of employees identified by union affiliation and the total number of employees stated elsewhere, is as a result of the slightly different dates on which these figures were accessed.

undertaken negotiations in respect of matters that have been delegated to this division by the Central Council of the SALGBC. The division has not intervened in the minimum service level negotiations in Ximafana nor has it monitored the progress in the municipality for giving effect to the processes that had been agreed in the central council from time to time on this matter.[199]

Ximafana previously established Local Labour Forums as provided for in the SALGBC Main Collective Agreement (MCA). These forums, established on directorate lines, did not prove very effective. This included inconclusive negotiations regarding essential services.[200]

The parties in Ximafana concluded a collective agreement (the agreement) on 14 December 2014, for the establishment of a Local Labour Forum (LLF) and Directorate Labour Forums (DLC) as provided for in Part C, Section 2, Clause 2.8 of the MCA. The agreement was initially intended to remain in force for a trial period of six months subject to a final decision on the period by the relevant Metropolitan Division of the SALGBC.

The powers and functions of the LLF are as set out in the MCA and are intended to deal with city-wide issues and/or directorate issues of a generic or cross-cutting nature.[201]

The DLCs provided for in the agreement are empowered to bargain on matters of mutual interest that are specific to departments in a directorate. The DLCs would however not be able to deal with matters that had been delegated to the Metropolitan Division of the SALGBC or to the LLF in terms of the Levels of Bargaining and LLF provisions of the MCA.[202]

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[199] Interview with Metropolitan Divisional Secretary of the SALGBC on 11 July 2018.
[200] Interview with employer representative, TU6.
[201] Clause 5 of the 'Collective agreement for the implementation of a local labour forum and directorate labour committees.'
[202] Ibid at clause 6.

While earlier discussions regarding essential services had taken place within directorates, the parties agreed that going forward it would be dealt with at the main LLF as required by clause 11.8.2.1.4 of the MCA.

5.10 Ximafana's minimum service level proposals

I was able to analyse seven minimum service proposals provided by the employer. These had been developed by the relevant departments and branches within Ximafana. They cover 14 service units with only energy not included in the proposals the employer provided.

5.10.1 Traffic Services

The traffic services proposal provides that 676 employees out of 1142 may strike. This covers 150 uniformed traffic officials, 47 non-permanent employees and 479 support/administrative personnel. Its proposal however is confusing in that while it allows for the 676 employees to strike, it also states that the total of 1142 must be on duty as the minimum service.

5.10.2 Solid Waste

In its motivation, the solid waste department acknowledges that refuse collection only becomes essential after 14 days. The motivation however also states that as household refuse is now commonly mixed with organic refuse, it points to an elevated health risk from the outset. The proposal makes provision that 2 015 employees out of a total of 2 984, constitutes the minimum service and are precluded from striking. This represents a 67.5 per cent 'no strike' provision. They also wish to have the option of recalling all striking workers linked to the Specialised Equipment Unit and the operational employees linked to a specific geographic area in the event of an emergency.

5.10.3 Metropolitan Police

Metro Police only provides a schedule of post designations. The motivation in respect of maintaining support and administrative staff within the minimum

service is ‘to allow sworn officers to perform optimally’ in their function. The number of employees in this department that, according to the employer, is required to maintain a minimum service is 566 out of a total of 613.

5.10.4 Law Enforcement

Law enforcement provides very limited motivation. Its proposal simply states that *‘[l]aw enforcement enforce the City’s by laws. They must respond to protest, disasters, emergencies, civil unrest and to all major incidents in the City.’* All 1 034 permanent and non-permanent personnel are included in the proposed minimum service. This figure includes 61 support and administrative staff. In other words, 100 per cent of the workers in this department are precluded from striking.

5.10.5 Health Services

Using a template of designations across the service as whole, the health services proposal simply reflects employee numbers at each of the 87 health facilities and designated all these 1219 employees as essential.

5.10.6 Fire Services

The fire services proposal indicates that there is 1 364 permanent and non-permanent employees and 120 seasonal employees engaged in the designated essential service. The proposal stipulates that all 1 364 permanent and non-permanent employees must constitute the minimum service. All seasonal staff plus 37 ‘workers’, 17 ‘support/administration staff’, 7 ‘hydrant staff’ and 7 ‘fire and life safety’ employees may join a strike.

5.10.7 Water and sanitation

In respect of water and sanitation, 3 574 employees are engaged in the designated essential service. The number of workers required to maintain the minimum service is 2 860. This constitutes 80 per cent of the total number of employees in the designated essential service who are precluded from striking.

5.10.8 Summary of the proposals

An analysis of the data received for these seven proposals indicate that, according to the employer, 10 200 out of 12 726 (80 per cent) employees in the designated essential services, would be required to maintain a minimum service in the event of a strike. As a percentage of the total workforce of 26 331, it represents 38.7 per cent.

Table 3. The breakdown of the employer's proposals

Dept./Branch	No. of employees in the designated essential service, extracted from the proposals.	No. of employees required to maintain the minimum service.	No. of employees who may strike.	Percentage of employees who may not strike.
Traffic	1 818	1 142	676	62.8
Solid Waste	2 984	2 015	969	67.5
Metro Police	613	566	47	92.3
Law Enforcement	1 034	1 034	0	100.0
Health	1 219	1 219	0	100.0
Fire Services	1 484	1 364	120	91.9
Water and Sanitation	3 574	2 860	714	80.0
Total	12 726	10 200	2 526	79.8

Source: Employer

This chapter introduced the case study and the minimum service level proposals developed by the employer. The next chapter details the outcomes of interviews with the identified participants and present the findings and analysis of the study. The themes that emerged were shaped by the research questions and the interview schedules.

6. CHAPTER SIX

6.1 Introduction

In this chapter, I present the findings from the interviews with the identified participants and, an analysis of these findings. Extracts from the data are used to reflect on the themes that emerged from these interviews. The key purpose of the interviews was to examine the familiarity with and understanding of the regulatory framework by the identified participants. In this chapter, I also examine what steps the employers and the trade union parties have undertaken to build the capacity of their representatives to negotiate on minimum service agreements.

6.2 Findings

6.2.1 Familiarity with the LRA regulatory framework in respect of essential and minimum services

Five of the employer representatives expressed a thoroughgoing knowledge and familiarity with sections 70 to 74 of the LRA. E5[203] was however less familiar with these provisions. She had only been employed in the sector for four years. Prior to this, she had worked in the private sector. While not completely familiar with LRA provisions, E5 did however indicate knowledge of an essential service as defined in the LRA and the distinction between an essential service and a minimum service.

The situation amongst the trade representatives was in complete contrast to the employer representatives. Although all were familiar with the concept of an essential service, only TU3 was conversant with the LRA provisions. TU1 stated that 'I know [the LRA framework] but I'm not sure if I've got a broad understanding'. TU2 postulated a similar view. 'I'm not going to lie. I only have a very broad understanding. I have no knowledge of the LRA provisions and the distinction

[203] Employer interviewees are identified as E1 to E 6 and trade union interviewees TU1 to TU8. See footnote 152.

between minimum services and an essential service.' TU6 stated that he 'had not studied the LRA provisions on essential services.'

6.2.2 Familiarity with the provisions of the SALGBC Main Agreement for dealing with essential services

As above, all but one of the employer representatives have a good working knowledge of the SALGBC MCA provisions regulating essential services. This is primarily because they have all been involved in coordinating minimum service level proposals from the relevant departments and branches of the employer. E5, while not completely familiar with the SALGBC framework, did however indicate that while the 'SALGBC main agreement should guide parties, the template to be followed in completing the minimum service agreement, was not very user friendly and too generic.' This observation was confirmed in other interviews with employer interviewees when discussing how their departmental proposals were formulated. It suggested to me that the SALGBC needed to reconsider the template so that it provided more explicit guidance to the parties.

The trade union representatives again displayed only a very broad knowledge regarding the SALGBC framework. One participant said that he was 'familiar with the SALGBC framework but not too clear about the distinction between an essential service and a minimum service. I know that we need an MSA. It is compulsory'[204] Another said that she was 'not familiar with and received no training on the SALGBC framework.'[205] On the issue of the template, another said he was 'not familiar with working with the SALGBC template.'[206]

Only TU3 indicated a working knowledge as he had been involved in essential service consultations and negotiations previously. 'I have been involved in approximately 10 negotiations sessions over the years. These were cross-cutting sessions but dealt mainly with Safety and Security. I think I'm sufficiently equipped to handle negotiations.'[207]

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[204] TU4.
[205] TU5.
[206] TU7.
[207] TU3.

As with the familiarity of employer and trade union interviewees with the LRA framework for regulating essential services, familiarity with the SALGBC framework, confirmed the disparity between the trade union and employer representatives, with the former ill-equipped for minimum service negotiations.

6.2.3 The process adopted for developing a minimum service proposal in Ximafana

According to E1, the development of the various proposals was coordinated at a corporate level. The actual content was, however. decided within the relevant departments or branches. One participant indicated that in their department workshops were held with line managers to prepare them for this process.[208]

The proposals would then be signed off by the Director and Support Manager of the relevant department or branch. According to E1, 'they are subject matter experts and the best people to deal with determining the minimum service.' E1 was not aware whether these managers receive special training. They were 'able to anticipate whether a threat is imminent in the event of an interruption of the service.'[209]

> 'Managers need to be on top of what the law says. This will improve as requirements for the job is tightened. Currently there is a bit of a disjuncture between operational and human resource issues. The complexity is getting it right in terms of numbers required to maintain a minimum service that meets the essential service definition.'[210]

Departments and branches were not instructed to approach the determination of a minimum service with pre-determined percentages.[211] 'You cannot have an across the board approach as issues like seasonal considerations etc might need to be taken into account. For us, it is not easy. These are very complex negotiations.'[212]

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[208] E3.
[209] E1.
[210] E4.
[211] E1.
[212] E1.

‘Adopting a percentage approach is dangerous. Operations differ in different sections.’[213]

This was confirmed by E2 and E3, who stated that in their sections they had adopted a percentages approach but had followed a scientific and thorough process. In E2’s department, the latest proposal was very similar to what had been developed some years ago, with changes arising from changed circumstances.

The template from the SALGBC was initially followed by all the departments and branches of the employer. Two of the employer participants found the template to be confusing and not user-friendly. In fact, E2’s department had not used the template but worked off the organograms for each depot of the department. They listed every post in each depot and considered what the impact would be if that post was vacant due to strike action.

The above approach was not followed by the other departments and branches represented by E1, E3, E4 and E5. Here they adopted a ‘job title and number approach.’

> ‘We were able to ‘move away from a percentages approach to one that would reflect the interests of all parties. We adopted a designation and number approach. We had to consider operational and support positions. For example, in disposal sites, some clerical posts are needed to keep the service running as required. So, it was the nature of the position and the nature of the operation that was considered.’[214]

All the trade union participants were aware that the employer had circulated its proposal but, except for TU4, none of them had seen these proposals nor had the unions started discussing the proposals. According to TU2, the proposals had not been discussed at the level of the shop stewards committee ‘and, even if we have a meeting, such things are never discussed.’ All eight trade union participants deferred

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[213] E5.
[214] E3.

to either their regional or national structures to provide guidance on how to take the process further or alternatively how to respond to the employer's proposals.

TU6 however indicated that he did not support the use of the SALGBC template for purposes of developing a minimum service. His opinion was that the departmental organograms were the most appropriate means by which to develop these proposals. This sentiment was identical to the approach already followed by E2's department. TU4, TU7 and TU8, all from the same union, indicated a willingness to participate in negotiations but stressed that their formal union position was not to conclude any agreement but rather to allow the ESC to issue a determination of a minimum service as the union did not want to forgo the right to refer a dispute to interest arbitration. This is consistent with the circular issued by the SALGBC in November 2016 following the SALGBC Executive Committee meeting where this matter was discussed. The other trade union participants also indicated a willingness to enter negotiations. They were however keen that the parties should conclude the agreement for ratification by the ESC as originally intended and did not support the stance of the other union on this matter.

According to TU3:

> 'The union will need to fast track its proposals. If not, the ESC will determine the minimum services. We should just crunch the numbers and get the most workers free to strike.'

6.2.4 Training and capacity building in Ximafana

None of the employer representatives has attended any essential services specific training or capacity building programmes. Two of them however indicated that their department had convened workshops for line managers.[215]

Other than TU3, none of the trade union representatives had undergone any essential services specific training and capacity building programmes at either the

[215] E3 and E4.

trade union, employer or SALGBC level. TU3 said that 'the union provided a lot of training in those years. I received some training at provincial level, under previous leadership, on essential services.'[216]Another participant said that he 'did not go for formal training to understand all these things. I teach myself. I carry the SALGBC Main Agreement in my bag.'[217]

On this issue, the interviews clearly reveal an absence of capacity building interventions for workers and their representatives or for the employer representatives.

6.2.5 Managing the no-work, no-pay principle

A trade union representative raised the problem of deciding how to deal with the remuneration of striking and non-striking employees in a designated essential service.[218] 'This causes divisions amongst workers.'[219] This has never been discussed by the Ximafana parties, either independently or at LLF level.

6.2.6 Municipal law enforcement services

Another issue that emerged from the interviews is that Law Enforcement and Disaster Management workers in Ximafana wanted to be declared as essential service workers even though they are not explicitly designated as such[220]. The employer supported this position.

Law Enforcement had historically been accepted by the parties as constituting an essential service. This was due to law enforcement, in an earlier iteration of the Safety and Security department of Ximafana, falling within what was clustered as 'Traffic and Law Enforcement Services'. Law Enforcement was mainly responsible for enforcing municipal by-laws. Subsequent restructuring had separated law enforcement, metropolitan police and traffic services into separate branches. A

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[216] TU3.
[217] TU1.
[218] TU 3 and TU4.
[219] TU3.
[220] TU3.

proclamation had now been issued that extended the powers of law enforcement officers to much of what was currently undertaken by traffic officers and metropolitan police services.[221] It had been suggested that, in order to clear up this confusion, it might be sound for the ESC to now define what is meant by 'municipal policing'[222]

6.2.7 Why have the parties in Ximafana not used the dispute resolution provisions of the LRA

In a general sense, all the employer participants stated that the employer was not in any rush to arrive at minimum service levels. The prevailing 'all-in' cover provided by the existing ESC determinations was beneficial for the employer. [223]

> 'Both sides have an incentive to disregard the law – the 'all-in cover provided by the determinations and the fact that the employer never dismisses.'[224]

An employer participant could not understand why the trade unions have not declared a dispute on the absence of agreed minimum service levels.[225] The trade union representatives provided no clear-cut answers as to why the trade unions in Ximafana had not followed the dispute resolution provisions of the LRA to resolve the delay in concluding minimum service level agreements. This approach appeared consistent with the general apathy by the trade unions towards a system that served to divide the workforce and where, at present, the employer was reluctant to institute more decisive action against striking essential service workers.

E1 and E2 also raised a concern about the employer's failure to use other legislative means at their disposal to intervene in the event of strike action by essential service workers thereby encouraging employees to 'act with impunity.'

> 'We don't really dismiss. We give warnings, deduct pay etcetera. Regardless of an agreement on an issue, we still see workers acting in conflict with the

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[221] E6.
[222] E6.
[223] E1 and E2.
[224] E5.
[225] E3.

> agreement. Given what has gone before, there is no guarantee that any agreement will be adhered to'[226]

The trade unions have also displayed an aversion to refer disputes on matters of mutual interest to compulsory arbitration. This I submit was due to a lack of confidence in compulsory interest arbitration process as reflected on in section 3.4.3.

6.2.8 Union legitimacy

Another issue that emerged, unprompted, from amongst the employer representatives in the interviews was that of trade union legitimacy. One employer participant said that 'one union is fighting political battles within the union to decide how to approach this issue.' [227] Another said that 'unions are failing to advance their members interests in ways other than to resort to strikes.'[228]

> 'Union legitimacy is in question and they need to address this. It is 'becoming more difficult to mobilise members to strike – this applies to both unions.' The employer has 'introduced driver training and other staff development interventions that has driven workers and management closer together.[229]

The issue of union legitimacy and the strategic and tactical choices made to pursue member interests, other than a broad statement of intent to maintain unity, is not only applicable to the unions in Ximafana. From my own experience, the issue of union legitimacy and relevance is a challenge confronting the trade union movement internationally and nationally.

6.2.9 Interventions necessary to improve the current situation in Ximafana

The identified interviewees suggested a number of interventions that should be considered to improve the current situation in Ximafana. An employer participant stated that:

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[226] E3.
[227] E2.
[228] E5.
[229] E3.

> 'There are too many grey areas – any agreement must be properly informed. The ESC should relook at the existing designations. Our own job titles need to be reviewed. For example, that of professional officer. We need more descriptive job titles. The whole environment around minimum services should be as formal and structured as possible, that will help a lot. The responsibility rests with both sides to drive the negotiations. Consideration should be given to bringing in independent people to chair the negotiations.'[230]

The suggestions put forward by E1, like most of the suggestions that follow, had not been proposed by any of the parties and considered at the LLF.

6.2.9.1 Improving familiarity with the regulatory framework

Trade union representatives suggested that the trade union parties needed to familiarise themselves with the relevant legislation and that they require more training.[231]The current framework is, in almost every respect, consistent with the principles and decisions decided by the ILO. The problem, it would seem, is not with the framework itself, but with the familiarity and understanding of the parties with the framework, and the buy-in to this framework by the Ximafana negotiating counterparts. This is especially so in respect of the trade unions.

6.2.9.2 Problems with the LRA and SALGBC frameworks for regulating essential services

The interviewees reported no problems, bar one, with the prevailing regulatory regime in South Africa regarding essential services. The one problem related to the instrument adopted by the SALGBC for recording the details of a minimum service. A proposal to amend the template to reflect departmental depots and posts was suggested.

6.2.9.3 Training and capacity building

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[230] E1.
[231] E2, E3 and E6.

All the trade union participants called for more training for both shop stewards and workers. 'Even short courses will assist.'[232] The training should cover the legislative framework and how to determine what constitutes a genuine minimum service.[233]

> 'Negotiators need to have technical knowledge of the service they are negotiating about. Alternatively, the essential service workers should be roped in to advise the negotiators'[234]

E5 also emphasised the need for 'greater education amongst trade union representatives.'

An employer representative suggested that consideration should be given to the development of a set of regulations that stipulate the minimum skill set/competencies that accompany jobs that affect the health and safety and life of citizens. This, it was suggested, would aid the parties in determining appropriate minimum service levels.[235]

6.3 Analysis of the findings

6.3.1 Familiarity with the provisions of the regulatory framework for essential services as provided for in the LRA, and the SALGBC.

The data indicated that the negotiating counterparts at Ximafana were unevenly matched. They demonstrate, particularly within the trade union participants, that familiarity with and knowledge of the regulatory frameworks of the LRA and the SALGBC is very general. Clearly, in terms of the trade unions, very little training or capacity building is happening. A heavy reliance is placed on executive structures to provide guidance and leadership. The need for training was expressed by all the trade union participants. The employer participants also noted this as a weakness within their negotiating counterpart.

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[232] TU2.
[233] TU1, TU3 and TU4.
[234] TU2.
[235] E2

Employer representatives themselves had undergone limited training. None of the participants had participated in the SALGBC initiated training programme for LLF members. The opportunity presented by this programme, which dedicated an entire section to essential services, is a training opportunity lost. The unevenness between the negotiating counterparts allied with the absence of involvement in training and capacity building programmes have contributed to the failure of the parties to make progress in concluding minimum service agreements.

6.3.2 Training and capacity building

Notwithstanding the training and capacity building deficit, all the participants possessed, at the very minimum, a broad understanding of the concept of an essential service. The same cannot be said about minimum services. While most of the employer and trade union participants had many years of service in the municipal sector, most of them had not actually worked in a designated essential service.

Technical knowledge has also been identified as important for deciding on appropriate minimum service levels. Many of the negotiators did not bring this experience to the table. The direct involvement of workers engaged in the designated essential services was almost non-existent. The employer participants had referred to the unsuitability of the SALGBC template for arriving at the appropriate level of a minimum service. The process they assert was very complex. The interviews also revealed the need of the negotiating parties to display the necessary levels of technical skills. Training and capacity building in disciplines such as negotiation skills and dispute resolution is insufficient for delivering minimum service level agreements.

6.3.3 Developing and responding to minimum service level proposals

The approach that the parties had adopted for developing or responding to minimum service level proposals was inconsistent with the approach suggested by

Pillay.[236]While strikes in certain municipal services have often caused inconvenience, Pillay asserted that these have not led to any reported loss of lives and that these services could be minimised without any endangerment to the personal health and safety and lives of a whole or a part of the population. She has stated that the following issues must be factored into a minimum service proposal:

- whether the whole or part of the designated essential service is indeed essential;
- the length of time a service can be safely interrupted before the endangerment factor kicks in; and
- what role, if any can non-striking members or members of other trade unions who are not on strike play in determining the appropriate minimum service must be factored into a proposal.

This has not been the case in Ximafana.

The approach by the employer in Ximafana towards developing its minimum service level proposals is also inconsistent. In services like health, fire services and metropolitan police services, in excess of 90 per cent of the workers are precluded from striking. Only one department worked off the detailed departmental organogram. No compelling motivations were provided for any of the departmental proposals.

The union parties in Ximafana, while aware that the employer has circulated proposals, have either not seen these proposals or have simply referred the proposals onwards to higher structures in the unions. They have not developed any proposals of their own.

The responses of the employer and employee interviewees do however confirm Pillay's views on the complexity of the process of negotiating an MSA.

6.3.4 Party interests in maintaining the status quo

Another reason for the absence of minimum service agreements, the data revealed was that both parties have an interest in maintaining the status quo. From an

[236] Pillay (fn 62) at 813 to 814.

employer perspective, the current 'all-in' effect of the current determinations rules out the option of strikes in designated essential services. This legally guarantees that essential services cannot be disrupted by strike action and, from my own experience, the risk of dividing workers along a strike/no strike, pay/no pay basis, is lessened.

Where workers in essential services have gone on strike, the Ximafana has shown reluctance to pursue mechanisms provided in law to respond to the strike. This includes the dismissal of striking essential service workers. This confirms the views articulated by Brand that trade unions embark on strike action involving essential service workers with impunity.[237]

The response by government to the recent strike by health workers in the North West province favoured a political solution above remedies allowed in law for dealing with strikes by essential service workers. This confirms the approach adopted by the employer in Ximafana. In this strike, the majority union NEHAWU absolved itself of any responsibility to provide essential services by laying the blame for the strike at the door of the employer for failing to respond positively to their substantive demands.[238]The approach of NEHAWU re-affirms Brand and reaffirms the stance adopted by the trade unions in Ximafana.

6.3.5 Union legitimacy

The state of trade unions in South Africa has been the subject of commentary since the advent of the post-apartheid South Africa. The Marikana massacre in 2012 served to sharpen this debate. [239] The trade union movement, particularly unions affiliated to COSATU and even COSATU itself, have been wracked by internal strife, divisions and splits. This coupled with a growing tendency towards

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[237] Brand (fn 116).
[238] Du Toit et al (fn 114) at 2145

[239] See G Hartford 'The mining industry strike wave: what are the causes and what are the solutions?' At https://www.groundup.org.za/article/mining-industry-strike-wave-what-are-causes-and-what-are-solutions/ accessed on 15 December 2018; E Webster and S Buhlungu 'Between Marginalisation & Revitalisation? The State of Trade Unionism in South Africa.' Review of African Political Economy (2004) No.100 at 39-56

centralisation and, a lack of capacity has raised the question of union legitimacy. My personal experiences attest to this. The organisational weaknesses in one union in Ximafana, as noted by the employer participants, is a further contributing factor to the lack of progress in finalising minimum service level agreements in Ximafana.

6.3.6 The role of the ESC

Engagement with representatives of the ESC and documents reviewed illustrate an improvement in the functioning of the ESC. This was also noted by the employer participants in Ximafana. The part-time status of the ESC however limits the amount of progress it can achieve in settling essential service disputes, facilitating minimum service agreements, and reviewing essential service determinations.[240]

6.4 Conclusion

While all the participants acknowledged that the limitation of the right to strike is necessary in respect of essential services in the strict sense, only a very small percentage of participants were adequately equipped to negotiate minimum service level agreements. Neither were they able to, in the event of a strike, compel essential service workers to return to work. A further contributing factor is the perceived benefit to both parties from maintaining the status quo.

The part-time status of the ESC limited the support and pro-active facilitation it can extend to the negotiating parties.

In the next chapter, I present an overview of why there are so few minimum service agreements in the municipal sector, along with recommendations that could be considered to increase the number of ratified minimum service agreements within the sector. Limitations of the current study are also presented along with recommendations for future research.

[240] Telephonic discussion with Deputy Chair of the ESC on 15 November 2018.

7. CHAPTER SEVEN

7.1 Introduction

The aim of the study was to develop an understanding of why, so few minimum service agreements have been concluded and ratified in the municipal sector. This question was examined through a single-case study.

This chapter provides some concluding remarks and suggests what interventions could be considered to ensure that a balance between the rights of workers and the broader community is achieved. The limitations of the current study are discussed and recommendations for future research are noted.

7.2 Conclusions and Recommendations

7.2.1 The regulatory regime

South African lawmakers have shown themselves responsive to the need, where necessary, to introduce amendments in attempts to fine tune the system and promote greater levels of buy-in from employer and trade union parties. The impact of the 2014 amendments has not been fully examined although interim indications are that there has been some progress, particularly in the role played by the ESC. The proposed amendment to section 72 to incorporate both minimum service agreements and minimum service determinations will further address the concern raised by the SALGBC parties regarding access to interest arbitration.

The SALGBC Main Agreement provides certainty and guidance to municipal role players about their role in determining minimum service levels in the sector. The negotiating parties carry the responsibility that their respective constituencies are more fully involved in the process. The November 2015 circular issued by the SALGBC makes explicit the need for parties to exclude workers who perform non-essential support functions, within a designated essential service, from an MSA. The extent to which this facilitates more MSAs is still to be measured.

The SALGBC parties could consider amending the template for recording minimum service levels to follow the approach adopted by one department in Ximafana. It would also, it is suggested, bring about greater uniformity in how the proposals and counter-proposals are developed and presented by the respective parties.

Principles and processes for the finalisation of the minimum service agreements should be agreed up front. This could include a specifically stated move away from a percentages approach to determining a minimum service level as anticipated in legislation ie the imminent threat to health, safety and life of the whole or part of the population due to the interruption of the service.

Capacity building can be enhanced by making the SALGBC LLF training programme compulsory for all minimum service negotiators. This would result in a more informed and capacitated cohort of negotiators.

7.2.2 The role of the ESC

A more robust role by the ESC, it is suggested, will drive the parties to negotiate and arrive at an agreement or risk the determination of a minimum service being decided by a third party. The imposition of a minimum service by a third party, albeit the ESC, does however have implications for both the parties in that self-regulation of the sector is taken out of their hands.

The part-time status of the ESC also needs to be addressed. Alternatively, its capacity needs to be bolstered through the creation of more panels as provided for in the LRA. So, while there has been progress since the promulgation of the 2012 amendments, more needs to be done. The annual national stakeholder seminar of the ESC could be extended to regional level to allow for more essential service workers and community representatives to be directly involved. This should allow the ESC to play a more proactive role in prompting and facilitating the conclusion of minimum service agreements in already designated essential services. A programme for reviewing the existing determinations with a view to narrowing the scope of these

determinations to align them much more closely with the definition of ‘essential service in the strict sense’, could be developed by the ESC in consultation with the affected parties.

MSA negotiations are complex. External expert assistance may be required. I propose that the ESC could become this expert body assisting parties to conclude minimum service agreements.

7.2.3 The involvement of essential service workers

While both the employer and the trade unions have expressed a desire to more directly involve essential service workers in the discussions towards determining appropriate minimum service levels, this has not materialised. Platforms for allowing such engagement could be considered by parties to the SALGBC. An LLF agreement providing could regulate such engagement.

7.2.4 The provision of essential services to communities

It is not only strikes that constitute a threat to the provision of essential services. Government credit control policies along with its inability to ensure that all communities have access a basic level of service also contribute to this situation. [241] Appropriate steps need to be considered for reversing this situation. The more direct involvement of the communities in the Integrated Development Plan process, other than through simply public hearings, must receive attention.

7.3 Limitations and strengths of this study and suggestions for further research

Insights from the Ximafana study should contribute to the stakeholder parties identifying strengths and weaknesses within the current arrangements for concluding minimum service agreements in this country. A strength of this study is the focus on a single industry in answering some of the research questions and allowed for municipal sector specific characteristics to emerge.

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[241] See McDonald and Pape (fn 122) and Pillay (fn 77)

It was however a single case-study. The study's intention was exploratory in nature and the results cannot be generalised to the municipal sector as whole. The fact that the negotiating counterparts in Ximafana were members of national trade unions and a national employers' organisation respectively that fall under the jurisdiction of a national bargaining council, mitigates this limitation. A series of case studies within the sector would provide a more comprehensive picture.

The sample size of the study may also appear limiting. While I had intended to interview more participants, only 14 interviews were secured. This limitation could, it is suggested, be remedied by conducting a larger qualitative study across the industry. The issues that emerged in the Ximafana study could also serve as the basis for a quantitative approach with a view to generalise the findings.

While mention is made of minimum service agreements at an international level, no empirical work has been undertaken on the role and ability of employer and trade union parties in this process. This needs to be further researched to better understand the South African situation through a comparative perspective.

7.4 Conclusion

Empirical research examining the issues covered by this study is, to my knowledge, absent. This study is meaningful in that it provides insight from the perspective of the parties charged with negotiating minimum service agreements. It set out to explore why employers and trade unions in the municipal sector in South Africa have failed to conclude minimum service agreements as provided for in the LRA. This was done by examining the experiences of the negotiating counterparts within a metropolitan municipality. It provided insight into the issues from the perspective of both the employer and the trade union parties. The findings, it is suggested, have the potential to resonate across the municipal sector.

A balance between a worker's right to strike and the right of a citizen to essential services, in the strict sense, can be achieved. The legal framework alone however cannot guarantee the attainment of a balance between these rights.

The actions of the parties and the purpose and the objectives of the law are currently at odds with each other. The failure of both employers and trade unions to comply with the relevant frameworks remains a worrying feature in the sector. A conscious move away from the adversarial character of industrial relations within the sector is needed.

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Appendices

Appendix A Interview Schedule – Trade Unions

1. Demographic Details

a. Age

b. Gender

2. Employment Details

a. Job Title/Occupation and or what service are employed in?

b. How long have you been in this job?

c. What other vocational training and education programmes have you completed?

3. Trade Union History

a. How long have you been a union member?

b. How long have you been a shop steward?

c. Do you hold an office bearer position in the union?

d. What union training programmes have you participated in?

e. Has the union sent you on any negotiations skills training?

f. Do you represent the union at the Local Labour Forum and/or the SALGBC?

g. How long have you been representing the union on these structures?

4. Essential Services

a. Explain what you understand about the LRA definition of what constitutes an essential service?

b. Could please explain to me your knowledge of and familiarity with the LRA regulatory/legal framework in respect of regulating essential services including strikes in essential services?

c. Can you explain the distinction drawn between an essential service and a minimum service in the LRA?

d. Could you also please share your knowledge and understanding of the SALGBC Main Agreement provisions on essential services and the SALGBC guidelines for concluding minimum service level agreements?

e. Have you attended any SALGBC, trade union or employer training on essential services and minimum service level negotiations? If so, could you please provide details?

f. How many minimum service negotiation sessions have you participated in?

g. What services did these negotiations cover?

h. Do you think you are sufficiently equipped to be involved in minimum service level negotiations and if so, why?

i. When did these negotiations start and when was the last time the parties negotiated with each other?

j. Has an agreement been reached?

k. If no agreement has been reached, what do you think is preventing the parties from reaching an agreement and what can be done to remedy this situation?

Appendix B Interview Schedule – Employer

1. **Demographic Details**

    a) Age

    b) Gender

2. **Employment Details**

    a) Job Title/Occupation and/ or what service?

    b) How long have you been employed by this municipality?

    c) How long have you been in your current job?

    d) What vocational training and education programmes have you completed from the time you entered the service of the employer?

3. **Essential Services**

    a) Can you please share with me your understanding of the LRA definition of what constitutes an essential service?

    b) Could please explain to me your knowledge of and familiarity with the LRA regulatory/legal framework in respect of regulating essential services including strikes in essential services?

    c) What distinction does the LRA draw between an essential service and a minimum service?

    d) Could you share your knowledge and understanding of the SALGBC Main Agreement provisions on essential services and the SALGBC guidelines for concluding minimum service level agreements?

e) Has the employer provided you and other negotiators with any training on essential services and minimum service level negotiations? If so, could you provide details?

f) What negotiating structures have been set up by the parties to deal with minimum service negotiations?

g) Does your employer centrally co-ordinate the minimum service negotiations in the different departments/services and, if so, how do they do this?

h) How many minimum service negotiation sessions have you participated in?

i) Which essential services did these negotiations cover?

j) Do you think that you are sufficiently equipped to participate in these negotiations? Could you provide reasons for your answer?

k) When did these negotiations take place and when was the last time the parties negotiated with each other?

l) Has an agreement ever been reached?

m) If no agreement has been reached, what do you think is preventing the parties from reaching an agreement and what can be done to remedy this situation?

Appendix C Letter to trade unions and employer

Dear Sir/Madam

Request to interview trade union representatives involved in minimum service negotiations

I am conducting research, as part of my M Phil studies, into why little or no minimum service agreements have been concluded and ratified in the local government sector. I will be using the ……..as a case study. Of particular interest to me is to assess the extent to which IMATU, SAMWU and …….. representatives are aware of and familiar with the legislative framework regulating strikes in essential services. This includes the provisions in the SALGBC Main Agreement, and the guidelines adopted by the SALGBC for concluding minimum service agreements. I will also be looking at the challenges and obstacles that might have arisen for the parties in preparing for and conducting negotiations.

For the purposes of this research, I would like to set up interviews with at least 7 of your representatives who have been involved in minimum service negotiations in …….. Each interview will take between 45 – 60 minutes. Ideally, I would like to conduct these interviews in the month of March 2018.

I would greatly appreciate your assistance in arranging these interviews. Should you have points of clarity, please do not hesitate to contact me on 082 4631464 or rnnrog01@myuct.ac.za

Yours sincerely

Roger Ronnie

Appendix D Profile of Trade Union Participants

	Job Designation	Years of Experience in the municipal sector	Performing an essential service	Years and position in union
Traffic	License Examiner	12 years	No.	12 years - 6 years shop steward, Regional Office Bearer
Health Services	Enrolled Nurse	6 years (27 years in Province)	Yes	6 years- 4 years shop steward, 4 years Regional Office Bearer (12 years shop steward in NEHAWU)
TU Organiser	Organiser	18 years as librarian and 14 years as union organiser	No	32 years -18 years with employer and 14 in Union; 12 years as shop steward) No office bearer position in union.
Human Resource	Labour Relations Officer	24 years	No	24 years - 20 years as shop steward Branch Executive Committee member, 8 years as branch office bearer
Fire Services	Assistant Emergency Centre Officer	25 years, 15 in current position	Yes	25 years – 12 years as shop steward but previously shop steward in the private sector. Shop steward committee office bearer.
Water	Process Operator – Bulk Water	21 years, 12 years in current position but before that also an operator in the electricity branch.	Yes	21 years – 9 years as shop steward. Shop steward committee office bearer.
Assets and Facilities	Housing Inspector	18 years, 8 years in current position.	No	18 years, 12 years as shop steward, former member of the NEC. Now a FTSS and member of the DLC.
Assets and Facilities	Admin Officer - Housing	38 years.	No	38 years, 20 years as shop steward. 11 years as FTSS. Regional office bearer.

Appendix E Profile of Employer Participants

No.	Directorate	Job Designation	Years of Experience in the municipal sector	Performing an essential service	
E1	Social Services. Incorporates Health	HR Business Partner	+ 25 years in various capacities. 10 years in current job.	No	Job reports directly to ED HR and links to directors and where possible, level 3 managers. Also serves on LLF and had served on a SALGBC Metro Division.
E2	Energy incorporates electricity	HR Business Partner	18 years. 11 years in current job.	No	
E3	Informal settlements water and waste	HR Business Partner	10 years. 6 years in current job	No	
E4	Informal Settlements water and waste	Departmental Support Services – Solid Waste	12 Years	No	
E5	Social Services	HR Business Partner	4 years. Before that, worked in private sector as HR practitioner	No	
E6	Corporate Services - Human Resources	Head – Collective Bargaining	+25 years in various capacities	No	

Appendix F **Participant Consent Form**

Do you agree to participate in the research on the terms as set out in the Information Sheet, including the recording of the interview?

YES	
NO	

Date: _____ Name: _____

Organisation _____ Designation _____

Signature: _____

Appendix G Information Sheet

My name is Roger Ronnie. I am conducting research for purposes of my dissertation. The dissertation is part of fulfilling the requirements for an M Phil degree at the University of Cape Town. The title of my dissertation is "Where are the minimum service agreements? A municipal case study."

The primary focus of my research is to investigate why employers and trade unions in the municipal sector have failed to conclude minimum service agreements as provided for in the Labour Relations Act (LRA). I have chosen to focus on …… as the site for exploring this issue. I will collect my data by way of structured and semi-structured interviews with key participants.

The data that I obtain from the interviews will be analysed to obtain key trends and insights related to the negotiation of minimum service agreements. This will serve as a basis to identify possible improvements to the theoretical and practical framework regulating essential services and minimum service agreements.

Please note that you do not have to participate in the research, i.e. your participation is voluntary. So, the choice to participate is yours alone. If you choose not to participate, there will be no negative consequence. If you choose to participate, but wish to withdraw at any time, you will be free to do so without negative consequence.

However, I would be grateful if you would assist me by allowing me to interview you. The research aims to shed light on the reasons for the absence of minimum service agreements in the municipal sector. This will be of benefit to all parties in the sector.

I would also ask that the interview be recorded to accurately capture the interview. You may decline to agree to have the interview recorded in which case I will rely on my notes. The interview will take between 45 - 60 minutes to complete. There will be no payment or direct benefit for being interviewed.

Please note that I will not mention the names of any interviewees in my dissertation, make their names public or use any other identifiers without their consent. To this end it is confirmed that your rights to anonymity will be safely secured. Furthermore, only I will have access to the completed interview notes and any recording (with your permission), which will be safely secured. I do not believe that participating in the interview will put you at risk of any adverse consequences. If you would like further information about this study, you may contact me, Roger Ronnie on 0824631464 or RNNROG001@myuct.ac.za

If you have **concerns about the research, its risks and benefits or about your rights as a research participant in this study**, you may contact the Law Faculty Research Ethics Committee Administrator, Mrs Lamize Viljoen, at 021 650 3080 or at lamize.viljoen@uct.ac.za. **Alternatively, you may write to the Law Faculty Research Ethics Committee Administrator, Room 6.28 Kramer Law Building, Law Faculty, UCT, Private Bag, Rondebosch 7701**.

Appendix H **Organogram of departments and branches delivering essential services**