

MEDICINE AND THE LAW

The National Education, Health and Allied Workers' Union (NEHAWU) strikes: South Africa's healthcare battlefield

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The right to strike is a fundamental right entrenched in section 23 of the Bill of Rights. Strikes are an almost everyday occurrence in South Africa and strikes in healthcare facilities raise difficult and complex moral and ethical questions. The right to strike is conditionally limited by section 36 of the Constitution and for workers engaging in essential services it is further limited under section 65 of the Labour Relations Act. Healthcare practitioners, including emergency care personnel, and much-needed healthcare facilities have come under attack during the National Education, Health and Allied Workers' Union (NEHAWU) strikes, which have prevented patients from accessing healthcare and threatened the training of undergraduate students and registrars. While generally security and policing have been lacking at targeted facilities, many doctors stood by their patients despite threats to their safety. Healthcare facilities, vehicles and practitioners must be protected. Solutions must come from politicians and include preventive actions and enforcement of the law.

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It's not enough to say there is a problem. The increasing lack of respect for health-care facilities and staff is a real concern. That is why we don't just want to raise awareness, we need to take action.
(Rudi Coninx^[1])

South Africa (SA) has witnessed increasing industrial action, such as strikes in all sectors, including healthcare. In democratic states, employees withdraw services to achieve certain goals in the workplace during strikes. Generally, this is done as a last resort towards addressing problems.^[2] The history of strikes can be traced back to 12 BC, with employees even then believing that strikes were the only way to declare their unhappiness in the workplace and to succeed in reaching their anticipated outcomes.^[3] While strikes occur worldwide, they are almost an everyday occurrence in SA.

Strikes in healthcare facilities raise difficult and complex moral and ethical questions because these facilities provide for the needs of vulnerable and sick patients. The reasons for the current National Education, Health and Allied Workers' Union (NEHAWU) strikes in the healthcare sectors in the North West and Gauteng provinces are primarily salary disputes, and non-payment of bonuses and salary increases.^[4] While these may be legitimate reasons and a good reason to strike, the appalling conduct of the striking workers has resulted in depletion of sympathy towards their grievances. Healthcare practitioners, including emergency care personnel, and much-needed healthcare facilities have come under attack by striking workers, resulting in patients being prevented from accessing healthcare. For the sick, treatment may be a matter of life and death. Therefore, protecting healthcare from attack is also a matter of life and death.

We discuss the right to strike in the context of essential services, domestic law and the International Labour Organization (ILO). The impact on safety of staff and patients, and the rights to dignity, life and access to healthcare, are highlighted and credit is given to doctors who stood by their patients despite threats to their safety. They honoured their oaths with courage and resilience.

The right to strike and essential services

The right to strike is a fundamental right entrenched in section 23 of the Bill of Rights of the Constitution of South Africa.^[5] Accordingly, every worker has the constitutional right to strike, which, in turn, allows for the central right of a worker to bargain collectively. As Cheadle^[6] observes, '... it is one of the ironies of collective bargaining that its very object, industrial peace, should depend on the threat of conflict'. However, collective bargaining without the right to strike, is tantamount to 'collective begging'.^[6]

This critical right to strike is further reiterated and regulated by SA's Labour Relations Act (LRA).^[7] As a member of the ILO, SA is bound by its conventions and publications, which conform with United Nations' practices.^[8] SA has ratified several conventions passed by the ILO and adapted its principles into national legislation. This is particularly relevant with regard to essential service workers and the limitations placed on their right to strike. In this regard, the ILO does not provide a defined list of essential service workers or the processes to be followed in such instance, leaving these determinations to the national requirements of each member country. However, it indicates specifically that the hospital sector is considered to be an essential service in a 'strict sense', where the 'right to strike may be subject to major restrictions or even prohibitions'.^[9]

In SA, the right to strike is conditionally limited by section 36 of the Constitution and for workers engaging in essential services it is further limited under section 65 of the LRA. These essential services are determined by an Essential Services Committee (ESC) established in terms of section 70 of the LRA. This committee may only determine a service as being essential where, in terms of section 213 of the Act, it can be shown that an interruption of that service would 'endanger the life, personal safety or health of the whole or any part of the population'. Moreover, it must be established that a clear and imminent threat to the life, personal safety or health of the whole or part of the population exists.^[10]

The following are all essential services as contemplated by the LRA: public health services and public health support services, including (but not limited to) emergency health services and the provision of emergency health facilities to the community or part thereof; nursing; medical and paramedical services; security; catering; porter and reception; pharmaceutical and dispensary; laundry; waste removal; and pest control.^[11] Section 72 of the LRA provides for parties engaged in essential services to enter into minimum service agreements, which regulate the minimum services to be provided by workers in that essential service in the event of a strike. If parties fail to conclude an agreement providing for the maintenance of minimum services or if such agreement is not ratified, the ESC may then determine the minimum services that must be maintained with regard to that service.

If such a minimum service agreement is reached, it will determine the minimum service levels that will become the agreed-upon essential services with which designated employees must comply. Such an agreement has the effect of preventing the number of employees, or percentage of the workforce that is required to continue providing the minimum services, from striking. Employees who are not required to provide the minimum services, as stipulated in the agreement, will be allowed to strike, even though they fall within the category of designated essential service employees.^[12]

However, public health service and support workers who are designated essential service employees do engage in strike action, despite there being no minimum service levels in place. Therefore, in most instances, these strikes are unregulated and to the detriment of society at large.

Strikes in the healthcare sector and the violation of rights

Strikes by individuals who provide essential services, without minimum service agreements or a determination by the ESC, are non-compliant with the LRA, and also directly violate patients' fundamental rights to access healthcare services, as set out in section 27 and, more critically, section 10, the right to dignity, as well as section 11, the right to life, as affirmed in the Bill of Rights.^[5] The right to healthcare cannot be separated from the rights to life and dignity, because not obtaining necessary treatment may be a matter of life and death or grave morbidity, which could have an impact on dignity. The National Health Act^[13] was legislated to give realisation to section 27. Moreover, the Patients' Rights Charter^[14] was proclaimed to further promulgate this right. The increasingly violent current and prolonged NEHAWU strike has resulted in the destruction of property, patients being denied access to healthcare and even dying.^[4] Medicine depots have been closed, and staff threatened, prevented from entering hospitals and chased off hospital property. Doctors have been removed from wards and refused entry into theatre; burning barriers have been erected outside hospitals, preventing movement of ambulances; cars have been stoned, and at Chris Hanani Baragwanath Hospital, Johannesburg, SA, intensive care unit and theatre services were restricted because oxygen delivery to the hospital was prevented.

Generally, there has been an extreme disrespect for the rights of patients and healthcare practitioners. Security personnel and sometimes the police have been reluctant or unable to intervene. The general lack of security and adequate policing at the targeted facilities has major consequences for healthcare provision. Healthcare practitioners might stay away from facilities for fear of threat to their safety. The sick stay at home rather than risk their safety by going to hospital for treatment.^[1] During the current strikes the commitment to compassionate care for patients by many doctors,

who, despite threats to their safety, were resilient and continued rendering treatment to their patients, has been laudable. Doctors have even resorted to inconspicuously entering hospitals in plain clothes, defying the violent striking protestors, to make good of their Hippocratic Oath.^[15]

Conclusion

The current crisis is complex and has far-reaching consequences for the provinces' healthcare systems. Moreover, several of these facilities are academic teaching hospitals. Training of undergraduate students and registrars is also under severe threat. These evil actions place our already strained healthcare system under greater pressure, with vulnerable patients suffering collateral damage. Patients suffer because healthcare facilities, services, patients and staff are targets of violence, with obstruction and denial of healthcare. The consequences can be dramatic, contributing to facilities being without services for several days. This could contribute to the total collapse of a brittle and already failing health system. If patients are to receive treatment and to be spared unnecessary suffering when NEHAWU goes on strike, healthcare facilities, their vehicles, and healthcare practitioners must be protected. Solutions must come from politicians, and must include preventive actions and enforcement of the law. The primary responsibility of the state is to prevent the targeting of healthcare practitioners and patients and obstruction and abuse of delivery of medical services.^[1] The state must ensure that all possible measures are taken to protect access to healthcare through implementation of its laws. To make protection of healthcare a reality, the state must stand against this violence and take timely and judicious action. It is also important to give credit to the courage, empathy, resilience, resolve and determination of the many healthcare practitioners who strive to reaffirm a space for humanity in our healthcare battlefield of today.

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