



# DESIGNATION

## ESSENTIAL SERVICES COMMITTEE

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Case Number: ES 368  
ESC Panel: Luvuyo Bono, Nomazotsho Memani, Aruna Ranchod, Clement Marule  
Date of Designation: 16 February 2021

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**In re: Investigation in terms of Section 71 of the Labour Relations Act, 66 of 1995:**

**Whether certain services in ports and marine should be designated as essential services**

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### DESIGNATION

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#### Introduction

1. The Essential Services Committee ("the ESC") received a referral from Transnet Port Terminal on 29 January 2020 seeking to have ports and marine services designated as essential services. On 25 February 2020 the ESC convened a meeting with the referring party. Following the meeting the referring party was requested to submit a motivation for its referral. The referring party failed to submit such.
2. Section 70B(1)(d) of the Labour Relations Act gives the ESC the power to institute an investigation, on its own initiative, as to whether the whole or part of a service is an essential service. In line with this section and after being aware that the International Labour Organisation had investigated port and marine services, decided to investigate whether port and marine services should be designated as essential services.

3. As provided for in section 71, read with section 70(2)(a) of the Labour Relations Act, 1995 (Act No 66 of 1995 as amended), the ESC gazetted a notice that it was conducting an investigation as to whether port and marine services is an essential service. (see Government Gazette No 43514, Notice No. 374 2020, dated 10 July 2020).

### **Details of Hearings**

4. The hearings were scheduled as per the notice published in the government gazette. In the hearings the ESC received a number of written submissions, and a number of interested parties also made oral representations to the ESC.
5. Transnet Port Terminals filed its notice to make oral submissions out of time and made an application for condonation. Condonation was granted.

### **Submissions**

6. The below submission are a summary of the submissions (oral and written) made in this application.
7. Mr. D H Watts made submissions on behalf of the South African Association of Freight Forwarders (SAAFF) and Mr. M Hlongwane made submissions on behalf of Transnet Port Terminals. Patricia Molipane also appeared for SASOL.
8. SAAFF made the following submissions in favor of the ports and marine services being declared as an essential service:
  - The ports need to function at optimum levels in order to have economic growth and development in the country and this cannot be achieved if there is industrial action such as strikes occurring.
  - The commercial ports in the country are essential links to the road and rail modes of transporting goods into and out of the country.
  - The effect of strikes or lock outs would result in the complete shutdown of the ports and bring import and export supply chains to a halt. This would lead to the economy suffering.
  - Weather conditions can be very unpredictable and conditions such as storms can cause ships to suffer severe distress. The marine services are vital in these instances as they come in and

provide assistance to the vessels that are in danger and this leads to lives being saved and crisis' being averted.

- The roles of the vessel controllers, pilots and tuggers is extremely important and without those functions the ports cannot operate.

9. Transnet made submissions in favor of having the port and marine services declared as an essential service:

- Transnet Port Terminal operational chain is as follows:

#### 9.1. Planning Department

This department plans how the loading and offloading of vessel will be done. This entails generation of Berth Plans which indicate equipment such as cranes that will be used, the number of employees required and where the cargo will be stored and the time dedicated to working the vessel. Critical for this department is to ensure that the vessel spends the time it was scheduled to spend at the port as the cost of vessel stay at any port can be very high. The vessels need to sail for the next port of call on schedule hence the importance of ensuring that no time is lost in working the vessel. Sections in Planning department include those dealing with Dangerous Cargo, liaison with shipping lines,

#### 9.2. Operations

##### 9.2.1. Waterside Operations

This operation is sea based. It entails loading and offloading of vessels. Waterside operations use stevedores which is labour contracted to assist with loading and offloading of cargo. Stevedoring activities on board the vessels are performed by stevedores contracted by the Terminal Operator.

##### 9.2.2. Landside Operations

This operation is land based. This is where cargo is received and stacked either as import or export cargo. Import cargo is received from the vessels and stacked in the Yard by various cranes and haulers. Export cargo is received from the trucks, stacked in the yard. It is then transported to Waterside to be loaded onto the vessels

#### 9.3. Transshipment

This operation entails vessels offloading cargo onto the terminal which will be temporarily stored in the yard while awaiting a vessel that will take it to various ports of destinations.

#### 9.4. Maintenance

Because port operations entail usage of heavy lifting equipment such as cranes and haulers, maintenance is very critical. Each port has various workshops responsible for servicing of the machinery including vehicles.

#### 9.5. Support services

These includes HR, Finance, Safety, Claims, Legal, Security and others.

- Of the above, three (3) are the most important ones or the ones that should be declared as essential. These are the operations department, which consists of waterside operations and landside operations, the maintenance department as well as the security department.
- The ports receive a variety of goods through the port, International maritime dangerous cargo (IMDG) is amongst the goods that are handled at the ports. These goods include explosive materials and chemicals that can be used to create explosive materials. These goods require stringent processes to receive and transport the IMDG cargo out of the port as the ports do not have the necessary force or capacity to handle such goods.
- When industrial action occurs the ports employees as well as surrounding areas and communities are affected due to the violent nature of the strikes. People and cars are often stoned, entrances to the ports are blockaded and the lives of the employees are put at high risk.
- The ports have until now been relying on court orders and interdicts to try and handle strikes however this has not been an effective remedy.

#### **Legal Framework**

10. In this matter the issue that the committee has to determine is whether port and marine services should be designated as essential services. In determining the matter, it is important that one should set out the legal framework.

11. Section 23(2) of the Constitution of the Republic of South Africa, 1996 (“the Constitution”) states that...  
“Every worker has the right ... (c) to strike.”

12. Section 36 (1) of the Constitution states inter alia that... “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”.
13. Section 65 (1) (d) (i) of the LRA states that ... “No person may take part in a strike ... if that person is engaged ... in an essential service”.
14. An ‘essential service’ is defined in section 213 of the Act as:
  - (a) a service the interruption of which endangers the life, personal safety or health of the whole or any part of the population;
  - (b) the Parliamentary service;
  - (c) the South African Police Service”.
15. Decision 842 of the International Labour Organization digest provides that private security services do not constitute essential services in the strict sense of the term (with the exception of public or private prison services)
16. The ***Constitutional Court in South African Police Service v Police and Prisons Civil Rights Union and Another [2011] 9 BLLR 831 (CC)*** said the following: -

“In order to ascertain the meaning of essential service, regard must be had to the purpose of the legislation and the context in which the phrase appears. An important purpose of the LRA is to give effect to the right to strike entrenched in section 23(2)(c) of the Constitution. The interpretative process must give effect to this purpose within the other purposes of the LRA as set out in Section 1(a). The provisions in question must thus not be construed in isolation, but in the context of the other provisions in the LRA. For this reason, a restrictive interpretation of essential service must, if possible, be adopted so as to avoid impermissibly limiting the right to strike (footnotes excluded)”
17. It is trite that strike action is an important element of collective bargaining and it is recognised as a primary mechanism through which workers exercise collective power (See ***Ex-Part Chairperson of the Constitutional Assembly in re: Certification of the Constitution of the Republic of South Africa, 1996 (4) SA744 (CC)*** at paragraph [66]).

18. Having regard to the above, it is clear that our law requires essential services to be restrictively interpreted, and that this means, inter alia, the following:
- It is the service which is essential, not the industry or the institution within which the service falls;
  - Only those employees who are truly performing an essential service, may be prohibited from striking; and
  - Essential and non-essential service workers may be found working side by side in the same institution.
19. Before the ESC can designate any service as essential, it must be satisfied that the interruption of the said service is likely to endanger life, personal safety or health of the whole or part of the population.
20. It is further trite that in view of the fact that the right that would be affected by such a designation limits or takes away a fundamental right, such designation must be reasonable and justifiable. If the ESC finds that parts of the service are not essential the Committee is obliged not to designate such services, as such a designation would be unreasonable and unjustifiable.

### **Analysis of Evidence**

21. Port services include the receiving, handling, unloading and even additional shipping of clients' products once they arrive at port and come off the ship. Marine services are port-related activities conducted to ensure the safe and expeditious flow of vessel traffic in port approaches and harbours and a safe stay at berth when moored or at anchor.
22. An Essential service is a service the interruption of which causes an endangerment to life personal safety or health.
23. Transnet Port Terminals argued that operations, maintenance and security should be designated as essential. Its operations both water side and landside deal with the loading / offloading; receiving and stacking of cargo. The argument by TPT was not convincing on how the interruption of these services would endanger life, health or safety.

24. Transnet Port Terminals also argued that the maintenance services should be designated as essential. Its argument in this regard is based on the heavy lifting equipment such as cranes and haulers that are maintained and serviced so that they are in good working order. No link was established as to how the interruption of these services would endanger life, health or safety.
25. It is not enough to simply say that some of the goods loaded and offloaded include explosive materials and chemicals that can be used to create explosive materials. One has to link that with the consequences of an interruption in the service, ie, if the service is interrupted would such interruption lead to the endangerment of life, health or safety of the population. This part did not come through from the arguments of Transnet Port Terminal. Equally there must be a nexus between the effects of failing or interrupting the maintenance of the machinery used to load and off load the goods and the endangerment of life, health and safety. This was also not clear from the arguments made.
26. The ESC recognizes the importance of security services in ensuring the safety of part or the whole of the population. It is against this background that security services in Municipalities (for municipal buildings and employees), at airports, at health institutions, at stadiums, at education institutions, etc has been designated as an essential service. For the same reason it makes sense to consider the importance of security for port and marine services.

### **Designation**

27. On the submissions made, the panel is not convinced that the interruption of operations (water side and landside) and maintenance services at Ports would endanger the life, or health of the population or part thereof;
28. The panel is convinced that, a case of designating Port Security and Marine services which ensure the safe and expeditious flow of vessel traffic in port approaches and harbours and a safe stay at berth when moored or at anchor are essential services, including the services rendered by vessel controllers, pilots and tuggers, has been made and they are accordingly designated as essential services.
29. The parties are hereby ordered to negotiate and conclude a Minimum Service Agreement no later than 15 June 2021

Signature:



Chairperson :

***Luvuyo Bono***

Sector:

***ESC Panel Chairperson***

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