

**IN THE ESSENTIAL SERVICES COMMITTEE
HELD AT JOHANNESBURG**

Case No.: ES449

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

Whether the manufacture of manganese from raw manganese ore should be designated as essential services

Designation

Introduction

1. The Essential Services Committee ("the ESC") received a referral from Manganese Metal Company (MMC) to investigate whether the service of manufacture of manganese from raw manganese ore should be designated as an essential service. The ESC considered the application and decided to investigate whether the service should be designated as essential.
2. The ESC published the notice of investigations in the government gazette (on the 6th of August 2021 and on the Sunday Times (on the 8th of August 2021). The advert

indicated that there would be a briefing session for all interested parties on the 18th of August 2021. At the briefing session, a brief overview of the service to be investigated was outlined and parties were reminded to comply with the ESC Regulations including indicating their intention to make submissions at the hearings as outlined in the notice. Parties had to submit their intentions by no later than the 25th of August 2021.

3. The Association of Mineworkers and Construction Union (AMCU), made an application to participate in the investigation and applied for condonation for their late application. On 6 September 2021, the ESC condoned the late application and approved AMCU's participation in the investigation.

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.

Submissions

5. MMC sought to have the following services designated as essential:
 - a. The refining of manganese ore through a continuous electrowinning process; and
 - b. The Treatment and management of contaminated water (leachate and run-off) which is specifically related to the refining of manganese ore through a continuous electrowinning process at the effluent treatment plant.

6. In support of its application, MMC led the expert evidence of Dr. Walter Fourie and Mr. Nel. Dr. Fourie testified that the process of refining manganese ore is a continuous one. Electrowinning is the process of passing an electric current through a solution containing manganese and the manganese solution then changes into a solid so that it can be harvested as an electrolytic manganese metal.
7. Dr. Fourie explained the process from when the ore is reduced so as to allow the manganese to become soluble, to when the purified solution enters the electrowinning cells where the electric current is passed through, and the metal is plated so that it can be harvested, and the sulphuric acid is passed back into the leaching section.
8. The interruption in the process will lead to a spillage which will cause contaminated water to enter the Besterspruit and Crocodile rivers which are used by the community for human and livestock consumption. This will have an impact on the personal health and safety of the population as rivers would be contaminated.
9. The process solution and contaminated water contains concentrations of manganese, ammonia and sulphates which would, as a result of the spillage into the surrounding rivers, cause drinking water to contain a quantity of these chemicals which exceeds the numerical limits as specified in the South African National Standards.
10. In the event that the river is contaminated it will put human life at risk. Further, there are no alternatives in relation to ensuring that the spillage and contamination could be avoided, and, during an interruption of the services, temporal replacement labour would not provide a solution because the operation is unique.

11. Mr. Nel testified that in 2015 there was a strike at MMC and with the assistance of members of the Solidarity union MMC was able to reduce the current passed through the electrowinning process in order to slow down the operation so that the operation could continue to run without stopping.
12. Part of the functions in respect of the refining of manganese through a continuous electrowinning process involves the transportation, management and treatment of contaminated water (run-off and leachable) between the Effluent Treatment Plant of MMC, the electrowinning facility and the two waste landfill sites of MMC. The interruption of the service at the Effluent Treatment plant will stop the treatment of contaminated water and will result in the spillage into the surrounding rivers.
13. NUMSA and MEWUSA opposed the application but did not make any submissions in support of their positions. AMCU submitted an affidavit by Jeffrey Mphahlele and another of Mr. David Lawson, an expert in the field who confirmed the contents of his report written by him and Mr. van Wyk. In his affidavit, Mr. Mphahlele expresses the importance of the right to strike and the test for a service to be designated as essential.
14. The report of this investigation indicates that it is accepted that some of the elements, materials and reagents used in MMC's operations can generally be classified as detrimental to a person's health however that is in fact so dependent on the particular constitution of the material in question and quantity of the material a person is exposed to. Regarding the effluent treatment the report indicates that the actual constituent reagents found in the leachate if metals contents, and other contaminants and run-off is not disclosed and therefore it cannot be properly assessed.

Legal Framework

15. In this matter the issue that the committee has to determine is whether the following services should be designated as essential services:
 - a. The refining of manganese ore through a continuous electrowinning process; and
 - b. The Treatment and management of contaminated water (leachate and run-off) which is specifically related to the refining of manganese ore through a continuous electrowinning process at the effluent treatment plant.
16. . In determining the matter, it is important that one should set out the legal framework.
17. 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."
18. 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".
19. 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".
20. 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".

21. 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 objects 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)”

22. 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]).
23. 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.
24. 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.
25. 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

26. The ESC on 12 September 1997 designated the control of discharge of industrial effluent into the system.
27. This designation was rendered to ensure that the life and health of the population, particularly in Municipality areas is not endangered, as a consequence of an interruption of this sanitation service.

28. The view of the panel is that the same argument as put forward by MMC before it, i.e., that part of the functions in respect of the refining of manganese through a continuous electrowinning process involves the transportation, management and treatment of contaminated water (run-off and leachable) between the Effluent Treatment Plant of MMC, the electrowinning facility and the two waste landfill sites of MMC. The interruption of the service at the Effluent Treatment plant will stop the treatment of contaminated water and will result in the spillage into the surrounding rivers.
29. The above argument is convincing in that the treatment and management of contaminated water (leachate and run-off), which is specifically related to the refining of manganese ore through a continuous electrowinning process at the effluent treatment plant, is important to ensure that there is no endangerment to life and health of the population. It stands to reason that treatment and management of contaminated water (leachate and run-off) which is specifically related to the refining of manganese ore through a continuous electrowinning process at the effluent treatment plant if interrupted will endanger the life and health of the population.
30. Now turning into the refining of manganese ore through a continuous electrowinning process. The panel has not concerned itself on the potential damage to property as such would be applicable in the case of a maintenance service. The panel has considered this service to the extent that if interrupted, such interruption would result in a spillage which will contaminate the water which is used by the population for drinking and other domestic matters.
31. Whilst the report submitted by AMCU suggests that the information argued by MMC is insufficient in some respects and that the process of refining manganese may be better controlled to avoid a spillage, what is not disputed is that a spillage is possible and if it

happens it will endanger the health of the population. This in the view of the panel is sufficient enough to ensure that the population is not exposed to such risk.

Designation

32. On the submissions made, the panel is convinced that the interruption of refining of manganese ore through a continuous electrowinning process; and the treatment and management of contaminated water (leachate and run-off) which is specifically related to the refining of manganese ore through a continuous electrowinning process at the effluent treatment plant would endanger the life, or health of the population or part thereof;
33. The panel therefore designates the following services as essential:
 - a. The refining of manganese ore through a continuous electrowinning process; and
 - b. The Treatment and management of contaminated water (leachate and run-off) which is specifically related to the refining of manganese ore through a continuous electrowinning process at the effluent treatment plant.
34. The parties are hereby ordered to negotiate and conclude a Minimum Service Agreement no later than 30 March 2022.



Adv. L Bono

ESC Panel Chairperson

30 December 2021