

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

Case No.: ES 470

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

General health screening; testing and control of infectious and communicable diseases; and Port Health

Designation

Introduction

1. The Essential Services Committee ("the ESC"), given the new prevailing protocols in the country involving communicable diseases, in line with Section 70B(1)(d) instituted an investigation on whether general health screening, testing and control of infectious and communicable diseases; and port health should be designated as essential services.

2. 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 general testing, testing and control of infectious and communicable diseases; and port health should be designated as essential services. (see Government Gazette No. 44945, Notice No. 456, dated 06 August 2021).

Details of Hearings

3. The hearings were scheduled as per the notice published in the government gazette. In the hearings the ESC received written submissions from the Department of Health (DOH). The DOH also made oral representations to the ESC.

Submissions

4. The below submissions are a summary of the submissions (oral and written) made in this application.
5. Public health security is and remains a challenge for the global community due to the highly mobile, interdependent and interconnected environment that facilitates trade and travel. The combination of infectious diseases that spread and emerge faster than ever before with accidental and deliberate disease outbreak, requires urgent and decisive actions.

6. General health screening is the examination or testing of individuals, group or population, to detect or rule out the presence of diseases for the purpose of separating those who are well from those who have an undiagnosed disease or defect or who are at high risk.
7. Testing is a procedure to test whether an individual has either symptoms or the actual infectious and/or communicable disease so as to avoid that persons endangering the whole or part of the population. Control is the management process employed once a positive test has been detected.
8. General health screening and control of communicable diseases is at the core of any fight against the spread of communicable diseases. Without this services, communicable diseases will spread quicker in an uncontrolled manner and endanger the life, personal safety and health of the population.
9. The reports of recurrent and new outbreaks of infectious diseases like the pandemic influenza, Ebola virus disease (EVD), cholera, and listeriosis, Covid-19 in our continent are stark reminders of the unpredictable nature of pathogens. Failure to screen for, test and control infectious diseases will lead to outbreaks, epidemics, and pandemics of infectious diseases. These outbreaks, epidemics and pandemics have serious human health and economic impacts.
10. Port Health Service is the first line of defense to protect the citizens of South Africa and visitors against the health risks associated with cross border movement of people, conveyances, baggage, cargo, shipments, and other imported consignments.
11. Port Health services are rendered at the ports of entry (Land Borders, Harbours, and International Airports). The service is rendered by Environmental Health Practitioners

serving as Port Health Officials and supported by other Health professionals (Clinicians, Emergency Health Services, Auxiliary workers and Environmental Health Assistants).

12. The purpose of port health services is to prevent, protect and provide a public health response by monitoring public health risks, it is further to minimize the risk of importation of communicable disease into the country and to ensure that all imported health related products are monitored and inspected for compliance with health requirements.
13. Port Health monitors and approves the transportation of travelers requiring health treatment including emergency health treatment in the country (Intentional Transportation of Sick Passengers). Conveyances arriving in the country are monitored to ensure no public health risk exists onboard and ensure compliance with health requirements. This includes the disinfection of aircrafts arriving from Yellow Fever and Malaria endemic areas and granting of a free pratique to all arriving vessels for the purposes of preventing the importation of public health risks and vectors associated with communicable diseases like malaria, yellow fever, and plaque.
14. Port health service also monitor the validity of health document for conveyances, i.e., General Declarations of Health, Ship Sanitation Control Exemption Certificate and Ship Sanitation Control Certificate.
15. Where risks of transmission of any diseases is detected or suspected by port health, corrective measures must be applied prior to the vessels being allowed to enter the port or the disembarkation of travelers in cases of aircrafts can be allowed.
16. Consignments arriving in the country are assessed and inspected and where necessary samples are taken to ensure that the products are in compliance with all health

requirements and that their consumption or use by the public will not result in adverse health effects.

17. Product monitored by port health include foodstuffs, disinfectants, cosmetics, hazardous substances, tobacco products, medicaments, biological products, and human remains.
18. Port Health has the responsibility to issue permit and monitor the import and export of human remains to minimize the risk of transmission of communicable diseases. Medicaments and biological products (including organs meant for transplant and blood) are some of the times sensitive product that can only be released into the country after port health has conducted all necessary assessments.
19. Port Health must assess, inspect and issue a release to all health-related products before they can be allowed into the country.
20. Where port health services are interrupted, conveyances, travelers and health related goods may enter the country without proper monitoring and engager public health.
21. Travelers who may potentially be infected with a communicable disease may enter and spread it further to other citizens resulting in the risk of loss of life.
22. If imported products are not inspected and cleared by PHO's prior entering the country, there is a potential of noncompliant products reaching the public and resulting in negative health effects.

23. Imported human remains may potentially be infected with a communicable disease which can be transmitted to those who handle the remains resulting in disease and possible loss of life. Imported human tissue and biological products require urgent processing as majority are used for life saving transplants which if not processed on time may result in loss of life. Arriving conveyances if not monitored may bring in disease causing vectors such as rodents and mosquitos. These vectors may transmit diseases which cause ill health and potential death.

Legal Framework

24. In this matter the issue that the panel has to determine is whether general testing, testing and control of infectious and communicable diseases; and port health should be designated as essential services. In determining the matter, it is important that one should set out the legal framework.

25. 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."

26. 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".

27. 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".

28. 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".

29. 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)"

30. 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-Parte Chairperson of the Constitutional Assembly in re: Certification of the Constitution of the Republic of South Africa, 1996 (4) SA744 (CC) at paragraph [66]***).

31. 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.
32. Before the ESC can designate any service as essential, it must be satisfied that the interruption of the said service is likely to to endanger life, personal safety or health of the whole or part of the population.
33. 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

34. The submissions made by the Department of health were not contested. In summary these submissions convinced the ESC panel that:
- a. General health screening is necessary to ensure to detect or rule out the presence of diseases for the purpose of separating individuals or groups of

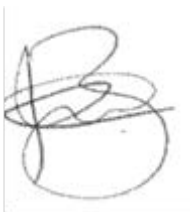
people who are well from those who have an undiagnosed disease or defect or who are at high risk. If general testing is interrupted this will endanger the health and life of the population or part thereof. Covid 19 as an example was used to illustrate that a person who enters a public place and has a high temperature may be infected and if not tested and allowed to enter such public place may spread the disease to other people.

- b. Screening is followed by Testing so as to test whether an individual has either symptoms or the actual infectious and/or communicable disease so as to avoid that persons endangering the whole or part of the population. Control is the management process employed once a positive test has been detected. Similar to screening, if testing and control is interrupted, the exposure of the population to the individual or groups suspected of being infected by the communicable disease may endanger the health and life of the population.
- c. Port Health Service is the first line of defense to protect the citizens of South Africa and visitors against the health risks associated with cross border movement of people, conveyances, baggage, cargo, shipments, and other imported consignments. Port Health services are rendered at the ports of entry (Land Borders, Harbours, and International Airports). The purpose of port health services is to prevent, protect and provide a public health response by monitoring public health risks, it is further to minimize the risk of importation of communicable disease into the country and to ensure that all imported health related products are monitored and inspected for compliance with health requirements. Consignment arriving in the country are assessed and inspected and where necessary samples are

taken to ensure that the products are in compliance with all health requirements and that their consumption or use by the public will not result in adverse health effects. Product monitored by port health include foodstuffs, disinfectants, cosmetics, hazardous substances, tobacco products, medicaments, biological products, and human remains

Designation

35. On the submissions made, the panel is convinced that the interruption of general health screening, testing and control of infectious and communicable diseases; as well as port health would endanger the health and or life of the population or part thereof;
36. The Department of Health is hereby ordered to negotiate and conclude a Minimum Service Agreement no later than 31 January 2022.

A handwritten signature in black ink, appearing to be 'Adv. L Bono', written over a light blue horizontal line.

Adv. L Bono

ESC Panel Chairperson

30 September 2021