

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

Case No.: ES 105

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

Whether the services rendered by team leaders and mud guards at tailing dams are essential services?

Designation

Introduction

1. The Essential Services Committee (“the ESC”) received a referral from Fraser Alexander (Pty) Ltd (Fraser Alexander) in terms of section 71 of the Labour Relations Act, 66 of 1995 (*“the LRA”*), 03 October 2017.
2. In its referral, the Fraser Alexander sought a determination to the effect that the services rendered by Team Leaders and Mud guards should be designated as essential services.
3. A preliminary meeting between the ESC and the parties was held and the ESC after considering the nature of the submission concluded that the request was

reasonable, and took a decision to conduct an investigation in terms of Section 71 read with Section 70(2) (a) of the Labour Relations Act 66 of 1995 as amended (hereinafter referred to as the Act).

4. The gazetted terms of reference for the investigation in terms of section 71 were” **Notice is hereby given in terms of section 71, read with section 70(2)(a) of the Labour Relations Act, 1995 (Act No 66 of 1995 as amended), that the Committee is in the process of conducting an investigation as to whether the services rendered by team leaders and mud guards at tailing dams are essential service.** (see Government Gazette No 41256, Volume 629 Of 2017, dated 17 November 2017), This notice was also published on the Sunday Times newspaper dated 12 November 2017.

Details of Hearings

5. The hearings were scheduled as per the notice published in the government gazette (), and also in the Sunday Times of . In the hearing the ESC received written submissions from the applicant an oral evidence was also led. There were no opposing submissions or evidence.

Submissions

6. The applicant in this matter submitted that it operates about 177 tailing dams at various mining operations across South Africa. The applicant’s Tailing Division employs about 2400 employees and of this number 623 work either as team leaders of mud guards.
7. These employees are responsible for monitoring and controlling the levels of tailing dams under the supervision of of Fraser Alexander Tailing Division, and are responsible for ensuring the integrity of the tailing dams.

8. This is a continuous operation that which is carried out 24 hours a day and seven days a week. A failure to maintain the tailing dams could result in a tailing dam spillage or failure and this could result in an environmental disaster.
9. The applicant submitted a report by SLR Global Environment Solutions and in this article it was said that a common characteristic of both tailing dams and water dams failing are primarily the loss of life within downstream communities and significant damage to property. In relation to the tailing dams there are also catastrophic consequences to the environment as the tailings often contain substances that are harmful to the environment.
10. The applicant submitted that given the consequences that are likely to occur in the event of a failure to maintain these dams, it is important and critical from an operational perspective that the team leaders and mud guards continue rendering the service in the event of a strike, particularly given the fact that the team leaders and the mud guards receive special training. The applicant submitted that it is not possible to secure replacement labour and that it would have to provide extensive training before such employees can perform this task.
11. The applicant submitted that it provides the maintenance of the tailings and since mine operations would be continuing when its employees are on strike there wont be any monitoring and maintenance of the tailing dams and this would result in a situation where one of the dams may collapse and that would endanger the communities that live around or in proximity to these dams.
12. In recent times with the emergence of many informal settlement closer to the tailing dams it is imperative that these dams be maintained.
13. The applicant referred to the Merriespruit disaster and submitted a video footage of the aftermath of the disaster.

14. In support of the application the applicant led the evidence of two experts and in essence their evidence was that there are essentially five failure mechanisms that have been identified in relation to the tailing dams and these would be :

- Overtopping
- Structural failure
- Slope failure
- Erosional failure and
- Piping failure

15. The applicant submitted that the tailing dams operations usually involves moving the deposition points from time to time to maintain the supernatant decant pond in the correct position around the decant facility. Failure to do so can result in inadequate freeboard or in the supernatant pond being pushed away from the decant facility and towards the confining embankment. This can lead to overtopping.

16. It was submitted further that the role of the Team Leader is basically to lead the deposition team. They are responsible to ensure compliance with the operating procedures and that the tailing dams are operated in a safe and sustainable manner. The Team leader is also responsible for initiating. Controlling and stopping decanting of water off the facility as and when required.

17. The Mud guards' primary role is to control the deposition of slurry onto the facility. Deposition has to be done in accordance with the standard operating techniques to ensure the outer wall and basin are constructed according to design. It is the direct responsibility of the Mud guard to prevent spills or overtopping during deposition.

18. During the inspection in loco the Committee observed how a hole can randomly appear at the bottom of the wall and this requires constant monitoring and filling as this could result in the wall collapsing. The evidence tendered also indicated that a collapse can cause catastrophic consequences for the nearby residential areas and had the immediate potential to cause death or injury.
19. A video footage was also submitted as evidence showing the aftermath of the Merriespruit disaster. How this affected the quality of life of some of the residents.
20. AMCU as a representative union also participated in the inspection in loco and they were also of the view that the mud guards and team leaders at tailing dams provided a service which if interrupted would cause harm to the part of the population. Accordingly they supported the application as brought by the applicant.

Legal Framework

21. In this matter the issue that the committee has to determine is whether the services that the applicant is rendering should be designated as essential services? In determining the matter, it is important that one should set out the legal framework.
22. 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.”*
23. 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”.*

24. 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*”.

25. 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”.*

26. The Constitutional Court in **South African Police Service v Police and Prisons Civil Rights Union and Another (CCT 89/10)** 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)”

27. 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]).

28. 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.

29. 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.

30. 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. Thus 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

31. In this matter the applicant is a company duly registered in terms of the laws of South Africa. The applicant operates about 177 tailing dams. The application is only limited to the services rendered by mud guards and team leaders at tailing dams. The applicant indicated during the public hearings that there are other companies that are rendering the same service to the mining companies.

32. As indicated above it is not an institution that is essential but it is the services rendered by an institution that are essential. Accordingly, the designation would

not only apply to the services rendered by Fraser Alexander Tailings Division but all service providers.

33. The evidence submitted by the applicant which is not disputed is that if this service is interrupted there is a likelihood that there can be a dam failure and this could cause harm to the personal safety or lives of the communities living in close proximity to the tailing dam.

34. On the evidence it was also clear that the dam failure can be caused by an insignificant event. The evidence regarding the Merriespruit disaster was that the rain that caused the dam to collapse in that instance was not significant. The problem was caused by the fact that the dam was not monitored and the mine was pumping tailings as a result with the small rain the dam became full and collapsed the walls and this resulted in a disaster.

35. As indicated above there is a need for constant monitoring of the dams as random rat holes appear and requires the mudguards to fix in order to ensure stability of the wall.

36. The evidence which is also not disputed is that the team leaders and mud guards work seven (7) days a week and this is a continuous operation where employees work three shifts of eight (8) hours.

37. Further that the Team leaders and Mud guards receive special training in relation to the monitoring and control of waste levels in the tailings dam as well as the monitoring and assessments of the walls of the tailing dams. The committee also observed during the inspection in loco that the function of the mud guard is not only to build the wall but it requires special skill in that they need to assess the direction in which the building should happen and also how this should be done. The applicant led evidence that it takes about three months to train Mud Guards and Team leaders. Based on this evidence the

Committee finds that it would not possible for the applicant to use replacement labour in the event of a strike.

38. Having considered the written and oral submissions of the parties, as well as the applicable law referred to above, the Panel is of the view that the following services should be designated as essential:

9. Designation

- (a) The ESC Panel therefore designates the services rendered by Mud guards and Team Leaders at tailing dams as an essential service.
- (b) The parties are directed to negotiate and conclude a minimum service agreement within 90 days of this designation.



Ms. Joyce Nkopane
ESC Panel Chairperson
2 April 2018