

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

**Case No.: ES 455**

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

**Whether the manufacture, production, supply and distribution of steel should be designated as essential services**

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**Designation**

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**Introduction**

1. The ESC received a request from ArcelorMittal South Africa Limited to conduct an investigation into whether the manufacture/ production, supply and distribution of steel should be designated as essential services.
2. The Committee considered the request and found the request to be reasonable. The Committee issued a notice to conduct investigation terms of section 71(1) read with sections 70B (1)(d) of the Labour Relations Act 66 of 1995 as amended (LRA) on 6 August 2021 under GN44945. The said notice was corrected by ERRATUM NOTICE published on 20 August 2021 under GN45020.
3. 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 70B(1)(d) 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 following services are essential:**

**(4) The manufacture/ production, supply and distribution of steel .**

**(see Government Gazette No 45020, GN496 of 2021, dated 20 August 2021)**

### **Details of Hearings**

4. The hearings were scheduled as per the notice published in the government gazette. Viz-
  - (a) 31 August 2021
  - (b) 02 September 2021
  - (c) 03 September 2021
  - (d) 07 September 2021
  - (e) 09 September 2021
  - (f) 10 September 2021
  
5. At the commencement of the public hearings the interested parties raised concerns regarding the notice, in particular the fact that the erratum notice did not afford them sufficient time to file written representations. The panel appointed by the ESC to determine this matter resolved the issue by extending the time frames.
  
6. The parties further indicated that there was a need to hear evidence in this matter. The Committee afforded the parties to lead evidence and submit written and oral arguments.
  
7. At the commencement of the hearing of evidence, AMSA indicated that it was no longer seeking a wide designation and indicated that it sought a designation on the following terms-
  - AMSA seeks a designation to the effect that the Blast Furnaces and Coke battery Services which are part of the manufacturing and production of steel , are essential services
  - Further that the ESC grant it a narrower consequential order to the effect that the services are essential for six days prior to the commencement of the trike action ( in essence AMSA seeks the notice period to be extended from 48hours to 6 days ) in order to allow and enable for a safe shut down of the blast furnaces and idling of Coke batteries .

8. The parties who participated in during the evidence stage of the investigation were-
- ArcelorMittal South Africa Limited (AMSA)
  - National Union of Metalworkers of South Africa (NUMSA)
  - Solidarity; and
  - Association of Mineworkers and Construction Union (AMCU)

### **Submissions and Evidence**

9. On behalf of AMSA four witnesses testified and in essence the evidence and submissions were as follows-

#### **Blast Furnaces**

10. AMSA's first witness testified that a full staff and contractor complement is required to blow-down the blast furnace and to restart it. This has to be done safely to avoid the risk of personal injuries or death to staff working in the area.
11. Hot air at around 300 kilo pascals is blown in at the bottom of the furnace. Further that under normal circumstances there will be around 300 to 800 tons of liquid at around 1480 degrees Celsius inside each furnace prior to tapping.
12. Proper furnace operation is crucial to ensuring that this hot metal is contained inside the furnace until it is allowed to drain through the tap hole and through the system. Every ton of hot metal produced around 2.4 tons of blast furnace gas, which is a mixture of mainly nitrogen, hydrogen, carbon monoxide and carbon dioxide. This gas is toxic and thus it is necessary that it should be properly contained as if it is not handled properly there could be explosions.
13. The witness further testified that it is imperative that the a controlled blow down of the furnace be undertaken and thus the request that the service be designated as an essential service.

14. On behalf of AMSA it was submitted that the lack of adequate time for preparation and controlled blow-down at the blast furnace may lead to the following –

- Liquid metal escape, which poses safety risks to both personnel and the plant itself, in addition to posing environmental risks. In this regard, the blast furnace is a steel shell, lined with refractory material. If the refractory material is compromised in the hearth area, the fins of iron may penetrate the shell and eventually burn a hole through the blast furnace shell. Consequently, the hot metal will no longer be fully contained within the furnace and will spill out into the surrounding area. This has, in the past, led to personnel fatalities at the blast furnace.
- Gas line and gas plant control, which could lead to possible gas explosions potentially leading to loss of life. An explosion occurred at Blast Furnace C in April 2020, leading to severe structural damage of surrounding infrastructure, working areas and vehicles.
- If salamander tapping does not occur, the hearth will be damaged upon restart. This may lead to refractory and shell damage resulting in a breakout upon operation, especially with repeated cumulative effects, endangering personnel life and safety.
- After an extended stoppage, the start-up of a blast furnace is complex and involves inter alia heating of the furnace and obtaining a gas passage blasting the furnace.

15. The lack of adequate time for preparation and controlled blow-down may lead to liquid metal escape, i.e. burn through, which is a safety and environmental risk and, with regard to the gas line and gas plant control, possible gas explosions or escape, leading potentially to loss of life.

16. Upon restart, a lack of salamander tapping may damage the hearth. Salamander is the hot metal remaining in the blast furnace, below the tap hole. During an extended outage, typically longer than 7 (seven) to 10 (ten) days, the hot metal solidifies because of the cooling of the hearth and is left in the furnace. When that material is heated, it exerts a stress on the refractory and on the shell of the furnace causing damage which may lead to a break-out upon operation, especially with repeated cumulative effects, endangering personnel who would be around the furnace.

17. In the case of an outage, the maximum that the salamander can be left untapped is 9 (nine) to 10 (ten) days. If the outage is longer, the salamander must be tapped to ensure safety. AMSA's decision to tap the salamander if there is going to be an outage of between 7 (seven) to 10 (ten) days is not irrational.
18. When AMSA taps the salamander, it is not making money; rather, it is losing money. The only reason that AMSA taps the salamander is to ensure the safety of the personnel working on the plant.
19. Restart procedures are riskier to operators than normal operations. The situation is flawed with unknowns, more so than in normal operations, and there are a lot more individuals on the cast house floor because of the cleaning of the troughs due to the lower temperature of the hot metal and the slag that starts coming out of the furnace.
20. Catastrophic loss of the furnace could lead to the permanent closure of the plant, which could affect everybody. AMSA submitted that more time is needed to blow down the two furnaces that it operates. A preparation stop during the blow-down is necessary. It is not ideal to skip the preparation stop, during which additional equipment, like additional gas analysers, need to be installed to provide a continuous analysis of the top gas during the blow-down process, as well as mechanical stock lines to keep track of the burden level during the blow-down step of the total shutdown process, and some shaft cooling. Additional gas analysers are needed to ensure the safety of personnel.
21. In essence AMSA submitted that it required the service to be declared essential for a limited duration in order to ensure that the blast furnaces are safely blown -down. This process requires personnel and these are employees who cannot be easily replaced.

### **Coke batteries**

22. In relation to coke batteries an explanation was provided to the effect that a coke battery is constructed with silica refractory material. This goes through chemical changes and expansion when the battery is first heated up in a subsequent total cooling down, the chemical changes cannot be reversed and the structure will shrink and crack. Considering

that a coke battery needs to be gas tight at the normal operating pressures, these cracks are destructive and may cause severe harm to the personnel, the plant and the environment.

23. The flammable gasses are produced and required by coke batteries and the large distribution network for these gases. The large piping system with flammable/explosive fuel gases is kept safe simply by keeping it under positive pressure and thus keeping air/oxygen out. In a short notice/walk-away interruption scenario, the gas pressure will drop over time; air will be sucked in, and explosive mixture will be created in the pipes. This has been proven to cause explosions.
24. Further that on the production gas lines, there must be a controlled production stop (pushing ovens empty one by one), sealing of ovens and standpipes, purging of lines with nitrogen and a skeleton staff at gas plants to monitor and maintain this nitrogen pressure inside the lines.
25. In order to maintain the heating, the assistant heaters, heater men, supervisors and certain maintenance and technical personnel, cannot participate in a strike. They must also not be prohibited from coming to work by violence and intimidation. This would include a limited amount of personnel at the energy distribution department.
26. The large piping system with flammable explosive fuel gases are kept safe, simply by keeping them under positive pressure and thus keeping air/oxygen out. In a short notice walk-away interruption scenario, the gas pressure will drop over time, air will be sucked in and an explosive mixture created in the pipes. This has been proven to cause very violent explosions.
27. Personnel cannot be evacuated to address this risk. Due to the potential damage to livelihood and possibility of job losses, some personnel will and have the right to try and safeguard the plant. Such a strike would therefore directly endanger their life, safety and health.
28. It was submitted that to mitigate this danger on the production gas lines, there must be a controlled production stop, pushing ovens empty one by one, sealing the ovens and stand

pipes, purging lines with nitrogen, and a skeleton staff at gas plants to monitor and maintain this nitrogen pressure inside the lines.

29. The risk in the coke plant is primarily caused as a result of excessive heat and gas. This presents a risk to the life of employees, as well as posing a danger to personal safety through injury. AMSA consumes a considerable amount of gas when it runs the batteries on the coke gas oven and blast furnace. It also consumes a considerable amount of air because it is a combustion process. Air is needed for the fuel to be in a combustion triangle, and off-gasses are also generated. The off-gases also get handled in the battery. So, there is always the danger of the area being classified as a gas hazardous area.
30. The witness further took the panel through the steps that are taken in order to stop the coke batteries safely. He further indicated that in the process they use refractory blankets and refractory castables in this process, and that they do not keep a lot of stock of these. It takes time to make safe as AMSA is required to procure the same from a third party. Further that during the 2022 strike it took AMSA two (2) days to procure the said items. The witness further testified that due to space constraints it is not possible for AMSA to pile stock the refractory blankets and refractory castables Further that such items are not part of its core business.
31. AMSA is the only one that operates coke batteries and accordingly it is not possible to secure replacement labour in the event of a strike.
32. NUMSA called one witness. Dr Maliongwe Manono testified that a properly planned interruption, with contingency plans of Blast Furnaces will not affect life , safety and health of the part or whole of the population.
33. He submitted that AMSA must have plans in place , as part of its training , to ensure that the process is managed in a safe manner. Further that any operation of heavy manufacturing or processing site would have the safety risks to its processes and thus safe operating procedures should be put in place together with refresher training sessions to ensure that operations are executed in a safe manner.

34. He indicated that it is possible that gas networks may pose an explosion risk and that there is a need for containment measures, these are things that ought to be catered for in the organisation's standard operating procedure.
35. Further that even if it could be assumed that such an incident could occur there is no evidence presented by AMSA of a cloud radius determination that could be affected by gas emissions. There is no evidence that shows the distance or extent of the impact and thus the gravity cannot be determined.
36. He submitted that the blow down can be safely done in 48 hours and accordingly there is no reason or justification to limit the right of employees to strike. Further that in the event of hot metal or slag spillages AMSA could put safety measures like "bund walls".
37. The witness also testified that banking is another method of stopping the furnace. Further that in terms of literature banking a furnace is a simpler process than a blow down.
38. In relation to Coke Batteries the witness accepted that these must be kept and maintained at an idling state, however the emergency controls and contingency plans must be activated. As this will allow AMSA to manage the risk with non-striking personnel and contractors.
39. He further accepted that coke batteries may not be stopped completely. He submitted that to keep the batteries idle it is not necessary to have the full staff complement.
40. In relation to arguments NUMSA raised a jurisdictional issue and submitted that the powers of the ESC panel are delineated in section 70D of the LRA. The section is clearly a closed list. Further that section 70D(1)(b), empowers the ESC to 'determine whether or not to designate the whole or a part of [a] service as an essential service'. The ESC does not have the power to extend the 48 hours strike notice which is legislated.
41. It was submitted that the only way the strike notice period can be altered is through the conclusion of a collective agreement between the parties, or by legislative amendment. The LRA does not confer on the ESC the power to perform these functions.



42. NUMSA also raised an issue regarding the independence of the expert witnesses of AMSA arguing that these witnesses were not independent as they are employees of AMSA.
43. In relation to the Blast furnaces and Coke batteries it was submitted that AMSA could not demonstrate that the interruption of the operation of blast furnaces and coke batteries will result in the kind of endangerment contemplated in the LRA. This is because the endangerment does not relate to the “whole or any part of the population”.
44. It was submitted that it was apparent that the ‘whole or any part of the population’ must be a collective – i.e., part of the broader public and society. Employees at the workplace are ‘isolated individuals’. Employees cannot and do not qualify as ‘part of the population’ as contemplated.
45. It was submitted that on the evidence there was no causal link between the interruption of coke batteries and an imminent danger to life, safety or health of the whole or part of the population.
46. Solidarity did not lead any oral evidence but it made written submissions. It submitted that on the evidence led by AMSA and the cross examination of the witnesses, it could not be said that the interruption of the services of blast furnaces or coke batteries would cause an endangerment to life, personal safety of the whole or part of the population and accordingly the application should not be granted.
47. On behalf of AMCU two witnesses testified and in essence their evidence was that blast furnaces and coke batteries can be shut down safely in the 48 hours allowed by the strike. Both these witnesses conceded that there are safety risks.
48. In its submission AMCU submitted that the services under investigation are not essential services.
49. It was submitted that AMSA safely blew down and salamander tapped Blast furnace C in 48 hours during the 2022 strike. Further that without the preparation stop AMSA was able to blow down Blast Furnace D in 1.69 days. Accordingly without the preparation stop both Blast Furnaces could be blown down in 48 hours. It was submitted further that the available

literature indicated that blast furnaces with salamander tapping could be blown down in 48 hours.

50. AMCU submitted further that during the Covid pandemic the preparation stop at Blast Furnace C took 14 hours. Further the preparation stop can be safely skipped. AMSA's blast furnaces are often forced into unplanned shut downs due to reliability issues. In such circumstances there is no time for a preparation stop and the furnaces are stopped immediately. The fact that there are no fatalities when this happens indicates that AMSA is able to manage any risk associated with omitting the preparation stop.
51. It was submitted that the fact that AMSA uses the same resources and manpower to blow down both furnaces cannot be used as an excuse. AMSA wants the benefit of sharing costs between the two furnaces. It should not be allowed to sacrifice employees' right to strike in order to benefit from "economies of scale".
52. Once the blast furnace are blown down with a salamander tap , they can be maintained by two people per blast furnace per shift. This function may be performed by the management in the event of a strike. Further that AMSA has many contractors and it can use these as replacement labour without interfering with the employees' right to strike.
53. In relation to Coke batteries it was submitted that the batteries can be discharged, sealed and production stopped, between 23 and 30 hours. This period is well under the notice period that is legislated. Further that each battery has its own personnel which makes it possible to shut them in the period stated above. The pushing out and sealing the ovens, it was submitted takes 24 to 30 hours.
54. On the submissions AMCU referred to all the stages and submitted that all these processes can be done in 24 to 30 hours.
55. It was submitted that the need to source ceramic blankets cannot be an excuse to delay the process of stopping production at coke batteries. AMSA could stock all the material it requires. Further that there is no evidence that these blankets could not be sourced in two days.

56. In relation to refractory castables it was submitted that AMSA does not need these during production stop. Further that permanent staff who would potentially be involved in strike action are not involved in the process using refractory castables.
57. In conclusion AMCU reiterated its submission that the services are not essential.

#### Legal Framework

58. In this matter the issue that the committee has to determine is whether blast furnaces and coke batteries as part of the manufacture/ production, supply of steel are essential services? In determining the matter, it is important that one should set out the legal framework.
59. 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.”
60. 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”.
61. 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”.
62. 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”.
63. 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)”

64. 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]).

65. In *SATAWU & Others V Moloto NO and Another* 2012 (6) SA 249(CCC) the Constitutional Court stated that :

“ The right to strike is protected as a fundamental right in the Constitution without any express limitation. Constitutional rights conferred without any express limitation should not be cut down by reading implicit limitations into them and when legislative provisions limit or intrude upon those rights they should be interpreted in a manner least restrictive of the right if the text is reasonably capable of bearing that meaning”

66. 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.

67. 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.

68. 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**

69. In determining whether the service must be designated as essential the panel considered the nature of the services and the applicable legal framework.

70. In this case as indicated the parties relied on oral evidence. NUMSA, AMCU and Solidarity argued that on the evidence of AMSA a designation as sought cannot be sustained as AMSA has failed to provide cogent evidence that demonstrate that the interruption of the operations of blast furnaces and coke batteries would cause an endangerment to the lives, personal safety or health of the whole or part of the population.

71. As indicated above NUMSA raised a jurisdictional issue and submitted that the ESC does not have the power extend the legislated 48 hours' notice. Further that AMSA can only achieve such an extension through collective bargaining or amendment to the LRA. At the commencement of these proceedings AMCU raised a similar point and a ruling with full reason was issued and that ruling should be read as if incorporated in this ruling. For the sake of completeness the ESC agrees with the submission that it does not have the power to extend the notice period for strike action and that such can only be achieved through a collective agreement between the parties or through legislative amendment. However in this application AMSA requested the ESC to investigate whether the services are essential only for a limited period. The LRA does not prescribe to the ESC that it should designate services as essential for the entire duration of a strike.

72. The prevailing circumstances would dictate the period for which an interruption would result in an endangerment to life personal safety or health of the whole or part of the population. Once the endangerment cease to exist there would be no justification in limiting a constitutional right. It would not be for the first time that the ESC makes a determination of that nature. In designating refuse collection as an essential service, the ESC based on the

evidence that was before it at that time determined that the service only becomes essential 14 days after the refuse was left uncollected. The fact that the request narrows the designation sought to a limited period is actually in line with the dicta in *POPCRU v SAPS (supra)* where the Constitutional Court emphasised a restrictive interpretation and that only services that are truly essential should be designated as such.

73. The other criticism levelled at the evidence of AMSA related to the fact that the witnesses who testified as expert witnesses were not independent because they are employees of AMSA. It is so that expert evidence presented should be or be seen to be the independent product of the expert which should not be influenced by the exigencies of litigation. Further that it should provide independent assistance by way of objective, unbiased opinion in relation to the matters within the expertise of the expert. In this case the panel is of the view that it is important to consider the evidence as tendered taking into account the nature of the proceedings. Section 71 of the LRA envisages a fact finding process and that is why it instructs that the ESC should conduct an investigation.
74. The question that arises is whether based on the facts, that all AMSA witnesses are also its employees can it be said that the panel cannot not rely on their evidence? The panel is of the view that the answer should be in the negative. As indicated above the principle is simply that the evidence should be the independent product of the expert. Further that the opinions provided should be objective.
75. In this case it is common cause that, in relation to the operation of blast furnaces and coke batteries AMSA is the only company in South Africa that conduct these operations. The witnesses indicated the basis of their expertise and their experience. The evidence that was presented by these witnesses was objective and in some instances the witnesses of NUMSA and AMCU conceded to the correctness thereof.
76. Accordingly the panel does not agree with the submissions of organised labour that it should not attach weight to this evidence. Whilst Dr Manono's expertise in this field is accepted as such, the reality is that he conceded that he has limited practical experience in the operations of blast furnaces and coke batteries. The panel is of the view that in order to make an informed and rational decision in this matter it must consider the entire evidence tendered by the parties and weigh the same against the test of whether the interruption of the service would result in the endangerment to the lives personal safety or health of the whole or part of the population.

77. As indicated above the right to strike is a fundamental human right and this right should not be interfered with unless there is justification for such interference. It is also important to note that the endangerment to life personal safety or health must not be a remote possibility.
78. On behalf of NUMSA it was submitted that based on the evidence that was submitted AMSA seeks a designation for its Vanderbijlpark plant as there was no evidence led on the Newcastle plant. It was submitted that it will be incorrect for the ESC to make a designation based on the peculiar and discrete factual matrix of the Vanderbijlpark plant. Further that the Newcastle plant only has one furnace and it will be unfair to limit the right of the right to strike in that plant based on the evidence submitted in relation to the other plant.
79. On behalf of AMSA it was submitted that there was evidence on the Newcastle plant and the panel accept that whilst the focus was on the Vanderbijlpark plant, there was some evidence tendered in relation to the Newcastle plant. The evidence was that AMSA requires about 4 days to safely shut down the one furnace at Newcastle. The submission that for the Newcastle blast furnace AMSA requires 4 days is very difficult to comprehend considering that according the AMSA's witness the reason why it cannot blow down the blast furnaces at Vanderbijlpark is 48 hours is because there are two blast furnaces and that the same resources are utilized for both. Whilst the panel accepts that it may take more than 48 hours to blow down one furnace when one factors in the preparation stop , there is no persuasive evidence to support the need for 4 days where there is only one blast furnace.
80. On behalf of AMCU it was submitted that blast furnaces can be successfully blown down in the 48 hours period that it allowed in terms of the LRA as the notice period. It was further submitted that the literature referred to in NUMSA's case illustrate that ArcelorMittal in other countries in fact blow down blast furnaces in 15 hours. In support of the argument that in fact blast furnaces can be blown down successfully in 48 or less hours examples were made of the instance where AMSA shut down its blast furnaces without doing a preparation stop, which on AMSA's evidence is vital. It was further argued that AMSA's blast furnaces are often forced into an unplanned shut down due to reliability issues. The difficulty with this argument is that it does not factor in the fact that the duration of a strike is often unpredictable. On the evidence of AMSA which was not disputed through cogent evidence from all the witnesses it was clear that there has never been a stage where both furnaces

had to be stopped at the same time except the Covid situation and also the May strike. In these instances it was indicated that preparation stop was not done on one furnace.

81. The panel agrees with the submission by AMSA that these submissions do not take into account the full picture. A maintenance blow down and a full blow down that includes salamander tapping requires a preparation stop. The evidence tendered by AMCU's witnesses could not assist the panel in demonstrating that a preparation stop was not necessary.
82. The evidence actually shows that the blowdown of Blast Furnace D during May 2022 was preceded by a preparation stop, as well as ~16hrs to stabilise the furnace. The furnace was thereafter blown down in 19hours, and the salamander tap was completed in just over 16.5 hours. The 1.69 days is accurate, but this does not include the full extent of the shutdown programme. From start to finish the blow down of furnace C and D took 5.7 days.
83. On behalf of AMCU it was further submitted that the literature worldwide confirms that the blast furnaces can be safely be blown down with a salamander tap within 48 hours and therefore the extended time requested by AMSA was not necessary. Again the difficulty that is presented by this argument is that it does not take into account the fact that the period referred to in the said literature only relates to one blast furnace. The evidence of AMSA which is not dispute is that the period is so requested because AMSA has to blow down two furnaces using the same resources.
84. It is important to indicate that a designation of a service as essential will apply to all those employers and employees who are rendering the service. The difficulty that the panel has with the evidence as tendered is that it is based mainly on the operations of AMSA, and more specifically its Vanderbijlpark plant. If the ESC grant the designation on the terms proposed by AMSA which is that for the period of six days preceding a strike the service is essential, the effect of such designation is that even for the Newcastle plant the service will be essential for that period in circumstances where it is not. As indicated above, according to AMSA's witnesses Newcastle only requires four days to shut one blast furnace safely. It will be worse if another plant is established and it has more blast furnaces than the Vanderbijlpark plant, in that on the evidence even the six days may not be adequate.



85. Based on the above the panel finds that it is not appropriate to make a designation based on the peculiar operations of a specific employer. The service should be viewed holistically to determine if it is an essential service.
86. In dealing with the submissions of shortage of manpower, a common thread from the submissions of AMCU and NUMSA was that the fact that AMSA uses the same resources to blow down both furnaces cannot be used as an excuse to interfere with the constitutional right of the employees to strike. Further that AMSA did not provide any cogent reasons as to why it was not increasing staff and the resources so that it could be able to blowdown both furnaces simultaneously. The same argument was raised in relation to coke batteries where it was suggested that AMSA should stock pile refractory and or ceramic blankets. This argument ignores the fact that a strike is not an everyday event and also AMSA does not have to blow down both furnaces all the time. The panel therefore accepts that it would be irrational to increase staff merely for the purposes of being able to blow down both furnaces at the same time in the event of a strike. Further that it will be irrational to for AMSA to stock pile material that it does not need for its day to day running of the business in anticipation of a strike.
87. NUMSA, Solidarity and AMCU submitted that AMSA has a number of contractors and that the employees of these contractors can be used during a strike. The difficulty with the submission is that it is not supported by any evidence. None of the witnesses that testified on behalf of the unions testified that the staff members that are responsible for the blow down of blast furnaces and shutting down or idling coke batteries can be sourced from the contractors. In fact the evidence tendered by AMSA indicated that these functions are performed by AMSA's employees.
88. The evidence of AMSA in relation to the risks as indicated above is that whilst blowing down the blast furnaces AMSA is not generating money. It contends further that lack of adequate time for preparation and controlled blow down of blast furnace may lead to liquid metal escape. The witnesses that were called by AMCU conceded that when the blast furnace is stopped there is a need for a safe and controlled blow down to avoid the risk of hot liquid metal escaping. This was also conceded to by Dr Manono. The only difference between the parties is that AMSA maintains that it needs more time to do this and the unions contends that this process can be safely done within forty eight hours.

89. All the witnesses agreed that the gas line and the gas plant control could also lead to possible gas explosions. On behalf of AMSA it was argued that the said explosions could lead to loss of life. It was further submitted that a gas explosion happened at Blast Furnace C in April 2020, leading to severe structural damage of surrounding infrastructure , working areas and vehicles.
90. Dr Manono in his evidence conceded that there are inherent risks and dangers in blowing down blast furnaces. He however submitted that if the company adheres to best practices the risks would be mitigated.
91. Dr Manono also conceded that there are dangers between the blow down period and the restart of the blast furnaces. He confirmed the evidence of Mr Lupton that the risks that are associated with the management of the gas pipelines. Further that there could be high amounts of carbon monoxide which is a very toxic gas for humans. There are also 15 possibilities of explosions and there are also possibilities of liquid matter slipping out of the furnace hearth and thereby causing explosions, especially if it does come into contact with water because that reaction is very sporadic and explosive. Thus there could be endangerment to both equipment as well as plant personnel if the processes in the in-between are not well controlled.
92. On the evidence above it is clear that there are inherent risks in the operation of the blast furnaces to both the personnel and the plant itself. In relation to coke batteries the evidence shows that the coke batteries need to be tight at the normal pressure. Further that any cracks to the batteries are destructive and may cause severe harm to the personnel , the plant and the environment. For the purposes of this investigation the panel will not make a pronouncement on the possible damage to the plant as that matter should be a subject of a different inquiry.
93. In relation to the coke batteries it was submitted that a full staff and contractor compliment is required to stop production and hot idle the batteries at coke making plants. This has to be done safely to avoid the risk of personal safety and death of staff working in the area.
94. Whilst there are differences in relation to the period required to safely shut down the batteries all the witnesses that testified acknowledged the safety risks that are inherent to the operation when shutting down.

95. The question that arises in this instance is whether the interruption of these services would lead to the endangerment of the health, safety or lives of the “**whole or part of the population**”. It is common cause that the closest community to the Vanderbijlpark plant of AMSA is community of Boipatong ,and on the evidence this community is about 5 kilometres away from the plant. There is no evidence that if the service is not designated there will be an imminent danger to that community. One of the witnesses did mention that a gas explosion might have an impact on the community. On the evidence there was an explosion on blast furnace C but this damaged the infrastructure and vehicles in the plant. The evidence is that the endangerment in this case would be to the workforce. The same with any safety risks emanating from the coke batteries.
96. The panel is of the view that when considering the threat to life personal safety of the population or part thereof the question should be how real and /or imminent is that threat. The ILO principles refer to a “clear and imminent threat.” It is thus important that in determining that a service should be designated as essential there must be a direct causal link between the interruption and the particular endangerment.
97. The said endangerment must be to the health, lives and safety of the **whole or part of the population**. Having accepted that there are inherent risks and dangers the panel is of the view that is important to determine whether the endangerment would be to the health, lives and safety of the **population**.
98. NUMSA in its submissions made reference to the ESC determination in the matter between Department of Social Development / NEHAWU obo Members, ES2 where the ESC panel , when dealing with the word population said the following-
- “It is the population or a part of a population that must face the endangerment, not merely isolated individuals – there is a collective component. In that respect ‘population’ means ‘the collective inhabitants of a country, etc.’”
99. It was submitted that from the above it is apparent that the ‘whole or any part of the population’ must be a collective – i.e., part of the broader public and society. Employees at the workplace are ‘isolated individuals’. Employees cannot and do not qualify as ‘part of the population’ as contemplated.

100. On behalf of AMSA it was submitted the workforce are part of the population and not isolated individuals. Further that their right to life is sacrosanct, and a narrow reading of the Labour Relations Act (LRA) which NUMSA urges takes no account of the right to life and bodily integrity of AMSA employees.
101. In determining what is contemplated by the phrase “whole population or part thereof” in the context of essential services the panel considered the dictionary meaning of population. Oxford dictionary defines a population as “all the inhabitants of a particular place”. Cambridge Dictionary provides the meaning of population as “all the people living in a particular country, area, or place”
102. The panel is of the view that the legislature in using the word population could not have intended a designation for the workforce, and in fact the intention was to protect the lives, personal safety or health of the broader community, society or inhabitants of the South Africa. The word part thereof should mean part of society or inhabitants of a region.
103. The panel accepts that whilst AMSA’s workforce are members of the population by virtue of them being part of a community and inhabitants of South Africa, the workforce per se cannot be said to be part of the population contemplated by the LRA in restricting the right of employees to strike. It is trite in our law that the interpretative process must give effect to the purposes of the LRA as set out in section 1(a). An interpretation that is so broad as to recognise a workforce as part of the population in the context of essential services is impermissible. There are many workplaces that have inherent risks and dangers in their respective operations. These are not designated as essential services because the endangerment is only to the employees. There are sufficient pieces of legislation that are aimed at protecting the lives, health and safety of the employees, and these protections are not necessarily available to ordinary members of society outside the workplace. The protection provided under essential services is to ensure that the lives, health and safety of the inhabitants of the country are not endangered when there is an interruption of the service.
104. Having considered the evidence and the submissions of all the parties in this matter the panel accepts that there are safety risks in the operations of blast furnaces and coke batteries if these are not shut down in a controlled and well managed manner. The panel finds further that whilst there may be endangerment such endangerment is not to the whole

or part of the population. Accordingly there is no basis to limit the right of the employees to strike by designating the service as essential.

### **Determination**

The ESC Panel therefore makes the following determination:-

105. The service of blast furnaces and coke batteries as part of the manufacture, production and distribution of steel are not essential services.

A handwritten signature in black ink, appearing to be 'JN', written in a cursive style.

Ms. Joyce Nkopane  
ESC Deputy Chairperson  
16 November 2022