

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

Case No.: ES 591

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

Investigation as to whether the coordination and oversight of all maritime search and rescue missions, as well as the prevention and combating of marine pollution from ships, including but not limited to oil spills from vessels, and maritime operations including response to any vessel emergency or pollution threat, which includes vessel inspections, emergency management, unseaworthy vessels as well as grounds, sinking, capsizing, flooding, fires and other emergencies onboard vessels.

Designation

Introduction

1. The Essential Services Committee (ESC) received a request from the South African Maritime Safety Authority to conduct an investigation as to whether the services of coordination and oversight of all maritime search and rescue missions, as well as the prevention and combating of marine pollution from ships, including but not limited to oil spills from vessels, and maritime operations including response to any vessel emergency or pollution threat, which includes vessel inspections, emergency

management, unseaworthy vessels as well as grounds, sinking, capsizing, flooding, fires and other emergencies onboard vessels should be designated as essential services.

2. The Committee considered the said request and concluded that it was reasonable for the purposes of conducting a Section 71 (LRA) investigation into the services.
3. In terms of section 71(1) read with sections 70B (1)(d) of the Labour Relations Act 66 of 1995 as amended (LRA) the ESC published a notice of its intention to conduct an investigation and 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 coordination and oversight of all maritime search and rescue missions, as well as the prevention and combating of marine pollution from ships, including but not limited to oil spills from vessels, and maritime operations including response to any vessel emergency or pollution threat, which includes vessel inspections, emergency management, unseaworthy vessels as well as grounds, sinking, capsizing, flooding, fires and other emergencies onboard vessels’

should be designated as essential services (see Government Gazette No 48660, GN436 Of 2023, dated 26 May 2023.

Details of Hearings

4. The hearings were scheduled as per the notice published in the government gazette. Viz-

27 June 2023

28 June 2023

29 June 2023

04 July 2023

07 July 2023

Submissions of the parties

Submissions were made at the online hearings by the parties. Parties further requested that inspection in loco take place which were conducted on:

21 August 2023 – SAMSA Cape Town

22 August 2023 – Transnet Ports Authority Cape Town

Written submissions were also made concluding the inspections in loco by SAMSA, Transnet and SATAWU.

5. The Committee received submissions from South African Maritime Safety Authority (SAMSA), South African Transport and Allied Workers Union (SATAWU and Transnet National Ports Authority (TNPA)

SAMSA submissions

6. SAMSA submitted that it is established in terms of the South African Maritime Safety Authority Act, 5 of 1998. Its legislated mandate is to
 - a) Ensure safety of life and property at sea;

- b) To prevent and combat pollution of the marine environment by ships;
and
- c) To promote the Republic's maritime interests.

7. Maritime Rescue Coordination Centre (MRCC) is established in terms of the South African Maritime and Aeronautical Search and Rescue Act 44 of 2002. It is responsible for the oversight and coordination of all maritime search and rescue missions within the area of responsibility as assigned to South Africa.
8. The area of responsibility is approximately 28 million square kilometres of ocean area which needs to be monitored on 24/7.
9. MRCC employees are responsible for coordinating search and rescue operations. Where vessels, aircraft or individuals experience an emergency situation at sea, the MRCC takes charge and coordinate response efforts.
10. MRCC employees monitor maritime traffic to ensure the safe and orderly movement of vessels. It disseminates important information to mariners, such as navigational warnings, and updates on maritime hazards. It also responds to environmental emergencies.
11. It was submitted that the interruption of the services rendered by MRCC would endanger the lives personal safety and health of people at sea.
12. SAMSA submitted that during the recent outbreak of Covid, MRCC played a pivotal role in coordinating the search and rescue services within the maritime sphere. It ensured that seafarers received medical care and many lives were saved.
13. It was submitted that in coordinating maritime emergencies time is of the essence. In medical emergencies, immediate action may save lives. Rapid medical intervention has the potential to save lives and prevent complication.

14. Further, that quick responses can mitigate injuries. In cases involving hazardous material or environmental disasters prompt action can limit the spread of dangerous substances that are harmful to marine life and human life.
15. In relation to MAS incidents, it was submitted that these can escalate if there is no prompt response. In maritime distress situation swift and coordinated action is essential to ensure the safety and wellbeing of those involved. MRCC and SAR system play a critical role in responding to distress calls coordinating, rescue operations and providing assistance to vessels and or individuals in distress at sea.
16. There is only MRCC to ensure an effective and efficient response, where time is minimised, and prevention is critically important to prevent an ineffective control of assets that may contribute to escalating the situation instead of de-escalating same.
17. The Principal officers and Surveyors play an important role to ensure safety of life at sea and the protection of the marine environment. These officers conduct Flag State Surveys and inspections for SA flagged vessels. They also conduct port state control inspections onboard foreign vessels calling into South African Ports, for the safety of life onboard those vessels and the protection of marine environment from substandard vessels.
18. The surveyors and principal officers are required to investigate casualties and injuries which by law are required to be reported to SAMSA within 24 hours.
19. In relation to marine pollution, it was submitted that there are different substances that cause pollution at sea. The degree of danger differs. To this end the panel was referred to a chemical spill which does not only harm the environment but also has the potential to cause harm to human life depending on the type of chemical spilled.
20. SAMSA submitted that the services that it referred to are lifesaving services and

accordingly they should be designated as essential services.

Submissions by SATAWU

21. On behalf of SATAWU it was submitted that the union accepts that search and rescue broadly is an essential service. SATAWU, however disputes that the services rendered by MRCC employees and surveyors are essential. It was submitted that the withdrawal of labour by one rescue coordinator would be minimal and would not result in a complete service interruption.
22. In relation to medical evacuations (MEDEVACs) it was submitted that the functions are based on technology and do not require the workers to “have their boots on the ground”. It is a well-oiled machinery comprising multiple agencies and joining of hands for a successful operation. It was submitted that this operation would not collapse simply because one agency is not available. To this end SATAWU referred to the incident in Angola where MRCC Cape Town took over the responsibility and also the Madagascar incident.
23. In relation to all the other services it was submitted that these services are not essential when one considered the definition of essential services including practice. Further that even if the services were essential the employer could rely on replacement labour.
24. SATAWU submitted that search and rescue operations would not be interrupted if RCC employees embark on strike as TNPA or other Rescue Coordination Centres in the region or international would respond. MRCC employees normally coordinate search and rescue incidents outside its area of responsibility. It was submitted that the coordination from alert stage, to communicating with the vessels, investigating, gathering and analysing data, to planning operations is based on the use of technology. It was submitted that TNPA can communicate with vessels at sea and receive alerts via Telkom Maritime Radio in the same way that MRCC is able to.

25. It was further argued that the submission by Captain Miya that the interruption of port operations if the VTC, marine pilots, tug masters and marine engineers strike would cause accidents is not sustainable as there was no evidence to the effect that during the recent strike at Transnet there was an increase of accidents.
26. In essence SATAWU submits that in relation to all the services that other agencies would respond in an emergency and that thus absence of MRCC employees due to strike action would not interrupt services.
27. In relation to MAS services the panel was referred to Annexure 2 of the IMO Resolution A 950(23), (Agenda item 17) in its guidelines on MAS which states that MAS are services that do not require the rescue of persons. Reference was made to three situations, for example where the ship loses cargo at sea or accidental discharge of oil. This does not endanger lives. The other example was where the ship according to its master's assessment needs assistance (e.g. where it is about to sink or there is a fire developing). The last example is where the ship is found in distress but those on board have been rescued except those that are dealing with the ship. SATAWU submits that the services rendered in these instances are not essential services because the practice currently is to prioritise search and rescue over MAS.
28. In relation to the surveying of vessels it was submitted that SAMSA "over-plays the importance of its intervention of surveyors in safety". It was submitted that the mariners that are employed to manage ship are highly skilled technocrats, and they look after the safety of the ship. Further that there are private surveyors and retired surveyors who can be used for the surveying and inspection of vessels.
29. In conclusion the union argued that it was curious that the application is brought twenty years after the creation of the institution (SAMSA) further that in relation to TPNA there has been strikes and there were no lives lost. The union prayed that the services should not be designated as essential.

Transnet National Ports Authority

30. On behalf of TNPA it was submitted that the entity is the national authority established in terms of section 3 of the National Ports Act 12 of 2005 (“the Ports Act”) to own, manage, control, and administer all of the ports in the Republic of South Africa. TNPA’s specific functions are set out in section 11 of the Ports Act.
31. TNPA has a specific interest in this investigation because a part of its statutory and regulatory functions falls within the scope of the services being investigated. Many TNPA personnel are involved in providing the services being investigated.
32. TNPA is mandated by various local and international instruments to perform functions and services that are covered by the scope of this investigation. Each of these instruments, and the obligations on TNPA that flow from them, is referenced below in the context of the service that is being investigated.
33. Broadly, one of TNPA’s statutory functions is to “enhance safety and security within port limits” (section 11(1)(g)(vi) of the Ports Act), and it must aim in its activities to “promote and undertake the necessary measures to enhance safety and security of life and property in ports” (section 12(h) of the Ports Act).
34. It was submitted that as part of this function, ports and their emergency response resource and capacity are listed in National Disaster Management Centre’s database.
35. South Africa is one of the parties to the International Convention on Maritime Search and Rescue, 1979, that was incorporated into SAMASRA. Section 4 of SAMASRA establishes the South Africa Search and Rescue Organization (“SASAR”), whose responsibility it is, amongst others, to ensure a coordinated and effective maritime and aeronautical search and rescue service within the South African search and rescue regions. SASAR acts in this role on behalf of the National Department of Transport as the authority responsible for the application of the

Convention, as well as in other conventions binding on the Republic on the Republic, regarding maritime and aeronautical search and rescue operations.

36. In terms of section 5 of SAMASRA, SASAR consists of representatives from various entities including, for present purposes, TNPA and the South African Maritime Safety Authority (“SAMSA”), whose referral precipitated this investigation. TNPA’s seat at SASAR accords with its statutory function to “discharge or facilitate the discharge of international obligations relevant to ports” (section 11(1)(t) of the Ports Act).

37. Section 6 of SAMASRA sets out the specific functions of SASAR. These include:

“(1) SASAR must within its means and capabilities co-ordinate its resources to-

(a) Search for, assist and, where appropriate, effect a rescue operation for-

(i) Survivors of aircraft crashes or forced landings;

(ii) The crew and passengers of vessels in distress;

(iii) Survivors of maritime accidents or incidents; and survivors of any military aircraft or vessel accident or incident if such aircraft or vessel is not engaged in an act of war; and

(b) Co-ordinate the evacuation of a seriously injured or ill person from a vessel at sea where the person’s condition is such that he or she must obtain medical treatment sooner than that vessel would be able to get him or her to a suitable medical facility.

38. SAMSA is the designated Maritime Rescue Co-ordination Centre (“MRCC”). It therefore plays a coordinating, reporting and administrative role in search and rescue missions. It is eight commercial seaports in South Africa, all under TNPA’S jurisdiction, that have been designated as Maritime Rescue Sub-Centres. As a matter of practice, the MRCC hands over the search and rescue to TNPA and the relevant port, in the port’s capacity as a Maritime Rescue Sub-Centre. The Harbour Master of the port, in consultation with relevant TNPA management, coordinates

resources and responses to the emergency in consultation with MRCC. In other words, SAMSA in its capacity as MRCC requires the cooperation, assistance and resources of the individual ports to execute its search and rescue functions.

39. TPNA submitted that apart from SAMSA and TNPA providing the services under investigation, there are no other bodies within the marine context with the necessary skills, equipment or personnel to do so. Although other bodies are designated to respond emergencies at sea (namely, the South African National Defence Force (“SANDF”); The Department of Transport, Disaster Management; Air Traffic and Navigational Services; and the South African Police Service), it is only TNPA that has the proximity, facilities, equipment and systems to actually conduct the response on an emergency basis.

40. TNPA maintains alerting posts, known as stations, and therefore is the first recipient of any report of a threat to safety or of an imminent danger at sea. It would notify the MRCC of the emergency so that a response, and if necessary, a search and rescue plan, can then be developed in consultation with the necessary TNPA employees. The alert centres function 24/7.

41. It was submitted that in these operations time is of the essence and TPNA has marine crafts along the coastline that are equipped to assist in most search and rescue operations.

42. TNPA staff who plan responses to the emergencies and who conduct the operations (including operating the required marine and aviation craft) naturally have specialized training, skills and experience of local port and sea conditions in respect of the vessels they operate, but also ancillary functions including firefighting, first aid and personal safety. These are not possessed by anyone save for the persons performing the services, much like nurses and doctors in hospital. It is therefore not possible to source the necessary replacement Labour in the event of a strike to provide the mandated emergency responses.

43. TNPA submitted that it is incontrovertible that an interruption to the services that are the subject of this investigation will directly result in the endangerment to life, personal safety, and health. The services provided are aimed at combatting physical emergencies such as fire, ship crashes, flooding and sinking. These occurrences are life- threatening. To this end a number of examples were referred to.
44. It was submitted that international vessels to just be advised on the 48 hours' strike notice that they should not enter South African seas is impossible as these vessels are at sea for many months at a time and any emergencies can occur, necessitating a response. In other words, emergencies at sea cannot be avoided, and when they endanger life, health or personal safety, as they generally do, they must be responded to immediately.
45. TNPA submitted that marine emergencies are uncontrollable thus necessitating the staff that render the service to be available. These emergencies occur not because of negligence or human error. In some instances, emergencies are as a result of extreme weather conditions on land are felt more strongly at the ports, and at sea (including within port limits). As a result, TNPA vessels, usually tugboats, must respond immediately to vessels caught adrift and at risk of wreckage or even vessels that have entered the ports and come unmoored. In the case of large vessels in the ports, such as container vessels, many tugboats will be required, sometimes all the tugboats at the particular port. Even if these vessels are prevented from running aground, and if the crew are evacuated, cargo, whether in containers or not, is often destabilized. Some of this include dangerous cargo, which if lost, not only pollutes the natural environment, but can present risks to humans – for humans – for example, if the vessel is carrying toxic gases, flammable liquids or gases, or if chemicals being transported reach rivers.

Legal Framework

46. In this matter the issue that the Committee has to determine is whether coordination and oversight of all maritime search and rescue missions, as well as the prevention and combating of marine pollution from ships, including but not limited to oil spills from vessels, and maritime operations including response to any vessel emergency or pollution threat, which includes vessel inspections, emergency management, unseaworthy vessels as well as grounds, sinking, capsizing, flooding, fires and other emergencies onboard vessels should be designated as essential services. In making the determination it is important that the Committee should set out the legal framework.

47. 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.”

48. 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”.

49. 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”.

50. 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”.

51. 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)”

52. 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]).

53. 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.

54. In relation to the services that are being investigated there are various pieces of legislation that are applicable viz.

- South African Maritime Safety Authority Act
- Merchant Shipping Act
- South African Search and Rescue Act

- Maritime Pollution (civil and liability) Act
- Maritime Pollution (Prevention of Pollution) Act
- Maritime Traffic Act; and
- Wreck and Salvage Act
- National Ports Act 12 of 2005

55. 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.

56. It is further trite that in view of the fact that the right that would be affected by such a designation limit 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 the Submissions

57. In determining whether the service/s being investigated are essential services the panel will rely on the oral submissions, the evidence gathered during the inspection in loco and also the written submissions of the parties.

58. On behalf of both SAMSA and TNPA it was submitted that the service of coordination of search and rescue missions should be designated as essential services as these services are lifesaving. SATAWU does not dispute that the services are essential however it contends that the services rendered by MRCC employees and surveyors are not essential as the withdrawal of labour by one rescue coordinating centre would be minimal and would not interrupt the service.

59. As indicated above it is the service that is essential and not the institution or the

employees. The fact that there may be other rescue centres across the globe does not render the service less essential.

60. Section 6 of SAMASRAA sets out the specific functions of SASAR. These include:

“(1) SASAR must within its means and capabilities co-ordinate its resources to-

(c) Search for, assist and, where appropriate, effect a rescue operation for-

(iv) Survivors of aircraft crashes or forced landings;

(v) The crew and passengers of vessels in distress;

61. The argument that the interruption of the service would be minimal cannot be sustained. In its submission the MRCC referred to an incident in the Madagascar sea waters where there was a ship in distress and MRCC had to organise and ensure that the necessary help was provided. Ultimately the passengers on board that ship received medical attention in South Africa. SATAWU referred to this incident and another incident in Angola. The argument in essence is that there is an alternative, thus the service is not essential.

62. The question that arises is whether can it be said that this is a viable alternative. The panel is of the view that it is not. It cannot be correct to expect other coordinating centres to assist in South African sea waters simply because the people who render the service are not available. This would be tantamount to the responsible authority in South Africa abdicating the responsibility to the users, the population at sea and its international obligations.

63. SAMSA and TNPA submitted that MRCC has the responsibility to perform the function of medical evacuations where passengers and crew are injured or ill at sea within its area of responsibility and even outside the Republic. The Harbour Master of the port, in consultation with relevant TNPA management, coordinates resources and responses to the emergency in consultation with MRCC. In other words,

SAMSA in its capacity as MRCC requires the cooperation, assistance and resources of the individual ports to execute its search and rescue functions.

64. SATAWU does not dispute that the service is critical in that it is a lifesaving service, it however argues that the strike by MRCC employees would not interrupt the service. In response to the evidence tendered by the witnesses of SAMSA and TNPA that in all evacuations MRCC initiates the operation and that the resources of TNPA are used in the search and rescue, SATAWU submitted that TNPA has access to the Telkom Maritime Radio and accordingly TNPA can liaise and handle the process of search and rescue in the absence of MRCC. From the evidence as tendered by TNPA it is clear that the Ports authorities assist in the process and if the argument by SATAWU is accepted it would mean that the body ceased with the responsibility to ensure that search and rescue operations are carried out are placed in a position where they cannot render the service, which is critical to saving lives and this is left to TNPA which has indicated during the process that it provides support or assist in the process. In any event it is immaterial as to who renders the service. If the service is designated as essential, it would be essential whether it is rendered by TNPA or MRCC.
65. The undisputed submission by MRCC which was supported by TNPA is that it is only MRCC that is able to coordinate national resources for the purpose of medical evacuations and the search and rescue. The submission that the Port Captain can activate the SAAF for search, rescue and medical evacuations is not supported by any evidence and cannot accepted by the panel.
66. The submission that the services would not be interrupted by strike is difficult to understand as the fact that the employees will not be there to render the service means that the service is interrupted.
67. On the evidence submitted before the panel it was submitted that in dealing with maritime emergencies time was of the essence. The panel accepts the evidence

tendered that rapid responses are necessary to ensure that the lives of those who are in distress at sea are saved. Further that without any prompt response to emergencies at sea, which is enabled by the coordinating centres. There will be endangerment to life personal safety and health of the population that uses the services that are under investigation.

68. The area that is monitored by MRCC is vast and the panel during the inspection in loco was shown the number of ships that is at sea at any given time. It is the responsibility of SAMSA to monitor the activities of vessels for safety and security. To also act as a point of contact for pollution reporting and ship security alerts. It was submitted that these services are not essential. In relation to safety and security Captain Molefe indicated that SAMSA works with other departments. It is clear from the mentioned departments that these are departments that deal with safety and security of the Republic of South Africa. The services rendered by the Defence Force and South African Police Services are already designated as essential service. The monitoring of safety and security at sea cannot be left to these departments to the exclusion of those that have the necessary expertise and jurisdiction bestowed by legislation. It is thus uncontrovertibly that the monitoring of safety and security of vessels at sea is essential irrespective of who is rendering it.

69. In relation to pollution the panel is mindful of the fact that pollution at sea is mostly harmful to marine life. The question that arises is whether is the harm only limited to marine life? If the answer is in the affirmative, then the service is not essential. The evidence of Captain Keller during the investigation was that depending on the source of the pollution human life may and will be impacted. The example provided in this instance was chemical spills and the nature of the chemical so spilled. The panel has considered the remoteness of that eventuality and the consequences of not having personnel to deal with that eventuality. The panel is of the view that it would be impossible to conduct a hair-splitting exercise of differentiating the types of pollution. The reality is that failure to deal with pollution in circumstances where such poses a threat to life personal safety and health of human beings would

endanger such life. Accordingly, the service is essential.

70. The panel further finds that MAS incidents also by their own nature have the potential to develop into emergencies. It would be reckless to say that such situations should be left unattended until they become emergencies. Prevention in these circumstances is pivotal.

71. Having considered the submissions of the parties, as well as the applicable law referred to above, the Panel is of the view that the services referred to in this investigation are lifesaving and the interruption thereof would endanger the life, personal safety and health of part of the population.

Designation

72. The ESC Panel therefore makes the following designation-

72.1. The services of coordination and oversight of all maritime search and rescue missions, as well as the prevention and combating of marine pollution from ships, including but not limited to oil spills from vessels, and maritime operations including response to any vessel emergency or pollution threat, which includes vessel inspections, emergency management, unseaworthy vessels as well as grounds, sinking, capsizing, flooding, fires and other emergencies onboard vessels are designated as essential services.



Ms. Joyce Nkopane
ESC Panel Chairperson

31 October 2023