

IN THE ESSENTIAL SERVICES COMMITTEE

HELD AT JOHANNESBURG

Case No: ES 715

**In re: Investigation in terms of Section 71 of the Labour Relations Act, 66 of 1995:
Whether the following Port Services: Marine Services; Cargo Services; Security
Services at ports; Fire and emergency services at ports; and Dredging services are
essential services**

DESIGNATION

Introduction

1. The ESC received a request to investigate whether the following Port Services: Marine Services; Cargo Services; Security Services at ports; Fire and emergency services at ports; and Dredging services are essential services. The ESC concluded that the request was reasonable and published a notice of investigation in terms of section 71(1) read with section 70B (1)(d) of the Labour Relations Act 66 of 1995 as amended (LRA).

2. 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(B)(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 Port Services: Marine Services; Cargo Services; Security Services at ports; Fire and emergency services at ports; and Dredging services are essential services (see Government Gazette No 50880, GN2604 of 2024, dated 28 June 2024.

Details of Hearings

3. The hearings were scheduled as per the notice published in the government gazette. Viz-
 - a) 06 August 2024
 - b) 07 August 2024
 - c) 08 August 2024
 - d) 13 August 2024
4. In the hearings the ESC received written submissions, and interested parties also made oral representations to the ESC. The interested parties were identified as-
 - Transnet National Ports Authority (TNPA)
 - Transnet Port Terminals (TPT)
 - South African Transport and Allied Workers Union (SATAWU)
 - United National Transport Union (UNTU)
 - AGBIZ (write it in full)

Submissions

5. Transnet National Ports Authority (TNPA) and Transnet Port Terminals (TPT) submitted that some of the ports or infrastructure within the ports are of critical importance as they are National Key Points. In highlighting the critical nature of the

services, TNPA and TPT submitted that these ports are recognised as being critical infrastructure by the Minister of Defence as any loss, damage, disruption and immobilisation may prejudice the country and jeopardise the safety of the public.

6. TNPA and TPT seek to have the marine services they provide jointly declared essential. The marine services that TNPA and TPT seek to be designated as essential services include vessel traffic services, pilotage, towage and berthing services.

7. It was submitted that the provision of vessel navigation services is a mandated function of TNPA under the Ports Act, which states that the TNPA must:

- 7.1 “regulate and control (i) navigation within ports and the approaches to ports; [and] (ii) the entry of vessels into ports, and their stay, movements or operations in and departures from ports” (section 11(1)(g) of the Ports Act);

- 7.2 “provide or arrange for tugs, pilot boats and other facilities and services for the navigation and berthing of vessels in the ports” (section 11(1)(n) of the Ports Act) and;

- 7.3 “provide, control and maintain vessel traffic services” (section 11(1)(o) of the Ports Act).

8. It was submitted that there are various vessel navigation services which are aimed at safely bringing ship into ports and securing them in a designated location. The vessel navigation services will be described below as follows:

- 8.1 Vessel Traffic Services (‘VTS’) are run by technical specialists are the essence of the below mentioned services which are imperative in preventing collisions entering and in the harbour. This service is provided from the shore-side and includes radio information to ships,

such as navigational warnings. The service is specialised as it has become progressively complex.

8.2 SOLAS Regulations have provided international recognition to the consequences of the interruption to the service and have asserted that VTS “contribute to the safety of life and sea, safety and efficiency of navigation and protection of the marine environment, adjacent shore areas, work sites and offshore installations from possible adverse effects of marine traffic.”

9. Pilotage is the next step in vessel navigation which follows the vessel being cleared for entry. Pilotage entails the use of pilot vessels and helicopters to transport marine pilots onto vessels entering and leaving the ports and in assisting them with berthing.
10. Pilot vessels, helicopter operators and marine pilots have specialised skills and training as the work required of them requires local knowledge of the port and specific port conditions, knowledge of the equipment being operated and in some instances physical fitness. These personnel report to the Chief Harbour Master who is responsible for the performance of their functions and they all fall into the TNPA bargaining unit.
11. Section 74(1) of the Ports Act requires TNPA, “for the purpose of ensuring safety of navigation and shipping in ports” to, among other things;
 - “(b) control the entry, stay, movement and operations of vessels in ports, and the departures of vessels from ports.
 - (d) provide or procure pilotage services, license pilots and regulate the safe provision of pilotage services by licensed pilots.”
12. Pilotage has been identified as a safety function because most vessels, mostly large vessels such as those entering South Africa's commercial ports do not have

the necessary knowledge and skills to navigate the ports and berth their vessels unassisted. The leading risk is the possibility of vessels colliding with each other and the risk of life, and spillage of hazardous material that endangers life.

13. It is therefore not an option to navigate into a South African port alone. A marine pilot's services are compulsory and must be accepted by foreign vessels as a condition for navigating the vessel within ports as per section 75(1) of the Ports Act.
14. It was submitted by TNPA and TPT that it would be implausible for the vessels to remain at sea when pilotage services are unavailable. It was further submitted that an interruption to pilotage services presents a serious risk to life, health and personal safety.
15. All vessels depend on fuel to power the entire vessel, which includes the generators and ancillary equipment. When the ships berth, they are generally low on fuel and they rely on the fuel provided by ports.
16. Low fuel on a ship impacts the sailing of the ship, the storage and preparation of food for the crew, hot water and heat as the ships become very cold.
17. If ships waited outside port areas and turned off their engines in an effort to conserve fuel this would result into them drifting into other traffic. This heightens the risk of collisions and health threatening consequences. Therefore, it was submitted by TNPA and TNA that the pilot vessel operators, helicopter operators and marine pilots in pilotage are on duty at all hours and their services cannot be brought to a halt.
18. Towage has been recognised as the next step in vessel navigation services. Towage entails vessels maneuvering to a designated area for berthing once the marine pilot has brought them into the port. This process is done using tugboats

because the vessels, due to size can only navigate safely in an open ocean with a considerable amount of open space. Ships generally have one or two engines but the constrained space in the port does not allow them to be able to maneuver safely without colliding with the quay wall or other vessels.

19. Section 74(1)(e) of the Ports Act recognizes towage as a function of safety as it requires TNPA to “provide or procure tug services, license tug service providers and regulate the safe provision of tug services by licensed tug service providers”
20. It was submitted that tugboats are heavy vessels and require tug masters. Tugboats are powerful smaller crafts that can generate high thrust in the water to assist vessels in a port environment and also outside the port during emergencies and during search and rescue operations.
21. The Merchant Shipping Standards of Training Certification and Watchkeeping Regulations has set a minimum manning level for a tug. Tug masters and associated engineers work in shifts to ensure that their services are never interrupted. This is crucial considering that among other vessels, there may be tankers entering the port, and these are high-risk given the life-threatening consequences in the case of minor collisions.
22. Tug masters employed directly by TNPA, similar to operators performing pilotage services are always on duty. Their functions fall within the responsibilities of the Chief Harbour Master, and they are in the TNPA bargaining unit.
23. It is submitted that the port has a limited number of berths and if essential cargo is destined to be discharged at a particular berth and the berth is occupied (as there is no berthing service to unberth a vessel) then an incoming vessel has to remain outside the port. If the vessel is carrying essential cargo, that cargo cannot be discharged.

24. Berthing has been identified as the final step in vessel navigation services. Berthing entails safely securing and releasing vessels at and from their designated bays (known as 'berths'). Berthing is a complex process, administratively and technically which is evidenced by the inability of replacement labour performing berthing tasks. The berthing process is governed by Terminal Operating Guidelines for Ro-Ro, Break-Bulk and Agricultural, Bulk and Ro-Ro Automotive Terminals (Terminal Operating Guidelines).
25. TNPA must regulate and control "the loading, unloading and storage of cargo" (section 11(1)(g)(iii) of the Ports Act and "the offshore cargo handling facilities" (section 11(1)(g)(v) of the Ports Act). TNPA must also "exercise the licensing of the erection and operation of off-shore cargo-handling facilities and services relating thereto)(section 11(1)(s) of the Ports Act). Furthermore, TNPA must aim to "ensure safety and secure cargo-storage and cargo-handling facilities" (section 12(f)of the Ports Act).
26. The first step with cargo after a vessel is berthed is the availability of cargo workers depending on the terminals and the cargo being offloaded.
27. TPT operates container terminals in the ports of Durban, Ngqura, Port Elizabeth and Cape Town handling among others essential cargo such as medical or dangerous cargo.
28. It was submitted that cargo working entails trained mechanical work as opposed to manual work of moving loads off vessels due to the size, fragility and other sensitivities of the cargo being received. These services are currently performed by training TPT employees because of the personal safety implications in the handling of certain cargo.
29. During waterside operations, stevedores employed by TPT move containers that are aboard vessels to the terminal yard using cranes. As a result of this work being specialized and dangerous, certified level Operator Lifting Equipment training

which is done over 3 months and includes theory and practical examinations, a period of mentoring and further assessments.

30. A variety of crane operators are used for the different cranes and Rail Gantry, Rubber-type Gantry cranes at Container Terminals, Multiple Harbour Cranes at multi-purpose terminals and straddle carriers at both type of terminals. Vessels generally require the container gantry in a container terminal to discharge the container safely because they do not have cranes.
31. It is important to note that there is cargo that is brought into the ports viz. “uncontainerised, dangerous goods” and more generally “dangerous goods” that are stored in containers. Several of these goods are hazardous to the environment, including some goods which endanger life, health and personal safety of human beings directly.
32. The IMDG Code has described the dangerous cargo as “the substances, materials and articles covered by the IMDG code”. The goods were classified from most to least dangerous are:
 - 32.1 Class 1 - Explosives.
 - 32.2 Class 2 - Gases: Compressed, Liquefied or Dissolved under Pressure.
 - 32.3 Class 3 - Flammable Liquids.
 - 32.4 Class 4 - Flammable Solids or Substances.
 - 32.5 Class 5 - Oxidizing Substances (agents) and Organic Peroxides.
 - 32.6 Class 6 - Toxic and infectious Substances.
 - 32.7 Corrosive substances; and
 - 32.8 Miscellaneous dangerous substance and articles
33. It was submitted by TNPA and TPT that most imported pharmaceutical products enter South Africa through the national ports of Cape Town, Durban and Gqeberha (Port Elizabeth). During shipping, the ventilation and humidity and/or temperature of pharmaceutical cargo is monitored closely. It is imperative that

ships are berthed speedily, cargo is offloaded and released from the terminals as soon as the ship enters the port. A vast number of pharmaceutical products entering the port are required for use by classified essential service providers who cannot perform their services without the products.

34. TNPA and TPT submitted that the ESC's declaration of chronic medication and the manufacture and supply of chronic medication as essential services respectively would be rendered futile if the services that facilitate the entry and the handle of pharmaceutical products at ports are not declared essential noting that South Africa imports 89 715 454,40 kilograms of pharmaceuticals.
35. TNPA's security obligations under the Ports Act are to maintain the sustainability of the ports and their surroundings as per section 11(1)(f) of the Act and section 11(1)(vii) which calls for the enhancement of safety and security within the port limits.
36. Fire and emergency response services are crucial in a port, and this is evidenced by firefighting being declared an essential service in the Government Gazette notice 18276 of 12 September 1997.
37. Dredging is required for the safe navigation of ships within a port as slit, sediment and debris in shallow water are cleared. Dredging maintains the accessibility of ship pathways to the large ships that enter them. This is done by maintaining port channels, basins and berths to promulgate depths.

UNTU's submissions

38. UNTU has submitted that TNPA and TPT can use replacement labour as well as their employees who do not belong to UNTU perform the disputed services, particularly security services because TNPA and TPT have already outsourced most of the security services at the ports to private security companies.

39. UNTU submits that the ILO committee has not declared ports services to be an essential service.
40. UNTU rejects the notion that an interruption to the services will negatively impact pharmaceutical products as they submit that pharmaceutical and healthcare cargo are not imported through the ports only but imported as air cargo.
41. UNTU further submits that dangerous cargo such as explosives are not essential to the life, health or personal safety of the population and do not need to be imported during a strike and should therefore remain at sea during a strike.
42. UNTU claims that dredging and marine or cargo services are not needed while ships are not entering the port and therefore can be resumed at the end of a strike.
43. Insofar as the request to dangerous cargo is concerned, UNTU has submitted that upon their 48 hours' notice to strike being given to TNPA and TPT, they would have the opportunity to offload and remove any ships from the ports. Dangerous cargo can be rerouted during the notice period and offloading dangerous cargo can be prioritized in relation to the ships that are already at port.
44. UNTU submits that the proposed designation would not have a limited scope and effect and claims that the proposed designation goes beyond the previous designation which was reviewed and set aside by the Labour Court. UNTU further submits that the proposed designation will result in all UNTU members having to work during a strike.
45. UNTU has stated that their members who are employed by TNPA and TPT are not public servants and are therefore not restricted from their right to strike as public servants exercising authority in the name of the state is not applicable to them.

46. UNTU have asserted that TNPA and TPT have ulterior motives in seeking the designation. UNTU alleges that TNPA and TPT are in the process of being privatized which includes the disputed services to a third party who is understood to be from a private company registered in the Philippines.
47. UNTU submits that the reasons advanced for the proposed designation differ from the reasons advanced by the previous designation which were correctly rejected by the Labour Court in reviewing and setting aside the previous designation.
48. UNTU submits that the ESC should not designate the services as requested by the TNPA and TPT as these services are not essential save for fire and emergency services.

SATAWU's submissions

49. On behalf of SATAWU written and oral submissions were made. It was submitted that the application should be viewed in the context of Transnet seeking to privatise some of its divisions. Potential purchasers of these divisions sought an assurance from TNPA and TPT that the services be designated as essential services, so that they do not have to deal with striking employees.
50. It was submitted that the designation of these services as essential services will impact the employees constitutional right to strike.
51. There is a recognition agreement that provides for consultation with the employees in respect of essential services and there was no consultation. The employees have worked for years without the services being declared essential. What is the sudden emergency to limit the rights of employees?
52. In relation to navigation services, it was submitted that each harbour has a Harbour Master and Deputies who are at management level and thus not allowed to strike.

SATAWU also submits that it is incorrect to say that vessels at anchorage are affected adversely by not being able to come to berths. The vessels may request the vessel controllers for the provision of fuel and medical assistance. These requests are authorized by the shipping agents. It is at this point that shipping handlers are dispatched. One-third of the ship handlers are not employed by TNPA or TPT.

53. In relation to security it was submitted that security services at TNPA and TPT are not essential services and should not be designated as such. Mr Goba and Mr Ndikandika who are SATAWU shop stewards submitted that TNPA and TPT have outsourced security services. They indicated that a small number of employees employed by TNPA and TPT render this service.
54. Further that the employees rendering this service do not have access to the vessels as they are not allowed to go on to the gangway. The Captain of the ship and crew are responsible for safety onboard the vessel. Further that even South African Police Services cannot gain access.
55. It was submitted further that firefighting services are not essential as TNPA and TPT rely on the municipality to provide the service. They only have a small number of employees who perform “basic things”. Further that these employees are there only for compliance purposes. Accordingly, these services are not essential.
56. It was submitted that the services at ports are not essential as not all the ports are operational 24 hours per day and seven days a week. Some of the ports operate until 22H00.
57. SATAWU disputes that any of the services that TNPA and TPT want designated are essential services and argues that both TNPA and TPT have been in operation and working for many years prior to this point without being declared essential

services. Thus, it is not understandable where the sudden emergency to limit the rights of employees come from.

58. In relation to the vessel navigation service it was submitted that this service has been delayed due to various other factors other than the employees participating in strike action. Tugs have been inoperable for two years and this has resulted in massive delays in the berthing of vessels at ports. Further that there is a shortage of trained pilots and this has caused difficulties in servicing vessels coming into the ports.
59. SATAWU conceded that the vessel navigation services are aimed at safely bringing the vessels to ports and securing them to designated locations.
60. In relation to dangerous cargo SATAWU argues that Dangerous goods/cargo have to be noted and categorised by the ship, the shipping agents and their customer way in advance of the vessel entering in order for TNPA and TPT to plan accordingly.
61. The crew on the vessels are responsible for the cargo and any emergencies that may arise. They are responsible to advise TNPA and TPT accordingly. TPT does not have a fire department. While they are trained for cargo handling they however do not receive extensive training on fire.
62. Harbour Masters through the TNPA services never come to a full halt from a strike action as they are employees who are within management who are not unionised.
63. Vessels have been delayed for many reasons. Vessels have been delayed by the weather, availability of berths and equipment. Planning needs to occur on everything, including Reefers (freezers/cold rooms) that need to be empty so that

the new cargo can come in. All information and manifests are shared prior to the vessels landing.

64. In relation to pharmaceutical and other health cargo SATAWU submitted that pharmaceutical cargo requires specific planning and receives a specific space for it to be stored alone. The vessels carrying medication are noted as “straight in vessels” and come in to the ports on priority. The applicants have intentionally created confusion in that they refer to Covid-19.
65. The quantity of the goods have also been exaggerated. Since Covid-19 has now come under control, the ports are not having to handle the vast quantities that originally came in.
66. There has always been tight restrictions on pharmaceutical cargo due to regulations that exist notwithstanding the concerns of illegal/contraband medication or restricted medication. It is for this reason that the Customs Authorities are always involved thus causing delays in the processing of the pharmaceutical cargo to the customer/end users.
67. Where pharmaceutical cargo is urgently required, the pharmaceutical companies opt to fly the cargo into the country instead of having to await the ship to land and the cargo to be processed which may take many weeks notwithstanding the possibility of loss at sea.
68. In relation to berthing services SATAWU denied that dredgers are required at all ports and submitted that there is a shortage of dredgers and that due to this shortage dredgers are moved from one port to another. It did not specifically dispute the submissions in relation to the safety aspect of the submissions by TNPA and TPT.

Legal Framework

69. In this matter the issue that the committee has to determine is whether following Port Services: Marine Services; Cargo Services; Security Services at ports; Fire and emergency services at ports; and Dredging services are essential services.
70. An 'essential service' is defined in section 213 of the LRA 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".
71. 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."
72. 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".
73. 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".
74. From the above it is clear that for the purposes of the LRA the interruption envisaged is that which may result from strike action or lockout by the employer.
75. 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)”

76. 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]).
77. 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.
78. 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.
79. 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 and arguments

80. As indicated above in this investigation the ESC is called upon to determine whether the following Port Services: Marine Services; Cargo Services; Security Services at ports; Fire and emergency services at ports; and Dredging services should be designated as essential services.
81. In determining whether the service/s being investigated are essential services the panel will rely on the written and oral submissions of the parties.

Marine Services

82. On behalf of TNPA and TPT it was submitted that marine services that the parties seek designated are traffic navigation services, piloting, towage and berthing. It was submitted that these services are essential services as they support a number of essential service designations that have been made by the ESC. Both unions have submitted that these services are not essential. In essence the argument is that when employees are on strike the ports would be closed and therefore there is no need for ships to enter the ports and accordingly there would be no endangerment to life personal safety or health of the whole or part of the population.
83. The panel considered the submissions and whether closing the ports during the strike is a viable alternative. The panel does not agree with this proposition. In fact, in its submissions SATAWU indicated that both the employers and labour had

agreed during Covid19 that the services were essential services. It was submitted that this was meant to be a temporary measure and the rationale as submitted by SATAWU was to ensure that employees were paid. Even during Covid19 one would not secure a certificate to the effect that the service was essential as a mere say so. One had to demonstrate the lifesaving nature of the service. The fact that the parties did secure a certificate is an indication that at that time and for purposes of ensuring life, safety and health it was regarded as essential. The panel is mindful of the fact that the designations that were made during that period were not made for the purposes of the LRA and that there were different considerations to the test as adopted by the ESC in making its determinations.

84. As indicated the employer submitted that closing the ports is not an option during the strike and the panel agrees with this submission. As indicated the ESC designated marine rescue services as essential service. The panel agrees that in an emergency a ship/vessel in distress once rescued would have to enter the port. In order for it to safely berth there is a need for navigation services to be available.
85. On behalf of TPNA and TPT an example was given of a ship on fire that is rescued and the need for it to safely berth. It is clear from the value chain as described during the submissions that the employees manning the navigation systems would be required to bring the ship into port and ensure that the ship is directed to the correct location. SATAWU did not dispute the nature of the service but rather argued that the service is not provided by TNPA and TPT. A concession was made that TPT is not involved in rendering the service. It was submitted that the service is offered by TNPA to Port Control.
86. As indicated above it is not the employee or the institution that is rendering the service that is essential but the inquiry should focus on the service. In this case it is not SATAWU's case that the service is not essential, but SATAWU focuses on who is rendering the service.

87. Having considered the nature of the service the panel is of the view that the service is critical to ensure that the ship enters the port safely and that it does not pose any danger to sea traffic until it reaches the designated location. Accordingly, this service is an essential service.
88. As part of vessel navigation it was submitted that pilotage is a recognised safety function because most vessels, particularly large vessels such as those entering South Africa's commercial ports, do not possess the necessary combination of knowledge and skills to navigate the ports and berth their vessels unassisted. The main risk is vessels colliding with each other and the risk of life, and spillage of hazardous material that endangers life. This service cannot be interrupted. Further that foreign vessels are compelled to accept this service.
89. In relation to pilotage services, it was submitted that it involves the use of pilot vessels and helicopters to transport marine pilots onto vessels entering and leaving the ports and to assist them also with berthing.
90. An interruption to this aspect of vessel navigation services presents a real risk to life, health and personal safety: all vessels depend on fuel to power everything onboard, including their generators and ancillary equipment.
91. SATAWU in its submission indicated that the service is offered using helicopters and that the use of helicopters was used as a pilot project. Not all ports have helicopters. The difficulty with this submission is that it does not deal with whether the service is a safety function or not. Further the submission does not deal with pilot boats that are used to provide this service.

92. SATAWU submits that not all ports have pilots, however there is no indication that vessels are able to dock without pilotage particularly those that are not exempt as submitted by TNPA and TPT. Further there is no explanation as to how these vessels get around the provisions of (section 75(1) of the Ports Act.
93. The undisputed submission of TNPA and TPT is that Pilots are not allocated “well in advance”. Pilots are allocated in real time at the beginning of each shift based on the licensing requirements per vessel and each vessel’s readiness to enter the port.
94. The question that the panel should consider in this regard is whether the service of pilotage, irrespective of how it is offered can be interrupted, put differently whether vessels entering South African ports can safely navigate the ports and berth unassisted. If the answer is in the negative then the service should not be interrupted. From the submissions it appears that the suggestion is that if the service is not available due to strike action the vessels can remain at sea. Whilst SATAWU seems to be disagreeing with the submissions by TNPA and TPT , the reading of their submissions indicate an acknowledgement that in adverse situations should there be an emergency, “the ship would contact Port Control, whom, after making arrangements with pilots, TNPA and TPT, could allow the vessel to come straight into port as a “lay-up” . If these pilots are not available due strike action at TPNA and TPT it will not be possible to deal with this emergency.
95. Having considered the submissions in this regard the panel finds that the service of pilotage is essential in that it provides the necessary safety assistance for vessels to navigate until berth.

Towage

96. Towage involves manoeuvring vessels to a designated area for berthing once the marine pilot has brought them into the port. This is done using tugboats because the vessels are so large that they can only navigate safely in an open ocean with lots of space.
97. The ESC has designated 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.
98. The resources of TNPA including tugboats are used in ensuring that the services of search and rescue are available in emergencies. The submission that in this case the service is required to prevent the vessels from colliding with quay walls and other vessels.
99. SATAWU mainly submits that the service is not offered by Transnet. Unfortunately, this argument does not address the issue of whether the service is essential. Having considered the submission and the fact that these services are already designated in emergency situations, the panel finds that the interruption of these services affect safety at sea and when vessels have to berth. The panel finds that the service is essential.

Berthing

100. On behalf of TNPA and TPT it was submitted that the final step of vessel navigation services is berthing. The service entails safely securing and releasing

vessels at and from their designated bays. It is common cause that prior notice is given before the vessel arrives at port. SATAWU submits that strike action and the nomination system may thus be managed between the employer and the trade unions. The challenge with this submission is that it does not provide any details in terms of how these processes may be managed.

101. It was submitted further that berthing a vessel must be done through collaboration between vessel crew, pilots and tug masters, and ground crew. It is complicated by harbour currents and wind conditions, which can easily cause a vessel to run ashore or into another berth. All ports are unique in some way or the other. There are dangerous points, shallow and deep water, and currents, tides as well as weather conditions that could change. Pilots are trained to be familiar with the environment and to be able to advise any vessel on how to enter or exit a port safely.
102. The panel accepts that in emergencies vessels in distress should be able to berth. The interruption of this service would result in the endangerment of life, personal safety and possibly health of the population.
103. On behalf of labour it was submitted that Transnet has in the past used replacement labour to provide this service. TNPA and TPT provided evidence in terms of the skills and training that is required for those rendering the service. The difficulty with this submission by labour that replacement labour was used is not backed by any evidence. TNPA and TPT provided evidence that demonstrates the level of skills that are required for this service and it is clear that people rendering this service must be properly trained.
104. The panel in dealing with this service considered the impact of an interruption of this final step in marine services. As indicated above all the other steps or parts of this service have been found to be essential. The whole purpose of navigation,

pilotage and towage is to bring the ship to berth. In emergencies it is accepted that ship should be able to berth. Further that in those circumstances, there is no doubt that the service is essential.

105. The question that the panel had to consider was whether the service should be designated as essential only in emergency situations? The panel finds that limiting the service to only emergency situation would pose a risk of traffic and would result in ship carrying dangerous cargo and/ or pharmaceutical products not being able to berth.
106. The service is accordingly designated as an essential service.

Cargo service

107. On behalf of TNPA and TPT it was submitted that dangerous cargo is received daily and emergencies involving dangerous cargo can happen at any time, anywhere within or near to the port environment. Further that should one or more of these services be interrupted on account of a strike, this would endanger life, health, and safety of TPT employees, other port users, other surrounding vessels and those onboard and even communities surrounding the port.
108. It was submitted that cargo may be categorised in terms of the International Maritime Dangerous Goods Code ("IMDG Code"). Other cargo may be regulated by medical and pharmaceutical rules. Dangerous cargo cannot remain at sea outside of a port as this may cause the risk of containers going overboard, spillage, explosions and or combustion. It was argued that all ships must be allowed to berth and be offloaded.
109. It was further submitted that it would be difficult to develop a system whereby only these goods are brought in and offloaded as essential pharmaceutical products or

dangerous cargo, because one ship may carry a range of cargo, including specialized cargo such as refrigerated medicines, non-essential items, non-perishable items and International Maritime Dangerous Goods or hazardous cargo all at the same time.

110. It was submitted that most imported pharmaceutical products enter South Africa through the national ports of Cape Town, Durban and Gqeberha (still referred to as Port Elizabeth in the ports legislation). During shipping, the ventilation, humidity and/or temperature of pharmaceutical cargo is monitored closely. Once the ship enters the port, it must be berthed speedily (according to a strict schedule) and offloading cargo and releasing it from the terminals is required to take place as soon as possible. Many of the pharmaceutical products received by sea are used by classified essential services providers whose services could not be performed in the absence of the products.
111. Finally, even if certain pharmaceutical products cargo could remain safe and usable for an extended period aboard a ship, leaving them onboard would interrupt the supply of essential medicines throughout the country.
112. Whilst the ESC accepts that there are risks if ships are not allowed to come in and berth, the implications of allowing all ships to berth and be offloaded goes against the spirit and purport of essential services as not all cargo that comes to port is lifesaving or poses a safety risk. It cannot be business as usual and it is impermissible to limit the rights of employees to strike in circumstances where the service being rendered is not essential.
113. On behalf of UNTU it was submitted that in relation to pharmaceuticals there is an alternative in that these products may be airfreighted. This argument does not take into account the fact that it takes time for the ships to arrive in South Africa, thus orders are placed well in advance. Plans are made around the delivery of the

medication and when 48 notice of a strike is given this would not take into account the plans made around the supply and distribution of chronic medication which is already onboard that ship.

114. In relation to airfreight as an alternative, the contention of the employer was that it is expensive to use this mode of transport. The Panel is mindful of the fact that the cost factor is not really an issue for consideration in determining whether a service is essential. What the panel considered is the feasibility of these alternative arrangements being made within such a short time.
115. The panel accepts that rerouting ships to other neighbouring ports is not an option as there may be a need for refuelling. Turning ships away because the ports are closed is also not an option in these circumstances.
116. As indicated the Constitutional Court in *POPCRU v SAPS (supra)* said that essential services affects a fundamental human right, and that there is a need for a restrictive interpretation. The panel in this matter considered the submission that all cargo should be offloaded and found such a broad designation would limit the right to strike in circumstances where there is no endangerment to health, life and safety of the population. The panel is of the view that an appropriate designation is a limited one. The panel therefore finds that cargo services should be designated as essential services however the services are essential only in emergencies viz where the ship is in distress and also where the ship requires refuelling. Cargo services are also designated as essential services in circumstances where the cargo to be offloaded are explosives, Gases: Compressed, Liquefied or Dissolved under Pressure flammable liquids, flammable solids, and pharmaceutical products.

Security services

117. As indicated, TNPA and TPT submits that these services are essential in that the interruption of thereof could endanger life personal safety or health of the whole or part of the population. SATAWU on the other hand argues that the service is not essential mainly because TNPA and TPT have outsourced this service. It was submitted that if Transnet viewed the service as essential it would not have outsourced the service. The panel is of the view that the fact that a service is outsourced does not change the nature of the service. The test is whether the service is lifesaving, irrespective of who is rendering the service.
118. In its submissions, TNPA indicated that the interruption of security services compromises crime responses which naturally affects port services, cargo stored at ports (including dangerous cargo), port tenants, and port users including staff on-board vessels and any staff the ESC, or a panel may designate essential. The threat to life, health and personal safety is particularly serious if port infrastructure is not being monitored as the results will be stowaways, trespassers, damage to property and theft. Theft of certain items, for example certain steel products, are essential to the protection of infrastructure.
119. Further that ports have become centres for the international movement of drugs. The operations aimed at preventing this rely in part on the access control, patrolling and CCTV monitoring performed at the ports. It was submitted that the panel has to consider the risk of human trafficking and the fact that if security is interrupted this may be heightened.
120. The Panel acknowledges the importance of security services in ensuring the safety of the whole or part of the population. Accordingly the Panel finds that the service is essential irrespective of who the service provider is.

Firefighting and emergency service

121. On behalf of TNPA and TPT it was submitted that fires and similar emergencies poses serious risks at port, hence the range of fire-fighting capabilities available. For example, tugs have fire-fighting equipment. This is essential when cargo in ships ignites either through spontaneous combustion or improper stowage of cargo. In some cases, tugs have had to work for hours to stop the spread of fire and cool the area. There is also a threat to the safety of people outside the immediate vicinity if fires are not stopped as soon as possible. Finally, the threat also extends to nearby communities if hazardous material, which is regularly transported on ships and stored in port terminals, reacts during fires. In terms of Port Rule.
122. UNTU conceded that this service is essential.
123. On behalf of SATAWU it was submitted that all ships have their own fire-fighting equipment and their crews are usually trained to contain fires. Further that TNPA and TPT only offer basic service as they rely on municipalities to provide theses services.
124. When there is a fire or an emergency at the port, it is necessary that the employees or people familiar with that environment should be present. The fact that the services of the municipality's fire and emergency departments are enlisted cannot absolve TPT and TPNA of the responsibility to ensure the safety health and lives of the port users and the communities around.

125. In fact, in cases of fire depending on the severity not only municipalities assist but all those with the capability to handle fires would come on board to prevent the catastrophic consequences if the situation is not handled properly.
126. The panel finds that these services are essential.

Dredging services

127. At the commencement of the investigation TNPA and TPT had requested the ESC to designate this service as essential. The request was subsequently narrowed and TNPA and TPT only requested the panel to designate the service of manning the dredger as an essential service.
128. It was submitted that the service of manning a dredger involves being physically on board the dredger to ensure that it remains safely berthed.
129. Further that given the size of the dredger there is a risk of snapping their mooring lines when they experience a tidal surge. If a dredger's mooring lines snap while berthed, it will cause the vessel to drift and collide with other vessels within the port. Vessel collision not only risks the life, health and personal safety of people in and around the port, but also increases the likelihood of a fire starting. It is imperative that the total crew complement as required by the Regulations man the dredger 24/7, in order to attend to a potential catastrophic situation when it arises.
130. On the submission of TNPA and TPT it is apparent that there is an alternative albeit not ideal, which is to dry dock them. It was submitted that dredgers are only dry docked for purposes of maintenance and also when they are being repaired. There was no real submission in terms of why this option cannot be used during a strike.

131. When balancing the competing rights in this regard the panel finds that the service of dredging including that of manning the dredger are not essential services.
132. Having considered the submissions of the parties, the Panel is of the view that in some instances it is necessary to apply a restrictive interpretation and designate the service only to the extent that there is an endangerment to life, personal safety and health of the population.
133. Accordingly, the panel makes the following designation.

Designation

134. The following services are designated as essential services:
- a) Marine Services i.e marine navigations services, pilotage, Towage and berthing;
 - b) Cargo services are designated as essential services only in circumstances where the cargo to be offloaded consists of explosives, Gases: Compressed, Liquefied or Dissolved under Pressure flammable liquids, flammable solids, and pharmaceutical products
 - c) Security Services
 - d) Firefighting and emergency services.
135. The parties are directed to conclude a minimum service agreement within three months from the date of this designation.



M J Nkopane

ESC Panel Chairperson

26 February 2025