

IN THE ESSENTIAL SERVICES COMMITTEE

ES736

**In re: Investigation in terms of Section 71 of the Labour Relations Act, 66 of 1995:
Whether the service of lifeguarding beach bathers against sharks/shark attacks are
essential services.**

DESIGNATION

Introduction

1. The ESC received a request to investigate whether the service of lifeguarding beach bathers against shark/shark attacks 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 lifeguarding beach bathers against shark/shark attacks are essential services”.(see Government Gazette No 50880, GN2604 of 2024, dated 28 June 2024.

Details of the hearing

3. The hearings were scheduled as per the notice published in the government gazette.
Viz-
 - 06 August 2024
 - 07 August 2024
 - 08 August 2024
 - 13 August 2024

4. The following parties indicated that they are interested to participate and made representations before the Committee-
Kwa Zulu – Natal Sharks Board (“KZNSB”)
Educators Union of South Africa (“EUSA”)
5. In the hearings the ESC received written submissions, and interested parties also made oral representations to the ESC

Submissions by the parties

6. On behalf of the KZN Sharks Board it was submitted that the unavailability of the service of bather protection against shark attacks can lead to adverse events. These events could lead to loss of life or loss of various body parts thus rendering an individual incapacitated and/or disabled.
7. It was submitted further that the Board provides its services through Service Level Agreements. There are currently 37 beaches that receive the services provided by the Board. The municipalities pay for the service and these services empower the municipalities to proclaim that their beaches are “protected” to communities and relevant stakeholders.
8. Operation activities pertaining to KZNSB include servicing the 177 drumlines at sea between Richards Bay and Port Edward. Every morning on weekdays the drumlines are serviced and baited when nets are serviced, this also occurs in instances over the weekend if sea conditions on Friday are hazardous.
9. The below mentioned activities are crucial in ensuring that beach users are protected from sharks and the loss of life due to shark attacks. The work is conducted on a daily basis due to the following:
 - 9.1. Nets have to be meshed and drumlines have to be serviced.
 - 9.2. There can be issues with the accumulation of marine growth on the nets which then requires nets to be removed and replaced with clean ones.
 - 9.3. The norm; if there are no issues with the drumlines and nets, is to remove and replace nets every 10 to 14 days.
 - 9.4. When a dangerous shark is found alive on a drumline, the trace is detached to the drum and the animal is secured and slowly taken out to sea well away from any bathing area. It is then tagged and released.

- 9.5. At times net entanglements take place owing to the movement of the sea and the dynamic environment where the nets are installed hence and there is a need for constant attendance to these.
 - 9.6. Cleaning and repairing of the nets at the base station for further use.
 - 9.7. Transmission of environmental data and catches to the Research Division.
 - 9.8. Checking/servicing of the boat and all other equipment.
 - 9.9. If the above is not done it compromises the safety of the processes and that of sea users.
 - 9.10. Loading the boat for the next day's operations.
10. The Research Division is responsible for the following:
- 10.1. Facilitating various scientific activities, which include monitoring, documenting and dissecting all catches, collecting biological samples, investigating shark incidents and investigating new non-lethal alternatives to the current shark safety gear.
 - 10.2. All catches recovered by the Operations Division at sea are transported to the Research Division for scientific sampling, investigations and recording.
 - 10.3. As part of its innovation, the KZNSB has been actively pursuing the development of alternative methods of shark mitigation. This has involved developing an electrical shark repellent cable system, based on the well-known fact that sharks are extremely sensitive to electrical fields. They are hoping that such a cable can be deployed to protect bathers at popular swimming beaches.
11. KZNSB further submitted statistical information that indicates that 398 sharks were caught by them in the period from January 2023 to December 2023. From the period of 2016 to 2023 there were 12 shark attacks on various beaches that were not protected. There are no injuries reported for 10 of these incidents, excluding the 2 attacks in 2022 in Westbrook which resulted in minor injuries. KZNSB protected beaches did not have any incidents.
12. The Educators Union of South Africa (EUSA) made written submissions on behalf of employees in the Operations Division. EUSA has submitted that employees are working 8 hours a day and 40 hours per week. The employees being their shifts either at 3 am, 4 am and 6 am, the typical shift is from 3 am to 11 am. Employees work over the weekend and on public holidays at the request of the employer. EUSA submitted that the employees place and replace safety nets from Richards Bay to Munster Bay. It was submitted that in view of the fact that this is not a continuous service that is

rendered on a 24 hours a day and seven days a week basis, it cannot be said that it is an essential service. The union however did concede that the employees avail themselves as and when they are required by the employer.

13. Further that the beaches in Mzingazi, Port Dunford and Emthunzini are not covered. The union challenges the applicant's claim that they provide an essential service as the sharks' board does not operate at swimming beaches in Eastern Cape and Western Cape.
14. It was submitted further that there is an annual marine migration between April and to September from Agulhas Bank up to KwaZulu Natal coast and beyond wherein a sardine run occurs. The sardine run entails schools of sardines moving along the Transkei coast and arriving of the KZN coast. The run benefits tourism in the coast and the local economy as local and international tourists participate in dive charters, predators and other activities related to the sea.
15. There is a seasonal event wherein southern humpback whales migrate between Antarctic feeding grounds and spring/summer and tropical temperature breeding grounds in winter. The migration takes place on the east coast of South Africa en route to Antarctic feeding grounds. EUSA submits that KZNSB removes safety nets from the sea during the sardine run and whale migration leaving the beaches and swimmers without any protection. Therefore, EUSA disputed that the nature of work rendered by KZNSB is not one that can be categorised as an essential service.
16. On behalf of the KZNSB further submissions were made and these are incorporated in the analysis below.

Legal Framework

17. In this matter the issue that the committee has to determine is whether the service of protecting bathers from shark attacks and the research services conducted by the Kwa Zulu Natal Sharks Board are essential services.
18. 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”.

19. 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.”
20. 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”.
21. 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”.
22. 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.
23. 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)”
24. 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]).
25. 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.

26. 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.

27. 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 Evidence

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

29. As indicated above the research services includes the facilitation of scientific activities like monitoring documentation scientific sampling, investigations and recording of data collected with a view of developing alternative methods of shark mitigation.

30. It was submitted further that if the service is interrupted valuable data would be lost and this might lead to loss of life as the research seeks to understand sharks and their behaviour. From the definition it is clear that the interruption of the service should endanger the lives health and personal safety of the population. It is not sufficient that there is a remote possibility of the endangerment.

31. The submission that data might be lost if there is an interruption of the research services is not persuasive. The loss of data does not necessarily translate to loss of life. The purported loss of life in this regard is too remote, and in fact the interruption of

this service has the potential to delay or impede research and not to endangerment of the lives health and safety of the population.

32. Accordingly there is no basis for limiting the right of the employees that are rendering this service from striking.
33. In relation to the service of protecting bathers from shark attacks, it is common cause that the service entails putting nets and drumlines in the ocean. On behalf of KZNSB it was submitted that the nets have to be maintained daily. The maintenance included the meshing of nets, where there is accumulation of marine growth the nets have to be removed and replaced and a constant attendance to entanglements of nets that are caused by movement of the sea.
34. EUSA argued that the service is not essential as these nets are removed during the Sardine run and also during marine migration in particular reference was made to whale migration. The removal of the safety nets, it was submitted interrupts the service and thus it cannot be said that the service is essential. This submission was not disputed by KZNSB, however through the evidence of Mr Love it was submitted that KZNSB does not use only one method to protect bathers. The drumlines are not removed and they also require daily maintenance.
35. In making the determination, the ESC Panel considered the service holistically and found that whilst the nets are removed, it cannot be said that the service is interrupted as the service does not only entail the installation and servicing the nets. There are other different methods and in this case the service also entails the servicing of drumlines and replacement of the baits.
36. In fact it becomes more critical to ensure that the drumlines are properly maintained at the time when the nets are removed. EUSA did not dispute that for the period that the nets are removed the employer still uses the same staff complement to maintain the drumlines. Further there is no evidence or submission before this panel that the drumlines actually serve the purpose of preventing sharks from entering the bathing area of the sea.
37. On behalf of EUSA it was submitted that the employees of KZNSB do not work for 24 hours and seven days a week This submission is not disputed. It is so that the interruption of the service is one of the factors that the ESC considers in making a determination. Further that typically essential services are rendered 24/7. The submission from the employer was that the operations are designed in such a way that

if the nets and drumlines are maintained and serviced properly that would suffice and there is no need for the employees to work over weekends and public holidays unless the circumstances require otherwise.

38. Strike action typically takes about a week or two, and the question that arises is what are the consequences of a week-long interruption. This would mean that the drumline is not serviced and there are no baits for sharks. In circumstances where the drumline is damaged, the effect is that nothing will prevent the sharks from approaching and getting into the bathing area. The panel finds that if this situation is allowed, it would lead to catastrophic consequences.
39. The other argument that was raised by labour is that the service is not provided to all the beaches in Kwa Zulu-Natal and further that the Eastern and Western Cape beaches are also not protected. On behalf of KZNSB it was conceded that not all the beaches are protected, however all the swimming beaches in Kwa Zulu-Natal are protected. Those that are not protected are non-swimming beaches.
40. In relation to the Western and Eastern Cape beaches it was submitted that the water conditions informs the interventions that provinces take. It was stated as an undisputed fact that the fact that Indian ocean water is warm there is a substantial number of the population using the beaches and also people stay longer in water in the Kwa Zulu-Natal beaches as compared to Eastern Cape and Western Cape.
41. Further that the water Atlantic ocean water is blue and clean, thus it is easier to spot the sharks in the water when it approaches the bathing area. In these areas they do not use the drumlines or nets but rather they use the spotters. These submissions were not disputed. Lastly it was submitted that that there is a species of sharks called the Zambezi shark. This species like the “dirty” waters of the Indian ocean and are commonly found in Kwa Zulu-Natal.
42. The Committee considered the submissions and finds that although the services are not rendered on weekends and public holidays such an interruption is very short as compared typical industrial action. Further failure to service and maintain the drumlines would endanger the lives and personal safety of the bathers and even the lifeguards using the beaches.
43. The fact that during certain seasons the nets are removed is something that should be considered when determining the minimum services to be maintained.

44. Accordingly the panel finds that the services rendered by the research department of KZNSB are not essential, however the services of lifeguarding beach bathers against shark/shark attacks are essential services.

Designation

45. In the premise the Panel renders the following designation-

- (a) The services of lifeguarding beach bathers against sharks/shark attacks are hereby designated as essential services.
- (b) The parties engaged in the service are directed to conclude a minimum service agreement on or before 31 March 2025.



M J Nkopane
ESC Panel Chairperson
08 November 2024