

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

Case No.: ES741

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

Whether certain Border Management services should be designated as
essential services

Designation

Introduction

1. The Essential Services Committee ("the ESC") received a referral from Border Management Authority (BMA) on the 26th of April 2024 seeking to have Border Management services designated as essential services. On 17 May 2024 the ESC convened a meeting with the referring party. The meeting was attended by two officials from PSA (Gracia Rikhotso and Peter Mngomezulu) and one official from NEHAWU (Solly Legodi) and Mr. Murdock Ramathuba attended on behalf of the Border Management Authority. On 24 May 2024 the ESC rendered a ruling concluding that the referral of the BMA was reasonable and that it would proceed with the investigation.

2. As provided for in section 71, read with section 70(2)(a) of the Labour Relations Act, 1995 (Act No 66 of 1995 as amended), the ESC gazetted a notice that it was conducting an investigation as to whether port and marine services is an essential service. (see Government Gazette No. 50880, Notice No. 2604, dated 28 June 2024.

Details of Hearings

3. The hearings were scheduled as per the notice published in the government gazette. In the hearings the ESC received a number of written submissions, and a number of interested parties also made oral representations to the ESC.
4. BMA and PSA both filed Regulation 2(2) notices that they would participate in the investigation. NEHAWU's intention to participate was late and they applied for condonation which was not opposed by the other parties and such condonation was accordingly granted.
5. The unions also requested that inspections be conducted in at least 3 BMA sites. This was done in the following site on the mentioned dates:
 - 08 October 2024: Cape Town Harbour
 - 12 November 2024: Durban Harbour
 - 13 November 2024: Maseru Border Post

Submissions

6. The below submissions are a summary of the submissions (oral and written) made in this application including during the inspections.

BMA

7. The request to designate various services of the Border Management Authority as an Essential Service is to ensure that the services are rendered without disruptions.
8. BMA applied for the following services to be designated as essential:
 - a. Law Enforcement;
 - b. Agricultural Specialised Functions
 - c. Environment Specialised Functions
 - d. Immigration Specialised Functions
9. The law enforcement component of the Border Management Authority (BMA) is the only designated body responsible for law enforcement at a port of entry and the border law enforcement area.
10. The absence of law enforcement component in the designated area has a potential to endanger the lives of other personnel working at the port of entry and border law enforcement area. This danger equally applies to travelers who use the border space environment.
11. The absence of law enforcement creates an opportunity for illegal migration and general lawlessness. This has a potential to endanger the lives and safety of inhabitants of the Republic. As such the law enforcement component of the BMA is required without any interruption.
12. Biological invasions are a massive and growing environmental problem and threaten rural livelihoods especially. Biological invasions are the main direct driver of biodiversity loss and threaten ecological infrastructure, ecosystem services (e.g. water provisioning), food security, livelihoods and animal and human health globally and in South Africa

13. Biosecurity interventions are a set of procedures or measures designed to protect the population against harmful biological or biochemical substances. This encompasses the safety of humans, animals, plants and other useful organisms against pests, diseases and other biological factors, and it is not only essential for trade but also for promoting sustainable agriculture, food, nutrition, health and livelihood security, and equitable economic development. With global trade allowing the movement of goods throughout the globe, there are additional risks to local production industries being exposed to harmful pests that may be carried with imports or proliferating due to changes in the climate. Some of these have potential of causing diseases that may be transmitted to people and communicated among people.
14. The establishment of the Border Management Authority brings together the specialist functions addressing the different elements of biological invasions at Ports of Entry, which will enable a much better-integrated approach to the management of the risks posed by such invasions, particularly in the area of zoonotic diseases inclusive of lessons learnt from the COVID 19 pandemic which is a zoonotic disease.
15. Sampling of consignments is undertaken when species identification is not easy, which then requires the samples to be taken to the laboratory for DNA barcoding which is a fool-proof method of identifying a species. Cases of non-compliance both in the biosecurity and illicit wildlife trade are treated as criminal enforcement matters, which involve taking pictures of the non-compliance for evidence purposes, seizing of the species and derivatives, preparation of seizure and handover certificates and inspection reports detailing the contravention intercepted and maintaining of chain of custody before handing over samples to the laboratory or intercepted species to Enforcement with the Department of Forestry, Fisheries and the Environment (DFFE). These EMIs then detain the perpetrator where applicable facilitate the opening of a case with the South African Police Services (SAPS) and serve as witnesses during court proceedings.

16. Biological invasions are massive and growing environmental problems and threaten rural livelihoods especially.
17. Biological invasions are the main direct driver of biodiversity loss and threaten ecological infrastructure, ecosystem services (e.g. water provisioning), food security, livelihoods and animal and human health globally and in South Africa. For example, biological invasions (*Pinus* species) were responsible for the devastating fires in the Knysna and Table Mountain Park areas, through the oils they excrete which exacerbated the extent of the natural fires.
18. Biosecurity interventions are a set of procedures or measures designed to protect the population against harmful biological or biochemical substances. This encompasses the safety of humans, animals, plants and other useful organisms against pests, diseases, and other biological factors, and it is not only essential for trade but also for promoting sustainable agriculture, food, nutrition and livelihood security, and equitable economic development.
19. The difference between environmental biosecurity and agricultural biosecurity is the scope of the latter is limited to impacts to the Agriculture sector whereas the former impact sectors such as biodiversity conservation, water, tourism, fire safety as already outlined above. The issue of biological invasion cuts across the agriculture, environment and health spheres of government and is highlighted well through the one Health approach which recognises the interconnectedness of risks posed by invasions.
20. The Environment Specialised Function of the BMA is responsible for biosecurity interventions at Ports as well as facilitating legal trade in wildlife by ensuring compliance with the Alien and Invasive Species Regulations and the CITES and TOPS Regulations respectively. Thus, in biological invasions, the Agriculture and Environment Specialised functions of the BMA are the first line of defence and as it relates to illicit wildlife crime, the

Environment Specialised function is the last line of defence before the species and the derivatives leave the country.

21. These functions are carried out by designated Environmental Management Inspectors (EMIs) or Green Scorpions as fondly known by the public. The EMIs conduct inspections on consignments (import, export, and re-export) which involves species identification, validation of the authenticity of permits as well as checking that the permits and consignments correlate and sampling. Sampling of consignments is undertaken when species identification is not easy, which then requires the samples to be taken to the laboratory for DNA barcoding which is a fool-proof method of identifying a species. Cases of non-compliance both in the biosecurity and illicit wildlife trade are treated as criminal enforcement matters, which involve taking pictures of the non-compliance for evidence purposes, seizing of the species and derivatives, preparation of seizure and handover certificates and inspection reports detailing the contravention intercepted and maintaining of chain of custody before handing over samples to the laboratory or intercepted species to Enforcement with the Department of Forestry, Fisheries and the Environment (DFFE).
22. The immigration services deployment at ports of entry seeks to, among other things, ensure that the Republic's security considerations are fully satisfied while ensuring that the entry and departure of all persons to and from the Republic is efficiently facilitated, administered and managed.
23. Border Management Authority (BMA) deployed necessary resources at the ports of entry and within the Border Law Enforcement area for effective enforcement of the Act. Considering the definition of prohibited and undesirable persons below, we intend to demonstrate how the interruption of the service provided by immigration specialists at the ports of entry may endanger the life, personal safety or health of the whole or any part of the population.

24. The BMA notes that public health security is and remains a challenge for the global community due to the highly mobile, interdependent, and interconnected environment that facilitates trade and travel. The combination of infectious diseases that spread and emerge faster than ever before with accidental and deliberate disease outbreak, requires urgent and decisive actions.
25. Section 30(1)(a) of the Immigration Act provides that (1) The following foreigners are prohibited persons and do not qualify for a port of entry visa, admission into the Republic, a visa or a permanent residence permit.
26. The interruption of the service provided exclusively by trained immigration specialists at the ports of entry may lead to delays in, and or failure to remove prohibited person and thereby endanger the life, personal safety or health of the whole or any part of population
27. In the case of a medical emergency where the person(s) does not meet the prescribed admission requirements, the immigration officer may admit such person(s) on humanitarian grounds [section 42(1)]. Then Port Health will take over and facilitate the receipt and monitoring of such people to prevent any associated health Risks.
28. Additionally, to health consideration as indicated above, immigration specialists are expected to take a lead in ensuring prohibited persons are not allowed admission into the Republic due to the risk of their incoming impacting on the health and safety of the people who live in South Africa.

PSA & NEHAWU

29. Law enforcement is managed in coordination with the South African Revenue Services (SARS) and South African Police Services (SAPS).

30. The agenda on biological invasions (as per Environmental specialisation) is not scientifically justified based on the introduction pathways (i.e. movement, vector and spread). Categories range amongst (release, escape, contaminant, stowaway, corridor, unaided). Furthermore, principles of risk reduction and trade facilitation dictates three (3) scientifically justified processes (pre-border, border, post-border). What is to be brought into the country in terms of biological control agents is well researched and scientifically known and controlled, the latter part of biological invasions is not adequately managed.
31. The agriculture specialization is only responsible for Import control (as mentioned in the regulation 2(2) notice that BMA has partly inherited such services from the releasing departments (not the sovereign stakeholder managing the service). Export is rested upon the department of agriculture (as it is a pre-border process). Operational hours relating to Agriculture at the port are based on operational demands and are disrupted upon closure of services (precisely based on the principle that it is known what should come into the country guided by ISPM provisions and sovereign commitment based on Phytosanitary status).
32. Law enforcement as the cornerstone of primary interface of compliance on the border law frontline and having arresting powers entrusted by the BMA Act can be declared essential (but the remains a concern and reservation given the non-compliance to provisions relating to firearms competency, peace officers declaration and compliance to the BMA Act, 2 of 2020 in so far as appointment and security clearances).
33. While the PSA acknowledges the importance of biosecurity, it does not meet the threshold for essential services designation. Interruptions in these functions do not pose an immediate threat to public health or safety. Established protocols and emergency response plans can adequately mitigate risks, ensuring that the population remains protected.
34. The interruption of immigration services, while inconvenient, does not pose an immediate or significant danger to the population's safety, health, or life. Alternative arrangements, such as temporary staffing or adjustments in service delivery, can effectively address any operational

challenges during disruptions. The PSA asserts that border security and public health can be maintained without declaring immigration services as essential.

35. Although efficient border management is vital for economic and operational reasons, it does not meet the criteria for essential services. The BMA has not provided compelling evidence that interruptions in these functions would result in significant harm to public safety or health. The PSA holds that the seamless movement of people and goods is not synonymous with the prevention of danger to the population
36. The unions made concession relating to the Law Enforcement service/ function to be declared as essential.

Legal Framework

37. In this matter the issue that the committee has to determine is whether Border Management services should be designated as essential services. In determining the matter, it is important that one should set out the legal framework.
38. 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."
39. 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".
40. 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".

41. 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".

42. The *Constitutional Court in South African Police Service v Police and Prisons Civil Rights Union and Another [2011] 9 BLLR 831 (CC)* 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)"

43. 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]).

44. 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.
45. 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.
46. It is further trite that in view of the fact that the right that would be affected by such a designation limits or takes away a fundamental right, such designation must be reasonable and justifiable. 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

47. It is common cause that port services were designated by the ESC on 11 February 2022 under GN45903 and this designation remains binding.
48. Law enforcement services the parties agreed that if they are interrupted there will be an endangerment to the personal safety of the population. The panel agrees with this concession and in fact according to the panel law enforcement services are there to protect and safeguard the life and safety of the population and even without the concession the panel concluded that law enforcement services should be designated as essential. The panel however appreciates the position of the labour unions in this regard.,

49. What is before this panel, and what this panel witnessed, in the Durban and Cape Town Ports is that through these ports, humans and food stuffs pass through. The employer argued that biosecurity interventions are a set of procedures or measures designed to protect the population against harmful biological or biochemical substances. This encompasses the safety of humans, animals, plants and other useful organisms against pests, diseases and other biological factors, and it is not only essential for trade but also for promoting sustainable agriculture, food, nutrition, health and livelihood security, and equitable economic development.
50. What also became apparent during the inspections is that some of the food stuffs that are imported or exported have a shelf life which requires that they be inspected quickly so that they could be allowed to come into the country or leave the country quickly so that they reach their destination within they required shelf life. If these products are not inspected as they come into the country and they have some form of disease they will endanger the life or health of the population. The criticism levelled against the sampling of consignments, does not hold water as the issue remains that it is a form of inspecting the goods. The issue that is important is that there is a need to test the products as they come into the country and that if not tested the consequences are too huge from a life, and health perspective.
51. The argument by the labour unions that South Africa produces enough for its own consumption was not corroborated by evidence, what we were advised in the Durban port was that poultry is one of the products that are not imported to South Africa.
52. The issue of biological invasion cuts across agriculture, environment and health services.
53. PSA argued that border security and public health can be maintained without declaring immigration services as essential. What PSA didn't say was how this could be done. What must be noted is that if there is any likelihood that an interruption could endanger the life, personal safety or health of the population, that service then meets the standard of being

designated as an essential service. The extent of the impact of the endangerment on life, personal safety or health is mitigated or managed through a minimum service.

54. While the argument that immigration officer merely stamp passports and on the face of it that can never endanger the life, health or personal safety of the population, what we saw during the inspections is that in every port, for people who disembark, there is a section for people to declare products they bring into the country and that includes any food products. Also this passport points are used for identifying if any prohibited or undesirable people enter the country. Such undesirable people may be criminals or people infected with diseases and who might infect others and therefore the interruption of this service may endanger the life, personal safety or health of the population.

Designation

55. On the submissions made, the panel is convinced that the interruption of Law Enforcement; Agricultural Specialised Functions; Environment Specialised Functions and Immigration Specialised Functions would endanger the life, or health of the population or part thereof. These services are accordingly designated as essential services.
56. The parties are hereby ordered to negotiate and conclude a Minimum Service Agreement no later than 30 July 2025



Adv. L Bono

ESC Panel Chairperson

7 March 2025