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- (1) REPORTABLE: ~~YES~~/NO.
(2) OF INTEREST TO OTHER JUDGES: YES/NO.
(3) REVISED.

08 Oct 2024

DATE

[Signature]

SIGNATURE



THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable

Case No: JR2748/22

In the matter between:

ARCELORMITTAL SOUTH AFRICA LIMITED

Applicant

and

**NATIONAL UNION OF METALWORKERS OF
SOUTH AFRICA ("NUMSA")**

First Respondent

SOLIDARITY

Second Respondent

**ASSOCIATION OF MINEWORKERS AND
CONSTRUCTION UNION ("AMCU")**

Third Respondent

**THE COMMISSION FOR CONCILIATION,
MEDIATION AND ARBITRATION**

Fourth Respondent

JOYCE NKOPANE N.O.

Fifth Respondent

NOMAZOTSHO MEMANI N.O.

Sixth Respondent

KGAKGAMATSO MOTEBE N.O.

Seventh Respondent

Heard: 02 July 2024

Delivered: 08 October 2024

JUDGMENT

ERASMUS, AJ

Introduction

- [1] This is an application for the review and setting aside of a designation ruling made by the Essential Services Committee (ESC) dated 16 November 2022 in terms of which the ESC determined that the services of blast furnaces and coke batteries as part of the manufacture, production and distribution of steel are not essential services.
- [2] Although the application was initially brought in terms of section 145 of the Labour Relations Act¹ (LRA), the applicant contended that the oversight to also refer to section 158(1)(g) of the LRA in the notice of motion should be condoned, alternatively, the applicant moved for an amendment of the notice of motion to indicate that the application was made in terms of section 145, alternatively, section 158(1)(g) of the LRA. After all parties agreed, the amendment was granted.
- [3] The review application was opposed by the first respondent, the National Union of Metalworkers of South Africa (NUMSA), the second respondent, Solidarity and the third respondent, the Association of Mineworkers and Construction Union (AMCU). The three unions shall collectively be referred to as the unions, where necessary.

Background to the dispute

¹ No 66 of 1995 (as amended)

- [4] The applicant, Arcelormittal South Africa Limited (Arcelormittal), has two plants in South Africa, situated in Vanderbijlpark and Newcastle. There are five coke batteries in the Vanderbijlpark plant and three in the Newcastle plant. The Vanderbijlpark plant also has two blast furnaces, with Newcastle having only one.
- [5] In essence, a coke battery consists of about 55 to 57 individual ovens combined in a single structure, each separated by a hollow refractory wall, where flames are burning to provide heat. Coke batteries are used to produce metallurgical grade coke for use as raw material in blast furnaces. The coke batteries also produce coke oven gas which is used as a source of energy to perform work in the plant. Coke batteries need to be hot-idled in the event of a strike.
- [6] Blast furnaces are used to reduce iron ore from nature to smelted metallic iron. The hot metal is transferred to a steel shop using torpedos. Torpedos are refractory-lined vessels. At the steel shop, residual carbon is removed, required alloys added and the resultant liquid steel is cast into slabs and cooled. In the event of a strike, blast furnaces need to be blown down.
- [7] Arcelormittal contends that six days are required to blow down two blast furnaces in the Vanderbijlpark plant, including the preparatory stop and tapping of the salamander, which it contends are necessary steps in the process. There is also a need for gas line and gas plant control. Liquid metal could escape if a hole is burnt through due to the compromised refractory material in the hearth. A lack of salamander tapping (draining the material below the taphole) could also damage the hearth upon restart. Insofar as the Newcastle plant is concerned, Arcelormittal contends that more than 48 hours, and up to four days, would be required to blow down the single blast furnace. Hence, the 48 hours' notice which a union is required to give in terms of section 64(1)(b) of the LRA of its intention to embark on a strike, is insufficient to ensure the safety of the plant and the people on it.
- [8] The unions contend, amongst others, that 48 hours' notice of the intention to strike provides Arcelormittal with sufficient time to bring the plants to safety.

- [9] Arcelormittal submitted a request to the ESC to conduct an investigation into whether the manufacture / production, supply and distribution of steel should be designated as essential services.
- [10] The ESC considered the request and found it to be a reasonable request, whereafter the ESC issued a notice to conduct an investigation in terms of section 71(1) read with section 70B(1)(d) of the LRA on 06 August 2021 under GN44945. The said notice was corrected by an Erratum Notice published on 20 August 2021 under GN45020.
- [11] The gazetted terms of reference for the investigation in terms of section 71 were that
- “notice is hereby given in terms of section 71, read with section 70B(1)(d) of the Labour Relations Act, 1995 (Act No 66 of 1995 as amended), that the Committee is in the process of conducting an investigation as to whether the following services are essential:
- “(4) The manufacture/ production, supply and distribution of steel.
(See Government Gazette No 45020, GN 496 of 2021, dated 20 August 2021)”.
- [12] The hearings were scheduled for various dates during August and September 2021. At the commencement of the public hearings, the interested parties raised concerns regarding the notice, more particularly around insufficient time to file written representations. The time frames were therefore extended.
- [13] The parties further indicated that there was a need to hear evidence in the matter. The ESC therefore afforded the parties an opportunity to lead evidence and to submit written and oral arguments.
- [14] At the commencement of the hearing for purposes of presenting evidence, Arcelormittal narrowed down the request considerably. More specifically, they sought a designation in the following terms:

- 14.1 That the coke battery and blast furnace operations should be designated essential services;
- 14.2 Alternatively, that the blow down of a blast furnace and hot idling of a coke battery be declared an essential service and the unions be required to provide a minimum of six days to ensure protection of life, personal safety and health of other employees that may not strike or have opted not to strike.
- 14.3 Furthermore, that the period between the blow down of a blast furnace and hot idling of a coke battery be declared an essential service and that none of the employees who are required to remain in attendance by Arcelormittal to ensure the safety of the staff as well as the operations and assets, may strike; and
- 14.4 The restart of a blast furnace and coke battery be declared an essential service and that no employees may strike for a period of two months after the restart operations have commenced.

[15] The unions objected to the narrowing down of the requested investigation. The ESC dismissed their point *in limine* in a ruling dated 20 January 2023 wherein the ESC held as follows:

- “34. From the above, it is clear that blast furnaces operations and coke batteries operations were considered to be part of the manufacture and production of steel and therefore part of the service that the ESC informed the public it would investigate. The broad terms of the investigation as published in the notice ensured that any interested party in the sector and any member of the public was informed of the intended investigation and invited participation. The fact that one interested party intends to prove that only a limited part of the service is in fact essential cannot be said to change the service that is being investigated. Accordingly, the panel is of the view that there is no prejudice to any party who could potentially have an interest in this investigation.
- 35. The issue of whether blast furnaces operations or coke batteries operations are part of the manufacture, production and or distribution of

steel can only be resolved after considering the evidence, and so is the issue of the appropriate designation to be made in this matter.”

[16] The above ruling of the ESC remained unchallenged.

[17] The investigation then commenced with an inspection *in loco*, followed by the leading of extensive evidence, including those of expert witnesses, and written submissions, whereafter a designation ruling was issued, dated 16 November 2022.

Background facts

[18] Extensive evidence and submissions have been presented by Arcelormittal, NUMSA and AMCU during the ESC investigation, with Solidarity also having presented written submissions in opposition to the relief sought by Arcelormittal.

[19] An extensive summary of the evidence led, and submissions made to the ESC have been captured by the ESC in its determination and I do not intend repeating same here. I will provide a further truncated version of the summary for reasons which will become clear.

[20] It was not disputed that Arcelormittal does not generate an income during the blow down process.

[21] Arcelormittal's witnesses contended that an essential services designation should be granted as it is imperative that a controlled blow down of the blast furnaces be undertaken to avoid the risk of personal injuries or death to staff working in the area of the furnaces.

[22] Hot air around 300 kilo pascals is blown in at the bottom of the furnaces and there would normally be around 300 to 800 tons of liquid inside each furnace prior to tapping of the liquid. The temperature of liquid inside would be around 1480 degrees Celsius.

- [23] Furthermore, every ton of hot metal produced around 2.4 tons of blast furnace gas which consists of mainly nitrogen, hydrogen, carbon monoxide and carbon dioxide. This gas needs to be properly contained to avoid explosions.
- [24] Liquid metal escaping poses a safety risk to personnel and the plant, as well as possible environmental risks.
- [25] Gas explosions could also lead to loss of life when gas lines and the gas plant is not controlled.
- [26] An explosion occurred at blast furnace C in April 2020 resulting in severe structural damage of the surrounding infrastructure, working areas and vehicles on the premises.
- [27] If salamander tapping is not done during the blow down, it may lead to refractory and shell damage, which may lead to a breakout, endangering personnel who would be around the furnace. This is because the salamander, which is the hot metal that remains in the blast furnace below the tapping hole, solidifies after an extended outage of around seven to 10 days. When such solidified metal is then heated, it exerts stress on the refractory and on the shell of the furnace, causing damage which may lead to a breakout.
- [28] Although the salamander can be left untapped for a few days, one would not know beforehand how long the strike would last, therefore necessitating the tapping.
- [29] AMCU's witnesses conceded that there is a need for a safe stop and controlled blow down when a blast furnace is stopped in order to avoid the risk of hot liquid metal escaping. Dr Manono who testified for NUMSA also conceded to this. The difference between the parties lies in the time needed to perform this task safely, with the unions contending that it can be done in less than 48 hours and Arcelormittal contending that it needs six days within which to complete the task.

- [30] The risk at the coke batteries is caused mainly as a result of excessive gas and heat, which in turn presents a risk to the life and safety of the personnel.
- [31] The flammable gasses are not only produced by, but also required by the coke batteries and the large distribution network.
- [32] The gas system is kept safe by keeping it under positive pressure and keeping air or oxygen out. Once the positive pressure drops over time due to non-attendance during a strike, air will be sucked in and an explosive mixture will form in the pipes, which would cause an explosion.
- [33] Skeleton staff is therefore required at the gas system to monitor and maintain the pressure inside the lines after the ovens have been pushed out, the ovens and standpipes have been sealed and the lines have been purged with nitrogen.
- [34] The structures of the coke batteries will shrink and crack when heated after a total cooling down. These cracks would be destructive of the system as it needs to be gas-tight at normal operating temperatures
- [35] NUMSA contended, amongst others, that a properly planned interruption, with contingency plans in place, will not affect the life, health and safety of the whole or part of the population. Processes, safe operating procedures and refresher training courses could be put in place to ensure safe shutdowns.
- [36] NUMSA also pointed out that no evidence was presented of a cloud radius affected in the event of a gas explosion and contended that standard operating procedures could address explosion risks posed by the gas networks. The risk could be managed by senior non-striking personnel.
- [37] Solidarity also submitted that the services should not be declared essential as any risks would not result in the endangerment of life or personal safety of the whole or part of the population.

- [38] AMCU's witnesses conceded that there are safety risks, but contended that the services could be safely blown down within 48 hours.
- [39] AMCU referred to the blowing down and salamander tapping of one blast furnace within 48 hours during a strike in 2022. AMCU also referred to a preparation stop having taken 14 hours during the Covid-19 pandemic and contended that the preparation stop could be safely skipped.
- [40] Despite AMCU's contention of the time needed, the evidence presented showed that the blow down of Furnaces C and D in 2022, took a total of 5.7 days, from start to finish.
- [41] The evidence furthermore demonstrated that there are inherent risks to both personnel and the plant in the operation of these services.

The legal framework

- [42] The right to strike is a fundamental right recognised in international law and in the South African Constitution². The right to strike however is not absolute and may be limited in terms of a law of general application to the extent that such limitation may be reasonable and justifiable in an open and democratic society.
- [43] The constitutional right to strike has been enacted in section 64 of the LRA. There are however certain limitations to the right to strike as set out in section 65 of the LRA, one of which is that employees may not strike if they are engaged in essential services.³
- [44] Any determination regarding whether a service ought to be regarded as essential, ought to entail a restrictive interpretation, so as not to impermissibly limit employees' Constitutional right to strike.

² Sect 23(2)(c) of the Constitution of the Republic of South Africa, No 108 of 1996.

³ See Sect 65(1)(d)(i) of the LRA.

[45] An essential service has been defined in section 213 of the LRA as meaning:

- “(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 Services.”

[46] The current matter came before the ESC in terms of section 71 of the LRA rather than section 73 or 74 of the LRA. In terms of section 71, the ESC must give notice in the Government Gazette of any investigation that it is to conduct an investigation to determine whether a whole or a part of a service is an essential service.⁴

[47] After the investigation, the ESC must determine whether the whole or part of a service is an essential service and if it is, a notice to that effect must be published in the Government Gazette.⁵

[48] Once a decision has been made that the whole or part of the service is an essential service, the process regarding the determination of the minimum services required, is to be made in terms of section 72 of the LRA.

Analysis

[49] From the evidence presented, it is clear that there is a risk to the life and safety of employees of Arcelormittal, as well as to the plant itself. The question however is whether that is sufficient in order for the services to be declared essential services.

[50] As referenced above, the LRA defines an essential service as one which endangers the life, personal safety or health of the “*whole or any part of the population*”.

⁴ Sect 71(1) of the LRA

⁵ Sect 71(7) and (8)

- [51] It is common cause that the closest community to Arcelormittal's Vanderbijlpark plant is the community of Boipatong which is situated approximately 5 kilometres from the plant.
- [52] A previous explosion at blast furnace C resulted in damage to the infrastructure and vehicles in the plant. The community of Boipatong remained unaffected.
- [53] In the ESC's determination in the matter of *Department of Social Development v NEHAWU obo Members*,⁶ the ESC panel has stated that:
- “[i]t is the population or part of a population that must face the endangerment, not merely isolated individuals – there is a collective component. In that respect ‘population’ means ‘the collective inhabitants of a country, etc.’”
- [54] The unions in the current matter argued that the employees that may be affected, constitute isolated individuals, *albeit* possible that some of them may reside in the Boipatong community.
- [55] The Mirriam Webster dictionary defines population as “*the whole number of people or inhabitants in a country or region*” or “*the total of individuals occupying an area or making up a whole*”.
- [56] The Shorter Oxford English Dictionary⁷ defines it as a “*peopled or inhabited place*” or the “*extent to which a place is populated or inhabited; the collective inhabitants of a country, town, area, etc.; a body of inhabitants*”.
- [57] Further definitions from other dictionaries such as the Oxford and the Thesaurus include “*all the inhabitants of a particular place – a particular group within this – the action of populating an area*” and “*inhabitants, residents, people, citizens, citizenry, public, community, populace, society, natives, occupants, formal denizens*” with the word “*populate*” having meanings such as

⁶ ESC case number ES2.

⁷ 6th Edition

“form the population of (a place) – cause people to settle in (a place)” and “inhabit, occupy, people; live in, reside in”.

- [58] The Cambridge Advanced Learner's Dictionary and the Thesaurus defines population as *“all the people living in a particular country, area, or place; all the people or animals of a particular type of group who live in one country, area, or place”.*
- [59] The Supreme Court of Appeal in the matter *S v Radebe*⁸, with reference to the Internal Security Act⁹, considered the meaning of the phrase *‘put in fear or demoralise the general public, a particular population group or the inhabitants of a particular area in the Republic’* held as follows:

“The words ‘the general public, a particular population group or the inhabitants of a particular area in the Republic’ in s 54(1)(d) must be seen and interpreted in conjunction with one another. Thus viewed, the Legislature clearly had in mind an intent of the kind specified directed towards the public at large, or a large section of the population having a common identity or interest, or the general body of persons residing within a particular geographic area. A population group may be categorised along racial or ethnic lines. In common parlance it probably would be so regarded. On the other hand, a population group could encompass an homogenous group bound together by a common language, religion or culture. At the very least it connotes a large population grouping sharing common characteristics or interests. A population group must be distinguished from a group of the population in the sense of a random collection of members of the public who do not have a common identity. Within the concept of different population groups, a particular population group would be one such group as distinct from the rest. Whatever meaning may be given to the words ‘population group’ it is clear that pupils at a school, even if they all belong to the same racial, ethnic, cultural, language or religious group, cannot themselves constitute a population group. At best they comprise a segment of a population group. The intent required to satisfy the provisions of s 54(1)(d) must be one directed at a particular population group as a whole, or the major portion of such group, and not merely at a segment

⁸ [1988] 2 All SA 99 (A) at p. 19.

⁹ No. 74 of 1982

thereof. Consequently the pupils of the school do not fall within the meaning of 'a particular population group' in terms of s 54(1)(d). Nor are they 'inhabitants of a particular area' within the meaning of that phrase in the section. The fact that all of them, or most of them, come from a particular area, and as such are inhabitants thereof, cannot satisfy the requirements of s 54(1)(d) in this respect. By the inhabitants of a particular area are clearly meant the total number of persons, or the vast majority of them, residing within a certain region or locality. The pupils of the school do not constitute the inhabitants of a particular area in that sense. Nor did the appellant direct, or intend to direct, his conduct towards the inhabitants of a particular area."¹⁰

[60] Arcelormittal contended that there is no other means of protecting the lives of the employees in the plant, other than a declaration of the service constituting an essential service and to not include the employees in the definition of population, would be absurd.

[61] AMCU on the other hand, contended that the employees can be protected by means of the Occupational Health and Safety Act¹¹ (OHSA) and its regulations in that employees cannot be required or permitted to work if there is a risk to their health or safety and that the employees must simply leave the premises. Whether the plant then goes to demise, becomes a maintenance service matter, rather than an essential services matter.¹²

[62] AMCU made reference to other ESC determinations where the following groups of people were protected by means of the essential services determinations:

62.1 The residents below tailings dams;¹³

¹⁰ *S v Radebe* 1988 (1) SA 772 (A) at 777C-I

¹¹ No. 85 of 1993.

¹² At the hearing of this matter, it was confirmed that a process has commenced in terms of which Arcelormittal has requested a declaration as a maintenance service. At the time of preparing this judgement, the Court was informed that a determination has indeed been made in terms of section 75 of the LRA that certain services at Arcelormittal are indeed maintenance services, including the services relating to blast furnaces and coke ovens. The Court was nonetheless requested to deliver judgement in this matter due to the uncertainty whether the unions would take the determination with regards to maintenance services on review.

¹³ ESC Case number ES11

- 62.2 Passengers and members of the public that use the Ortia, Lanseria and George Airports;
- 62.3 Groups of more than 2000 people that attended sporting events at stadiums;
- 62.4 People residing at facilities for people living with disabilities.¹⁴

- [63] Solidarity confirmed that the arguments for the unions are all similar and that the employees of Arcelormittal is distinguishable from faceless people forming the population or part thereof.
- [64] It contended that the determination has the power of an award but that Arcelormittal is seeking to appeal the ESC's determination, rather than review same.
- [65] NUMSA essentially supported the arguments advanced by AMCU and Solidarity.
- [66] From the previous determinations made by the ESC, it is clear that the purpose of an essential services designation is to protect large groups of people and although those groups can be referenced by means of their description, for example, more than 2000 people attending a sports event, people residing below a dam, people with disabilities in residential facilities, they were not identified with any manner of precision, and at least not with the same precision that Arcelormittal is able to identify the employees that work in the plants in respect of which the designation was sought.
- [67] Although it was suggested on behalf of Arcelormittal that one cannot predict who may be present on the premises of Arcelormittal when an explosion happens and that it may be possible for cable guys to be present to replace stolen cable or that the police may be present, granting an essential services determination just in case a very small number of people of the population may accidentally be present, is farfetched. The intention of the legislature could not

¹⁴ ESC Case number ES2

have been to restrict the right to strike, just in case a handful of people are present at a particular moment in the event of an explosion.

[68] From the definitions referred to above, it is clear that there is a distinction between a workforce and the population or a part thereof. It is clear that the intention was to protect large groups of people that are unidentifiable, apart from identifying them as a group, for example, people living in a certain area, people making use of airports, disabled people residing in residential facilities and so forth.

[69] The determination made by the ESC that there are safety risks in the operation of blast furnaces and coke batteries if same is not shut down in a controlled and well managed manner and that, whilst there may be endangerment, such endangerment is not to the whole or part of the population, is correct.

Costs

[70] Arcelormittal stated that a current relationship exists between the parties, that the matter raises a novel point and that it approached the Court to protect its employees.

[71] AMCU suggested that costs should follow the result whilst NUMSA left the issue of costs in the Court's hands.

[72] Solidarity confirmed that a current relationship exists between the parties but that the unions had to incur great expenses to support the finding of the ESC and defending the application.

[73] As confirmed, a current relationship exists between the parties to this matter. The matter also called for interpretation of the LRA in circumstances where little guidance exists in the form of previous judgements. It also involved a decision to be made regarding the limitation of a constitutional right which is a matter of great importance to all parties involved, especially where the applicant also

sought to protect the safety of its employees and their future livelihoods. As a result, a costs order would not be warranted in this instance.

[74] In the premises, the following order is made:

Order

1. The review application is dismissed.
2. There is no order as to costs.



L. Erasmus

Acting Judge of the Labour Court of South Africa

Appearances:

For the Applicant: Adv. F.A. Boda SC
Instructed by: Cliffe Dekker Hofmeyr Inc.

For the First Respondent: S. Chetty of Serena Chetty Inc Attorneys

For the Second Respondent: Adv. W.P. Bekker SC
Instructed by: Serfontein Viljoen & Swart Attorneys

For the Third Respondent: Adv. W Strobl
Instructed by: LDA Inc Attorneys