Watching the indicators: What the 2025 essential services designation means for tailings dam safety

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In August 2026, a tailings dam wall of Samancor Chrome's Dikwena tailings storage facility situated near Brits, North West, collapsed, releasing mining sludge that disrupted access to a neighbouring mine, damaged Eskom infrastructure and a railway line, and triggered power interruptions across surrounding communities. It was not the first time South Africa had witnessed the consequences of tailings storage failure. In September 2022, the collapse of the Jagersfontein tailings dam in the Free State sent a torrent of slurry through a town, killing people, displacing hundreds of residents, destroying homes, and contaminating agricultural land and water sources. These events echo the 2019 collapse of a tailings dam operated by Vale in Brumadinho, Brazil, which killed approximately 270 people and became the catalyst for a global rethink of how mine residue is stored and managed.

Tailings facilities can fail slowly, in ways that are often invisible until they are catastrophic, and the consequences are never confined to the mine boundary. This is not a coincidence of bad luck. It is the reason South African law has, over the past eight years, reclassified the people who monitor, maintain, and manage tailings dams as providers of an essential service. That reclassification reached its most significant milestone in November 2025, and deserves far more attention from occupational health and safety practitioners than it has received so far.

Tailings dam management sits at an unusual legal intersection. The Mine Health and Safety Act No. 29 of 1996 (MHSA)[1] and the Labour Relations Act No. 66 of 1995 (LRA)[2] now operate as an interlinked regulatory mechanism aimed at ensuring that the functions that keep a tailings storage facility (TSF) safe are never interrupted.

Safety and labour law do not, however, exhaust the regulatory framework. Tailings dams are also regulated under environmental legislation, particularly the National Environmental Management Act No. 107 of 1998 (NEMA)[3] and the National Water Act No. 36 of 1998 (NWA).[4] The NEMA imposes a general duty of care to prevent pollution and ecological degradation, and requires environmental authorisation for listed activities associated with residue deposits and stockpiles. The NWA regulates water use associated with tailings facilities, including the storage of water containing waste.

Together, these environmental instruments add a further layer of obligation that operates alongside the MHSA and LRA framework discussed in this article. While the focus here is on the safety and labour law dimensions of tailings dam management, operators must remain alive to the environmental impact and compliance requirements that attach to every phase of a TSF's life cycle.

The MHSA imposes a demanding standard. Section 2(1)(a) requires every employer, as far as reasonably practicable, to ensure that a mine is designed, constructed, and equipped to be safe and without risk to health. This obligation demands active, ongoing systems to identify and manage hazards. Section 5(2) extends that duty beyond the workforce, requiring employers to identify hazards to which non-employees may be exposed and to ensure, as far as reasonably practicable, that those persons are not placed at risk by mine activities.

Section 11 requires hazard identification and risk assessment before any work begins. For a TSF, that means addressing the specific failure modes, hazards, and risks that make these structures dangerous, such as slope failure, overtopping, seepage, phreatic surface levels, water management failures, erosion, and washout.

Importantly, "reasonably practicable" is not aspirational. As the Labour Court confirmed in *Truworths Limited v The Chief Inspector: Occupational Health and Safety, Department of Employment and Labour* (2025) 46 ILJ 1426 (LC),[5] the test requires a feasibility-based assessment weighing costs, resources, and capability against the degree of risk. The question is not whether the theoretically best outcome has been achieved, but whether what has been implemented can feasibly ensure safety. Given the scale of harm a tailings dam failure can cause, the threshold is correspondingly high.

Beyond the Act, the Chief Inspector of Mines' Guidelines for the Compilation of a Mandatory Code of Practice for Mine Residue Deposits,[6] issued under section 9 of the MHSA, serve as the primary technical framework governing TSF design, construction, operation, maintenance, modification, and decommissioning in South Africa.

Those guidelines reflect the global finding that tailings facility failures are overwhelmingly attributable to inadequate management, gaps in policy, monitoring, training, record-keeping, and auditing across the facility's full life cycle.

The 2025 designation: From job titles to job functions

The novelty lies on the labour law side. Section 213 of the LRA defines an essential service as one whose interruption endangers the life, personal safety, or health of the whole or any part of the population. Section 65(1)(d)(i) prohibits any person engaged in such a service from striking. The courts have consistently required this designation to be interpreted restrictively to avoid impermissibly limiting the constitutionally protected right to strike.

Tailings dams first entered this framework in 2018, when a designation covering "mud guards" and "team leaders" was granted following an application Webber Wentzel assisted in bringing to the Essential Services Committee (ESC). That designation proved too narrow because different employers used different job titles for identical work. The ESC found it was being applied inconsistently and opened a fresh investigation under section 71 of the LRA to determine what the essential service was, rather than who performed it.

Following hearings involving industry bodies and the National Union of Mineworkers, the evidence established that continuous services relating to slurry distribution, critical planning, water extraction and the safe storage and control of tailings, all needed to be performed without interruption.

The functions captured include managing pipe systems and freeboard to prevent overtopping; monitoring slurry distribution to prevent slope failure and erosion; maintaining spigots, valves, and vent pipes to optimise the basin profile and decant surplus water; taking and reporting piezometer readings to track phreatic surface levels; inspecting slopes for seepage and sloughing; monitoring underdrain flows; and maintaining catwalk access to the penstock so that pool depth and water decanting can be properly managed.

The 2025 designation is function- and service-based. It follows the work, rather than the job description, which matters enormously for workforce classification. The final determination has two limbs: all services necessary for the construction, maintenance, and risk management of deposition sites and tailing dams to ensure their integrity, safety, and stability; and all services in hydro mining relating to the integrity of the water management system.

Why tailings dams cleared a bar that a blast furnace could not

The distinction becomes sharper when considered against *ArcelorMittal South Africa Limited v National Union of Metalworkers of South Africa and Others*, in which the Labour Appeal Court dismissed an appeal seeking essential services status for blast furnace and coke battery operations.

Despite evidence that blast furnaces gas contains 25% carbon monoxide, that a concentration of 2% would be lethal, and that safe shutdown requires six days with a full staff complement, the Labour Appeal Court held that "any part of the population" cannot mean the workers performing the service itself. It must mean a broader segment of the population affected if the service were withdrawn. The harm in ArcelorMittal was confined to workers on site. An occupational hazard, however severe, does not satisfy the essential services test.

Tailings dams sit on the other side of that line because of their reach. A dam failure extends beyond the facility to downstream communities, water systems, and ecosystems, causing harm that can persist for generations. That is a public safety and environmental question, not only an occupational one, and it is precisely what the ESC's evidence in the tailings investigation established.

The tailings designation was not handed to the industry lightly. It required years of technical evidence, structured hearings, and sustained advocacy, which is why it matters that it succeeded where the blast furnace application did not.

Individual safety rights survive

Essential services status does not displace individual safety rights. Section 23(1) of the MHSA gives every employee the right to leave a working place where circumstances arise that, with reasonable justification, appear to pose a serious danger to health or safety. This threshold requires objective information pointing to imminent and serious danger, rather than subjective unease.

An essential services designation under the LRA prohibits collective, concerted strike action in pursuit of a dispute of mutual interest. It does not affect the individual health and safety rights conferred by the MHSA. Essential services status means that employees' labour cannot be withheld as collective leverage; it does not mean that they have consented to work in dangerous conditions.

An employee who observes signs of impending dam wall failure, such as seepage, cracking, or other indicators of structural compromise, has clear and compelling grounds to invoke the section 23 right regardless of essential services status. Where a group of essential services employees simultaneously invokes section 23 without reasonable justification, however, the conduct risks being characterised as a disguised strike and losing protection under both statutes.

Compliance and implementation

The significance of the 2025 designation is convergence. The MHSA has always required certain TSF functions to be performed continuously by competent persons for health and safety reasons. The LRA now independently prohibits industrial action that would interrupt those functions.

Before November 2025, an employer facing a strike by critical monitoring staff had to seek urgent interdictory relief. That risk is now substantially reduced as those employees are legally precluded from striking. However, parties must still negotiate and conclude a minimum service agreement within 90 days of the designation, balancing TSF integrity, employees' residual collective bargaining rights, and operational requirements under the MHSA risk assessment process.

The designation translates into a concrete implementation checklist that may require mapping which personnel and services fall within the function-based test; communicating with affected employees about strike restrictions and alternative dispute resolution mechanisms; concluding minimum service agreements as an operational imperative; reviewing employment and contractor agreements to reflect essential services obligations; and embedding designated functions in the mine's hazard identification and risk assessment documentation under the MHSA.

The ESC published a further notice in July 2026 opening new section 71 investigations, including into lamp room safety functions and the emergency supply of specialised water treatment chemicals to municipal water and wastewater facilities. Hearings are scheduled across several cities in September 2026.

The right question is not "are we legal?"

The events of August 2026 did not create these obligations. They illustrated why they exist. The 2025 designation helps to ensure that the people responsible for monitoring these indicators are never pulled away from that work by a labour dispute at the moment their vigilance matters most.

That protection was not granted lightly, nor should it be treated as a compliance formality once achieved. The task now is to implement it properly through workforce audits, contract reviews, employee communication, and minimum service agreements.

A strong safety culture, clear governance, independent review, risk-informed design and operation, and comprehensive documentation are the elements of responsible tailings management that sit above the regulatory floor, not at it. Compliance with the MHSA is the foundation; good practice sits above it. As every tailings dam failure demonstrates, the question every operator should be asking is not "are we legal?" but "are we safe, and can we prove it?"

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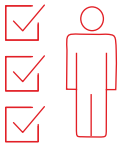

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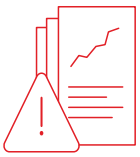
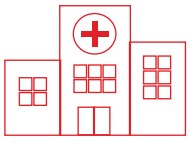
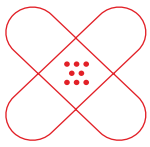


Early risk identification and management measures are put in place



Onsite clinics, Mobile and walk-in clinics, where medical surveillance is provided.



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