

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

Case No.: ES 86

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

Whether certain services rendered by mental health institutions should be designated as essential services

Designation

Introduction

1. The Essential Services Committee (“the ESC”) received a referral from Cape Mental Health in terms of section 71 of the Labour Relations Act, 66 of 1995 (*“the LRA”*).16 July 2016
2. In its referral, the Cape Mental Health sought a designation of the whole institution and services that it renders to be designated as essential.
3. A preliminary meeting between the ESC and the parties was held and the ESC after considering the nature of the submission took a decision to conduct an

investigation in terms of Section 71 read with Section 70(2) (a) of the Labour Relations Act 66 of 1995 as amended (hereinafter referred to as the Act).

4. 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(2)(a) 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 all services rendered in public, private and state funded mental health institutions are essential.**
5. (see Government Gazette No 40496, Volume 901 Of 2016, dated 15 December 2016), dated 15 December 2016).

Details of Hearings

6. 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 .

Submissions

7. The applicant in this matter submitted that it is a registered non profit organization that provides or facilitate a comprehensive , proactive and enabling mental health services in the Western Cape. The applicant operates 22 community based programmes and these programmes service over 16000 people with intellectual disability and people with psychiatric disabilities and their families.
8. The applicant submitted that people with intellectual disabilities are not ill and therefore they could not be cured. Many require lifelong care or support. The applicant offers a range of services. These services range from counselling support, education, care centres for children and adults, training and employment opportunities to those who cannot work.

9. In relation to those that suffer from psychiatric disabilities the applicant submitted that since these individuals' ability to cope with their feelings and with the demands of outside world, the applicant offers them counselling, support , rehabilitation , training and reintegration programmes with the view of reintegrating them to take their rightful place in society.
10. The applicant referred in its application to various projects that it operates, the services rendered per project and the impact should the service be interrupted. For the purpose of this determination it is important that the same approach be used.
11. The first two projects referred to were the "Intake Social work Department" and Social work department.. It was submitted that these programmes offer individual and families
- specialist mental health counselling and home intervention
 - education about the needs of people with mental disabilities
 - assistance in accessing service , resource and opportunities
 - strengthening of coping skills and self reliant behaviour
 - administration of social grants
 - community based groups providing support, life skills training. food security programmes and income generating initiatives.
12. The services rendered in this department are amongst others, the diagnostic assessments of new referrals of people with intellectual and psychiatric disabilities, mental health crisis management, assisting families to process involuntary admission to a mental health facility/ hospital to users who are mentally ill and area risk to themselves and their families .

13. These projects offer therapeutic counselling which has the impact of reducing anxieties and promotes improved level of functioning amongst the people with intellectual and psychiatric disabilities.
14. It was submitted that in the event of industrial action there would be no mental health services to the users and families, and that this may lead to increased suicide rate due to lack of immediate intervention. Further that the interruption of the service may lead to the user being readmitted to psychiatric institution as they may not be able to access the necessary support.
15. The other project referred to was the Sexual Abuse Victim Empowerment Programme. The project assist in the legal process where a person with intellectual disabilities has been sexually abused. The project seeks to offer the complainants the same access to justice as the general population and to ensure the conviction of the perpetrators.
16. The services rendered in this project are amongst others.
- Psychological assessment of the victims level of functioning, competence to testify and the ability to consent to sexual intercourse
 - Court preparation, on going support, counselling and sex education for complainants with intellectual disabilities.
 - Provide expert evidence in court if required.
 - Liaise with relevant agencies, e.g. SAPS and the Department of Justice
17. It was submitted that the interruption of the service could lead to increased in cases of sexual abuse of the people with intellectual disabilities. They will not receive the necessary support. The cases may be compromised by the barriers caused by communication difficulties.

18. The two other projects are “Mind matters” and Learning for life. In relation to mind matters the service rendered is psycho social service to schools. The services rendered in terms of this project are-
- psycho –social assessments and counselling to learners
 - classroom activities to promote emotional intelligence
 - parent support groups
 - sports programmes referral to external services
19. It was submitted that the interruption of the service would result in non compliance with funding contractual obligations. There may be reduced support to learners who are mentally and emotionally vulnerable. Further that there may be increased risk of suicide for learners who are identified as depressed and emotionally vulnerable.
20. Learning for life is aimed at providing quality, customised and affordable training to service providers including community workers , medical personnel educators, care workers , caregivers, teachers, nurses and others including NGO/ government staff.
21. The applicant conceded that the interruption of this service would not impact on service users directly , but would impact the upskilling of staff to perform their duties.
22. The other two projects identified are “ Special Education and Care Centres and training workshops
23. The Special Education Care Centres provide education to 180 children with severe and profound intellectual disabilities . The aim is to develop these children in a holistic way including their self care.

24. It was submitted that if the service was interrupted the children would be deprived of psychological, emotional and physical development and well being. Further that they would be unattended and would not have access to water , food and may be exposed to abuse.
25. The same result could follow in relation to the interruption of the services that are offered to adults in the Training Workshops.
26. The applicant also referred to the Fountain House project and submitted that this was a community based rehabilitation centre that provides skills development and vocational training to people with psychiatric disability. The aim is to facilitate and enhance persons with psychiatric disability to become reintegrated into society and the workplace. The programme encourage the users to actively take decisions and enhance their ability to build their own self confidence and empower them.
27. Strike action would impact the continuity of the program thus interrupting the routine for users and this may result in stress and anxiety causing relapse. Members may loose trust in the service and may not return and this impacts their well being.
28. In the Rainbow foundation members are taught to adhere to their medicine, to understand their illness and to handle their illness.
29. The strike action could result in the groups having to close down.
30. The Residential Facilities provide supervised accommodation for users with intellectual disabilities. They provide a home environment meeting the physical, emotional / therapeutic and financial needs of the residents.

31. Any form of strike action will increase vulnerability of abuse to users. Many of the users do not have alternative placement. A strike would result in stress for the users and this may lead to anxiety.
32. During the inspections it was indicated that they are taught to take their medication and that if this routine is disturbed they may not take their medication appropriately and this may result in some of them relapsing.
33. They would not have formal access to community health care and their families would not be able to secure optimal health care. The individuals may face institutionalization as a result of the families rejecting them. Further that they may feel isolated and lonely.
34. The respondent further submitted that the services rendered by public relations, communication, admin and finance departments should be designated as essential.
35. The Committee received supporting submissions from other institutions rendering the same services as the applicant, but there were no submissions from labour.

Legal Framework

36. In this matter the issue that the committee has to determine is whether the services that the applicant is rendering should be designated as essential services? In determining the matter, it is important that one should set out the legal framework.
37. 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.”*
38. 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”.

39. 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”.

40. 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”.

41. 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)”

42. 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]).

43. 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.

44. 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.

45. 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. 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

46. The applicant in this matter sought a blanket designation in that it sought all services and projects that it operates to be designated as essential services. As indicated above it is not an institution that is essential it is the services

rendered by an institution that are essential. Accordingly, this application is not only relevant to Cape Mental Health but all such institutions that render the same or similar services.

47. In its application the applicant did not specify the services specifically that it sought to be designated. In an attempt to identify and categorize the services the ESC considered the projects as referred to by the applicant and also the provisions of the Mental Health Services Act 17, 2002 as amended.

48. The Committee further considered the objectives of the act which are contained in the preamble in particular the part that provides that in promulgating the Act the legislature recognized the need to promote the provision of Mental health care services in a manner which promotes the mental well being of the users of mental health care services and the communities in which they reside.

49. The applicant in its application submitted that (this was confirmed during the inspection carried by the Committee) it provides a holistic mental health care, rehabilitation and training to adults and children with intellectual and psychiatric disabilities. As indicated above the services are rendered through different projects that the Applicant operates

50. As one cannot designate the institution, the ESC in an attempt to categorize the services identified the services provided by the applicant and other institutions rendering the same services as follows:-

- Mental health care
- Diagnostic assessments of new referrals in respect of people with intellectual and psychiatric disabilities
- Psychological assessment
- Therapeutic Counselling services

- Mental health crisis management
- Court preparation for victims
- Rehabilitation services
- Treatment (assistance with adherence to medication)
- Training
- Administrative services
- Financial Services
- Public Relations and Communications

51. As indicated the test that the ESC adopts in determining whether a service is essential is whether the interruption of that service would endanger the health, life and safety. Where the interruption of a service would cause inconvenience or economic hardship, such a service cannot be designated as essential.

52. On the submissions it is clear that administrative services, financial service, public relations and communication are necessary to ensure the smooth running of an institution, whilst the interruption of such services may cause inconvenience there would be no immediate loss of life or endangerment to safety or health of the users. The Committee is therefore of the view that these services should not be designated as essential.

53. In relation to training the applicant indicated that there is training that is offered to the users and training that is offered to stakeholders in **the Learning for Life** project. Whilst this is an important program, it is not essential in the sense that the interruption of this service is unlikely to impact on the lives of the users.

54. The training or services offered in **Mind matters** are also important but are not essential. The applicant conceded that the interruption of this would result in non compliance with funding contractual obligations. There may be reduced support to learners who are mentally and emotionally vulnerable. Further that

there may be increased risk of suicide for learners who are identified as depressed and emotionally vulnerable. The risk referred to above is not immediate and since these kids receive this intervention whilst at school alternative arrangements can be made. Accordingly these services are not essential.

55. All other forms of training including training offered at the Special Education Care Centres and training workshops is essential . during the inspection it was apparent that this is not just ordinary training and that it enhances the quality of life of the users. It was apparent that the interruption of this training would adversely impact on the lives, health and safety of the users. The ESC accepts that this form of training is an integral part of the holistic mental health care that the applicant and similar institutions seek to provide and accordingly the service is an essential service.

56. Having considered the written and oral submissions of the parties, as well as the applicable law referred to above, the Panel is of the view that the following services should be designated as essential:

- Mental health care
- Diagnostic assessments of new referrals in respect of people with intellectual and psychiatric disabilities
- Psychological assessment
- Therapeutic Counselling services or any other counselling services
- Mental health crisis management
- Court preparation and assistance for victims who fall within the category of users.
- Rehabilitation services
- Treatment (including assistance with adherence to medication)
- Training (only to the extent that it is offered to the mental health users)

9. Designation

The ESC Panel therefore designates mental health care and the following support services rendered by mental and related institutions:

- Diagnostic assessments of new referrals in respect of people with intellectual and psychiatric disabilities.
- Psychological assessment
- Therapeutic Counselling services and any other form of counselling.
- Mental health crisis management
- Court preparation and assistance for victims who are users.
- Rehabilitation services
- Treatment (including assistance with adherence to medication)
- Training (only to the extent that it is offered to the mental health users).



Ms. Joyce Nkopane
ESC Panel Chairperson
28 December 2017