

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

Case No.: ES

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

Whether early childhood development should be designated as essential services.

Determination

Background

- 1 The Essential Services Committee (ESC) issued a notice in terms of Section 71(1) read with Section 70B(d) of the Labour Relations Act 66 of 1995 as amended, calling on all interested parties to make submissions and representations on whether or not caring and schooling of children in Early Childhood Development (ECD) phase should be designated as an essential service.
- 2 Several public hearings were scheduled and presided over by Ms Joyce Nkopane ESC: Deputy chairperson, Advocate Nomazotsho Memani and Mr Sifiso Khumalo. Parties were also afforded the opportunity to submit written submissions.

Issue to be decided

- 3 Whether early childhood development should be designated as essential services.

Submissions

- 4 The ESC received submissions from several Early Childhood development Centres. In essence the parties submitted that the right to strike is a constitutional right and should not be interfered with easily. The workers in ECD need to have the right to strike and this happens as a last resort therefore there is no need to designate the service as essential.
- 5 It was further submitted that before industrial action is taken there is prior planning and practitioners would not leave the children unattended. Should the need arise for industrial action to happen safety measures will be put in place so that children will not be at risk.
- 6 It was submitted further that the EDC centers are an integral part of the community and thus the community is always involved in ensuring that the children that are in these centers are taken care of even during strike action so there is no need to declare the service essential as there is no life that is likely to be lost. It was submitted that ECD Practitioners should also have the right to speak out should the need arise and taking the right to strike away from them would deprive them of the right to speak.
- 7 The sector is not recognized and there are a lot of unfair practices and it would be unfair to take away the right of practitioners to strike.
- 8 The department of Social Development also made written submissions. On behalf of the Department the legal framework governing early childhood development was set out, and it was against that background that the Department submitted that services rendered at ECD centers should be designated as essential.

- 9 The department submitted that the withdrawal of ECD services from children will harm their stimulation and development and would have a long term effect on their psychological and mental health, which may impact on their cognitive ability as grown ups.
- 10 If appropriate care and stimulation is not provided during this stage of development such cannot be regained at a later stage in life. Further that withdrawal of the services would affect the play based education program. If children play by themselves without supervision they can swallow toys and this compromises their safety.
- 11 Majority of play based education programs are aimed at improving gross motor skills and are conducted outdoors. If there is no supervision this can endanger the lives and safety of the children as they play on swings and slides.
- 12 Further that the withdrawal of services can result in the children being handed over to strangers, drunken parents or guardians or people who are not mentally stable. This would put their lives at risk and would endanger their safety. The children would miss out on nutritional meals, which are part of the ECD program.
- 13 The Department further submitted that in ECD replacement labour is not permissible, as employees who are employed to work with children must be vetted against the child protection register.
- 14 Further that working with children requires special skills. Passion and character and these skills are not readily available. It was submitted that children in an ECD program need to continue with the specific program depending on developmental age and needs. Any replacement labour will not be able to provide the requisite developmental needs within the ECD program.

Analysis of the submissions and arguments

15 This investigation was initiated by the Essential Services Committee in terms of Section 71 of the Labour Relations Act 66 of 1995 as amended.

16 Section 23(1) and (2) of the Constitution confers upon every worker the right to strike. It provides that:

“(1) Everyone has the right to fair labour practices.

(2) Every worker has the right—

- a) to form and join a trade union;
- b) to participate in the activities and programmes of a trade union; and
- c) to strike.”

17 The importance of the right to strike, a “component of a successful collective bargaining system”, was stressed by the Constitutional Court in *In re: Certification of the Constitution of the Republic of South Africa, 1996*. The Court stated:

“Workers exercise collective power primarily through the mechanism of strike action. In theory, employers, on the other hand, may exercise power against workers through a range of weapons, such as dismissal, the employment of alternative or replacement labour, the unilateral implementation of new terms and conditions of employment, and the exclusion of workers from the workplace . . . The importance of the right to strike for workers has led to it being far more frequently entrenched in constitutions as a fundamental right than is the right to lock out”

18 The Labour Relations Act gives effect to the right to strike as conferred by the constitution. However Section 65(1)(d)(i) provides that “no person may take part in a strike if that person is engaged in an *essential service*”

19 Section 213 of the Labour Relations Act defines essential services as :-

“essential service” means-

- (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.”*

20 Section 91 of the Children’s Act 38 of 2005 as amended provides that: -

(1) Early childhood development, for the purposes of this Act, means the process of emotional, cognitive, sensory, spiritual, moral, physical, social and communication development of children from birth to school-going age.

(2) Early childhood development services means services—

(a) intended to promote early childhood development; and

(b) provided by a person, other than a child's parent or caregiver, on a regular basis to children up to school-going age.

(3) An early childhood development programme means a programme structured within an early childhood development service to provide learning and support appropriate to the child's developmental age and stage.

- 21 As indicated above the ESC conducted public hearings and in the hearings most of the people in attendance were employers and various organizations in the ECD sector. The common submission was that there would be no real threat to the lives and safety of the children in circumstances where ECD practitioners were to embark on industrial action. The common thread on all the submissions was that the ECD providers would in such circumstances put plans in place to ensure that the interruption of the service does not compromise the lives, safety and health of the children and therefore there was no need for the ESC to designate the service as essential.
- 22 The Department submitted that the withdrawal of the service would harm the children's development both psychologically and mentally and this may have a life long impact on their cognitive abilities as adults. Industrial action as part of collective bargaining is not a long-term measure but rather a temporary measure to force an employer to comply with a demand from labour. Whilst the Committee agrees that a total withdrawal of the ECD services to children would have the potential to negatively impact on their development, the same cannot be said for temporary withdrawal of labour.
- 23 On behalf of the Department it was further submitted that the withdrawal of services could lead to children playing by themselves and swallowing toys without supervision. The employers in the hearings submitted that adequate measures are put in place in cases of industrial action and therefore measures are taken to ensure that such eventualities do not happen.
- 24 On the submission that the children may be handed over to strangers, drunken parents or guardians or people who are not mentally stable. The Committee is of the view that this is a very remote possibility and that in the normal course the children go home at the end of the day and the ECD practitioners have no control on what happens at home.

- 25 Although replacement labour may not be an option the employers and interested parties indicated that the ECD centers are part of the community and sufficient contingency measures are in place to ensure that the safety of the children is not compromised. Since these are the people that are working and taking care of the children the committee accepts these submissions.
- 26 Section 28 (2) of the Constitution provides that a child's best interests are of paramount importance in every matter concerning the child. Accordingly in determining whether the to designate ECD services as essential the committee has to balance the rights of children to a safe schooling environment and the right of employees to freedom of association and effective collective bargaining.
- 27 On the submissions made, the Committee is not convinced that the health, life and safety of the children would be compromised if there is industrial action by the ECD practitioners.

Determination

- 28 In the premise the ESC makes the following ruling:

Early Childhood learning is not designated as an essential service.



Joyce Nkopane - Deputy Chairperson

Essential Service Committee

6 January 2016