

IN THE ESSENTIAL SERVICES COMMITTEE  
(HELD AT JOHANNESBURG)

Case No.: ES616

In re: Investigation in terms of Section 71 of the Labour Relations Act, 66 of 1995:  
Whether the service of care of children in schools for **special needs** should be  
designated as essential services

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Designation

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Introduction

1. The Essential Services Committee ("the ESC") on its own initiative decided to conduct an investigation in terms of section 70B (1) (d) of the Labour Relations Act, 66 of 1995 ("the LRA") on whether the service of care of children in schools for **special needs** should be designated as an essential service.
2. The gazetted terms of reference for the investigation were published in Government Gazette No 48660, dated 26 May 2023.

## Details of Hearings

3. Public hearings were held at the following venues:
  - (a) 27 June 2023: CCMA Cape Town and Kimberly
  - (b) 28 June 2023: CCMA Port Elizabeth and Polokwane
  - (c) 29 June 2023: CCMA Durban and Mpumalanga
  - (d) 4 July 2023: CCMA National Office and Rustenburg
  - (e) 7 July 2023: CCMA Bloemfontein

## Background

4. Section 70B (1) provides that the powers and functions of the essential services committee are to –
  - (d) decide, on its own initiative or at a reasonable request of any interested party, whether to institute investigation as to whether or not the whole or part of any service is an essential service.
5. The Essential Services Committee identified the service of care (looking after) of children in schools for **special needs** as a service that needs to be investigated.
6. A school for **special needs** is a school catering for students who have special educational needs due to learning difficulties, physical disabilities, or behavioral problems. Special schools may be specifically designed, staffed and resourced to provide appropriate special education for children with additional needs.
7. The service of care includes all persons taking care of children in specials schools, including and not limited to educators.

## Submissions by interested parties

8. The ESC received submissions from the Western Cape Education Department and the Public Servants Association.
9. Ms. B Daniels, a Director responsible for special schools in the Western Cape Education Department made submissions that in special schools there are day scholars and children that are residential. They have 45 special schools. There are teachers and class assistants that look after the children in the special schools. There are also public service staff in the hostel/residential for care and support of daily living of the kids. Learners are always supervised by the public service staff.
10. For younger learners 6-13 years there needs to be adult supervision for the safety of the children. The more able learners in the high school also require supervision but not as much as the younger children and much depends on the weighting of each disability. Each disability category has the below weighting.

### Disability weightings:\_Special Schools

Barrier/Disability	Weighting
Learners with mild to moderate intellectual disability	2,5*
Learners with severe intellectual disability	3
Learners with specific learning disability/dyslexia	3
Learners with epilepsy	3
Learners with physical disability and cerebral palsy	4
Learners who are blind or deaf	5
Learners with severe behaviour challenges	5
Learners on the autism spectrum	6

12. The ratio of teacher/learner ratio depends on the weighting. The weighting is divided from the class size average of 35, for example the class size for autism would be 35 divided by 6 and the teacher/pupil ratio would be 6, meaning that there would be six learners per teacher.
13. Children in special schools cannot be left without supervision as their lives, health and safety might be endangered.
14. The residential children have a higher requirement of care as the kids require assistance with bathing, dressing and all other life requirements.
15. The Public Servants Association sent written submissions supporting the designation of care of children at special schools as an essential service.

### **Applicable Legal Principles**

16. In determining whether a particular service should be designated as an essential service the ESC is guided by the legal principles as indicated herein below.
17. 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."
18. The right to strike is a fundamental right and just like any other constitutional right it is not absolute. 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".

19. The legislature has enacted the Labour Relations Act 66 of 1995 in order to give effect to the rights contained in the Constitution. 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".
20. 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".
21. Strike action is also an important element underlying our collective bargaining system (*See National Union of Metal Workers of SA and Others v Bader Bop (Pty) Ltd and another, 2003(3) SA 513(CC)* at paragraph [13]).
22. Brassey (in *Commentary on the Labour Relations Act*, Volume 3, Juta) notes that an essential service is narrowly defined in our law; that the emphasis is on threats to safety and security, and that considerations of mere expense and inconvenience fall beyond the ambit of the definition of an essential service.
23. The Labour Court endorsed this view of Brassey in *SA Police Service v Police & Prisons Civil Rights Union & Others (2007) 28 ILJ 2611 (LC)*, when it ruled that not all employees of the South African Police Service render an essential service which prohibits them from embarking on strike action. The Labour Court held that it is the service that is essential, not the industry. The suggestion that finance administrators, human resource personnel, tea ladies and cleaners render an essential service by reason only of being employed by the SAPS was, in the Court's view, difficult to comprehend. It could not be argued, on the definition of essential service in the Act, that the interruption of the service of the above

workers would “endanger the life, personnel safety or health of the whole or part of the population”.

24. This was confirmed by 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:

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“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)”

25. 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.

26. 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.

27. 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

28. What is clear from the submissions made is that special schools provide care services (including educational services) for children with a range of disabilities. The care required by these children varies, but what is similar is that because of the children's disabilities, they require care in the form of assistance and supervision when in class by their Educators and when in residences by the public service staff, in order for them to be able to live, learn or perform life activities like bathing, dressing, and many other life activities.
29. Having considered the written and oral submissions of the parties, the panel makes the following designation.

### Designation

30. The care of children in schools for special needs is designated as an essential service.

Adv. L Bono



ESC Panel Chairperson

31 August 2023