

## **IN THE ESSENTIAL SERVICES COMMITTEE**

**Case No.: ES800**

**Investigation in terms of Section 71, read with 70B(1)(d) of the Labour Relations Act, 66 of 1995:**

**Whether pre-school elementary (primary) school services rendered by educators and support staff in basic education should be designated as essential services**

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### **Designation**

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#### **Introduction**

1. The Essential Services Committee on its own accord decided to investigate the above services.
2. As provided for in section 71, read with section 70(2)(a) of the Labour Relations Act, 1995 (Act No 66 of 1995 as amended), the ESC gazetted a notice that it was conducting an investigation on the above services. (see Government Gazette No. 51903, dated 17 January 2025).
3. The Committee called upon written submissions and the submissions were received from the following parties:
  - a. SADTU;
  - b. NAPTOSA;
  - c. PSA; and
  - d. Department of Basic Education (including provincial departments)

6. Notice was also given that the ESC would hear oral representations on the following dates and at the venues mentioned below:
- 11 February 2025  
CCMA Offices, 28 Harrison Street, Johannesburg
  - 12 February 2025  
CCMA Offices, 97 Govan Mbeki Avenue, Gqebera
  - 13 February 2025  
CCMA Offices, 78 Darling Street, Cape Town
  - 14 February 2025  
CCMA Offices, 275 Anton Lembede Street, Embassy House, Durban

### **Summary of the Submissions**

7. SADTU submitted that a number of countries have designated pre-school and elementary education as essential. The BELA includes early childhood development (Grade R) into formal schooling. One of the critical activities at school level involves the supervision of children some as young as four years old who require constant supervision in addition to learning. A school has various categories of learners per age cohort. Children in higher grades need far less supervision than children in the lower grades such as foundation phase. The Cambridge Dictionary defines "Pre-School" as, "of or relating to children who are between about three to five years old and have not yet gone to school, and their activities". The Cambridge Dictionary defines "Elementary School" as, "a school that provides the first part of a child's education, usually between five and eleven year old". Primary and secondary education (grades 1 to 12) has not been universally classified as an essential service by the ILO because its interruption, while highly disruptive, does not typically pose an immediate threat to life, personal safety, or health. The ILO aims to balance the rights of workers to strike with the need to maintain essential services. Countries like South Africa and Canada have advocated for education to be declared an essential service, arguing that prolonged strikes can

significantly impact students' futures and societal development. However, the ILO has maintained its stance, focusing on the immediate and direct impact on public safety and health when defining essential services. It is the position of the Constitutional Court that rights must be interpreted in the least restrictive manner. The Constitutional Court would on the basis of its judgements be loath to unnecessarily restrict the right to strike. As SADTU, noting both definitions of pre-school and elementary school definitions respectively, the submission is that is no practical basis for elementary schools being included in this ESC process. Further, elementary education from Grade 1 to Grade 12 does not fall within the ILO definition of essential services.

8. NAPTOSA argued that in South Africa, the terms "Pre-School" and "Elementary Education" are not used in formal education policy and can be misleading. Instead, the system follows the Curriculum and Assessment Policy Statement (CAPS) and the South African Schools Act (SASA), which define Education Phases as follows:
  - Early Childhood Development (ECD) (ages 0–4)
  - Grade R (Reception Year)
  - Foundation Phase (Grades R–3)
  - Intermediate Phase (Grades 4–6)
  - General Education and Training (GET) Band (Grades R–9)

South Africa is a member of the International Labour Organisation (ILO), having ratified Convention 87 on Freedom of Association and Protection of the Right to Organise and Convention 98 on the Right to Organise and Collective Bargaining. The ILO's Freedom of Association Committee has repeatedly held that education does not constitute an essential service. Section 213 of the Labour Relations Act (LRA) defines an essential service as "the interruption of which endangers the life, personal safety, or health of the whole or part of the population." Education, while important, does not meet this definition. Even during strikes, learners' lives are not endangered in the way that would justify suppressing teachers' right to strike. Education does not involve immediate risks to life,

health, or personal safety. The CCMA has previously ruled against classifying education as an essential service, aligning with international best practices (Case No.: ES239). Declaring education an essential service would prohibit teachers from striking under Section 65 of the LRA. Equal Education, in its 2013 Position Paper, argued that "Teaching is Essential, but it is not an Essential Service." The impact of a strike, while disruptive, does not meet the legal threshold for an essential service. International and domestic law support the right of educators to strike. Declaring education an essential service would:

- Violate South Africa's constitutional and international obligations.
- Undermine collective bargaining and fair labour practices.
- Fail to address systemic educational challenges.

9. PSA argued that while the PSA recognizes the critical role of education in society and the impact of disruptions in schooling, they strongly oppose the classification of Pre-School and Elementary Education as an essential service for the following reasons:

- It contradicts established labour rights under both domestic and international law.
- It unjustifiably limits the right to strike, which is a constitutionally protected right of workers.
- There are alternative measures to mitigate disruptions in education without removing workers' rights.

The International Labour Organization (ILO) has established that education services are not classified as essential services because disruptions do not pose an immediate threat to life, personal safety, or health. While education is undoubtedly important, a temporary interruption does not pose an immediate risk to life or health in the same way as healthcare or emergency services. For the reasons outlined above, the PSA strongly opposes the classification of Pre-School and Elementary Education as an essential service. They urged the ESC to:

- 9.1. Reject the classification of these services as essential under the LRA.
- 9.2. Recognize international and domestic legal frameworks that protect the right to strike.

9.3. Encourage alternative solutions such as Minimum Service Agreements instead of outright restriction of industrial action.

10. The Department of Basic Education (including the provincial departments of education) argued that in the 2018 ESC investigations together with its stakeholders and structures such as, Equal Education, Centre for Child Law (UP), Section 27, Economic Research Southern Africa and KZN Provincial Parliament, made the necessary representations at the said hearings, which representations reflected in part as follows:

10.1. "A blanket approach to declare education an essential service was not possible as education comprised of many services or functions and the question arose as to which service or function should be declared an essential service, e.g. teaching performed by educators did not include providing security.

10.2. On the question of whether in the event of a strike, learners would be at risk: In terms of the LRA, a protected strike required advance notice to be given and accordingly the situation would not be different from where children are required to stay at home due to adverse weather or outbreak of disease. Therefore, the life, personal safety and health of children attending schools was not entirely dependent on staff in schools and therefore they could not be endangered by an interruption where lawful procedures for such interruption had been complied with.

10.3. The pronouncements of the Constitutional Court, the application of the principles of legality and the rule of law, it was not possible for the ESC to declare education an essential service and such a designation could well constitute the exercise of a power not conferred on it;

10.4. In appreciation of section 23 of the Constitution as well as section 213 of the Act on the significance of the right to strike, DBE holds strong reservations against

the designation of the Grade R component or elementary education as an essential component;

- 10.5. No evidence exists highlighting whether threat to life, personal safety or health or whole or part of the population, as defined in the Act, would emerge if the ECD component falls short or excluded from the “essential service” category;
- 10.6. Thus, DBE notes that no further justification exists to invoke section 36 of the Constitution (Limitation of Rights);

## Legal Framework

- 11. 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.”
- 12. 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”.
- 13. 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”.
- 14. 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”.

15. 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)”

16. 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]).

17. 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.

18. 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.
19. 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. 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 oral and written submissions made**

20. The panel acknowledges that education is not an essential service. However, this classification is not static.
21. In terms of section 213 of the LRA, 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 Services;
22. All the parties that participated in the investigation argued that the services in question should not be designated as essential services. The basis of their argument is similar. It focuses on the ILO prescripts as well as the definition of essential services in South Africa.
23. Indeed, the ILO has held that the possible long-term consequences of strikes in the teaching sector do not justify their prohibition (Par. 590). Although the ILO has found that the education sector is not an essential service.



24. The position at International law that education should not be designated an essential service, that the possible long term consequences of strikes in the teaching sector do not justify their prohibition and that the ESC can not override the SA Government's international obligations.
25. In terms of our case law, a restrictive interpretation must be given to the meaning of essential services so as not to impermissibly limit the extent of the right to strike. It follows that there is no scope in law for the ESC to designate basic education (including pre-school education and elementary/primary school education) as an essential service.

### Designation

26. Having considered the submissions, the Committee has decided not to designate the services in question as essential services.

Done and signed on 21 March 2025



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Luvuyo Bono  
ESC Chairperson