

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

Case No.: ES 31

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

Whether certain services provided by privately owned old age homes as well as nursing homes and institutions that care for assisted and frail care patients and that are not registered with the Department of Social Development or that do not receive any financial assistance or subsidy from the State, should be designated as essential services

DESIGNATION

1. Introduction

- 1.1 The Essential Services Committee ("the ESC") received a number of referrals in terms of section 73 of the Labour Relations Act, 66 of 1995 (*the LRA*). These referrals were referred by privately owned old age homes as well as nursing homes and institutions that care for assisted and frail care patients but are neither registered with the Department of Social Development nor do they receive any financial assistance or subsidies from the State (these homes and institutions are collectively referred to as "Homes" hereinafter).

- 1.2 The Homes sought clarity on whether they were covered by previous designations of the ESC (as referred to in paragraph 2 below) (see in this regard the referrals of *Belvidere Park Home Owners Association vs ICHAWU* (ES 22), *Panorama Park Aftree Dorp vs NEHAWU* (ES 24), *Unitaspark NG Gemeente vs NEHAWU* (ES 27), *Rosemore Home for the Aged vs ICHAWU* (ES 28) and *Livewell Suites vs ICHAWU* (ES 32).
- 1.3 After consideration of the aforesaid referrals as well as the previous designations of the ESC, it was decided by the ESC to conduct the current investigation in terms of section 71 of the LRA.

2. Previous designations of the ESC and current investigation

- 2.1 During September 1997, the ESC designated the following services as essential:

"7. The following services provided by nursing homes which are registered as welfare organisations in terms of the National Welfare Act, 1978 (Act No. 100 of 1978), to patients in need of moderate (level 2) and maximum (level 3) care:

- a) Emergency health services and the provision of emergency health facilities;*
- b) Nursing; and*
- c) Medical and paramedical services.*

8. The following services in support of the services referred to in paragraph 7:

- a) Physiotherapy;*
- b) dispensary;*
- c) catering;*
- d) laundry;*
- e) boiler;*

- f) transport; and
- g) security"

(See Government Gazette 18276 dated 12 September 1997 – Notice No 1216)

2.2 During December 2004, the ESC also designated the following services as essential:

"a) the whole of the services provided by old age homes registered in terms of the National Welfare Act (Act No. 100 of 1978);"

(See Government Gazette 27104 dated 24 December 2004 – Notice Nr. R1462).

2.3 The referring parties, referred to in paragraph 1.2 above, are privately owned old age homes, nursing homes and/or homes that specifically care for assisted and frail care patients. They are not registered with the Department of Social Development and they do not receive financial assistance or subsidies from the State.

2.4 Notice of the investigation was given in the Government Gazette of 21 November 2014 (see Gazette Number 38229) as well as in the Sunday Times newspaper. Interested parties were requested to submit written submissions to the ESC. Notice was also given that oral representations could be made at various centres around the country.

2.5 The notice referred to in paragraph 2.4 above invited written representations on:

"... whether private owned old age homes and centres that are not subsidised by the government are rendering essential services".

3. Details of Hearings

3.1 A number of written submissions were received and a number of interested parties also made oral representations to the ESC (these are dealt with in detail in paragraphs 5, 6 and 7 below).

3.2 Public hearings were held at the follow venues:

- (a) CCMA George – 8 January 2014;
- (b) CCMA Cape Town – 9 January 2015;
- (c) CCMA National Office (Johannesburg) – 12 January 2015
- (d) CCMA Durban – 26 January 2015; and
- (e) CCMA Port Elizabeth – 3 February 2015.

3.3 An inspection *in loco* was also conducted on 7 February 2015 at the Livewell Suites, a Home in Cape Town.

4. Legal Framework

4.1 It is necessary to set out the legislative context within which the ESC must make its designation.

A The Constitution of the Republic of South Africa, 108 of 1996

4.2 Section 23(2) of the Constitution of the Republic of South Africa, 1996 (*"the Constitution"*) states that:

"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."*

4.3 In terms of Section 36 (1) of the Constitution:

"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, taking into account all relevant factors, including:

- (a) *the nature of the right;*
- (b) *the importance of the purpose of the limitation;*
- (c) *the nature and extent of the limitation;*
- (d) *the relation between the limitation and its purpose; and*
- (e) *less restrictive means to achieve the purpose."*

4.4 Section 39 (1) of the Constitution states:

"(1) When interpreting the Bill of Rights, a court, tribunal or forum –

- (a) *Must promote the values that underlie an open and democratic society based on human dignity, equality and freedom;*
 - (b) *Must consider international law;*
 - (c) *May consider foreign law.*
- (2) *When interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purpose and objects of the Bill of Rights.*

- (3) *The Bill of Rights does not deny the existence of any other rights or freedoms that are recognised or conferred by common law, customary law or legislation, to the extent that they are consistent with the Bill."*

B The Labour Relations Act, 66 of 1995

4.5 Section 3 of the Act states:

"Any person applying this Act must interpret its provisions –

- (a) to give effect to its primary objects;*
- (b) in compliance with the Constitution; and*
- (c) in compliance with the public international law obligations of the Republic."*

4.6 Section 65 (1) (d) (i) of the Act states that:

"No person may take part in a strike ...if-

- (d) that person is engaged in-*
- (i) an essential service".*

4.7 An 'essential service' is defined in section 213 of the Act 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*".

4.8 The Constitutional Court has approved that essential services must be restrictively defined (See ***Chirwa v. Transnet Ltd and Others* 2008 (4) SA 367 (CC)** at paragraph [101]).

4.9 Furthermore, strike action is the primary mechanism through which workers exercise collective power (See ***Ex-Parte Chairperson of the Constitutional Assembly in re: Certification of the Constitution of the Republic of South Africa, 1996* (4) SA744 (CC)** at paragraph [66]). 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 has led to it being far more frequently entrenched in constitutions than the right to lock out".

4.10 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]). The Court stated:

"In the first place, it is of importance for the dignity of workers who, in our constitutional order, may not be treated as coerced employees. Secondly, it is through industrial action that workers are able to assert bargaining power in industrial relations. The right to strike is an important component of a successful collective bargaining system".

4.11 In terms of Section 39 (1) (b) of the Constitution and Section 3 (c) of the Act, the ESC must consider international law and interpret its role in compliance with the public international law obligations of the Republic.

4.12 The first part of the definition of an “essential service” in the Act is:

“a service the interruption of which endangers the life, personal safety or health of the whole or any part of the population”

This definition is drawn directly from a number of the International Labour Organisation (hereinafter referred to as “the ILO”) decisions (see Freedom of Association – Digest of Decisions and Principles of the Freedom of Association Committee of the Governing body of the ILO, fifth (revised) edition, International Labour Office, Geneva).

C Right to Strike and Essential Services

4.13 The ILO Committee of Experts and the ILO Committee on Freedom of Association have interpreted the right to freedom of association in the ILO Constitution and Convention 87, and the right to collective bargaining in Convention 98, as including the right to strike.

4.14 The right to strike is also recognised in article 8 of the International Convention on Economic, Social and Cultural Rights. It is recognised in article 6 of the European Social Charter and in article 27 of the Inter-American Charter of Social Guarantees.

4.15 The right to strike is also found in a number of modern constitutions, such as those of Italy, France, Portugal, Greece, Brazil, Argentina and Mexico.

4.16 Decision 581 of the ILO reads:

“to determine situations in which a strike could be prohibited, the criterion which must be established is the existence of a clear and imminent threat to the life, personal safety or health of the whole or part of the population”.

The same criterion is referred to in Decisions 582 and 583 as constituting what is meant by "essential services in the strictest sense of the term" ("the strict definition").

- 4.17 Historically, public services tended to be strongly identified as essential services rather than the private sector, but as the drafters of the Act noted:

"Developments at an international level have encouraged the erosion of the public/private labour law divide. ILO Convention No.87 of 1948 concerning the Freedom of Association and the Protection of the Right to Organise and the European Social Charter apply equally to the private and public sectors. These international requirements, together with Conventions 98 and 151 of 1978, guarantee to public and private sector employees (excluding the police and armed forces) the full range of freedom of association and collective bargaining rights" (Chirwa v Transnet Ltd and Others 2008 (4) SA 367 (CC)).

- 4.18 The ILO delineates State enterprises as subject only to the "strict definition" in Decision 577, setting parameters to the application of decision 574 on "public servants exercising authority in the name of the State".

- 4.19 The ILO Committee of Experts has stated the following in relation to essential services:

"The principle whereby the right to strike may be limited or even prohibited in essential services would lose all meaning if national legislation defined these services in too broad a manner. As an exception to the right to strike, the essential services in which this principle may be entirely or partially waived should be defined restrictively: the Committee therefore considers that essential services are only those the interruption of which would endanger the life, personal safety or health of the whole or part of the population".

5. Written and Oral Representations made to the ESC

A. George – 8 January 2015

5.1 Belvidere Park Home Owners Association ("Belvidere")

Belvidere was represented by Ms A. Erasmus, an official of the National Employers Association of South Africa ("NEASA").

Ms. B. Kimber was called to testify as an expert on behalf of Belvidere. She testified as follows:

- (a) She is a professional nurse, registered with the South African Nursing Council ("SANC") since 1971. She has 18 (eighteen) years of experience working with the elderly and she is currently employed as the Care Manager at Belvidere.
- (b) Her responsibilities as the Care Manager include the overall medical care of 10 frail residents and the overall care of the occupants/residents living in the 80 cottages in Belvidere (around 100 elderly persons are housed there). The average age of the residents is 80 years. Ms Kimber also runs the operations of the day clinic for both residents and staff.
- (c) By virtue of her training, experience and qualifications, she:
 - (i) Is registered as a SANC General Nurse;
 - (ii) Has received a National Vocational Qualification ("NVQ") Assessors award in care work; and

- (iii) Has extensive experience in the moving and handling of patients, nursing duties in frail care, assisted living care and dispensing and administration of medication in frail care and assisted living.
- (d) Belvidere employs 2 registered nurses, 11 care workers, 2 domestic workers, 2 chefs and 2 kitchen assistants.
- (e) The frail care unit provides a 24 hour service (with a day and night shift). The Home uses a special hoist to lift patients up and move them. The operator of the hoist must be trained.
- (f) Patients that are paralysed have to be moved/changed every two hours. This is to ensure that patients do not get bed sores.
- (g) Caregivers also assist patients by feeding them. It is therefore imperative for the care giver to know the patient. This is especially important when frail patients have special dietary needs.
- (h) The care that patients receive must be consistent. Many of them have psychological problems. Any small change in the behaviour of the patient will be picked up by the care giver and reported appropriately so that the necessary intervention can be made.
- (i) The different serious ailments that residents suffer from include dementia, terminal illnesses and other age related illnesses. Specialised care and services are required, which include assisted living and home-based care. The services provided by Belvidere are of such a specialised nature that same might not be able to be provided on short notice by alternative service providers.

- (j) Currently over 80% of the staff contingent are affiliated trade union members and strike action will have far-reaching and serious implications with regards to providing adequate and consistent care and services for the sick, frail and elderly residents of Belvidere.
- (k) Strike action, which would lead to an interruption of Belvidere's services, will result in the serious disruption of the elderly residents' day to day lives, be a cause of considerable anxiety and distress to the elderly residents and will damage the trust relationship between the residents and staff, in particular those who suffer from various degrees of dementia, which demands strict continuity of care routines and carers.
- (l) Furthermore strike action poses a clear and imminent threat to life, personal safety and/or health of all residents or at least a large number of the residents.
- (m) Alternative service providers or replacement labour, if such were available, are not familiar with routines and practices such as fire drills, how to operate the hoist, etc.
- (n) A work stoppage may not necessary lead to someone's immediate death, but it will lead to serious regress and ultimately pose a risk to the health and well-being of the patient.
- (o) Consequently Belvidere is of the view that the services that it renders should be designated as essential services.

5.2 Rosemore Home for the Aged ("Rosemore")

Rosemore was represented by Mr G. Gersuad, an official of NEASA. Rosemore called two witnesses to testify on its behalf, Mr L. Frans and Ms C. Witbooi.

Mr Frans, the Manager of Rosemore, testified as follows:

- (a) Rosemore was established in June 2001. Rosemore cares for very frail patients. The Home is a registered Non-Profit Organisation and is also registered as a Residential Facility.
- (b) All of the residents are above 60 years of age and some are above 90 years of age. The home has 97 permanent residents who are cared for on a 24 hour, 7 day a week basis. It also has an emergency bed for patients who need urgent placement and who have been individually identified by a social worker as an abused or neglected elderly person. This bed is funded by the State.
- (c) The residents of Rosemore suffer from an array of ailments with some of the residents suffering from more than one disability. Therefore, daily nursing, caring and the provision of medication is of the utmost importance. Any disruption/interruption of these services will lead to an imminent threat to life, personal safety and health of these residents.
- (d) The residents suffer from ailments, which include:
 - 24 frail care/bedridden residents;
 - 22 cases of diabetes;
 - 49 cases of hypertension;
 - 11 epileptic cases;
 - 27 post cerebral vascular accidents;
 - 17 psychiatric cases;
 - 7 residents with amputations;
 - 29 incontinent cases;
 - 7 blind elderlies;

- 22 dementia cases;
 - 39 wheelchair bound residents.
- (e) Rosemore cannot not make use of any alternative service providers due to financial constraints. Furthermore suitable replacement labour providers are not easily attainable.
- (f) Each staff member plays a vital role in the wellbeing of the residents, and the residents of the Home are totally dependent on the services rendered, particularly caregivers, nursing, cleaning and kitchen staff.
- (g) The Home's complement of staff is 66 staff in total, 44 of which are trade union members. By virtue of the fact that such a large component of the staff are union members, being around 66.7%, all or most services rendered by Rosemore will be affected during a strike.
- (h) During 2014 there was a strike at Rosemore. The duration of the industrial action was one week and it had a negative impact on the Home and its residents. Only 22 out of the 44 union members participated in the industrial action. If all of the union members participated in action, the consequences would have been irreparable. The use of and payment of alternative service providers drained the Home financially. To make use of alternative service providers would not be financially feasible over the long term and for longer periods of strike action.
- (i) The strike caused distress and anxiety to the elderly due to the fact that the services rendered by the Home are based on a close trust relationship between the existing staff and the elderly residents.

- (j) The Department of Social Development has issued Norms and Standards for Residential facilities for Older Persons in July 2013. These norms and standards, as well as certain local government regulations must be complied with.
- (k) Examples of the norms and standards that must be complied with are:
- The Home must have an infection prevention and control programme in place;
 - The Home must provide a building or facility that is safe and accessible for older persons and that complies with municipal by-laws;
 - The Home must comply with applicable laws/regulations with administering medication to older persons;
 - A safety programme for residents and staff members must be maintained;
 - Appropriate staff must be provided to cope with the health needs of residents.
- (l) The aforesaid norms and standards require specific tasks/requirements to be met. For example, very specific requirements are to be met when dealing with environment cleaning, waste management, linen management, etc. This will not be possible (or very difficult) if replacement labour is brought in during a strike.
- (m) Mr Frans then proceeded to testify as to the specific duties that certain categories of employees perform. These duties are set out in detail in the job descriptions that were entered into evidence.
- (n) The categories of employees that Mr Frans testified about were:
- Professional Nurses;
 - Caregivers;
 - Cleaning and laundry services;
 - Chef/Supervisor.

(o) With regards to the professional nurses, they perform *inter alia* the following services (those that relate specifically to this investigation):

- Management functions;
- Treatment and care of all residents;
- Keep registers of medication;
- Assist with the ordering of stock (such as medicine, bandages, etc.)
- Nursing duties include:
 - Taking of blood pressure;
 - Wound care;
 - Applying tube feeding;
 - Handle catheters;
 - Apply and control oxygen;
 - Ensure that medical legal risks are excluded;
 - Create a safe environment within which services are delivered;
 - Supervise the treatment and nursing services to all residents;
 - Assist the doctor during routine visits.

(p) Caregivers are not unskilled employees. They are required to undergo training and they must be registered with the Department of Social Development. Caregivers performing *inter alia* the following duties (relevant to this investigation):

- Making of beds;
- Ensure washing basins and cloths are clean;
- Comb hair of patients at least once a day;
- Men must be shaved at least every 3 days;
- Nail treatment (at least once a week);

- Puts resident outside in a chair (and cover him/her, where required);
- Assist with the brushing of teeth;
- Wash water bottles;
- Move residents every 2 to 4 hours and ensure residents are dry. Any patient that is left wet for 6 hours or more, will get a soft skin and this will lead to bed sores;
- Encourage residents to drink fluid and make hourly rounds to monitor residents;
- Emptying of urine bags and report abnormalities;
- Ensure that all necessities are within reach of residents;
- Report bed sores, (scabs, swelling, etc. to seniors);
- Assist residents when eating by:
 - Ensuring that the patient sits correctly;
 - Ensuring that the food of blind residents is placed in the "clock" position;
 - Removing bones out of food and mashed food;
 - Ensuring that the resident receives fluids after meals;
 - Ensuring bed railings are up for patients that are bed-ridden;
 - Ensuring that patients are strapped into chairs when necessary;
 - Completing the daily care plan for all frail-care, Dementia, Alzheimer's and psychiatric patients; and
 - Caregivers also sometimes administer medicine, but under supervision of a nurse.

(q) The cleaning and laundry employees perform normal/standard services associated with laundry and cleaning services. The Norms and Standards as issued by the Department of Social Development prescribe that cleaning must be done in a certain way.

- (r) The supervisor/Chef also performs normal/standard catering/cooking services. Emphasis, however, was placed on the fact that many residents have special dietary needs. For example, those that are diabetic and those that have to eat "soft" food.
- (s) The services provided by security staff is essential because they must know the residents. A risk is created if a Dementia or Alzheimer's resident walks out of the grounds.
- (t) Mr Frans concluded by conceding that the services provided by the Financial and Administrative staff cannot be regarded as essential services, but that the other services rendered should be designated as essential services.

Ms C. Witbooi then testified as an expert on behalf of Rosemore. She testified as follows:

- (a) She is a nurse and she is very experienced in the nursing environment. She has over 35 years' of experience and she has 25 years' experience of working with the elderly. She is currently employed as the senior supervisory nurse at Rosemore. Her responsibilities as the caretaker/nurse include the overall care of frail residents as well as the operational care of the residents. She is a registered nurse.
- (b) She holds *inter alia* the following qualifications:
 - (i) Senior Certificate;
 - (ii) Tertiary Education;
 - (iii) Nico Malan Nursing College Certificate;
 - (iv) Nursing Diploma.
- (c) Residents of the Home suffer from dementia, diabetes, hypertension, epilepsy, cerebral ailments, vascular accidents, psychiatric cases, disabilities and other terminal

illnesses and age related illness. The residents require specialised care including assisted living and home-based care. The services provided by the Home are of such a specialised nature they cannot be provided on short notice by alternative service providers. Residents received the full spectrum of nursing services.

- (d) Ms Witbooi also testified as to the specific duties performed by the employees of Rosemore and confirmed the evidence of Mr Frans in this regard.
- (e) The home is for very frail members of the community and all residents are over the age of 60 years, some over 90 years of age. The latter are all totally dependent on the assistance of another person, and in the majority of cases, are dependent on more than one person. These residents cannot care for themselves.
- (f) Some residents have more than one disability and daily nursing, caring and medication is of the utmost importance. These residents also need assistance with personal hygiene, oral hygiene and basic personal functions like clothing, feeding and moving around.
- (g) Residents require 3 meals a day and diabetics require very specific care in this regard. Their blood sugar levels require close monitoring. Disruption of the aforesaid assistance and service could have dire consequences for the residents, including giving rise to a number of medical emergencies and even death.
- (h) A strike will result in the serious disruption of the elderly residents' day to day lives, endanger the personal safety of the residents from a medical point of view, and in addition cause considerable anxiety and distress to the elderly residents. Furthermore, the trust relationship between the residents and staff will be damaged, in particular those who suffer from mental conditions such as dementia, which demands strict continuity of care routines and carers.

- (i) Under cross examination by Mr Fish of ICAWU, Ms Witbooi conceded that when Rosemore faced a strike in the past, replacement labour was brought in to ensure that services continued. She stated that replacement labour was provided by a labour broker during the strike. As skeleton staff was on duty, the health of residents deteriorated. Ms Witbooi could, however, not give more detail of the manner or extent of the deterioration of the health of the residents. She also stated that, in her view, caregivers are unskilled. Caregivers are able to commence work at the Home and then get training as they go along.

B. Cape Town – 9 January 2015

5.3 Livewell Suites ("Livewell")

The following written submissions were made on behalf of Livewell:

- (a) Livewell is a private full time care facility for people living with Alzheimer's and Dementia.
- (b) Alzheimer's can be defined as "a progressive mental deterioration that can occur in middle or old age, due to generalized degeneration of the brain. It is the commonest cause of premature senility".
- (c) Dementia can be defined as "a chronic or persistent disorder of the mental processes caused by brain disease or injury and marked by memory disorders, personality changes, and impaired reasoning". Many causes of dementia symptoms exist. Alzheimer's disease is the most common cause of a progressive dementia.

- (d) Memory loss generally occurs in dementia. However, memory loss alone doesn't mean the patient has dementia. Dementia indicates problems with at least two brain functions, such as memory loss and impaired judgment or language, and the inability to perform some daily activities such as paying bills or becoming lost whilst driving. Dementia can make the patient confused and unable to remember people and names. Changes in personality and social behavior may occur. Some causes of dementia are, however, treatable and even reversible.
- (e) Common signs and symptoms include:
- Memory Loss;
 - Difficulty communicating;
 - Difficulty with complex tasks;
 - Difficulty with planning and organizing;
 - Difficulty with coordination and motor functions;
 - Problems with disorientation, such as getting lost;
 - Personality changes;
 - Inability to reason;
 - Inappropriate behavior;
 - Paranoia;
 - Agitation; and
 - Hallucinations.
- (f) Livewell provides full time care and treatment for people living with the conditions and in some instances day care and part time support. The staff comprises a majority of caregivers and companions that look after residents on a 24/7 basis.
- (g) Caregivers require a minimum of one month's training as a home care giver and three months' practical training by a registered institution.

- (h) Currently Livewell cares on a full time basis for 60 residents and it employs 207 staff members.
- (i) As opposed to other old age homes, all the activities for the daily living needs of the patients need to be done for them. This includes personal hygiene, brushing of teeth, eating, dressing, taking medication, changing diapers, all toilet functions need to be accompanied, etc. The residents receive 24 hour care daily, including weekends, as they cannot function on their own.
- (j) Should the personnel go on strike, the residents/patients will be left unattended and as a result would not be able to perform any of the activities as set out above. In the event of the patients being left unattended, they will urinate and defecate anywhere, they will attempt to escape (which is a great urge with dementia sufferers) and injure themselves in the process. The patients will not be fed, no medication will be taken or distributed and the possibility exists that they will fight and injure each other. They will not find their rooms as they need to be shown where their rooms are every time. Patients will die if the services are interrupted.
- (k) With the aged, the levels of assistance are classified as follows:
- Old age home (person is independent)
 - Assisted living (person is independent but receives assistance)
 - Frail care (person is in hospital with full time medical assistance)
 - Dementia care (person can only survive with full time assistance from another)
- (l) Traditionally persons living with dementia were institutionalized (meaning imprisoned) in a psychiatric facility such as Sterkfontein, Weskoppies, Valkenberg and other such facilities, formerly called mental asylums. These institutions, however, have very limited capacity.

- (m) The service offered by Livewell is to extend a level of dignity and humanity to those suffering from the illness.

On 7 February 2015 the ESC conducted an inspection *in loco* at Livewell.

- (a) The inspection was also attended by the Department of Social Development, the South African Older Persons Forum and Action on Elder Abuse SA, as interested parties. The parties were advised that the purpose of the inspection was to have a visual understanding of the evidence placed before the ESC during the public hearings. The parties were advised that the ESC would focus on the areas that the interested parties made submissions on during the public hearings, being: nursing, caregiving, catering, laundry and security (including groundsman).
- (b) Ms. M Fraenkel, the Manager: Mental Healthcare of Livewell, led the inspection. She firstly gave background information on the process of caring and looking after dementia patients. She stated that Livewell is not a normal old age home but a category 3 care level institution. It provides less restriction and medication on patients and replaces that by increasing human caring through nursing staff. Patients are also allowed to have pets for companionship.
- (c) The inspection commenced in the lounge and dining area. The dining area is divided into sections depending on how assisted the patients are. There is an area for the patients that require more assistance and an area for those requiring less assistance.
- (d) The entertainment area was visited next. Here the patients have music groups playing under supervision of the caregivers. There is entertainment every day. Patients cannot distinguish between the days of the week.

- (e) In the patient's room there are patient notes for the caregivers and nurses to converse with the patient. The patients also do not bath as they have a fear of depth. The toilets are slightly elevated to assist patients.
- (f) A nurse looks after 20 to 30 residents. Caregivers are grouped according to the patients that they look after. This is done to ensure that the routine of the patient is maintained.
- (g) In the kitchen it was observed that there is general menu for the patients and a limited number of specific choices.
- (h) The laundry has a standard industrial strength washing machine. The laundry department is divided into two sections, one being for the washing and the other for storing the clean linen. Linen change is done once a week, unless there is a need to change sooner. Clothes are washed twice a week.
- (i) Caregivers were observed reading stories for the patients, with a nurse supervising them. The on duty nurse explained that each patient has a caregiver allocated to him/her. The caregiver is with the patient from the morning until the evening. They start in the morning by washing the patient and then they spend the rest of the day with the patient. The nurse on duty is the only one who dispenses medication to patients. When the caregiver thinks there is something wrong with the patient, she is called and she will examine the patient. If necessary, she will call the doctor. She also takes the blood pressure of the patient and conducts other medical tests.
- (j) The security guard on duty stated that he does not know all the residents. He continued by stating that on one occasion there was a patient that went missing and was found at the ABSA bank. When a patient is found who has gone missing, one must plead with him/her to come back and speak nicely to them. The security guard

has not received specific training. He has acquired his skills through experience. When a security guard goes to search for a missing patient, they will do this with the other staff members.

5.4 Helderberg Village ("Helderberg")

Helderberg was represented by Mr. L. Coetsee. The following submissions were made on behalf of Helderberg:

- (a) Helderberg is non-profit company. It is a privately funded, gated lifestyle retirement village. It comprises 720 dwelling units, 37 one and two bedroom apartments, 15 assisted living bed-sitter apartments annexed to the health care centre and a 70 bed health care centre. Helderberg has over 1 200 residents. Helderberg receives no financial aid from the State.
- (b) In addition, it also has a dining room/restaurant, administration, housekeeping, laundry, a common property area and infrastructure offices. It does its own on-site maintenance, fixes blocked drains, etc.
- (c) The average age of residents is 78 to 79 years of age.
- (d) The health care centre provides for the needs of any resident requiring medical care and/or assistance. The medical care is primary sub-acute treatment and a recovery unit registered for 18 beds, a frail care unit comprising 51 beds and a dementia unit with an 11 bed capacity.
- (e) The acuity level of the residents in the health care centre determines the level of care that they require. Acuity can be defined as the level of severity of an illness. This is one of the parameters considered in patient classification systems that are designed to

serve as guidelines for the allocation of nursing staff, to justify staffing decisions, and to aid in the long-range projection of staffing needs and the budget.

(f) The following table sets out the level of care:

Category	Description
1 Independent self-care	<ul style="list-style-type: none"> • Capable to live independently and without assistance of nursing staff • Expected to still drive, cook, shop and take care of own financial affairs • Still able to attend social functions and events
2 Assistance required moderate care	<ul style="list-style-type: none"> • Starting to require a little assistance • No longer coping with the requirements of daily life • Need some assistance in either mobilizing or washing or with taking daily medication • Can still live alone with the assistance of a part time caregiver
3 Dependent maximum care Required	<ul style="list-style-type: none"> • Requires a lot of nursing and needs regular help with dressing, washing and toileting • Requires constant supervision • May or may not be bed-ridden • Needs to be given medication at prescribed times • Diagnosed with Alzheimer's Disease/Dementia

(g) The acuity level of the residents in Healthcare is currently a majority category 3, which is indicative of maximum care required by the residents. They are totally dependent on nursing care and cannot do without it.

(h) The average age of the residents in Healthcare is currently 89 years.

(i) The current staffing levels of the unit is as follows:

<u>Unit</u>	<u>Room capacity</u>	<u>Bed capacity</u>	<u>Category of staff</u>	<u>Employees per day shift</u>	<u>Employees per night shift</u>	<u>Total</u>
Frail Care	4 single rooms	35	Enrolled Nurse	1	1	4
	18 single en-suite rooms		Enrolled Nursing Assistant	1	0	2
	7 studio apartments		Ward Attendant	4	3	14
Sub-acute	8 sub-acute/sick bay rooms	24	Professional Nurse	1	1	4
	13 frail care rooms		Enrolled Nursing Assistant	1	1	4
			Ward Attendant	3	1	8
Dementia	11 single rooms	11	Enrolled Nursing Assistant	1	0	2
			Ward Attendant	2	0	8

Village Nursing Services	0	0	Professional Nurse	1	0	2
			Enrolled Nursing Assistant	1	0	2
			Ward Attendant	1	0	2

- (j) In addition there are support and infrastructure activities that support the provision of the care services as set out above.
- (k) Helderberg provides full time care facility for people living with Alzheimer's and Dementia. Men suffering from these illnesses have the constant urge to escape. Furthermore, if they see someone in a mirror, they want to know who the person is.
- (l) The United Nations' Guidelines for Elder Abuse recognizes 3 basic categories of elderly abuse, namely domestic, institutional and self-neglect as well as 7 major types or forms, i.e. physical abuse, sexual abuse, emotional or psychological abuse, neglect, abandonment, financial or material exploitation and self-neglect. Self-neglect includes behaviour that threatens their health or safety.
- (m) The older the person is, the more vulnerable such person becomes to abuse. The services offered by Helderberg are to ensure a level of dignity and humanity to all its residents and to monitor and prevent incidents of elder abuse.
- (n) Should the provision of medical care, sanitation and security services be disrupted, there is a heightened probability of elder abuse. In the health care centre the risk of harming, injuring and degrading patients, but even more so, the risk of injury and even death to some, may increase. The above is especially relevant to the Dementia and

Alzheimer's sufferers. The Home ensures that levels of care, as required by law, are met.

- (o) Replacement labour would be very difficult to obtain in the event of a strike. It would also be very difficult to move patients to other facilities in the event of a strike.
- (p) Helderberg uses armed response for security purposes.

C. Johannesburg – 12 January 2015

5.5 Johannesburg Coronation Foundation ("Coronation")

Coronation was represented by Mr. H Richards. The following submissions were made on behalf of Coronation:

- (a) Coronation is registered as a non-profit organisation. Coronation's main object, in terms of its constitution, is *"the provision of residential accommodation and care to older persons"*. Coronation is also registered as a Public Benefit Organisation in terms of the Income Tax Act, 58 of 1962. Finally, Coronation operates through the Queenshaven Old Age Home, which is registered as a Residential Facility in terms of the Older Persons Act, 13 of 2006.
- (b) Coronation manages two residential care facilities, being Queenshaven Old Age Home and Hillcrest Cottages.
- (c) At Queenshaven, the care activities are structured into three sections:
 - Section one consists of the provision of accommodation to older persons who can demonstrate the ability to live substantially independently.

- Section two consists of the provision of accommodation and all meals as well as 24/7 nursing services. Older persons being cared for in this section are deemed semi-independent (sometimes referred to as semi-frail). Ancillary to section two is a primary health care facility providing nursing care to older persons. The purpose of the primary health care facility is the provision of recuperative nursing services on a 24/7 basis to older persons who have undergone surgery or who are suffering from short-term illness or injury.
 - Section three focusses on the provision of accommodation and all meals as well as 24/7 nursing care to older persons who are physically and cognitively frail. Section three also provides end-of-life care.
- (d) Queenshaven provides rehabilitative support services in the form of structured physiotherapy and occupational therapy as well as social work services. Support services are available eight hours per day, Monday to Friday. A dispensary is managed by suitably qualified staff to control the administration of prescribed medicines in sections two and three, as referred to above.
- (e) The rental fees charged reflect the income level of the residents and only cover 54% of the operating costs of Queenshaven. The balance of the operating costs (46%) is raised through fund raising activities and draw-downs from an endowment fund established in the late 1950's.
- (f) At Hillcrest Cottages, older persons who can live independently and choose to buy life-rights in their living unit are accommodated.
- (g) Coronation also provides home based care for older persons in the immediate surrounding area of Queenshaven. The outreach programme provides the full

spectrum of social and caregiver services to older persons living in sub-economic council flats and who have been identified as vulnerable persons requiring these services on an ongoing basis. Coronation receives a State subsidy of R250 per person per month, exclusively for this programme.

- (h) At Queenshaven there are at any one time 360 to 390 older persons spread across the three sections mentioned above, with an approximate spread as follows:
 - Section one - independent living: typically cares for approximately 245 persons;
 - Section two - semi-frail care: cares for 60 persons; and
 - Section three - frail care: cares for 47 persons.
- (i) The average age of the residents at Queenshaven is 82 and a half years. 88% of residents at Queenshaven are female and of these residents, 85% are single (widowed).
- (j) At the end of 2012, Coronation established that Queenshaven has a dementia rate of 21% among all residents. This figure reflects both the national population average and the international average for this disease.
- (k) 82% of residents at Queenshaven receive the old age grant as their primary (only) source of income. The remaining 18% receive a monthly pension from a past employer or retirement fund. The average amount of this monthly pension does not exceed R5 000 per month.
- (l) At Hillcrest Cottages, all 24 residents are in receipt of a private pension, the monthly amount being approximately R7 000 on average.
- (m) There are 110 older persons presently receiving daily home-based care services (in terms of the outreach programme referred to in paragraph (g) above). 5% of this group

has disabilities and 10% of this group are confirmed HIV positive. All 110 persons receive basic nursing care, social welfare services, transport to a provincial hospital when required, and one meal per day in terms of the programme. The average age of the target group is 69 years. 100% of the target group lives on some kind of government grant and all are unemployed.

(n) The staff profile of Coronation is as follows:

- It employs 120 persons;
- 110 employees provide care services;
- 62 are registered nurses or health care workers;
- 4 employees provide occupational therapy services;
- 3 employees provide social work services;
- 14 employees provide laundry services;
- 15 employees provide cleaning services;
- 12 employees provide catering services; and
- Staff providing indirect care services: 10, of which 5 persons provide management and administration services and 5 persons provide maintenance and building repair services to residential and community based older persons.

(o) In South Africa, the care of older persons is governed by the Older Persons Act. The Act defines "basic needs" as *"needs which must be met in order to ensure an older person's survival and includes shelter, food, water, access to health care services and access to social security"*.

(p) Section 20 of the Older Persons Act provides that every service provider providing a community-based care and support service and every operator of a residential facility must have measures in place to promote the rights of older persons, which includes *inter alia* access to care and support services.

- (q) There can be no justifiable or equitable reason to differentiate between an old age home subsidised by the State and an old age home not subsidised by the State when determining essential services. Old age homes not subsidised by the State and operating primarily in the lower income group of older persons provide a range of care services that would otherwise have to be provided by the State. In order to comply with its obligations in terms of the Older Persons Act, Coronation would need uninterrupted services through which it can comply with its legal mandate.
- (r) The care of semi-frail and frail older persons, both in residential facilities and in the community should not be subordinated to the dynamics of the collective bargaining processes. It is in the interests of society and humanity that mechanisms be sought to manage the care services to vulnerable older persons during collective bargaining disputes. Older persons in the lower income levels generally require a higher degree of care services and these services cannot be placed on hold in the event of a strike.

5.6 Flower Foundation

The Flower Foundation was represented by Ms. N Liebenberg. The following submissions were made on behalf of the Flower Foundation:

- (a) The Flower Foundation is a registered Non-Profit Organisation and it is registered as a Public Benefit Organisation in terms of Section 30 of the Income Tax Act. The Flower Foundation aims to provide accommodation and care for those over the age of 55 years both at the Foundation's retirement villages and care facilities. The care offered to all residents includes a broad spectrum of physical, psychological and counselling support, provided by suitably skilled staff. Care is offered 24 hours a day at the frail care facilities.

- (b) The Foundation cares for over 800 residents of whom over 240 require care or assistance with their daily living. In addition it cares for over 75 older persons suffering from Dementia and Alzheimer's.
- (c) The frail care residents and residents suffering from Dementia and Alzheimer's are very reliant on the staff and the following categories of staff are deemed as essential to the life, safety and health of these vulnerable residents:
- Nursing staff;
 - Care workers;
 - General assistants;
 - Kitchen staff;
 - Laundry staff; and
 - Security staff.
- (d) These members of staff provide:
- (i) Support and Care to the elderly as a vital means in sustaining human life, because:
- The elderly have special needs;
 - They have a low immune system;
 - They have decreased mobility;
 - The elderly require medication administration and monitoring (chronic/acute dependency);
 - They require medication maintenance, which is vital to sustain life; and
 - They receive oxygen on an ongoing basis.
- (ii) Assistance with daily living, as the elderly require:
- Hydration and nutrition;
 - Medication administration (Chronic / Actual);

- Bathing;
 - Dressing; and
 - Assistance with mobility.
- (iii) Special nutritional needs, as some of the elderly require:
- Peg feedings; and
 - IV therapy.
- (iv) Specialised nursing care, as many of the elderly receive:
- Wound care;
 - Post-operative care;
 - Palliative care;
 - End of life care; and
 - Oxygen maintenance.
- (v) Infection Control (low immune systems), because some of the elderly may have/require:
- Low immunity;
 - Communicable diseases;
 - Infections;
 - General hygiene (laundry); and
 - Facility cleanliness (kitchen food handlers).
- (vi) A Clean hygienic environment due to their condition – they have no control over bodily functions, which leads to:
- Risk of disease outbreaks;
 - Bed sores;
 - Bladder infections; and

- Communicable diseases.
- (vii) Support of special needs Dementia and Alzheimer's residents – these residents require constant safety and security monitoring due to them:
- Escaping;
 - Wandering; and
 - They often require restraint.
- (e) In terms of the Constitution of South Africa and the Older Persons Act, older persons have the right to:
- Social security;
 - Access to nutrition;
 - Access to health care;
 - Access to shelter; and
 - Protection against abuse.
- (f) Section 30(2) of the Older Persons Act defines "Abuse" and which in summary states *"an act of an omission or even a lack of appropriate action which can result in harm or distress to an older person."*
- (g) The withdrawal of labour at old age homes or frail care facilities or facilities caring for Alzheimer's and Dementia Sufferers will lead to the abuse of the elderly and could possibly induce abuse and neglect. It could create incidents were the basic needs of older persons are not properly met. For example they may not receive adequate food and care and the actions of persons striking would be tantamount to causing such neglect or abuse.

5.7 Methodist Homes for the Aged

The Methodist Homes were represented by Ms J. Butcher. The following submissions were made on behalf of the Methodist Homes:

- (a) Methodist Homes for the Aged has 14 Homes situated in the Gauteng and North West Provinces. Nine of the homes have frail and mid care facilities. They provide accommodation for some 2 000 residents over the age of 60 years, ±600 of these residents are in the frail care nursing sections.
- (b) These residents require 24 hour care and nursing services 365 days a year. Most of the patients are very frail (Grade 3) with many residents suffering from Alzheimer's disease or other forms of Dementia. Many also suffer from other chronic diseases e.g. cardiac disease, hypertension, stroke and diabetes. Services are also provided to residents who require assistance in independent living units to enable them to continue to live in their units for as long as possible.
- (c) The staffing levels of the frail care sections are according to the minimum staffing requirements as set out in the Norms and Standards issued in terms of the Older Persons Act. 12 hour shifts are worked by the staff to ensure 24 hour coverage by the nursing staff and care workers.
- (d) A minimum service agreement cannot be entered into as the staffing levels cannot be reduced further. The Basic Conditions of Employment applies and employees are given a salary that is comparable within the industry. There is a fine line between what the residents and their families can afford to pay and what employees are paid.
- (e) Families are generally not able to adequately care for residents at home due to various reasons. The older person is thus placed in a frail care centre. Many of the residents

do not have family who are in a position to provide care for them in the event of a strike. Many families are no longer resident in South Africa. Some residents do not have any family at all. Methodist Homes for the Aged is entrusted with the responsibility to care for the residents placed in their homes. These residents are the most vulnerable members of society. They are unable to provide for themselves, including basic activities of daily living. Residents and volunteers cannot be exposed to the risks and danger when strike action becomes violent and/or includes intimidation.

(f) The care required by residents in the 24 hour facilities includes:

(i) Assistance with activities of daily living:

- Bathing and dressing;
- Care of bodily functions;
- Nutrition and hydration including special diets, feeding of residents and special feeds e.g. tube feeds and PEG feeds;
- Assistance with mobility and activities;
- Administration of daily medication and prescribed treatment; and
- Chronic and acute treatment and care.

(ii) Special nursing care:

- Monitoring of chronic conditions e.g. blood pressure and blood glucose monitoring;
- Palliative care;
- Post-operative or post hospitalisation care;
- Wound care;
- Long term oxygen therapy; and
- End of life care.

(iii) Infection Control

- Ensure a clean, safe environment (residents have a low immunity);
- General hygiene and cleaning services;
- Laundry services;
- Strict control of food handlers and kitchen services;
- Prevention of infection;
- Reduce the risk of disease outbreaks e.g. conjunctivitis, scabies, urinary tract infections; and
- Prevention of communicable diseases.

(g) The essential services required for the care of older persons includes:

- Nursing and care worker personnel;
- Cleaning services;
- Laundry services;
- Kitchen services; and
- Security services (even protest action can be very frightening to older persons).

(h) In terms of the Constitution of South Africa, the Older Persons Act and the Declaration of the Rights of Older Persons, older persons have the right to:

- Social security and appropriate social assistance
- Access to adequate nutrition and fluids
- Access to health care to ensure their physical, mental and psychological well-being
- Access to safe accommodation and shelter
- Protection from abuse.

(i) It is critical that frail care services (old age homes, residential care facilities, frail care facilities) at both subsidised and private institutions continue to be classified as

essential services. This is to ensure the continued care and protection of frail, vulnerable residents who are unable to care for themselves. Failure to protect the older persons will result in the abuse and neglect of older persons who cannot care for themselves. If the basic needs of vulnerable older persons are not properly provided, it could also result in litigation against the organisation.

5.8 Trans 50 Association ("Trans 50")

The Trans 50 Association was represented by Mr. J. Wilkenson. The following submissions were made on behalf of Trans 50 Association:

- (a) Trans 50 owns and manages 6 centres in South Africa.
- (b) Trans 50 is a registered Non-profit Organisation and it is registered as a Public Benefit Organisation in terms of the Income Tax Act. It has 1500 residents and it employs 280 staff members as well as 120 contracted staff. The average age of the residents is 78.
- (c) The following categories of residents stay at Trans 50:
 - Fully functional residents who are able to care entirely for themselves;
 - Semi frail residents, either in their own apartment or cottage, who need a little planned assistance, usually related to medication or activities of daily living;
 - Physically frail residents who need constant care in terms of basic activities of daily living;
 - Mentally frail residents who need constant support and care in all areas of daily living; and
 - Rehabilitation residents who are with Trans 50 for only a short time, whilst they recover from surgery or illness.
- (d) The services offered at the centres include:

- Post-operative care of PEG tubes;
- Management of circulatory insufficiency in the elderly;
- Management of nasogastric feeding;
- Tracheostomy care: using suction to remove respiratory secretions via a tracheostomy care;
- Continuous assessment of the residents' health status and health needs;
- Management, control and administering of medication;
- Management of depression in the older person;
- Administering of eye, nose and/or ear medication;
- Fluid balance/intake and output;
- Prevention and management of decubitus ulcers;
- Full bed bath and assistance to wash;
- Bathing/showering a resident;
- Repositioning and transferring of a resident;
- Dressing and undressing a resident;
- Emergency management of fractures caused by falls;
- Management of a resident who has had a cerebral vascular accident (stroke);
- Care of the elderly with hearing loss;
- Care of the visually impaired/blind resident;
- Prevention and management of dehydration;
- Feeding of a resident;
- Initiating intravenous infusion;
- Managing laundry for a resident;
- Emergency management of bleeding;
- Emergency management of a diabetic coma;
- Management of all medical emergencies (24/7);
- Keeping of nursing records;
- Testing of blood glucose levels;

- Support of a resident receiving chemotherapy treatment;
- Management of epilepsy and seizures;
- Insertion of a urinary catheter;
- Managing shock;
- Nebulisation;
- Cataract removal - post operative care;
- Pin and Plate - post operative care;
- Removal of sutures and wound clips;
- Management of spinal fusion;
- Stoma care;
- Myocardial infarction;
- Eye care;
- Congestive cardiac failure;
- Caring for residents with amputations;
- Management of burns;
- Management of persons with Parkinson's disease; and
- Management of persons with Alzheimer's disease.

(e) The following services should be designated as essential services:

- Security;
- Nursing;
- Care practitioners;
- General assistants;
- Catering; and
- Laundry.

(f) Each older person has the right to be treated humanely. Trans 50 is duty bound to physically take care, feed and love the older person to enable them to live a dignified

life. It is clear that trained staff are needed to assist older persons and by utilising the assistance of volunteers, the elderly are placed at risk.

- (g) A Care Practitioner must also at all times do the following in terms of the Code of Conduct for Care Practitioners:
- Treat older persons with respect and dignity and honour their right to appropriate care, privacy, cultural and religious beliefs, confidentiality and habits;
 - act with integrity and conscientiously in the performance of his or her duties;
 - discharge his or her duties with efficiency, competency, due care and diligence;
 - maintain effective inter-personal skills recognising the importance of personal and courteous communication;
 - not engage in any act of dishonesty, corruption or bribery;
 - protect older persons against any form of danger;
 - take the necessary action to prevent and combat any form of abuse, exploitation or victimisation of older persons;
 - be accountable for the quality of care given and strive to advance knowledge and skills through ongoing training;
 - provide older persons and their families with clear information on the execution of a care practitioner's tasks;
 - refer questions concerning the older person's health status to family members of the older person, and
 - report any allegation or suspicion of abuse to the relevant authorities.
- (h) Private old age homes have to comply with the Older Persons Act, the Bill of Rights, Health, Nursing and Pharmaceutical laws, Health and Safety Act, etc. Therefore, if the private old age homes are not declared essential services, it would mean that Homes would not be able to comply with legislation. This could have serious consequences for vulnerable older persons residing at the residential facilities, i.e. endangering the lives, personal safety and health of the vulnerable population.

5.9 Operation Compassion

Operation Compassion was represented by Pastor L. Sanabria. The following submissions were made on behalf of Operation Compassion:

- (a) South Africa, as a member of the international community, is required to conform to international standards. From a political perspective this translates into accepting, ratifying and the implementation of all legal instruments that have been presented by the United Nations. It also requires a proper implementation of the Bill of Rights as enshrined in our Constitution.
- (b) The Madrid Resolutions, as ratified by South Africa in 2002, commit the State to be directly responsible for the care of all older persons. This means that the State must ensure the protection and care of all persons over the age of 60 years. Operation Compassion believes that South African legislation has been put in place to ensure that the government complies with what it has committed to in the international arena.
- (c) In terms of the Bill of Rights everyone has inherent dignity/equality and the right to have their dignity and rights respected and protected.
- (d) The Older Persons Act requires that all facilities accommodating or providing services to older persons must be registered. At no time does registration imply that a facility will in fact receive any funding from the State.
- (e) In the employer/employee relationship the trade unions have a vital role to play. Every person in the country has the right to belong to a union. However, in dealing with the welfare sector, civil society is being dealt with (rather than organised business), which delivers services that should in fact be delivered by government.

- (f) Other than State owned and operated old age homes, all old age homes regardless of whether subsidised or not, require that the families of residents must contribute financially towards the accommodation of older persons. The economic position of the country is precarious. Rising costs in food, fuel and utilities together with salaries and maintenance of homes must be built into the unit cost of an old age home. It is inevitable that as costs increase it becomes more difficult for families to cover costs. Whilst it is understandable that the unions would want increases for members, if the families of residents are not able to pay, then residents will be faced with being removed from the home. With each residential vacancy comes the joint possibility of job losses and the closure of a home. This has the effect of more persons, who are not cared for by the State, and they will be subjected to physical neglect and emotional abuse.
- (g) There is a need for unions to recognise that the homes that are not operated by the State are in fact attempts by civil society to address the service shortfall of the State.

C. Durban – 26 January 2015

5.10 Bill Buchanan Association for the Aged ("BBAA")

BBAA was represented by Mr L. Wright of Laurie Wright and Partners Inc. Attorneys. Mr D. Forbes testified on behalf of BBA. Mr Forbes testified as follows:

- (a) BBAA was established on 2 July 1962 to provide accommodation for pensioners, by the Durban Corporation. It was then taken over from the local authority in 1971 by the Association. The Home looks after 646 residents at present.

- (b) Emmerson House currently caters for 91 frail residents, whose problems range from dementia (restrained to chairs), wearing nappies full time, bed-ridden, unable to attend to their own hygienic requirements and unable to feed themselves – all of which requires 24 hour monitoring and assistance by staff to whom they can relate and have confidence in.
- (c) In order to ensure that these frail residents are cared for properly and to ensure that the requirements of the Older Persons Act and the Constitution of South Africa are met, the following activities are paramount:
- (i) Social Security (as defined in the constitution);
 - (ii) Access to nutrition;
 - (iii) Access to health care;
 - (iv) Access to shelter; and
 - (v) Protection against abuse, which in section 30(2) of the Older Persons Act, in summary states *"an act or an omission or even a lack of appropriate action which can result in harm or distress to an older person."*
- (d) In order to provide for the above, the following services must be provided to frail and semi-frail residents 24 hours a day:
- (i) Assistance with daily living:
 - Hydration and nutrition
 - Chronic and acute medicine administration
 - Bathing
 - Dressing
 - Assist with mobility
 - Feeding

(ii) Maintenance of a hygienic environment to prevent disease outbreaks:

- Bedsores
- Infections
- Skin problems (scabies)

(iii) Specialised nursing care:

- Wound care
- Oxygen therapy
- Post-operative care
- Colostomy care
- Catheter care
- Monitoring and administration of insulin therapy

(iv) Infection control:

- Daily change of bed linen, as and when necessary
- Changing of personal clothing
- Daily bed bathing
- 2 hourly change of nappies
- Mouth care

(v) Constant emotional support:

- Reassuring anxiety related problems
- Counselling
- Communicating and advising relatives
- Providing family support to residents who have no family

- (vi) Safety of Dementia/Alzheimer patients:
 - Constant supervision and monitoring of patients' movements when wandering
 - Supervising mobility

- (vii) Dealing with emergencies:
 - Falls
 - Fractures
 - Acute medical conditions (cardiac, pulmonary, cerebral)

- (viii) Care of the dying and palliative care (up to 8 deaths per month):
 - Specialised routine care.

- (e) Withdrawal of any of the above services would create incidents where the basic needs of the older person are not met, and this would be tantamount to causing neglect and abuse, for which the Association could be sued civilly and also prosecuted by the State.

- (f) In terms of general hygiene, the laundry operates on a daily basis and handles bedding as well as clothing. Any interruption in this service would pose a serious health risk, as well as a shortage of replacement linen in the home.

- (g) As with the laundry, the kitchen feeds all of the residents three times a day, and caters for special dietary needs such as diabetics, etc. These meals are served at two sittings per meal in the main diningroom as well as in the special area for those residents with mobility problems. The meals in the frail care centre are served to those who are able, with help, to access the dining room, and served on the various floors to those who cannot get to the dining room, and most of the latter have to be fed by staff.

- (h) The logistics involved in providing food to all residents in the care of the Home are vast and would not be easily controlled without staff experienced in the environment. In the frail centre, nursing, kitchen and domestic workers all assist in the feeding of the residents. All cutlery and crockery for all residents has to be washed after each meal, ready for use at the next meal.
- (i) Security is of utmost importance, not only to control access points, but also to protect the property and residents. In this regard the Home has already experienced several break-ins and attempted break-ins, but luckily without harm to any resident.
- (j) The staff of the Association forms an integral team which, if disrupted by strike action, would have serious repercussions on all of the residents in their care, and disastrous consequences on those in frail care.

The following further arguments were then advanced on behalf of BBAA by its legal representative:

- (k) The Constitution of the Republic of South Africa, in section 23, recognises the right to strike, whilst section 11 most importantly, recognises the right to life and section 14 recognises the right to dignity.
- (l) In attempting to balance these rights in the constitutional democracy, i.e. the rights of workers to strike and the right to life, etc., workers in essential services are excluded from the right to strike.
- (m) The Older Persons Act, which became the applicable law dealing with the care of and rights of older persons, provides:

"basic needs" are stated to mean needs which must be met in order to ensure an older person's survival and includes shelter, food, water, access to health care services and access to social security"

"Every service provider providing a community based care and support service and every operator of a residential facility must have measures in place to promote the rights of older persons, which includes amongst others..."

- (n) The Essential Services Committee has designated several services as being essential in the past. These include:
- Nursing
 - Medical and paramedical services
 - Catering
 - Security
 - Pharmaceutical and dispensary
 - Laundry
 - Waste removal
 - Mortuary services
- (o) The services provided by BBAA cannot be taken in isolation of each other but must be seen as part of a composite whole. This includes caring for the elderly persons by providing nursing, linen, general cleanliness and hygiene services in all those facilities and needs that ensure life and the quality of life commensurate with their rights guaranteed to them by the Constitution.
- (p) The right to life, so to speak, trumps all other rights. An interruption of the service may endanger the lives of the residents.

- (q) What circumstances and conditions may cause one individual to collapse and die and cause another no form of distress whatsoever, are impossible to determine in advance.
- (r) Extremely stringent conditions are imposed on those who provide care and shelter for the older persons by the Older Persons Act.
- (s) The ESC was also referred to the matter of ***S v Makwanyane & Another 1995 (3) SA 391 (CC)***, where the Court held that the rights to life and dignity were the most important of all human rights and the source of all other personal rights.

D. Port Elizabeth – 3 February 2015

5.11 Life Esidimeni ("Esidimeni")

Esidimeni was represented by Mr A. Vos. The following submissions were made on behalf of Esidimeni:

- (a) Esidimeni is a fully owned subsidiary of the Life Healthcare Group, and is the largest and oldest hospital partnership in South Africa. It has been engaged in delivering healthcare services to indigent patients, under contract to the national and provincial Departments of Health and Social Development, for over five decades. These services are aligned with national and provincial policies, standards and action plans. These services are 100% funded by government, and are most often awarded on tender.
- (b) The company delivers care centre services in the fields of chronic mental healthcare, frail care, chronic rehabilitation and acute care in five provinces. It offers 4 171 beds through its network of 12 facilities, some of which provide dual services. Esidimeni has a number of businesses nationally, which provide care to older persons with specific

needs. These include psychogeriatric services, 24 hour care for both physically and cognitively impaired patients and palliative care.

- (c) The focus of all Esidimeni programmes is to ensure that the quality of life of residents is maintained at the highest level - with reintegration back into the community being their desired outcome for all patients. Patients resident in Esidimeni facilities are admitted in line with national legislation and provincial guidelines. The distribution of these facilities is as below:

Province	Facility Name	Funded
Eastern Cape	Kirkwood Care Centre	Department of Health ("DoH")
	Algoa Care Centre	DoH & Social Development
	Lorraine Care Centre	Social Development
Limpopo	Shiluvana Care Centre	Social Development
Mpumalanga	Siyathuthuka Care Centre	DoH
Western Cape	Lentegour Intermediate Care Centre	DoH
Gauteng	Waverly Care Centre	DoH
	Witpoort Care Centre	DoH
	Baneng Care Centre	DoH
	Randwest Care Centre	DoH

- (d) The specifications of Esidimeni's contract requires it to comply with all aspects of a category A frail care service/residential facility for disabled persons as described in the national norms and standards regarding the acceptable levels of services to older persons and service standards for residential facilities (issued in terms of the Older

Persons Act) and the minimum standards on residential facilities for persons with disabilities. While Esidimeni is a private company, the services rendered are an essential service that is indispensable to the State in the care of its older persons, as these services form part of the government's overall service provisions to older South African citizens.

- (e) The residents in Esidimeni facilities have profoundly deteriorated mental/or physical functioning ability. They are often unable to understand what is happening in their surroundings. They may require medication, adult nappy changing, feeding tubes to aid with their nutrition and assistive devices, for example wheelchairs. As most of the patients in these facilities are bedridden, there are additional needs, which include nutritional support, bed sore management, security and catering, all of which are provided by Esidimeni staff. Without staff to assist them with eating, dressing, bathing and mobility to ensure their wellness, they would effectively die.
- (f) The Kirkwood care centre, for example, while they do have some older persons in the patient mix, do not provide old age home services in line with the Older Persons Act. The facility is licenced for mental health rehabilitation services. The patients remain at the facility simply because there are no old age homes available to care for them, and because they have chronic mental illnesses with other social behavioural issues, which cannot be accommodated in the community. The services at Kirkwood are essential services, not because it is an old age home, but because the patients who use the service are chronic mental patients who fall under the Mental Health Act and the facility is licenced under this Act.
- (g) There is a difference in what services old age homes provide - as not all older persons require care, and some require 24 hour care or essential care - with a number of different groups in between. Patients who require these services fall under the

Department of Social Development. The approximate groupings of these individuals are:

- (i) Older persons who can live independently;
 - (ii) Those that require some assistance but are otherwise independent;
 - (iii) Those that require assistance and supervision for their daily activities; and
 - (iv) Those that, because of their mental or physical condition and deterioration due to age, require frail care services with 24 hour care.
- (h) Esidimeni has two facilities that cater for the frail care group - Algoa and Lorraine Care Centres. The patients have profoundly deteriorated mental and/or physical functioning ability and are often unable to understand what is happening in their surroundings. They often require medication, adult nappy changing, feeding tubes to aid with their nutrition and other assistive devices, for example wheelchairs. Without staff to assist them with eating, dressing, bathing, and mobility to ensure their wellness, they would effectively die.

5.12 Methodist Homes

The Methodist Homes was represented by Mr H. Barnard, its General Manager. The following submissions were made on behalf of Methodist Homes:

- (a) Methodist Homes has 570 residents and employees 110 staff. They render services to residents that can still function independently, those that require assisted living and those that require frail care. Nursing staff and care workers work with patients in the last two categories. 34 beds are used for patients that are physically impaired.
- (b) 60 of the members of staff care for the 74 patients in frail care. The other 50 staff members render services to the 500 or so remaining residents that live in the cottages.

The frail care patients are often bed ridden, they wear adult nappies, have to be pushed around in wheelchairs and must be washed. They have to be turned around in bed. They cannot do anything without assistance.

- (c) Nurses and caregivers must be essential services. Everybody knows and understands the nature and level of care required in frail care centres. If there should be a strike, then people will die.
- (d) There are agencies that sometimes provide relief staff, but they don't have sufficient enrolled nurses and skilled staff to meet the needs of patients should there be a strike.
- (e) Laundry, cleaning and security services are outsourced, however, cleaners play a very important role, especially for the frail care unit. People soil beds and it is very important to clean this as quickly as possible.
- (f) Due to financial constraints, the Home cannot afford 24 hour security services. Methodist Homes focusses on having proper fencing to protect the residents on the property.
- (g) The agencies that are able to provide replacement labour in the short term would not be able to provide such replacement labour if a strike affected more than one or a few Homes. Furthermore, most Homes simply cannot afford to pay for replacement labour.
- (h) The frail care side of the business is heavily subsidized by the other residents.
- (i) The Department of Social Development is very strict with regards to how many nurses and care workers must be on duty at any given time.

- (j) In Port Elizabeth four frail care centres have recently closed down due to a lack of funds.

5.13 Brooksure Homes - Grahamstown

Brooksure was represented by Mr B. Harvey. The following submissions were made on behalf of Brooksure:

- (a) Brooksure adopted the same position as Methodist Homes. At Brooksure there are a number of patients that do not have all their limbs as well. Brooksure also has independent living people and patients in frail care.
- (b) All the frail care patients require 24 hour per day care. The number of care workers depend on the number of patients in frail care. The physical state of each patient will also play a role in determining how many care workers have to be employed.
- (c) The frail care patients are totally dependent on assistance. They are bedridden, have to be push around in wheelchairs, etc. They cannot do anything for themselves and they need 24 hour a day care.
- (d) Normally a senior sister (nurse), an enrolled nurse and the care workers are on duty. The care provided will differ depending on the state of the patient. For example, a blind person may need one person to help him/her. A heavy set person may require the assistance of persons. The number of care workers relates directly to the nature of the patient's illness/disability/frailty.
- (e) The services that patients receive on a 24 hour basis include moving, turning and massaging so that they don't get bed sores. The patients must be fed. The patients must be washed and their adult nappies must be changed.

- (f) The Home tries to stimulate patients by talking to them or entertaining them. There is thus a relationship of trust that develops between patient and care worker.
- (g) Past disputes with the trade unions have been resolved through private arbitration. CCMA Commissioners have not made a distinction between privately owned old age homes and those receiving State subsidies. The CCMA adopted the approach that since frail care patients are involved, the services rendered must be essential.
- (h) In respect of catering, the patients are totally dependent on the meals that they receive. These patients have to be fed. Older people also have very specific dietary requirements that have to be met.
- (i) Laundry workers are responsible to clean linen and soiled sheets.
- (j) The services that are provided are all linked. Any finding that these services are not essential, would be a breach of the Older Persons Act. In the smaller Homes, care workers may also help in the kitchen with the preparation of food. The services that the employees thus render is interlinked.
- (k) Old people are very vulnerable. Strikes often turn violent and this would have a severe impact on patients. The example was cited where a 94 year old patient fell out of a wheelchair and the patient died 4 days later.

5.14 Amala Health Care ("Amala")

Amala was represented by Ms E. Botha. The following submissions were made on behalf of Amala:

- (a) Amala has a 50 bed capacity of which 40 are currently occupied. The frail care section has a capacity of 25 patients. Currently there are 21 frail care patients.
- (b) Amala agrees fully with the submissions of Methodist Homes and Brooksure. They are furthermore of the view that the nursing, caregiving, laundry, catering and security services should be designated as essential services.
- (c) All the patients in frail care are bedridden. They must be cared for, washed, cleaned, etc. Everything must be done for them.
- (d) Amala used a CCTV system for security.
- (e) Amala employs its own kitchen staff. Patients have special dietary needs and the kitchen staff ensure that this service is rendered.
- (f) The home also has patients suffering from Dementia and Alzheimer's.
- (g) Due to costs constraints, finding suitable replacement labour is highly unlikely.
- (h) In the smaller Homes, care workers may also help in the kitchen with the preparation of food. The services that the employees thus render is interlinked.

5.15 Lavender Lodge ("Lavender")

Lavender was represented by Ms C. McLaren. The following submissions were made on behalf of Lavender:

- (a) Lavender has 14 patients all of whom are in frail care. It employs 15 staff members. The Home does not receive any State subsidy.

- (b) If the Home has to use replacement labour during a strike, then it will have to close down.
- (c) Lavender furthermore confirmed that it agrees with the submissions made by Methodist Home and Brooksure.

5.16 Ann's Care Centre ("ACC")

Ann's Care Centre was represented by Ms. A. van der Merwe. The following submissions were made on behalf of ACC.

- (a) ACC has been in existence for 15 years. There are 30 residents in the Home and they employ 49 staff members.
- (b) ACC delivers an integrated service with its nurses, social worker, care workers, kitchen staff, etc. laundry workers and cleaners. It too made common cause with the other parties that made submissions before it.

5.17 Malabar Homes ("Malabar")

Malabar was represented by Ms. S. Joel. The following submissions were made on behalf of Malabar.

- (a) The Home has 20 frail care patients and a number of assisted living patients.
- (b) There is a link between all the services that are delivered. For example, a patient must be clean, otherwise there is a health risk. If the patient doesn't have a proper diet, then

his/her immune system is negatively affected. The patients must receive good nursing services.

- (c) It is important to have a security guard on duty to protect patients suffering from Dementia and Alzheimer's.
- (d) The Home employs 38 employees.

6. Representations by Trade Unions

6.1 Independent Catering Hospitality and Allied Workers Union ("ICHAWU")

ICHAWU made representations at the hearings held in George and Cape Town respectively. It was represented by its General Secretary, Mr D Fish. A number of ICHAWU shop stewards also attended the hearings. The submissions made on behalf of ICHAWU were as follows:

- (a) The Constitution of the Republic of South Africa allows workers to exercise their democratic right to strike (as set out in the Bill of Rights).
- (b) In respect of Belvidere Home, it is a private home that generates huge profits from residents.
- (c) The professionals, i.e.; Sisters, Nurses and Matrons are paid huge salaries in this institution to care for the residents' health on a day-to-day basis and to provide medication for residents who are or have been diagnosed with various ailments.
- (d) The wage gap between the professionals and the unskilled workers is huge and can only be narrowed by collective bargaining.

- (e) Labour Brokers are able to provide labour inclusive of professional workers and unskilled workers. Belvedere already utilises two professionals that are provided by an outside/external service provider.
- (f) The employer has the resources to engage the services of labour brokers who can replace labour, should a strike take place.
- (g) Residents do not receive any medication from care workers, therefore a strike will not pose clear and imminent threat to life, personal safety or the health of residents.
- (h) Rosemore intended to call an expert witness, a Dr Pedro, to testify at the hearing in George. The witness, however, never testified.
- (i) During a recent protected strike (in November 2014), Rosemore utilised the services of a labour broker to supply replacement labour during the strike.
- (j) Rosemore has no employment equity plan in place and it totally disregards the Employment Equity Act.
- (k) Ms C Witbooi, an expert witness called to testify on behalf of Rosemore, was not aware of the statements set out in her expert notice and she contradicted herself during cross examination.
- (l) ICHAWU disagrees that the trust relationship between residents and staff will be damaged or put at risk should a strike take place.
- (m) ICHAWU does not agree that the two institutions should be declared essential services. The rationale behind collective bargaining is to maintain industrial peace, it is one of the ironies of collective bargaining that its very object, industrial peace, should

depend on the threat of conflict. The protection given to the fundamental right to strike is based on the functional importance of strikes to collective bargaining. Collective bargaining without the right to strike amounts to collective begging. There can be no equilibrium in industrial relations without the freedom to strike.

- (n) Strike action in these institutions will not endanger the lives, personal safety or health of the residents. The employers have the resources to prevent this from happening. Residents are monitored by CCTV to ensure that the residents are watched 24 hours a day.
- (o) Labour brokers are available to supply staff when nurses cannot work.
- (p) Care givers do not perform specialist work and any untrained person can do this work, especially under the supervision of a nurse.
- (q) If a patient is no longer able to pay for the service, he/she will have to leave the facility and go to a public facility.

6.2 National Education Health and Allied Workers Union ("NEHAWU")

NEHAWU made representations at the hearings held in Johannesburg and Durban respectively. It was represented by its National Organiser: Social Development Sector, Mr H. Sekhitla. The submissions made on behalf of NEHAWU were as follows:

- (a) NEHAWU recognises, respects, promotes and advocates for the rights of older persons, as provided for in the Older Persons Act. Therefore, defending and promoting workers' right to withdraw their labour in the form of a strike is always, and shall always, remain the primary responsibility of trade unions and as such cannot be construed as being ignorant to the rights of older persons.

- (b) NEHAWU notes and acknowledges that services to older persons are critical and there is a temptation that services rendered privately should be treated the same as those run by government or subsidised by government. The context, however, between these two sub-sectors of the Social Development Sector differs.
- (c) Initially, at the public hearing in Johannesburg, NEHAWU was not opposed to health services (nurses and caregivers) being declared as essential, but opposed laundry, cleaning, catering and security services being declared as essential services. However, when it made its submissions at the hearings in Durban, it opposed the declaration of all services rendered by old age homes and centres that are not subsidised by government as essential services and for the following reasons:
- (i) A minimum of 48 hours' notice, prior to the commencement of a protected strike, is sufficient;
 - (ii) Arrangements can be made for replacement labour;
 - (iii) As there is no centralised bargaining, it is highly impossible that all institutions can strike at the same time, therefore they can exchange patients and staff members. Collective bargaining takes place at individual old age homes and bargaining cycles differ. A strike at one or two homes cannot lead to a catastrophe;
 - (iv) Arrangements can be made to move patients to other facilities, if need be;
 - (v) Private old age homes admit residents on an affordability basis. They provide "user pay" services;
 - (vi) Indigent senior citizens are not admitted. Those who become indigent while in the system, are discharged. This practice dilutes the argument that private old age homes and centres render essential service. The service cannot be essential when employees are supposed to exercise their constitutional right to strike, while institutions have a way to decide who to admit and not to admit.

- (d) Furthermore, there is no legislation that prohibits the practice mentioned in paragraph (vi) above. Even the monitoring tool used by the Department of Social Development to monitor residential facilities, including old age homes is falling short to monitor this practice.
- (e) The right to strike as provided for in the Constitution, in particular for employees in this vulnerable sector, should not be viewed lightly in that:
- It is an essential element of trade union rights;
 - ILO Convention 98 promotes the right to organize and bargaining collectively. The premise of this right is that collective bargaining is based on the recognition of the fact that employers enjoy greater social and economic power than individual workers; and
 - Workers' right to participate in decision-making in the workplace is hardly recognized. Employees are exposed to exploitative working conditions, where victimisation is imminent. Employees have to choose between either raising issues affecting them or risking their jobs.
- (f) Whilst it is explicit that services to older persons are critical, NEHAWU would find it unjustifiable that services rendered by private old age homes and centres be declared as essential taking into consideration the nature and context within which such services are rendered.
- (g) When the ESC asked why NEHAWU differentiates between State funded and privately funded facilities, the union indicated that it is because the privately funded institutions discharge residents and patients once they cannot afford to pay to stay in the Homes.

6.3 National Union of Public Service and Allied Workers ("NUPSAW")

NUPSAW was represented by Mr L. Thethe. The following submissions were made on behalf of NUPSAW:

- (a) The union agrees that nursing services and the service provided by care workers are essential, however, the union does not agree that the catering, laundry or security services are essential.
- (b) People can be easily trained to cook, to do laundry and to do security work. These services can be performed by unskilled workers and workers can easily be obtained from labour brokers or contract/temporary workers.
- (c) Clients pay for the services at a privately owned old age homes and replacement labour can be paid for.

7. **Representations by Other Interested Parties**

7.1 Department of Social Development ("DSD")

DSD made representations at the hearings held in Johannesburg, Durban and Port Elizabeth respectively. DSD was represented by Ms G. Keetse, representing the Office of the Director-General for the DSD. Representatives of DSD also attended the inspection *in loco* held at Livewell Suites on 7 February 2015. The submissions made on behalf of DSD were as follows:

- (a) The Older Persons Act provides that services to older persons be rendered at community based care centres and residential care facilities. The community based care centres provide services to older persons who still need to remain in their

community but still receive quality services. Residential care is for those older persons who are not in a position to remain in their communities.

- (b) DSD, as custodians of older persons, is mandated by section 22 of the Older Persons Act to monitor all services to older persons for compliance in terms of the norms and standards issued by DSD. It is for that reason that whatever happens in community based care services and residential facilities, be they privately owned, subsidised or state owned, the Minister of Social Development is always held accountable.
- (c) The Department has taken a stance that, given the nature of its mandate, the Non-Profit Organisation Sector (NPOs) is an extension of its service delivery arm. This is so because the Department cannot be everywhere at all times in terms of service delivery. As indicated below, the majority of the old age homes are operated by the private and the NPO sectors.
- (d) Residential facilities provide a basket of comprehensive services under three categories, namely:
 - Independent living: This service is rendered to older persons who only need accommodation but can care for themselves. The facilities normally have flats for rental or life-right buying
 - Assisted living: This category is for older persons who still have the ability to perform most of the daily activities but need assistance here and there (if one is using a wheelchair or has had a stroke)
 - Frail care services: This is for older persons who are mostly bed-ridden and need 24/7 care. They are totally dependent on caregivers and health workers. The workers should always be available to ensure that they are bathed, fed and given

their medication as prescribed. Most of them are using adult nappies, which need to be changed constantly to avoid bed sores. Another category under frail care is older persons suffering from Alzheimer's and Dementia. These categories of older persons are characterized by forgetfulness. They forget their names, their children and even how to dress, to say the least.

- (e) Critical services rendered to patients listed in the second and third categories above (as mandated by section 17 of the Older Persons Act) are as follows:

Services	Implications when service is disrupted
<p>Nursing services</p> <ul style="list-style-type: none"> • Frail older persons are mostly on medication that can only be dispensed by professional nurses. • Some are on life supporting machines, which are the competency of nursing staff. • 24 hour care and support services to frail older persons who need special attention. • Care and supervision services to older persons suffering from dementia and related diseases. 	<ul style="list-style-type: none"> • Disruption of this service will lead to older persons not receiving their medication as prescribed. • This will lead to loss of many lives and the worsening of their condition due to a lack of appropriate care and attention, i.e. injuries. • Older persons suffering from dementia and other related diseases may endanger themselves and others if no care and supervision is provided.
<p>Carers</p> <ul style="list-style-type: none"> • Continuous nappy changing 	<ul style="list-style-type: none"> • Disruption of this service will

<ul style="list-style-type: none"> • Daily bathing • Feeding • Bed making 	<p>lead to older persons developing bed sores since no one will be changing their nappies and making sure that they bathed.</p> <ul style="list-style-type: none"> • Unhygienic environment leads to severe bedsores, which can be fatal. • Frail older persons are mostly bedridden and cannot feed themselves. If carers are not available to feed them their health will deteriorate or they may even die due to starvation.
<p>Catering</p> <ul style="list-style-type: none"> • Preparation and provision of nutritional meals to all older persons • Preparation and provision of special diets according to dietary requirements 	<p>Interruption of this service can cause loss of life since:</p> <ul style="list-style-type: none"> • Some medication cannot be taken on an empty stomach and must be timeous • Lack of a proper special diet can lead to complications and deterioration.
<p>Laundry Services</p> <ul style="list-style-type: none"> • Provision of clean clothes and linen on a daily basis. 	<p>If frail older persons cannot be provided with clean clothes including bed linen and towels, the facility will be very unhygienic. As a result the health of older persons will deteriorate, which can lead to the</p>

	loss of life, as some may aggravate sores, etc.
Security	Frail older persons sufferings from dementia need 24 hour care, including security. If the service is disrupted older persons may be in danger of being attacked. But critically, those suffering from dementia may harm themselves and others or even get lost. It is preferable when the older persons deal with security officers that are familiar to them, as they understand their conditions in this regard, as opposed to guards who are not aware of the conditions.

(f) Privately owned facilities may not be able to secure replacement labour during industrial action and for the following reasons:

- Dealing with frail older persons requires specialised training, skills, passion and commitment.
- Section 31 of the Older Persons Act provides that no one should be employed to work with older persons before ensuring that the person in question has not been convicted of committing any crimes against an older person. The employer will have to conduct security checks, which may take time. It is not going to be possible to do this when there is a strike action.

- (g) The following basic differences between State run, subsidised and privately owned facilities were also highlighted:
- Privately owned facilities: These facilities are privately owned and registered with the Department of Trade and Industry. They are not registered as Non-Profit Organisations (NPOs).
 - Partially Subsidized: These facilities are registered with the Department of Social Development as NPOs. They are reliant on government and other generous donors for funding.
 - State run facilities are 100% funded by the Department of Social Development (government).
- (h) Privately owned facilities are for profit making but have the following legal obligations:
- Must be registered in terms of section 18 of the Older Persons Act;
 - Must comply with the minimum norms and standards as set out in the Act and regulations thereto; and
 - Make their services accessible to all older persons.
- (i) Facilities that need to operate privately must register with the Department of Trade and Industry. DSD only monitors compliance in terms of the legislative norms and standards.
- (j) The State owned facilities and the NGOs are not in a position to assist privately owned facilities due to inadequate resources. They are always short staffed and their capacity is limited. Moving frail older persons around will also pose challenges due to the fragile nature of their state of health.

- (k) The following is a breakdown of State and NGO facilities and their capacity. These facilities always have waiting lists due to the limited number of patients that can be accommodated at any given time;

NO	PROVINCE	STATE OWNED	CAPACITY	NGOs
1.	Eastern Cape	1	60	51
2.	Free State	3	190	33
3.	Gauteng	1	110	85
4.	Kwa-Zulu Natal	1	60	44
5.	Limpopo	1	74	7
6.	Mpumalanga	None	None	18
7.	Northern Cape	None	None	25
8.	North West	1	140	26
9.	Western Cape	None	None	118
TOTAL		08	640	407

- (l) The interruption of the services rendered at the privately owned old age homes would result in the loss of life and pose danger to the older persons who are residing in the centres, as mentioned above. The whole of the services rendered in the mentioned institutions are essential and must be declared as such.
- (m) The fact that the whole of services rendered in the same institutions, which are fully funded and partially funded by the State are already declared essential, should also serve as a precedent and an indication that the same service, as rendered in the privately owned institutions, is an essential service in terms of the provisions of the LRA.

8. Survey of the Evidence and Arguments

- 8.1 The constitutional right to strike is well entrenched in our law. Section 23(2) of the Constitution gives effect to this right. It states:

"Every worker has the right-

- (a) ...;*
- (b) ...; and*
- (c) To strike."*

- 8.2 Section 64 of the Act sets out the procedure that must be followed when employees wish to embark on protected strike action, the provisions of which are not relevant for present purposes.

- 8.3 Section 36 of the Constitution allows for the limitation of the rights that are embodied in the Bill of Rights. The relevant section states:

"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, taking into account all relevant factors, including:

- (a) the nature of the right;*
- (b) the importance of the purpose of the limitation;*
- (c) the nature and extent of the limitation;*
- (d) the relation between the limitation and its purpose; and*
- (e) less restrictive means to achieve the purpose."*

8.4 Section 65 of the Act provides for the limitation on the constitutional right to strike. The relevant sub-section thereof for purposes of this application is section 65 (1) (d) (i), which states:

"No person may take part in a strike ...if-

- (d) that person is engaged in-*
- (i) an essential service".*

8.5 It is trite law that a court, tribunal or forum, when interpreting the Bill of Rights, must give consideration to international law (see paragraphs 4.11 to 4.19 above).

8.6 It is furthermore trite law that essential services must be restrictively defined (See ***Chirwa v. Transnet Ltd and Others 2008 (4) SA 367 (CC) at paragraph [101]***).

8.7 Chaskalson *et al* (in *Constitutional Law of South Africa, Volume 4, Second Edition, Juta*) point out that having regard to the definition of essential service in the Act, the prohibition on strikes in essential services operates only in very restricted circumstances.

8.8 Similarly, 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.

Brassey notes further:

"It is the service that is essential – not, as was so under the previous Act, the industry within which such service fell. Thus essential and non-essential service workers can be found

working side by side in the same institution. In a hospital for instance, doctors and nurses might be essential service workers, whereas the cleaners and gardeners would probably not be”.

- 8.9 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*”.
- 8.10 The above judgment was confirmed on appeal by the Labour Appeal Court. Waglay JA held that while employees employed under the Public Service Act Proclamation 103 of 1994 provide important support and complementary functions to the SAPS, they do not form part of the SAPS that is designated as an essential service by the Act. Such employees were accordingly not prohibited from striking in terms of section 65(1) (d) of the Act. Waglay JA held that giving effect to the interpretation sought by the SAPS, to the effect that all persons employed by SAPS rendered an essential service, would unjustifiably restrict the fundamental right to strike enshrined in the Constitution.
- 8.11 The Labour Appeal Court judgment was confirmed on appeal by the Constitutional Court. A unanimous Constitutional Court held that the Labour Appeal Court could not be faulted in holding that not all SAPS employees are engaged in an essential service, and that the wide interpretation sought by the SAPS was incorrect. The Constitutional Court held that “a

restrictive interpretation of essential service must, if possible, be adopted so as to avoid impermissibly limiting the right to strike”.

8.12 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:

8.12.1 It is the service which is essential, not the industry or the institution within which the service falls;

8.12.2 Only those employees who are truly performing an essential service, may be prohibited from striking; and

8.12.3 Essential and non-essential service workers may be found working side by side in the same institution.

8.13 Essential service is defined in section 213 of the Act as:

“a service the interruption of which endangers the life, personal safety or health of the whole or any part of the population”.

8.14 Before the ESC can designate any service as essential, it must be satisfied that:

8.14.1 It is a service, or part thereof, that is essential. It is not employees, or a business or industry that is essential (see **SAPS v. POPCRU and Others** supra);

8.14.2 There must be an interruption, irrespective of whether it is partial or complete. If industrial action is unlikely to interrupt the service, or if the interruption can be avoided (for example by using replacement labour), the service will not be designated as an essential service;

8.14.3 The interruption of the service must endanger life, personal safety or health. Endanger means "putting at risk", "imperil" or "jeopardise". This implies that the conditions prevailing at the time that the designation is made, must be considered, and not the circumstances that may occur at some future stage; and

8.14.4 The endangerment must impact on the population, being human beings (see D Pillay "*Essential Services under the new LRA*" (2001) 22 ILJ 1 and the ESC designation in the matter of the *Road Traffic Management Corporation and Others vs. NEHAWU and Others*).

8.15 In terms of the submissions received from the various Old Age Homes and other care institutions this Committee is requested to declare the following services as essential (in broad terms):

- Nursing;
- Caregiving;
- Catering;
- Laundry; and
- Security

8.16 Furthermore, the DSD also supports a designation of the aforesaid services as essential.

8.17 On the other hand, the trade unions oppose such a designation, although they have different opinions with reference to nursing and caregiving services. This is dealt with below.

8.18 Nursing

- (a) Nursing, in general, means to take care of, looking after or advising another person. The scope of nursing is so wide as to include situations in which they are vital to the preservation of life and health, to others where the service may be purely advisory with

no risk in the short term if it is interrupted. What activities and functions are encompassed in the service will depend largely on whom the service providers are and the needs of the people who are served.

- (b) Nursing care includes the ordering and controlling of medication, observing the health status of patients and residents by, for example, regularly taking a pulse, temperature, blood pressure, urine, blood sugar level tests, referring to doctors, arranging physiotherapy, occupational therapy, dental care, providing emergency treatment for breathing problems, epileptic convulsions, faints, strokes, heart attacks and injuries caused by falling, dressing chronic wounds and ulcers, pressure sores, surgical wounds and minor lacerations.
- (c) Physical care includes bathing, dressing, toileting and feeding patients. Mental and physical stimulation is also necessary, especially for frail patients.
- (d) The prevalent medical condition of the aged includes chronic obstructive airways disease, diabetes, hypertension, epilepsy, cardiac diseases, arthritis, schizophrenia, Alzheimer's disease or Dementia, Parkinson's disease, depression and renal disease.
- (e) Most homes provide for an all hours (24/7) nursing service especially for assisted and frail patients.
- (f) The trade unions ICHAWU and NUPSAW conceded that nursing services should be designated as an essential service.
- (g) NEHAWU, at the public hearing held in Johannesburg, was also of the view that nursing services should be designated as an essential service. At the hearings in Durban, however, it changed its opinion and opposed such a designation. Its main argument was that privately owned old age homes are profit driven and the user-payer

principle applies. The evidence, however, does not support this. It is clear from the submissions of the Old Age Homes that the majority of them struggle financially. They survive on donations and fund raising, over and above a portion of levy income. In a national designation, as with the current designation, it is not possible for the ESC to distinguish between the very few Homes that do make a profit and the majority of them that are struggling financially.

- (h) Consequently, based on the evidence and submissions, the ESC designates nursing services as an essential service.

8.19 Caregiving

- (a) The services provided by caregivers are summarised in section 17 of the Older Persons Act. These services are:

The following services may be provided at residential facilities, namely-

- (a) 24 hour care and support services to frail older persons and older persons who need special attention;*
- (b) Care and supervision services to older persons who are suffering from dementia and related diseases;*
- (c) Rehabilitation services;*
- (d) Public education on issues of ageing, including dementia;*
- (e) Counselling services to residents and family members who need these services;*
- (f) Implementation and monitoring of outreach programmes;*
- (g) Provision of beds for the temporary accommodation of older persons at risk;*
- (h) Respite care services;*
- (i) Training of volunteer caregivers to deal with frail older persons; and*
- (j) Sport and recreational activities."*

- (b) The services mentioned in sections 17(a), (b), (c), (h) and (i) are specifically relevant to the current designation.
- (c) Rosemore Home for the Aged, in its submission also, gave detailed evidence of the duties of caregivers. This evidence was repeated and/or supported by the other Old Age Homes and institutions, including DSD and the evidence is accepted by the Committee.
- (d) The trade unions also had different views on this service. NUPSAW agreed that the services provided by caregivers was essential, however, ICHAWU and NEHAWU did not support this. The main argument of the two unions, in opposing the proposed designation, was that the employees involved in caregiving were unskilled and could easily be replaced by replacement labour.
- (e) The arguments of ICHAWU and NEHAWU are unsustainable. Firstly, the ESC considers the service that is rendered and not the employees that provide the service. Secondly, on the evidence presented, it is clear that caregiving is an integrated and integral part of the full scope of services delivered to especially assisted and frail care patients. They support the nursing and medical services. Lastly, the trade unions did not contest the evidence that it is almost impossible to source caregiver services from employment agencies.
- (f) If the service should be interrupted, the following consequences could follow:
- Bedridden patients would not be turned regularly. This would encourage bedsores which take as little as four hours to develop, if patients are not moved.
 - Those who are incontinent would not have their clothing changed. Failure to change faecal and urinary incontinent patients would encourage bacteria and septicemia, which could be life threatening. There is a high rate of sepsis amongst geriatrics who pick up infections easily.

- Patients who are not kept mobile in chairs or helped with walking may suffer pneumonia or may fall and sustain injuries. For the elderly this could lead to further complications or even be life threatening.
 - Many patients are unsteady on their feet and could slip and injure themselves if floors are not kept clean.
 - Patients may suffer emotionally. Most patients are generally depressed because of their disabilities, age or loss of family. For many older persons the relationship with the caregiver is their refuge. Those who suffer from anxiety disorders may experience panic attacks caused by the perceived instability of their nurturing and structured environment.
 - Unfamiliar replacement, temporary or volunteer workers may disorientate patients which could create handling problems occasioned by the changes in their routine.
- (g) Consequently, based on the evidence and submissions, the ESC designates caregiving services as an essential service.

8.20 Pharmaceutical and Dispensary

- (a) Most of the patients in assisted and frail care require daily medication. Nurses are the only persons who administer medicine, however, if medication is administered by another person, then this must be done under the supervision of a nurse.
- (b) If patients do not receive their medicine the following consequences could follow:
- Patients with asthma, heart disease, diabetes and high blood pressure, who require daily doses of medication to remain functional, may have to be admitted to hospital as in-patient. The lack of medication for these patients at in-patient level could lead to death.

- High blood pressure patients run the risk of suffering strokes, becoming crippled, immobilised and possibly institutionalised.
 - Mentally ill patients may become violent if their medication is not given to them regularly. They may harm themselves or others.
- (c) The evidence supports that an interruption of a service to give residents/patients medicine will cause harm to such residents/patients.

8.21 Occupational Therapy, Rehabilitative Support and Physiotherapy

- (a) Occupational therapists foster the wellbeing of older persons by supporting their efforts to maintain social connectedness, adopt to and manage health/ability challenges as they arise and engage in activities that allow self-expression, and promote feelings of belonging.
- (b) Occupational therapists perform many types of activities, employing many types of therapies, with the overriding goal of helping older persons regain or maintain a level of independence that will allow them to age in place for as long as possible. Occupational therapy has been proven effective for older persons living with various medical conditions or recovering from surgery. In addition to working with individuals to increase strength or regain important life supporting skills, occupational therapists work throughout a community, counselling families and community groups to ensure that each is doing what it can to help older persons to maintain their independence.
- (c) Similarly rehabilitation support and physiotherapy assist older persons when recovering from illnesses and operations. Many patients are permanently immobilised or have pulmonary and circulation problems and require these services to recover.

- (d) It is thus imperative for the well-being of older persons that these services not be interrupted.

8.22 Catering

- (a) Many patients require special meals. This is especially important for diabetic patients as well as for those with renal problems. Patients/residents also require a balanced diet.
- (b) An incorrect diet could lead to complications and even death.
- (c) The evidence and submissions made support a designation of catering services as an essential service as the interruption of this service would endanger the life and health of the elderly in the homes.

8.23 Laundry and Security Services

- (a) Many of the Homes have outsourced these services and although evidence was presented that linen has to be changed when beds are wet or defecated, it is clear that caregivers normally perform this duty.
- (b) Furthermore, many of the Homes conceded that if the laundry services are interrupted, that the Home would be able to cope with service delivery for the short to medium term.
- (c) The evidence submitted, for example during the inspection *in loco* at Livewell, showed that the laundry services comprise a washing machine and ironing facilities. The interruption of this service, based on the submissions received, would not have any risks to patients/residents.

- (d) The position is the same with security services. Many of the Homes do not have security guards or they use CCTV cameras for security purposes.
- (e) Many of the Homes also conceded that if this service should be interrupted, that the Home would cope in the short to medium term with service delivery.
- (f) The evidence provided by the various Homes regarding laundry and security services was not persuasive.
- (g) Consequently, based on the submissions received, the interruption to security services would not lead to any threat.

8.24 Replacement Labour

- (a) The trade unions argued that replacement labour is available in the categories of nursing, caregiver, catering, laundry and security services and because of the availability of replacement labour, the services in question should not be designated as essential services.
- (b) Although it is true that labour brokers provide relief staff to some Homes on an *ad hoc* basis, it is clear that the caring for assisted and frail care patients is sufficiently specialised so that replacement labour is not a realistic option. Some Old Age Homes also indicated that labour brokers were not active in their areas and therefore not available.
- (c) Furthermore, the cost associated with replacement labour, considering the specific set of facts as they apply to these Old Age Homes, makes it highly unlikely that replacement labour would be a viable alternative option during a strike.

- (h) The DSO also indicated that the State is not in a position to assist Old Age Homes during industrial action by caring for older people. There are a limited number of State facilities that have the required level of care and they are fully occupied (with long waiting lists). The State relies heavily on NGO's and privately owned old age homes to lift the burden on the State in its duty to care for older persons.
- (i) Even if State facilities were an alternative to place older persons, especially those in assisted living and frail care, it is highly unlikely that these patients could be moved, be it by ambulance or any other mode of transport.

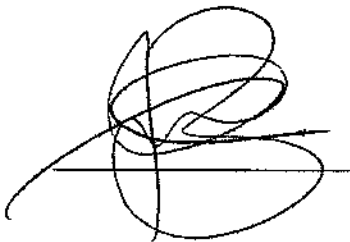
9. Designation

The ESC therefore makes the following designation:

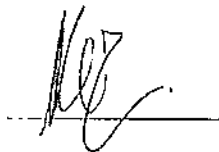
The following services provided by privately owned old age homes as well as nursing homes and institutions that care for assisted and frail care patients and that are not registered with the Department of Social Development or do not receive any financial assistance or subsidies from the State, as essential services:

- (a) Nursing;
- (b) Caregiving being the service of caring for an elderly assisted and/or frail patient with the implied or express consent of that person and in support of nursing services, and as set out in Section 17 of the Older Persons Act, 13 of 2006;
- (c) Pharmaceutical;
- (d) Dispensary;

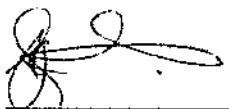
- (e) Occupational therapy;
- (f) Rehabilitative support;
- (g) Physiotherapy; and
- (h) Catering.

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Advocate Luvuyo Bono
Chairperson of the ESC

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Johan Koen
Member of the ESC

A handwritten signature in black ink, with a prominent loop at the beginning and a horizontal line at the end.

Sifiso Khumalo
Member of the ESC