

SECTION27 SUBMISSION TO THE ESSENTIAL SERVICES COMMITTEE:

Whether services rendered by educators and support staff in basic education including Early Childhood Development should be declared essential.

JULY 2018

THE INTEREST OF SECTION27 IN MAKING THIS SUBMISSION

1. SECTION27 is a public interest law centre that has a reputation for defending and advancing human rights. In particular, SECTION27 is one of a small number of public interest organisations in South Africa that works to draw attention to, and pursue legal remedies to address the poor quality of education in the majority of South Africa's public schools.¹
2. Thus, much of the advocacy and litigation that SECTION27 has been involved in has been directed at ensuring improved access to a quality education for South Africa's poorest learners in terms of Section 29(1)(a) of the South African Constitution.

THE PURPOSE OF THE SUBMISSION

3. On 15 June 2018, notice was given in terms of section 71, read with section 70(2)(a) of the Labour Relations Act² ("LRA"), that the Essential Services Committee ("ESC") is in the process of conducting an investigation as to whether the following services are essential:
 - a. Public Transport Services; and
 - b. Services rendered by educators and support staff in basic education including Early Childhood Development.
4. SECTION27's submission will focus on services rendered by educators and support staff in basic education including Early Childhood Development.

¹ The most notable intervention by SECTION27 in this regard has been the litigation to ensure the textbook delivery to all schools in the Limpopo Province. See *Section 27 and Others v Minister of Education Another; Basic Education for All and Others v Minister of Basic Education and Others* 2014 (4) SA 274 (GP) and culminating in the case of *Minister of Basic Education and Others v Basic Education for All and Others* ('BEFA') [2016] 1 All SA 369 (SCA). See too other interventions such as: *Komape and Others v Minister of Basic Education and Others* Case No: 1416/2015; *Organisasie vir Godsdiens-onderrig en Demokrasie v Laerskool Randhart and Others* 2017 (6) SA 129 (GJ) and *Solidariteit Helpende Hand NPC and Another v Minister of Basic Education and Another* case no: 58189/2015 (8 November 2017).

² 1995 (Act No 66 of 1995 as amended).

5. SECTION27 submits that these services should not be declared essential for the reasons set out below.
6. SECTION27 submits further that should the ESC be inclined to designate these services as essential, they must be limited in the following ways:
 - a. The designation be partial and only to the extent necessary. This would be a partial designation including a minimum service agreement containing the following detail:
 - i. Teachers teaching matric learners are not allowed to strike;
 - ii. A catch up plan be developed and implemented immediately after strike action to assess and remedy gaps in curriculum coverage caused by the strike; and
 - iii. Where strike action is prolonged, a temporary designation to protect learners and their rights.
7. The submission accordingly sets out:
 - a. Context: the South African education system and its challenges;
 - b. Definition and interpretation of essential services;
 - c. Legal framework including rights framework in terms of the Constitution and international framework;
 - d. Strike action in teaching and its impact;
 - e. Limitations analysis in terms of section 36 of the Constitution; and

- f. Recommendations.

CONTEXT: THE SOUTH AFRICAN EDUCATION SYSTEM AND ITS CHALLENGES

1. Some of South Africa's foremost education researchers have referred to the South Africa public schooling system as a 'fundamentally bifurcated' or 'hybrid' education system³. In terms of which there are two different systems of schooling. The first being the well-resourced schools which are the wealthy independent and former model-C schools, and to a lesser extent the former Indian schools. The second schooling system catering for poor, predominantly African learners and being the majority of public schools existing in varying degrees of under-resourcing and dysfunctionality.⁴
2. The Constitutional Court has also on more than one occasion seized the opportunity to comment on the ongoing impact of these historical disparities. In *Governing Body of the Juma Masjid Primary School and Another v Ahmed Asruff Essay NO and Others* (Juma Masjid) for example the Court noted:⁵

'The inadequacy of schooling facilities, particularly for many blacks was entrenched by the formal institution of apartheid, after 1948, when segregation even in education and schools in South Africa was codified. Today the lasting effects of the educational segregation of apartheid are discernible in the systemic problems of inadequate facilities and the discrepancy in the level of basic education for the majority of learners.'

3. This duality, despite a constitutionally entrenched right to a basic education, still exists today. It manifests itself in a myriad of challenges, including inequalities in the school environment, the lack of quality education in a safe environment, insufficient

³ See N Spaul 'Poverty and privilege: Primary school inequality in South Africa' (2013) 33 *International Journal of Educational Development* 436; G Bloch *The toxic mix: What's wrong with South Africa's schools and how to fix it* (2009); B Fleisch *Primary education in crisis: Why South African schoolchildren underachieve in reading and mathematics* (2009) and S van der Berg, C Burger, R Burger, M De Vos, G Du Brand, M Gustaffson, E Moses, D Shephered, N Spaul, S Taylor, H van Broekhuizen and D von Fintel 'Low quality education as a poverty trap' Stellenbosch University (2011).

⁴ According to Brahm Fleisch this would constitute between 70 per cent - 80 per cent of school children. B Fleisch *Primary education in crisis: Why South African schoolchildren underachieve in reading and mathematics* (2009) v.

⁵ 2011(8) BCLR 761 (CC) para 42.

funds for the provision of basic education, inadequate buildings, a shortage of qualified and skilled educators, and the inability of the school system to cater for learning differences, to mention only a few.

4. Our learners perform worst in many of the cross national and international studies.

Examples include:

- a. Trends in International Mathematics and Science Study (“TIMSS”) 2015 - Grade Nine and Grade Five learners participated. According to Nic Spaul’s analysis of these latest results, only 34 per cent of Grade Nine learners reached the lowest international benchmark, meaning that only this percentage of learners could do basic mathematics, as opposed to 66 per cent of Grade Nine learners, who could not do basic mathematics.
- b. Southern and East Africa Consortium for Monitoring Educational Quality (SACMEQ) Project 2017 - the tests cover reading and mathematics and are administered to Grade Six learners. South African learners ranked 10th for reading and 8th for mathematics (out of 13 participating countries), behind poorer countries such as Tanzania, Kenya and Swaziland. Mathematics scores were lower than reading scores. The results found that 27 per cent of South African Grade Six learners were illiterate.
- c. Progress in International Reading Literacy Study (PIRLS). PIRLS is aimed at testing reading literacy across 45 participating countries. According to the most recent PIRLS 2016 results released in 2017, South African Grade 4 children scored the lowest in the 50 countries that participated. 78% of SA Grade 4 students cannot read for meaning. This disparity manifests itself around gender lines with girls scoring much higher than boys in reading across the board. In Grade 4 girls are a full year of learning ahead of boys.

5. These conditions do not only affect learners and learning outcomes, they also have an effect on teaching. Teachers have to work under these extremely difficult circumstances including challenges such as overcrowded classrooms, collapsing infrastructure, poor sanitation and shortages of teaching and learning material.⁶ They frequently strike over salary disputes and such poor working conditions.

6. Challenges in education are also not limited to physical aspects of education. Researchers have found that there are many other challenges affecting learning and teaching. These include:
 - a. Poor teacher content knowledge: SACMEQ III (2007) also tested Grade Six teachers. Analysis of this data shows that many South African mathematics teachers have below-basic levels of content knowledge, with high proportions of teachers being unable to answer questions aimed at their pupils. Given that teachers cannot teach what they do not know, these findings have severe implications for the quality of education in South Africa.

 - b. High levels of teacher absenteeism: An analysis of data collected from principals and teachers during the SACMEQ study revealed high levels of teacher absenteeism and late coming, as reported by principals. This problem is particularly widespread in the 4 poorest quintiles of the system, where 97-100% of principals reported it as a problem.

 - c. Incomplete curriculum coverage: A number of studies have reported on the extremely slow pace at which learning happens in classrooms.

 - d. Wasted class time: A number of South African studies have aimed to measure opportunity-to-learn and have frequently found that less than half of the official curriculum is being covered in the year and fewer than half of the officially scheduled lessons are actually taught. In one study in the North

⁶ Ibid 520.

West Grade 6 teachers only taught 40% of scheduled lessons for the year (compared to 60% among schools across the border in Botswana).⁷ Another study conducted in 2005 showed that time spent on actual instructional activity ranged from a low of 6% to a high of 56% of the total official school time available.⁸

7. Challenges in the education system are many and complex. As we will demonstrate below, strike action by teachers in comparison, constitutes a small part of these challenges.

DEFINITION AND INTERPRETATION OF ESSENTIAL SERVICES

8. Section 213 of the LRA defines essential service as follows:

“(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”.

Only Parliamentary Service and the South African Police Service are specifically deemed to have been designated an essential service in terms of the LRA.

9. In order to limit uncertainty around which other services could be designated as essential, the LRA provides for the establishment of an Essential Services Committee (“ESC”) which must determine which services fall within the definition.⁹
10. The LRA also prescribes the process which the ESC must follow in designating a service as an essential service.¹⁰

⁷Chisholm et al, The low achievement trap: comparing schooling in Botswana and South Africa, 2018 available at <http://www.hsrc.ac.za/en/research-data/view/5959>.

⁸ Chisholm, L., U. Hoadley, M. wa Kivulu, H. Brookes, C. Prinsloo, A. Kgobe, D. Mosia, H. Narsee and S. Rule. 2005. *Educator workload in South Africa*. Cape Town: HSRC Press.

⁹ LRA at section 70.

¹⁰ LRA at section 71.

Key considerations for designation

11. Key considerations for the designation of an essential service include:

- a. the service must be essential in that the interruption of it would endanger the life, personal safety or health of the whole or any part of the population;
- b. it is not the business, employees, industry or the institution that will be designated as essential, but the service – consequently the designation applies nationally; and
- c. there should not be replacement labour readily available in the event of the interruption of the service.

Meaning and interpretation of “essential service”

12. As mentioned above, in order for a designation as an essential service - the ESC must be satisfied the service, if interrupted would endanger the life, personal safety or health of the whole or any part of the population. Below we set out the meaning of the definition as set out by Pillay¹¹:

- a. **“Service”**: In terms of the LRA it is the service and not the employees, business or company that is declared essential. This distinction is important because once the service is declared essential, the “who provides the service” part is a separate issue.
- b. **“Interruption”**: In order for a service to be designated as 'essential', it must be subject to the threat of interruption, irrespective of whether such interruption is partial or complete. The following are some considerations the ESC will look at:

¹¹ Pillay, The South African Essential Services Committee Part I: The definition of essential services in South Africa Southern African Business Review, Volume 5, Issue 1, Jan 2001, p. 57 – 60.

- i. The committee may be less concerned with the morality of relying on replacement labour. Its primary purpose is to limit the right to strike only if it is strictly necessary. Recourse to replacement labour is a policy choice that is left to the employer and employees.
 - ii. Another consideration is the training that is required and the length of time it would take to train people sufficiently to render the service. Highly skilled personnel are not easily replaced.
 - iii. The interruption must be caused by industrial action. If the state discontinues the provision of critical health services because of a lack of funds, the committee would have no jurisdiction.
- c. **“endanger the life, personal safety or health”**: 'Endanger' means to put at risk, imperil or jeopardise. Couched in the present tense, it also implies that the conditions prevailing at the time the designation or determination is made must be considered, rather than circumstances that may obtain at some point in the future. Some jurisdictions such as Quebec widen the definition by including welfare¹², or the economic well-being of individuals, as in Sweden and Italy. At the far end of the spectrum, countries such as France and Britain include inconveniences perceived as undesirable by the public¹³.
- d. In South Africa, the probability of economic harm, no matter how real, is not regarded as endangering to life, personal safety or health.¹⁴ It may happen

¹² Canada 1996. Labour Code RSQ, c C-27, 1 July. section 111.10.

¹³ Bernier, J. 1994. *Strikes and Essential Services*. Quebec : University of Laval Press at 83.

¹⁴ Hodges-Aeberhard, J. & Odem de Dios, A. 1987. 'Principles of the Committee on Freedom of Association concerning strikes', *International Labour Review*, 126(5): September-October at 552.

that a service is not essential at all times and may only become so when certain circumstances prevail.¹⁵

- e. **“Population”**: Another condition is that the endangerment must impact on the population. Plants and animals are not protected by the definition.

13. As far as interpretation goes, our courts have encouraged a restrictive interpretation of “essential services”. The Constitutional Court in *South African Police Service v Police and Prisons Civil Rights Union and Another*¹⁶ said the following: -

“In order to ascertain the meaning of essential service, regard must be had to the purpose of the legislation and the context in which the phrase appears. An important purpose of the LRA is to give effect to the right to strike entrenched in section 23(2)(c) of the Constitution. The interpretative process must give effect to this purpose within the other purposes of the LRA as set out in Section 1(a). The provisions in question must thus not be construed in isolation, but in the context of the other provisions in the LRA. For this reason, a restrictive interpretation of essential service must, if possible, be adopted so as to avoid impermissibly limiting the right to strike (footnotes excluded)”

14. This is understood with the fact that strike action is an important element of collective bargaining and it is recognised as a primary mechanism through which workers exercise collective power.¹⁷

15. 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:

- a. It is the service which is essential, not the industry or the institution within which the service falls;

¹⁵For example, a chemical or effluent clearance service would not be essential unless there were a chemical spillage in a public place that posed a threat to the life, personal safety and health of the population. Such a spillage might not occur for an entire bargaining year. It would therefore be wrong to find that the service was essential all of the time.

¹⁶ (CCT 89/10) at para [insert].

¹⁷ See Ex-Parte Chairperson of the Constitutional Assembly in re: Certification of the Constitution of the Republic of South Africa, 1996 (4) SA 744 (CC) at paragraph [66].

- b. Only those employees who are truly performing an essential service, may be prohibited from striking; and
- c. Essential and non-essential service workers may be found working side by side in the same institution.

16. In the light of the above, SECTION27 submits that the ESC continue to adopt a restrictive interpretation as recognised in our jurisprudence.

LEGAL FRAMEWORK

South African framework

17. Of importance to this debate are sections 23, 28, 29 and 36 of the South African Constitution.

18. According to section 23(2)(c) of the Constitution, 'every worker has the right to strike'.¹⁸ The Labour Relations Act ("LRA")¹⁹ defines a strike as follows:

"It is a partial or complete refusal to work or a partial or complete retardation or obstruction of work by persons who are or have been employed by the same or different employers for the purpose of remedying a grievance or solving a dispute in respect of any mutual interest between the employer and the employee and reference to work in this definition includes overtime work, whether it is voluntary or compulsory".²⁰

19. The Constitutional Court in *Ex parte Chairperson of the Constitutional Assembly*²¹ held that the right to strike was included in the Constitution because it fosters workplace democracy as it encourages the participation of workers in the workplace.²² The court held that 'employees need to act in concert to provide them collectively with sufficient power to bargain effectively with employers and [they]

¹⁸ Section 23(2)(c) of the Constitution.

¹⁹ Act 66 of 1995.

²⁰ Section 213 of the LRA.

²¹ 1996 *ILJ* 821 (CC).

²² M A Chicktay 'Placing the Right to Strike within a Human Rights Framework' (2006) *Obiter* 344, 346.

exercise power primarily through the mechanism of strike action'.²³ What this means is that workers have the right to strike in order to counter the tremendous power employers have in determining conditions of employment.²⁴ Workers form unions which give them a voice and as a collective, confront the employer's authority in the workplace.²⁵

20. The right to strike is not absolute and may be limited by section 36 of the Constitution. Strikes can be restricted where it is reasonable to do so such as during a war, where there is an emergency and where parties reach a voluntary agreement to avoid striking.²⁶ The right to strike can also be restricted in essential services.

21. The Constitution at section 28, provides specific rights for children in addition to the range of general rights that they enjoy under the provisions of the Bill of Rights. In particular section 28(2) provides that, "A child's best interests are of paramount importance in every matter concerning the child."

22. Section 29 of the Constitution makes provision for the right to a basic education. Unlike other socio-economic rights, the right to education is not subject to internal limitations such as available resources and progressive planning. Education is to be immediately realised.

23. The right to a basic education compels the state to provide adequate education in order for the right to be enjoyed and fulfilled.²⁷ The right to a basic education can therefore be described as:

... an unqualified right requiring the priority attention of the State, also in respect of budgetary allocations. This requires the State to provide sufficient schools, educators and support, and other incidental services in order to ensure reasonable access to basic education for everybody. The right refers

²³ *Ex parte Chairperson of the Constitutional Assembly* para 67.

²⁴ *Ibid* para 67.

²⁵ *Ibid* para 67.

²⁶ ILO *Freedom of Association: A Workers Educational Manual Second Edition* (1987) 66.

²⁷ See *Ex parte Gauteng Provincial Legislature/ In re Dispute Concerning the Constitutionality of Certain Provisions of the Gauteng School Education Bill of 1995* 1996 3 SA 165 (CC) paras 8-9.

to education up to a level of functional literacy, in other words, reading, writing, arithmetic, and an elementary knowledge or awareness of economics, culture and politics.²⁸

24. Our education system also has a component of compulsory education. By law, children up until the age of 15 or when a learner reaches grade 9, are required to be at school. This binds both the education Member of Executive Council in a province, having to make sure there are enough spaces available, and parents, requiring them to ensure that their children are at school.

25. In the Constitutional Court case of *Governing Body of the Juma Masjid Primary School and Another v Ahmed Asruff Essay NO and Others (Juma Masjid)*, the Court, quoting from General Comment 13 to the ICESCR also discussed the purpose for the entrenchment of the right to basic education :²⁹

“Education is both a human right in itself and an indispensable means of realising other human rights. As an *empowerment right*, education is the primary vehicle by which economically and socially marginalized adults and children can lift themselves out of poverty and obtain the means to participate fully in their communities. Education has a vital role in empowering women, safeguarding children from exploitation and hazardous labour and sexual exploitation, promoting human rights and democracy, protecting the environment, and controlling population growth. Increasingly, education is recognised as one of the best financial investments States can make. But the importance of education is not just practical: a well-educated, enlightened and active mind, able to wander freely and widely, is one of the joys and rewards of human existence.”

26. Section 36(a) of the Constitution says that any of the rights in the Bill of Rights – which includes the rights provided for in articles 18 and 23 – can only be limited in a way that is “reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom”. Such a limitation must take into account:

- “(a) the nature of the right;
- “(b) the importance of the purpose of the limitation;

²⁸ Obiter - The implementation of the right to education in South Africa and Nigeria (Part 1) Obiter, Volume 33, Issue 1, Jan 2012, p. 93 - 120

²⁹ 2011(8) BCLR 761 (CC) para 41.

- (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.”

27. Accordingly, SECTION27 submits that in considering whether education services should be designated as essential, the ESC must carefully balance very important rights: the right to engage in strike action as well as an unqualified right to basic education, together with a Constitutional imperative to ensure that the interests of children remain paramount.

International law framework

28. South Africa has ratified the International Labour Organisation (“ILO”) Conventions, the Freedom of Association and Protection of the Right to Organise Convention 87 of 1948 (“ILO Convention 87”) and the ILO Right to Collective Bargaining Convention 98 of 1949 (“ILO Convention 98”). These have been interpreted by the ILO to provide employees with a right to strike.³⁰

29. According to these international standards, national legislation may dictate the processes and requirements for workers to fulfil prior to exercising their right to strike. These requirements must not defeat the purpose of the right by being too excessive.

³⁰ The ILO supervisory bodies have used art 4 of Convention 98 to lay down minimum standards relating to an employee’s right to strike. Article 4 provides that: ‘Measures appropriate to national conditions shall be taken, where necessary, to encourage and promote the full development and utilization of machinery for voluntary negotiation between employers or employers’ organizations and workers’ organizations, with a view to the regulation of terms and conditions of employment by means of collective agreements.’ See ILO *Freedom of Association A Worker’s Education Manual* 2 ed (1987) 67. Also, although the right to strike is not mentioned in Convention 87, the ILO supervisory bodies have interpreted arts 3 & 10 to include the right to strike. Article 3 provides that: ‘Workers’ and employers’ organizations shall have the right to draw up their constitutions and rules, to elect their representatives in full freedom, to organize their administration and activities and to formulate their programmes *and that* the public authorities shall refrain from any interference which would restrict this right or impede the lawful exercise thereof. Article 10 provides that ‘in this Convention the term organization means any organization of workers or of employers for furthering and defending the interests of workers or of employers’. The ILO supervisory bodies have held that laws that prohibit strikes violate art 3 since they violate employees’ right ‘to organize their administration and their activities’. It also held that denying employees a right to strike violates art 10 since it prevents employees from furthering and defending their employment ‘interests as workers’.

ILO and essential services

30. Initially the Freedom of Association Committee defined essential services as a service 'whose interruption would cause public hardship'³¹ or 'serious hardship to the national community'³². These definitions were however too broad, prohibiting strikes in a wide range of services. They were also too vague making it uncertain as to which services were essential and which were not. As a result, in 1979, the Freedom of Association Committee narrowed the definition to those 'whose interruption would endanger the existence or well-being of the whole or part of the population'.³³ It was only in 1983 that the Committee of Experts defined essential services as it stands today. They defined essential services as those services 'the interruption of which would endanger the life, personal safety or health of the whole or part of the population'.³⁴ This definition was later adopted by the Committee on Freedom of Association.³⁵

31. Both committees have interpreted this definition very narrowly. They have only declared services essential if they genuinely cause a serious threat to life, property or personal safety.

32. In relation to teachers, the Freedom of Association Committee has indicated that they do not fall within the definition of essential services, despite the importance of the service they provide to pupils and the community at large. For example, in a case

³¹ Case no 179 (Japan) 54th Report of the CFEA.

³² ILO *Digest of Decisions and Principles of the Freedom of Association Committee of the Governing Body of the ILO* 3 ed (revised edition) (1985) 393.

³³ Case no 909 (Poland) 194th Report of the CFEA.

³⁴ ILO *Report of the Committee of Experts on the Application on Conventions and Recommendations on Freedom of Association and Collective Bargaining* (1994) 70.

³⁵ In Nepal employees within the hotel industry partook in a tripartite negotiation. They demanded a ten percent service charge in the hotel sector. When negotiations failed hotel employees went on a nationwide strike on 15 March 2001. Halfway through the first day of the strike action, the government applied the Essential Services Act 2014, banning strikes in nine other service sectors and the hotel sector. As a result a complaint was made against the government of Nepal to the Freedom of Association Committee. The committee held that the right to strike may be restricted or prohibited for public servants exercising authority in the name of the state or in essential services in the strict sense of the term, ie services whose interruption would endanger the life, personal safety or health of the whole or part of the population. The committee then indicated that the hotel services do not constitute essential services in the strict sense of the term. It thereafter requested that the Nepali government repeal the Essential Services Act of 1957.

involving Argentina a ministerial promulgation declaring state and private education to be essential services was declared unlawful by the committee who indicated that the education sector does not constitute an essential service in the strict sense of the term.

33. The Special Intergovernmental Conference on the Status of Teachers, held in Paris, the United Nations Educational, Scientific and Cultural Organization (UNESCO) adopted a resolution including the following statement:

“Appropriate joint machinery should be set up to deal with the settlement of disputes between the teachers and their employers arising out of terms and conditions of employment. If the means and procedures established for these purposes should be exhausted or if there should be a breakdown in negotiations between the parties, teachers' organizations should have the right to take such other steps as are normally open to other organizations in the defence of their legitimate interests.”

34. This decision was interpreted by the Joint ILO/UNESCO Committee of Experts as providing teachers with the right to strike. They have indicated further that since para 84 does not distinguish between public or private teachers the recommendation should be interpreted to provide both with the right to strike.³⁶

ILO rules on essential services

35. Despite the ILO's narrow application of the essential services definition, it has constructed a range of important rules and qualifications surrounding them.

- a. Each case must be scrutinised on its own merits: According to the ILO what is an essential service in one country may not necessarily amount to an essential service in another. Each matter should be dealt with on a case-by-

³⁶ See ILO/UNESCO *Joint ILO/UNESCO Committee of Experts on the Application of the Recommendation Concerning the Status of Teachers* 2nd session, Paris, April–May 1970, Final Report 339.

case basis. According to the Committee of Experts, while strikes in some countries may merely cause an inconvenience, strikes in the same service in other countries could be more disastrous resulting in a danger to life, personal safety or health of the population.³⁷

- b. Some services can develop into essential services: A non-essential service could become an essential service if the strike affecting it exceeds a certain extent or duration so that the life, personal safety or health of the population becomes endangered even though they were not initially endangered
- c. Minimum service agreements can be entered into in essential services: It is possible for parties within essential services to enter into minimum service agreements, whereby some employees would continue to work and provide a minimum service while other employees could strike.
- d. Essential services employees must be provided with alternative mechanisms: ILO supervisory bodies have held that they should have recourse to alternative dispute resolution mechanisms

36. Disputes over whether education can be declared an essential service have arisen in many countries, and have been adjudicated by the Freedom of Association Committee. Determinations by Committee of the Governing Body of the ILO are consistent in finding that education cannot be declared an essential service. As South Africa has ratified ILO Conventions 98 and 87, these decisions are relevant in our consideration of declaring education an essential service.

37. In Case No 2467, involving Canada³⁸, twelve unions in Canada brought a complaint against a Canadian law³⁹ which prohibited public employees, including teachers, the

³⁷ For example, strikes by employees within the shipping industry may be more harmful to an island state than to one that is not an island. See ILO *Report of the Committee of Experts on the Application on Conventions and Recommendations on Freedom of Association and Collective Bargaining* (1994) 70.

³⁸ *Case No 2467 (Canada)* - Complaint date 1 February 2006, Report No 344, March 2007

³⁹ Act respecting Conditions of Employment in the Public Sector, S.Q. 2005, chapter 43.

health and social services sectors, from striking and did not provide alternative mechanisms for dispute resolution.⁴⁰

38. The Committee noted that the right to strike was of fundamental importance and was only restricted in essential services and this term had to be interpreted very restrictively.⁴¹ It noted that the disruption for the government and general public was not a proven threat to the life, health or personal safety of the population. In the event that the right to strike was limited, the workers had to be protected adequately to compensate for such limitation which was not the case here.

39. In Case No 2784 against Argentina⁴², an executive decree in one of the provinces of Argentina designated education as an essential service and established minimum services which aimed to ensure that schools would remain open and learners would not be interrupted. It wanted to ensure that at least 50% of all classes at all levels would continue uninterrupted at any given school day. Also, it was to ensure that 100% of all classes and activities take place in special schools, boarding schools, schools that provide meals and schools with residential facilities.

40. The committee noted that an activity was essential if its duration and geographical extent endangered life and safety or if it affected a public service of vital importance. This standard was not met in this case, however the committee did not consider the fact that previous decisions had confirmed that the provision of food to learners of school age and the cleaning of schools could be considered essential services in the strict sense of the term.

41. In a previous case where the committee had to decide over restricting the rights of education workers in Argentina⁴³, it recommended that a minimum services agreement be established in the education sector where a strike prolonged.

⁴⁰ Case No 2467 para 503 and 565.

⁴¹ Ibid at para 570.

⁴² Case No 2788 (Argentina) – Complaint date 8 June 2010, Report No 362, November 2011.

⁴³ Case No 2784 (Argentina) - Complaint date: 18 May 2010. Report No 360, June 2011.

42. A complaint brought before the committee the previous year involving Bulgaria⁴⁴ reiterated that education is not an essential service in the strict sense of the term but listed the terms of which minimum services could be established:

- a. Where the extent and duration of a strike could create an ‘acute national crisis endangering the normal living conditions of the population’.⁴⁵
- b. The minimum service would need to be confined to operations that are ‘strictly necessary’ to avoid such danger.⁴⁶
- c. Worker organisations must participate in defining the minimum services alongside employers and government. Involvement of the social partners was necessary to ensure that the scope of the minimum service did not make a strike ineffective.⁴⁷

43. SECTION27 submits that the abovementioned committees’ approach further reinforces a restrictive approach to designating services. The ESC must genuinely be convinced, based on evidence, that a strike will cause a serious threat to life, property or personal safety.

STRIKE ACTION IN TEACHING AND ITS IMPACT

44. Post-apartheid South Africa has only seen two massive strike actions by public servants including teachers. The first in 2007 and the second in 2010. SACMEQ III dataset indicate that South African teachers were absent for an average of 11.7 days in the 2007 year due to teacher strikes. In 2010 1.3-million public servants, including nurses, health practitioners and teachers, embarked on a 20-day strike for higher wages.

⁴⁴ Case No 2696 (Bulgaria) - Complaint date 15 February 2009: Report No 356, March 2010. Also see Case No 2587 (Peru) - Complaint date 10 July 2007. Report No 354, June 2009.

⁴⁵ Ibid para at 308.

⁴⁶ Ibid.

⁴⁷ Ibid.

45. Although there is a growing empirical literature on the effect that teachers' collective action on these educational achievement outcomes, research on the particular effect of teachers' strikes on students is still scarce. We draw on a few examples in other countries.

a. The studies of Belot and Webbink⁴⁸, Johnson⁴⁹ and Baker⁵⁰ constitute three efforts to estimate that effect; they all conclude that strikes have deleterious consequences for student achievement. In their evaluation of the long-term effects of teachers' strikes in Belgium, Belot and Webbink found strikes that lasted from May to November of 1990 in the Francophone community negatively affected the development of the students involved, leading to higher grade-level repetition rates.

b. Johnson⁵¹ and Baker⁵² show that primary teachers' strikes (on average 10 days) in the province of Ontario, Canada, had a significantly negative effect on the scores of students in both reading and math who experienced the strikes. Johnson suggests that the negative impact of 10-days strikes (or longer) is significantly higher for students who come from households with lower educational levels.

46. These findings are consistent with what we know about teacher absenteeism and learner outcomes.

47. Closer to home, we have found evidence specific to matric learners. In 2007, it is reported that Grade 12 learners could not make their tertiary applications on time as they did not have their first term report cards and could not get teachers'

⁴⁸ Belot, M., & Webbink, D. (2010). "Do Teacher Strikes Harm Educational Attainment of Students?" *LABOUR*, 24(4), 391–406.

⁴⁹ Johnson, D. R. (2011). "Do Strikes and Work-to-Rule Campaigns Change Elementary School Assessment Results?" *Canadian Public Policy*, 37(4), 479–494.

⁵⁰ Baker, M. (2013). "Industrial actions in schools: strikes and student achievement". *Canadian Journal of Economics*, 46(3), 1014–1036.

⁵¹ Johnson above n 39.

⁵² Baker above n 40.

testimonials.⁵³ In 2010, a teachers' strike left schools closed, teachers who opted to continue teaching during the strike were intimidated by striking teachers.⁵⁴ Learners were also intimidated from attending school during the strike.⁵⁵

48. We submit that where there are many factors that impact negatively on a child's best interests in education, it would be wrong to isolate and elevate teacher strikes where the harm of such strikes can be mitigated through development and implementation of catch-up plans.

49. Strike action while affecting education, cannot be said to be the primary cause of poor education. Therefore, we argue that underlying causes of poor educational outcomes be addressed. Further we submit that teacher strikes are infrequent and the harm is mitigated through development and implementation of catch-up plans. We do not believe there is sufficient evidence to warrant a designation that would significantly limit teachers' right to strike.

LIMITATIONS ANALYSIS

50. Section 36 provides a framework for an analysis. In terms of this framework, a limitation must take into account:

- “(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.”

The nature of the right:

51. A strike is the most powerful weapon of organised workers and thus cannot be lightly restricted. Strike action is an important element of collective bargaining and it is recognised as a primary mechanism through which workers exercise collective

⁵³ D Horsten & Corlene le Grange 'The Limitation of the educator's right to strike by the child's right to basic education' (2012) 27 SAPL 509, 514.

⁵⁴ Ibid.

⁵⁵ Ibid.

power.⁵⁶ However, the rights of teachers cannot be considered at the exclusion of the rights of learners. The provision of education is a service which involves two parties. The learner receives this service, while a teacher is paid to provide it.⁵⁷ While teachers have unions to represent them, learners do not. Teachers have responsibilities towards learners and it is compulsory for learners to have access to basic education at least until they are 15 years of age.⁵⁸ While teachers owe learners certain responsibilities, they are also employees of the Department of Education (and sometimes the SGB). They are entitled to their labour rights.⁵⁹ If teachers exercise their right to strike, they are directly denying or limiting learners' right to accessing education.⁶⁰ If teachers are refused their right to strike, they are being denied their constitutional right and this impairs their dignity. It is therefore essential for these rights to be balanced.

52. Teachers have to work under extremely difficult circumstances such as overcrowded classrooms, collapsing infrastructure, poor sanitation and shortages of teaching and learning material.⁶¹ They frequently strike over salary disputes and such poor working conditions. Strike action, however, by teachers will disrupt the quality and duration of a child's learning and sometimes strikes occur during the examination period.⁶² While picketing is permitted under section 69 of the LRA, which gives trade unions the authority to picket peacefully in demonstration of their discontent with the Department of Education, sometimes teachers disrupt schooling activities during picketing.

⁵⁶ 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].

⁵⁷ H J Deacon 'The balancing act between the constitutional right to strike and the constitutional right to education' 34(2) *South African Journal of Education* (2014) 1.

⁵⁸ H J Deacon 'The balancing act between the constitutional right to strike and the constitutional right to education' (2014) 34(2) *South African Journal of Education* 1 – 15, 1.

⁵⁹ *Ibid.*

⁶⁰ M G Masitsa 'Teachers' right to strike vis-a-vis learners' right to education – justice for one is an injustice for the other' *Interim* 28.

⁶¹ *Ibid* at 520.

⁶² Deacon above note 48 at 1.

53. It is also submitted that the best interests of the child is of paramount importance in all matters concerning the child.⁶³ In *Governing Body of the Juma Masjid Primary School v Ahmed Asruff Essay NO*⁶⁴ where a dispute between the Department of Education and an owner of private property had implications towards the provision of education to learners, the court based its decision on the best interests of the learners.⁶⁵

The importance of the purpose of the limitation:

54. The limitation's purpose is ostensibly to safeguard the education of children. This is an important purpose. Given the framework above, there can be no doubt that sections 28 and 29 of the Constitution reinforce the importance of education.

The nature and extent of the limitation:

55. If education is declared an "essential service" there could be a total limitation of the right to strike. A limitation, in the form of ensuring minimum services, is only permissible in respect of a particular strike where the strike is protracted and affects many learners. Where this is done, workers – through their trade unions – must participate in agreeing on the definition of minimum services;

The relation between the limitation and its purpose:

56. The limitation's purpose is to safeguard the education of children. This is an important purpose. Section 29 of the Constitution guarantees the right to a basic education and section 28 provides that "A child's best interests are of paramount importance in every matter concerning the child". Notwithstanding the importance of the purpose, the "relation between the limitation and its purpose" involves an inquiry into the empirical relationship, or lack thereof, between curtailing the right to strike and improved education outcomes.

⁶³ Section 28(2) of the Constitution.

⁶⁴ 2011 8 BCLR 761 (CC).

⁶⁵ Ibid at para 68.

57. As demonstrated above, international case law provides for the right to strike to be limited, in specific circumstances, only to the extent that a minimum service may be required for the purpose of avoiding danger to health and safety while the parties negotiate a solution to the dispute;

Less restrictive means to achieve the purpose:

58. There are many less restrictive means to achieve this purpose. This includes, social dialogue, negotiations, improved conditions of service for teachers, and various other forms of imposing accountability on teachers. These constitute alternative means to achieve the purpose of ensuring that children's rights to education are met.

RECOMMENDATION

59. The question whether education services should be designated as essential is not an easy one. We believe however that if education is truly considered a priority, measures aimed at safeguarding the right should be based on dealing with underlying challenges to education.

60. From the evidence we rely on, we do not believe that strike action is so frequent and harmful to education that it would warrant limitation of teachers' rights. We do not submit that this would be the case at all times; where a strike is prolonged such that the effects cannot be mitigated through interventions such as catch-up plans then – in those instance, these services would need to be declared essential.

61. We therefore recommend that services rendered by educators and support staff in basic education including Early Childhood Development, not be designated as essential.

62. In the alternative, should the ESC deem it fit for these services to be designated as essential, we recommend that the designation be partial and only to the extent necessary. This would be a partial designation including a minimum service agreement containing the following detail:

- a. Teachers teaching matric learners are not allowed to strike;
- b. A catch up plan be developed and implemented immediately after strike action to assess and remedy gaps in curriculum coverage caused by the strike; and
- c. Where strike action is prolonged, a temporary designation to protect learners and their rights.

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