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Litigation and social mobilisation for early childhood development during COVID-19 and beyond

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Background: Litigation has been utilised to advance a range of socio-economic rights in post-apartheid South Africa, including the right to basic education. Nonetheless, there has not been significant litigation or sustained broad-based mobilisation around issues impacting the early childhood development (ECD) sector in the democratic era. The coronavirus disease 2019 (COVID-19) pandemic, however, saw some ECD stakeholders turning to the courts to advocate for their survival, as well as to mobilise and advocate for sector reforms.

Aim: This article aimed to critically reflect on the role of litigation and social mobilisation in advancing the right to ECD during and beyond the COVID-19 pandemic.

Setting: The article assesses two South African cases with national implications.

Methods: The article critically assesses two South African cases relating to ECD during the pandemic. At the time of writing, these were the only South African judgements specifically relating to the impact of COVID-19 on the ECD sector.

Results: The two cases played an important role in: (1) reopening the ECD sector during the pandemic; and (2) making efforts to ensure that the sector could remain open. However, the cases were not based on a holistic rights-based approach to ECD, which remains an area for further development.

Conclusion: The article concludes that litigation may play a significant role in advancing children's rights to ECD, particularly as a complement to broader social mobilisation strategies. The cases highlight the (1) need and potential for building a holistic rights-based foundation of ECD jurisprudence post the pandemic; and (2) strategic use of litigation interventions as part of broader mobilisation strategies.

Keywords: early childhood development; legal mobilisation; strategic litigation; COVID-19; children; international law.

Introduction – COVID-19 plunges ECD sector into crisis

In March 2020, the President of South Africa declared a national state of disaster to contain the spread of the coronavirus disease 2019 (COVID-19) pandemic. Early Childhood Development ('ECD') services across the country were shut down, along with the rest of the economy. Following months of closure, the ECD sector was plunged into crisis. According to one study, only 13% of children were attending an ECD programme between mid-July and mid-August 2020, reflecting the lowest ECD programme attendance since the early 2000s (Wills, Kotze & Kika-Maistry 2020:2). The study revealed that 'supply-side barriers' (the closure of ECD services) were the primary reason for non-attendance (Wills et al. 2020:21).

As various sectors of the economy and society reopened – including the phased reopening of schools – there was little to no communication or guidance offered by the Department of Social Development ('DSD') regarding the ECD sector. It was only after urgent litigation and a scathing court judgement in Skole-Onsersteuningsentrum NPC and Others v Minister of Social Development and Others ('*SOS*') that the sector was permitted to reopen and began to recover. However, even then, the ability of ECD providers to reopen remained hampered because of government subsidies having been withheld during the lockdown in all the provinces other than the Western Cape. Again, urgent litigation ensued in the case of *S*A Childcare (Pty) Ltd & Others v Minister of Social Development & Others ('*SACA*'), and a court order reprimanding government authorities was handed down, requiring the payment of subsidies to qualifying ECD providers.

Note: Special Collection: Early Childhood Development in Theory and Practice.

Whilst litigation has been utilised to advance a range of socio-economic rights in post-apartheid South Africa, including the right to basic education, there has not been significant litigation or sustained broad-based mobilisation around issues impacting the ECD sector in the democratic era. Atmore (2021:14) suggested that this is because ECD stakeholders are 'scared to litigate' and 'are fearful of speaking out for fear of losing funding opportunities'. The COVID-19 pandemic, however, saw some ECD stakeholders turning to the courts to advocate for their survival, as well as to mobilise and advocate for sector reforms.

We proceed by outlining the state of the ECD sector in South Africa before the pandemic. We thereafter provide an overview of the *SOS* and the *SACA* cases, with a view to highlighting the role that litigation played in (1) reopening the ECD sector; and (2) efforts to ensure that the sector could remain open. We thereafter reflect on lessons that can be drawn from the cases, particularly (1) the need and potential for building a holistic rights-based foundation for ECD jurisprudence post the pandemic; and (2) the strategic use of litigation interventions as part of broader mobilisation strategies.

Background – The early childhood development sector in South Africa

There are over 6 million children in South Africa under 6 years of age and 62% of those children are considered 'multidimensionally poor' (Statistics South Africa 2020:16). The provision of holistic ECD services is widely accepted to reduce poverty and socio-economic inequality and is critical for the development of young children (Daelmans et al. 2017). The 'essential package' of ECD services includes not only early learning, but also primary level maternal and child health, social services (including income support), nutritional support, and support for primary caregivers (Ilifa Labantwana 2014).

The importance of ECD as a holistic package of services has been acknowledged by the South African government in the National Development Plan 2030 (National Planning Commission 2012:264). The *Children's Act*, 2005 ('Children's Act') also recognises that ECD includes the 'emotional, cognitive, sensory, spiritual, moral, physical, social and communication development of children' (Section 91(1)). Furthermore, the National Integrated Early Childhood Development Policy, 2015 ('ECD Policy') goes some way towards detailing how universal access to comprehensive, age-appropriate, and quality ECD services may be achieved from conception to the year before a child enters formal school (Republic of South Africa 2015). Notably, the ECD Policy specifically acknowledges ECD as a 'universal right and public good' (2015:18).

However, despite these policy commitments – and whilst there has been substantial growth in access to ECD services over the past 20 years (Wills et al. 2020:15) – nearly 3.2 million children aged 0 to 5 years still have no access to any form of ECD programme (Ilifa Labantwana n.d.). Moreover, the access to ECD services has largely been driven by private providers who run ECD programmes as small or micro businesses. Unlike the basic education sector, where two-thirds of children can access no-fee schools (Wills et al. 2020:7), ECD programmes charge fees for their services in order to remain viable. This is the case even for the few programmes that are subsidised, as the subsidy (at R17 per child per day) is not enough to cover the running costs of an ECD programme (Wills et al. 2020:8). Barriers to registration for ECD providers also severely impact the ability of ECD programmes to obtain government subsidy (Wills et al. 2020:32).

In 2019, in a move signalling potential opportunities for reform, President Ramaphosa announced that the responsibility for ECD centres would be moved from the DSD to the Department of Basic Education (DBE) (Ramaphosa 2019). He also announced the introduction of 2 years compulsory pre-school (Grade RR and Grade R). However, little clarity regarding the implementation of these proposals followed and, as will become clear in the cases discussed below; the confusion regarding the roles of DSD and DBE was acutely manifest during the pandemic.

The COVID-19 pandemic dealt a severe blow to the already-strained ECD sector. As Wills et al. (2020:4) noted, the significant decline in ECD programme attendance rates has not only threatened the long-run developmental outcomes of children – an issue of global concern (Shumba et al. 2020; Yoshikawa et al. 2020) – but has also brought the sector to the brink of collapse.[1] The ECD sector is now in a 'highly precarious position', with potential ripple effects on millions of households relying on ECD services (Wills et al. 2020:1).

As a fragile sector impacting on the most vulnerable members of society, clear communication and sufficient support was needed at the onset of the pandemic (see, e.g. Yoshikawa et al. 2020 on mechanisms to mitigate the impact of COVID-19 on ECD). Instead, the sector was caught in the throes of a lack of government coordination, unlawful, enforced closure and non-payment of subsidies. A turn to the courts ultimately proved necessary, with two cases being launched that would aim to reopen the sector and ensure that there would be some support to sustain ECD services and programmes.

Litigating to reopen the sector

As the South African government considered easing restrictions following the initial 'hard lockdown', a heated debate emerged over the reopening of schools (Joint Media Statement 2020; Spaull & Van der Berg 2020; South African Paediatric Association 2020). After weeks of uncertainty, the Minister of Basic Education eventually announced that the phased reopening of schools would begin from 01 June 2020

1.While the NIDS-CRAM Wave 3 Synthesis Report indicated an improvement in ECD attendance from July/August 2020 to November/December 2020, such attendance was still below pre-pandemic levels (Spaull et al. 2021:6).

(which was delayed to 08 June 2020). However, despite the reopening of schools, the position in relation to the ECD sector remained unclear.

On 28 May 2020, the Minister of Cooperative Governance and Traditional Affairs (COGTA) published regulations, thus moving South Africa to Lockdown Level 3 (Department of Co-Operative Governance and Traditional Affairs (2020), referred to as the 'COGTA Regulations'). This signalled a substantial shift in the regulation of activity during the pandemic, with socio-economic activity now being permitted unless expressly prohibited. The COGTA Regulations listed certain sectors excluded from reopening, including 'education services', which would only be allowed to reopen 'as set out in the directions issued by the Cabinet members responsible for education' (Table 2, Item 9 of the COGTA Regulations). No specific reference was made to partial care and ECD services, nor to the cabinet member responsible for the DSD in the list of exclusions.

On the face of it, it appeared that the ECD sector would reopen, subject to health protocols and physical distancing measures (along with the rest of socio-economic activity). However, a day after the COGTA Regulations were published and following a period of effective public silence, the DSD issued a circular stating that the ECD sector could not yet reopen (Mchunu 2020). This appeared to contradict the COGTA Regulations. The circular also indicated that the DSD had held its *first* engagement with ECD stakeholders on 26 May 2020 (Mchunu 2020) – a startling revelation in light of the fact that 2 months had already passed since the national state of disaster was announced.

In addition to contradicting the COGTA Regulations, the DSD's circular was also inconsistent with the directions published by the DBE on 29 May 2020 (DBE Directions 2020). The DBE Directions, providing for the phased return of learners according to staggered dates, indicated that 'ECD' and Grade R would be phased back from 06 July 2020 (Direction 4(1) of the DBE Directions). In subsequent amendments to the DBE Directions – on 01 and 23 June 2020 – the DBE limited the phased return of children attending Grade R and lower in *schools*, excluding ECD programmes under the Children's Act from its ambit.

Amidst reining confusion, civil society organisations and stakeholders sought clarity from the DSD. In a media statement dated 04 June 2020, the DSD indicated that the 'ECD sector will remain closed under Level 3 regulations' without revealing any concrete timeline for sector reopening (DSD Media Statement 2020). With the DSD's statement indicating a blanket and indefinite closure of the ECD sector, a legal challenge was mounted by the Skole-Ondersteuningsentrum ('SOS'), Bronkieland Kleuterskool ('BK') and Solidarity (collectively referred to as 'the Applicants') on 09 June 2020.[2] The SA Childcare Association ('SACA')[3] joined the case as *amicus curiae* [a friend of the court].

2.Skole-Ondersteuningsentrum is a non-profit company providing ECD support services. Bronkieland Kleuterskool is a private pre-primary school. Solidarity is a trade union, which represented the interests of its social worker members involved in ECD.

3.The SACA provides professional support services to ECD and after-care centres.

Whilst the Applicants framed their case as being primarily concerned with 'private' pre-schools, the *amicus curiae* intervened to highlight that the 'relief is for each and every ECD and Partial Care centre in South Africa' (Founding Affidavit [*amicus curiae*] 2020:para 25). The thrust of the case was to seek confirmation that the blanket closure of the ECD sector by the DSD was unconstitutional and unlawful. To this end, the Applicants argued that the COGTA Regulations, properly interpreted, did not empower the DSD to limit the reopening of the ECD sector.

In support of their challenge, the Applicants emphasised that various fundamental rights were implicated by the continued closure of ECD programmes. In particular, it was submitted that children's rights to basic education (section 29[1][a] of the Constitution) and to have their best interests considered paramount (section 28[2] of the Constitution) would be unjustifiably limited if ECD programmes remained closed. Drawing on expert opinion, the Applicants and *amicus curiae* noted emerging evidence indicating that COVID-19 did not impact on children as seriously as adults and highlighted the crucial role of ECD services to children's holistic well-being and development (including access to food security, cognitive and sensorimotor stimulation, emotional support and social interaction) (Founding Affidavit [*amicus curiae*] 2020:26; Founding Affidavit [Applicants] 2020:15–18). The Applicants also underscored the heightened need for ECD facilities to ensure effective care and support for children under Lockdown Level 3 as parents increasingly returned to work (Founding Affidavit (Applicants) 2020:18). Finally, it was submitted that ECD providers faced an existential crisis if the ECD sector was not reopened. As the owner of BK indicated in a supporting affidavit:

> 'It pains me to state that the financial position of Bronkieland has now reached such a dire level that I will have to close the school down in the event that the school is not permitted to re-open in July'. (Supporting Affidavit [Bronkieland] 2020:8)

On 29 June 2020, the day before the matter was due to be heard, the DBE made an eleventh-hour amendment to the DBE Directions, this time removing all references to pre-Grade R. The effect of this amendment was to now limit the reopening of *all* pre-Grade R ECD programmes, whether in schools or not. Whilst no substantive response was filed by the DSD, on 30 June 2020 (the very day that the matter was due to be heard) the DSD submitted a notice arguing that the application had been rendered moot in light of the DBE's amended directions. Judge Fabricius, who had already begun drafting his judgement in the matter, was taken aback by this last-minute submission (*SOS* para 22), which the *amicus curiae* described as the 'product of a strategically planned ambush' (quoted in *SOS* para 25).

Moreover, it transpired that the DBE had issued a letter indicating that schools, which had already begun to phase in pre-Grade R children, did not have to reverse this position (*SOS* para 34). Not only did this letter contradict the DSD's position on the return of children to ECD programmes, but

it also contradicted the DBE's own amended directions. In an effort to explain the incongruity between the DSD and DBE's positions, the DSD eventually submitted that the DBE had no authority to regulate pre-Grade R and that the letter issued by the Minister of Basic Education was of no force and effect (*SOS* para 50). This was a significant submission, effectively exposing the lack of coordinated engagement between government departments and a fundamental confusion around the roles and responsibilities for ECD.

With a trail of inconsistent and contradictory messaging by the DBE and DSD on ECD reopening having been established, Judge Fabricius handed down a scathing judgement on 06 July 2020. Traversing a plethora of issues arising from the eleventh-hour amendments and circulars, Judge Fabricius effectively agreed with the Applicants' interpretation of the COGTA Regulations and held that the indefinite and blanket closure of ECD programmes by the DSD was unlawful (*SOS* paras 14–17, para 30). The Court accordingly declared that all private pre-school institutions offering ECD services (Grade R and lower) were entitled to reopen immediately, subject to 'appropriate and/or prescribed safety measures being in place' (*SOS* para 51 read with para 1). The Court also censured the DSD with a punitive costs order for its haphazard approach to the matter, which the Court indicated was unacceptable 'in a case of this nature, involving millions of children' (*SOS* para 51 read with para 2).

In a news interview following the judgement, Minister Lindiwe Zulu claimed that the DSD had determined a date for the reopening of ECD programmes even prior to the judgement, and plans for reopening had already substantially progressed (SABC 2020). But, no such plans were communicated to the Court. Despite the Minister's claims then, it seems clear that the SOS judgement played an important role in bringing the indefinite and blanket closure of ECD programmes by the DSD to an end, thereby mitigating the impact of COVID-19 on children.

However, shortly after this judgement, another case was launched in order to ensure that ECD providers would actually have the means to support their reopening.

Litigating to keep the sector open

Even though the SOS judgement required the reopening of the ECD sector, the DSD failed to create an enabling environment in which ECD programmes could realistically reopen. Instead, onerous, costly and in some cases, exclusionary requirements were put in place as conditions for reopening. Lutuli (2021:41), for example, described the requirements as 'largely unreasonable given the poor resources available to the majority of ECD centres'. Such requirements were principally articulated in directions issued by the Minister of Social Development on 10 July 2020 (DSD Directions 2020), and in Standard Operating Procedures and Guidelines incorporated in the DSD Directions by reference (SOPs 2020).

In addition to the onerous requirements and protocols preventing ECD programmes from reopening, reports emerged of Members of Executive Councils (MEC) in eight provinces (with the exception of the MEC in the Western Cape) withholding, either entirely, or in part, subsidies to be paid to registered ECD programmes.

The subsidy of R17 per child per day is divided into three portions, namely, nutrition, stimulation and administration. In some cases, the entire subsidy went unpaid, whilst in others, only the administrative portion was paid, despite clear undertakings made in the DSD Directions and in various statements made by the Minister that provinces 'must continue to subsidise ECD centres or partial care facilities during the national state of disaster' (Mchunu 2020; Direction 14 of the DSD Directions).

With onerous reopening requirements and with subsidies being unpaid, ECD providers were unable to pay employees or comply with COVID-19-related health and safety standards, resulting in a severe contraction of the ECD sector. By way of illustration, a survey of 5300 practitioners conducted in September 2020, found that 68% of practitioners had not reopened their ECD programmes, citing the two main reasons for not opening as follows: (1) not being able to afford compliance with the health and hygiene requirements imposed by DSD; and (2) not having enough money to reopen (BRIDGE et al. 2020). Significantly, with ECD programmes closed, children were also unable to access essential ECD services, including nutrition. The adverse impact of COVID-19 on early life nutrition has been highlighted by Headey et al. (2020:520), who noted that 'the profound impact of the COVID-19 pandemic on early life nutrition could have intergenerational consequences'.

Civil society organisations and stakeholders wrote to DSD, raising these urgent concerns. However, when pleas to pay full ECD subsidies to simplify COVID-19 protocols and to support compliance went unanswered, the SACA (also the *amicus curiae* in the SOS matter) and five other applicants (together the 'SACA Applicants') launched proceedings in the Gauteng Division of the High Court on 12 August 2020. The applicants sought an order against the Minister of Social Development and eight MECs ('SACA Respondents') for, among others, a declaration of unlawfulness in respect of certain provisions of the DSD Directions and a structural interdict for the immediate payment of unpaid subsidies allocated to the ECD sector prior to COVID-19.

The dispute over the constitutionality of the DSD Directions was ultimately rendered moot as the country had moved from Level 3 to Level 2 of lockdown during the course of the litigation. As a result, the parties agreed that the impugned DSD Directions would be replaced by new directions issued on 11 September 2020, which removed most of the obstacles put in place by the first set of DSD Directions (SACA paras 9–11) (although the onerous SOPs remained unchanged and continued to apply at the time of writing). Relief continued to be sought in relation to the payment of the ECD subsidies.

The SACA Applicants argued that the Minister and the eight MECs were under both a constitutional and a statutory duty to ensure that the full subsidies were paid to qualifying ECD programmes to allow them to function, whether or not they had resumed provision of ECD services (Founding Affidavit [SACA Applicants] 2020:para 190.1.6). The applicants emphasised various fundamental constitutional rights implicated by the failure to pay the full portion of the subsidies, including, among others, the right of every child to 'basic nutrition, shelter, basic health care and social services' (section 28(1)(c) of the Constitution). They also argued that various statutory duties were infringed, in particular, those contained in the *Division of Revenue Act*, 4 of 2020 ('DORA'), which outlines the framework according to which the subsidy must be used and its spending monitored, and against which the Minister has a duty to take action in cases of non-compliance (Founding Affidavit [SACA Applicants] 2020:paras 190.1.1–190.1.3).

Extensive evidence was adduced to illustrate the devastating effect of non-payment or withholding of subsidies on the ECD sector (Founding Affidavit (SACA Applicants) 2020:paras 95–141). An ECD practitioner and representative of an ECD Forum in Soshanguve in Gauteng told the Court:

> 'Without being able to get our subsidies again, we will close. The collective impact will be that approximately 15 000 children will not be able to access ECDs in Soshanguve and thousands of practitioners will be out of work.' (*SACA* para 27)

A principal of a day care centre in Soshanguve also noted the impact that non-payment of subsidies had on the nutrition of children:

> 'During lockdown l see children roaming around and I ask what they are going to eat … We used to provide two balanced meals with snacks in between. If we do not open how will we feed the children? Without the subsidies, I don't know what we are going to do.' (*SACA* para 28)

In opposing the relief claimed, the MECs – shockingly – dismissed the testimony of ECD experts and practitioners as 'sensational and ill-informed' (*SACA* para 61). They offered various administrative reasons for why subsidies or portions thereof were withheld during Levels 3, 4 and 5 of lockdown and further argued that the payment of only the administrative portion of the subsidy would be justified as ECD programmes did not need nutrition and stimulation funds if they were non-operational. With the move to Level 2 of the lockdown during the course of the litigation, the MECs undertook to reinstate the full allocation of the grant (Answering Affidavit (SACA Respondents) 2020:para 29). However, this undertaking was subsequently qualified by the claim that, once again, subsidies were only payable to 'operational' ECD programmes (SACA paras 35–36).

On 20 October 2020, Judge Nieuwenhuizen handed down a condemnatory judgement noting with concern the MECs' 'hurtful and demeaning' (*SACA* para 62) response to the plight of the people they were constitutionally obliged to serve, and the position taken by the MECs to only pay subsidies to operational ECD programmes, which placed 'ECDs in the poor communities in the invidious position that they cannot open without receiving the subsidy, but without opening they cannot receive the subsidy!' (*SACA* para 36).

Judge Nieuwenhuizen was equally critical of the Minister, who in her opposing papers, denied having a duty to take action in the event that the DORA framework is not complied with. A position, which the Judge stated was 'manifestly wrong' (*SACA* para 30), and in fact, that the Minister had a clear statutory duty with which she had failed to comply.

Relying on the judgement in *Equal Education and Others v Minister of Basic Education and Others*, which dealt with the resumption of school feeding schemes during the pandemic, Judge Nieuwenhuizen also held that the failure of the Minister and MECs to ensure that subsidies were paid infringed children's rights under section 28(1)(c) of the Constitution, which includes the right to basic nutrition and social services (*SACA* paras 43; 46–47).

The Minister and MECs were accordingly ordered to pay the full amount of subsidies owed to ECD providers for the full duration of the lockdown, irrespective of whether or not they had been able to resume ECD services. The state's 'hurtful and demeaning' response to the plight of ECD providers and children, and their 'persistent denial of their statutory and constitutional obligations' (*SACA* para 58) were strongly reprimanded by the Court through a punitive costs order, similar to the one issued by Judge Fabricius in the SOS matter.

On 10 November 2020, an application to the court *a quo* was filed by the Minister and the MECs for leave to appeal the entire judgement. Whilst the High Court only granted leave to appeal in respect of a narrow question (pertaining to the Minister's constitutional duties), the Supreme Court of Appeal (SCA) ultimately granted the Minister and the MECs leave to appeal the entire judgement. Whilst the pending appeal limits the ability to enforce the High Court order if subsidies continue to go unpaid, there is perhaps an opportunity for the SCA to provide useful precedent pertaining to the obligations of the Minister and the MECs, which would have application beyond just the payment of ECD subsidies. Moreover, notwithstanding the appeal processes, the fact that the state was required to publicly engage on issues impacting the ECD sector through the litigation was, in our view, itself an important outcome of the process. And, as we discuss in the following section, both the *SOS* and the *SACA* cases offer a starting point for reflection on the development of ECD jurisprudence in South Africa.

Legal mobilisation to advance the realisation of early childhood development – Beyond COVID-19

We have suggested that the *SOS* and the *SACA* cases played an important role in responding to the impact of COVID-19 on the ECD sector in South Africa. In particular, the cases

represent a willingness by litigants and courts to hold government officials accountable for decision-making in respect of ECD. Indeed, South Africa's children's rights jurisprudence has been rich and extensive, and well-regarded as 'an exemplar of how constitutional law can be used to advance children's rights' (Kilkelly & Liefaard 2019:523; Skelton 2017a; Sloth-Nielsen 2019). Sloth-Nielsen (2019:511) has suggested that South Africa's children's rights jurisprudence is 'arguably the most far reaching currently in the world'. This may be owing, in part, to the generous protection of children's rights recognised in the Constitution, a receptive judiciary and the existence of an 'active community of legal advocates' working on issues relating to and impacting on children (Kilkelly & Liefaard 2019:523, 526–527).

Nonetheless, Proudlock (2017:401) noted that, with the exception of the right to basic education, 'the concrete substance' of children's socio-economic rights has not been well-developed in South African case law. Moreover, until now, there has been limited focused litigation in relation to the rights of children to ECD services, as such.[4] The *SOS* and the *SACA* judgements are thus significant as they signal the emergence of a nascent jurisprudence relating specifically to ECD services and programmes. However, as we discuss in the following section, the judgements demonstrate the need for a more coherent and robust rights-based framework to ground a *holistic* understanding of ECD. In addition, when considering the role of litigation as a strategy to advance the realisation of ECD post COVID-19, current developments in the ECD sector suggest opportunities for strategically combining litigation together with broad-based mobilisation for ECD reform.

The need for a holistic early childhood development rights-based framework

Whereas development in early childhood was 'once regarded primarily as the domain of educators' (Lake 2016:12 cited in Ally 2017:1), it has been increasingly acknowledged that ECD requires a multidimensional and holistic approach. It is significant that in the *SOS* judgement, Fabricius J recognised the importance of a holistic approach to ECD. As he stated:

> 'It is clear from expert evidence … that development of the pre-school child takes place holistically. Every aspect of their development influences other aspects of development being intellectual development and physical development. If a child's social development is neglected it will impair intellectual development for example'. (*SOS* para 17)

The *SOS* judgement's recognition of the interdependence of various dimensions of children's development and the need for a holistic approach is to be welcomed. However, despite this recognition, the judgement is regrettably thin on articulating the *rights*-based foundation to ground this holistic concept of ECD. Whilst the judge notes broad agreement with submissions by the Applicants and *amicus curiae*, the clearest explication of the rights impacted in the case is the Court's indication that the continued closure of the ECD sector would not be in the best interests of children, as required by section 28(2) of the Constitution (*SOS* para 17). Whilst the best interests of the child principle can be useful and relevant, sole reliance on section 28(2) may be overly diffuse and non-specific. As Skelton (2019:557) has argued, an over-reliance on section 28(2) 'risks spreading the right too thinly' and courts should, where possible, determine which specific and substantive rights of children are infringed in a particular case. More specially in relation to ECD, Sloth-Nielsen and Philpott (2015:316) have argued that it is 'axiomatic that "getting a good – or the best – start" can only be in the best interests of the child' and that '[*s*]tating this obvious link does not add weight to claims for recognising [ECD] as a right of the child'.

In the *SACA* case, the Court did recognise that the failure to pay ECD subsidies implicates the specific right of children to basic nutrition in terms of section 28(1)(c) of the Constitution. However, the Court failed to ground this within an articulation of a *holistic* rights-based framing for ECD (which we explore below) and thereby failed to draw out the interconnectedness of each of the key components of the 'essential package' of ECD services.

The shortcomings we have identified in the judgements are regrettable but also understandable in light of the urgency underpinning the matters. Nonetheless, the cases highlight the need for considered reflection on the ways in which ECD rights-based jurisprudence can be developed in future. Significantly in this regard, it must be recognised that whilst the Constitution affords potent, specific protection to some components of the 'essential package' of ECD services (such as, for instance, the immediately realisable rights to 'basic nutrition, shelter, basic health care services and social services' under section 28[1][c]), there is less specificity around other components (such as, rest, leisure and play).[5] Notably, whilst the Constitutional Court has confirmed that the right to basic education includes primary and secondary schooling (until Grade 12), it has not yet engaged the question whether section 29(1)(a) includes the right of children to opportunities for early childhood education.[6] Moreover, the Constitution does not explicitly include an all-encompassing 'right to development' for children. This can possibly be attributed to the fact that, at the time the Constitution was enacted, the discourse around the recognition of children's right to ECD services was still developing globally.[7] Nevertheless, and notably, despite the Constitution not specifically providing for the right of children to ECD *as such*,

4. While the rights of children to healthcare services, shelter and nutrition have been engaged in some cases, these cases were not specifically framed as engaging children's rights to ECD services (See, for example, *Government of the Republic of South Africa and Others v Grootboom and Others* [2000] ZACC 19; 2001 (1) SA 46; 2000 (11) BCLR 1169; *Minister of Health and Others v Treatment Action Campaign and Others* (No 2) [2002] ZACC 15; and *Equal Education and Others v Minister of Basic Education and Others*).

5. Although this has been acknowledged implicitly by Sachs J in *S v M* [2007] ZACC 18 at para 19, where he states that '[i]ndividually and collectively all children have the right to express themselves as independent social beings, … to play, imagine and explore in their own way'.

6. Fredman et al. (2021) offered a comprehensive assessment of international law obligations in respect of early childhood education.

7. Ally (2017:4), for example noted: 'The last three decades has heralded a significant paradigm shift, indeed a "revolution", in the field of childhood education and development' (Citing Lombardi 2016:6).

government has itself acknowledged a rights-based approach to ECD in various policy statements. For example, the ECD Policy states in unequivocal terms:

> Government recognises early childhood development as a fundamental and universal human right. (Republic of South Africa 2015:22)

The ECD Policy further recognises that the 'essential components' of ECD services are immediately realisable and 'essential precondition[*s*] for the realisation of young children's rights' (Republic of South Africa 2015:54–55). Whilst government's policy commitments are undoubtedly significant, and have in other contexts been used by courts as the basis for determining the content of state obligations (Veriava 2016:336–339), some have suggested that an 'objective test' for determining constitutional obligations should be preferred. In the context of the right to basic education, Veriava (2016:337) argued that courts should not rely solely on the government's own discretionary policies to ground rights-based claims, but should interpret the Constitution, itself, objectively 'for determining the necessary entitlements that make up the content of the right' (Veriava 2016:336).

Establishing a coherent and constitutionally grounded rights-based approach to ECD in this way can, as Sloth-Nielsen (2019:520) has argued, play at least two important roles. Firstly, 'constitutionalising children's rights has the advantage of elevating their status to the highest point in a legal system' (2019:520). This, in turn, 'brings the twin advantages of entrenchment (making them harder to erode) and supremacy'. Secondly, 'rights hav[*e*] the capacity to shift the balance of power' (2019:520) as '[*r*]ights claims command the respect of others in our society and demand that one be taken seriously' (Federle 2017:280–282 cited in Sloth-Nielsen 2019:520).[8]

The question that arises then is whether and how a holistic rights-based approach to ECD can be recognised within our Constitutional framework. In our view, engagement with international law offers one avenue for jurisprudential development in this direction – and one that was not relied on in the *SOS* and the *SACA* cases.

The right to development, international law and the Constitution

In the children's rights field, international and regional instruments have been regularly and successfully used to bolster South African jurisprudence (Sloth-Nielsen 2019:519). It is significant that various articles of the United Nations Convention on the Rights of the Child (UNCRC),[9] which hold near universal ratification, protect the 'physical, mental, moral, social, cultural, spiritual, personality and talent' rights (Peleg 2019:201) of children. Moreover, Article 6 of the UNCRC, which is described as a 'cross-cutting right' (Sloth-Nielsen & Mezmur 2008:10), recognises that every child has the inherent right to life (Article 6[1]) and requires states to 'ensure to the maximum extent possible the survival and development of the child' (Article 6[2]) (for commentary on Article 6 of the CRC, see Tobin 2019:186–236; Vandenhole, Turkelli & Lembrechts 2019:88–99).

Some authors have compellingly argued that Article 6, in particular, establishes a rights-based foundation for a *holistic* approach to ECD services. Sloth-Nielsen and Philpott (2015:309), for example, argued that owing to the 'composite nature' of ECD services, 'it is under article 6 of the UNCRC that [ECD] most properly resorts.' Similarly, in his work on 'developing the right to development', and writing from a broad international perspective, Peleg (2019:203) has argued that the right to development can serve as a 'composite right' of which other substantive rights relating to various childhood developmental domains form part, *and* which also allows for recognition that the 'whole is greater than the sum of the parts' (Sengupta 2004:183 cited in Peleg 2019:204).

Significantly, in its General Comment 7 on Implementing Child Rights in Early Childhood, the UNCRC has also emphasised the need for a holistic approach to rights in early childhood. The Committee noted that 'article 6 encompasses all aspects of development, and that a young child's health and psychosocial well-being are in many respects interdependent' (UN Committee on the Rights of the Child 2005:4).

Children's rights to life, survival and development are also reflected in African regional instruments. Article 5 of the African Charter on the Rights and Welfare of the Child requires State parties to ensure the 'survival, protection and development of the child' to the maximum extent possible. And the African Commission on Human and People's Rights has noted the obligation of states to introduce measures to promote children's 'healthy physical and psychological development without distinction or discrimination' (African Commission on Human and People's Rights 2011:58).

In addition to these binding obligations, there are also non-binding international frameworks affirming the importance of ECD. The Sustainable Development Goals (SDGs), for example, commit states to the goal that all children 'have access to quality ECD, care and pre-primary education so that they are ready for primary education' by 2030 (UN General Assembly 2015:Goal 4.2).

These international law frameworks, and particularly the 'right to life, survival and development', offer fertile ground for developing a holistic rights-based foundation to ECD in South Africa. Sloth-Nielsen and Philpott (2015) argued that one avenue by which international frameworks may be constitutionally recognised is through section 231(4) of the Constitution, which provides that international instruments

8. While a rights-based approach to advancing particular developmental gains has been recognised as an important milestone, there are notable critiques of rights-based struggles to advancing social justice. Critical legal study theorists, for example, have argued that rights rarely live up to their promises and that a rights-based approach can circumvent or usurp other political struggles to advance social justice gains (McCann 2014:246).

9. Articles of the UNCRC relevant to ECD include Articles 6, 18, 21, 24, 27, 28, 29, 31 and 32.

become binding domestically when enacted into law by national legislation.

According to Sloth-Nielsen and Philpott (2015:313), the Children's Act may serve as such national legislation because one of the stated objects of the Act is 'to give effect to the Republic's obligations concerning the well-being of children in terms of international instruments binding on the Republic' (section 2[c]). On this basis, they argue that Article 6 of the UNCRC has already been domesticated through national legislation and 'it can be concluded that there is indeed a constitutional foundation for ECD via section 231(4)'.

Whilst the argument that Article 6 of the UNCRC (or Article 5 of the African Charter on the Rights and Welfare of the Child [ACRWC]) has been domesticated by the *Children's Act* may be viable, it is not clear that, reliance on the Act's generalised objects unambiguously translates into the specific domestication of the right to life, survival and development as articulated under Article 6. The argument may, however, be bolstered when considering provisions of the Act that specifically recognise 'a child's need for development and to engage in play and other recreational activities appropriate to the child's age' (section 6[1][e]), and which make provision for the 'emotional, cognitive, sensory, spiritual, moral, physical, social and communication development of children' (section 91[1]; see also section 2[d]).

But, even where section 231(4) may serve as a mechanism for drawing recognition of the right to development into the domestic sphere through national legislation, this route does not ground a holistic rights-based approach to ECD *within* the Bill of Rights itself. Sloth-Nielsen and Philpott (2015:315–316) suggest that the rights to equality (section 9 of the Constitution) and dignity (section 10) offer constitutional hooks to ground such an approach. We further suggest that the *right to life* (section 11 of the Constitution), when interpreted in light of international law, can offer such an anchor.

The Constitution's requirement that courts 'must consider international law' when interpreting rights in the Bill of Rights (section 39[1][b]) is of relevance here. With regard to section 39(1)(b), it can be argued that the *right to life*, which children also enjoy, must be interpreted in light of international law as including the right to development. Indeed, the Constitutional Court has endorsed the concept of the right to life that is more than mere existence, and as being 'the right to live as a human being, to be part of a broader community, to share in the experience of humanity' (Soobramoney v Minister of Health [Kwazulu-Natal] ['Soobramoney'], para 31). The Court has also indicated that the right to life includes 'access to housing, food and water, employment opportunities, and social security' [Soobramoney, para 31]. However, the Court has made clear that where there are concretised and specific socio-economic rights provided for by the Constitution, *these* rights should be relied on as the source of the state's positive obligations and not the right to life [Soobromoney, paras 15–17]. But this should not, in our view, deter engagement with the right to life in the context of ECD.

Firstly, whilst some components of the right to development (as part of the right to life) may find specific protection in the Bill of Rights (e.g. the rights to 'basic nutrition, shelter, basic health care services and social services' under section 28(1)[c]), there are other components (such as leisure, rest and play) that are not expressly included. This suggests an independent and distinct role for the right to development (as part of the right to life) in addition to more specific rights. As Peleg (2019) has argued, 'the right to development should not be seen merely as a summary of other rights that support child development' (p. 207). Secondly, the right to life can also play 'an indirect role in decisions concerning urgent access to vital socio-economic goods and services' (Pieterse 2014:21). In the context of ECD, the 'cross-cutting' (Sloth-Nielsen & Mezmur 2008:10) nature of the right to life (interpreted in line with international law) can serve in this way to highlight the interdependence of various aspects of ECD. This also aligns with the view that children's right to life under the CRC should be interpreted expansively. As Tobin (2019) argued:

> [*R*]ather than interpreting the right to life as some kind of colonisation agenda, it could be understood as reflecting a growing awareness of the interdependence between civil and political rights and economic and social rights. (p. 196)

In addition to interpreting the right to life to include the right to development, it is also worth noting that in *Glenister v President of the Republic of South Africa and Others* ('Glenister'), the Constitutional Court, with reference to section 39(1)(b), held that international law is relevant to establishing whether the state is taking reasonable and effective steps towards respecting, protecting, promoting and fulfilling the rights in the Bill of Rights (as required under section 7[2] of the Constitution).[10] International law duties, said the majority of the Court, do not only exist in the international sphere (*Glenister*, para 189). Rather, the Constitution 'appropriates the obligation for itself, and draws it deeply into its heart, by requiring the state to fulfil it in the domestic sphere' (Glenister, para 189; see also, Cameron 2013:403). Following this approach, it is arguable that the state's measures to fulfil children's rights in the Bill of Rights (including section 28 and section 29[1][a]) must generally be assessed in line with the South Africa's obligation to ensure 'to the maximum extent possible the survival and development of the child' under international law.

These suggestions indicate possibilities, in broad terms, for how the litigants and the Court in the *SOS* and the *SACA* cases could have more holistically framed the blanket closure of ECD programmes and the non-payment of subsidies as a failure of the state to protect and fulfil the right of children to development. We have not, however, sought to provide an

10.This approach was also applied recently by the Constitutional Court in Sonke Gender Justice NPC v President of the Republic of South Africa and Others [2020] ZACC 26.

exhaustive account of the ways in which international law frameworks can be relied on to ground a holistic rights-based approach to ECD in South Africa. We have also not engaged the scope and content of the right to development, including, for example, questions around immediate or progressive realisation. Instead, we have only gestured towards areas for further engagement and consideration with a view to developing recognition of a holistic rights-based foundation for ECD that is not, as Sloth-Nielsen and Philpott put it, merely '"nice to have" or "add-ons" in the articulation of essential state obligations' (2015:310). For us, the development of such rights-based jurisprudence has particular significance as rights can, as we discuss in the below section, lend weight to broader 'legal leveraging' or 'legal mobilisation' strategies.

Litigation and mobilisation for early childhood development reform

There is significant scholarship on the role or value of litigation in advancing social change. It is beyond the scope of this article to traverse the spectrum of views animating debates in this field (for an overview of relevant literature, see: Madlingozi 2014:92–94; Veriava 2019:75–83). Suffice it to state that, in our view, litigation can be an important, although not always, adequate mechanism for securing social change. In this regard, some scholars have argued that 'legal mobilisation' or translating claims into rights-based demands may be particularly effective when combined with broader mobilisation strategies. McCann (2014:256), for example, suggested: 'rights, sometimes, can gain weight as a resource for egalitarian challenge and transformation *when they animate organized collective challenge* by exploited, excluded, needy, or righteous persons' (*Our emphasis*).

In South Africa, reports commissioned into the role of public interest litigation in South Africa by the Atlantic Philanthropies Foundation (Budlender, Marcus & Ferreira 2014; Marcus & Budlender 2008) have also suggested that the success of litigation can be enhanced when used in combination with other mobilisation strategies, such as 'conducting public information campaigns' and 'making use of social mobilisation and advocacy' (Marcus & Budlender 2008:5–6).[11] This approach – of using litigation in combination with a broader array of social mobilisation tools – was employed with substantial success by the Treatment Action Campaign ('TAC') in its efforts to expand access to antiretroviral treatments in South Africa (Madlingozi 2014; Marcus & Budlender 2008:69–92). And, inspired by the TAC model, social movements such as Equal Education have employed litigation as part and parcel of broad-based campaigns aimed at advancing the right to basic education in the country (Budlender et al. 2014:81–84; Veriava 2019:140–145).

In Brazil, this legal mobilisation model was utilised with some success by the *Movimento Creche para Todos* (Childcare for All Movement, referred to here as '*Movimento*') to advance ECD campaigns (Skelton 2017b). *Movimento*, emerging in 2008, initially used 'protests, petition drives, community organising, and other non-litigation methods of advocacy' (Skelton 2017b:36) in its campaign to increase ECD spaces in Sao Paulo. Eventually, *Movimento* began utilising litigation to realise campaign objectives, ultimately securing a court order requiring the Sao Paulo municipality to expand access to childcare institutions and pre-schools across the city. Skelton (2017b:36) described this case as 'the most outstanding example of strategic litigation for access to quality education in Brazil: coordinated, collective lawsuits to address structural problems in the field'.

Lessons on the use of litigation as part of coordinated and broad-based campaigns are significant for the ECD sector in South Africa. This is particularly so as there are promising signs of emergent broad-based mobilisation within the sector, with two significant campaigns having been launched in 2020 bringing together a range of ECD stakeholders.

The first initiative is the #SaveourECDworkforce Campaign, which was launched in July 2020. As King (2021:11–12) noted, in the midst of the COVID-19 crisis, the ECD sector 'pulled together valiantly' so as 'to raise public awareness of the plight of our ECD workforce and bring pressure to bear on government'. The campaign emerged in response to an announcement that R1.3 billion would be spent on 'compliance monitors' to enforce COVID-19 protocols by ECD providers (Chabalala 2020). The owner of a nursery school in Nyanga (Western Cape) described the allocation as 'add[*ing*] insult to injury' (Lutuli 2021:42) as many ECD programmes faced the prospect of closure owing to lack of income. The ECD sector, led by the C19 People's Coalition, mobilised in response, arguing that the funds should instead be spent on 'continuity grants' to ensure that ECD sites could reopen (C19 People's Coalition 2020). The Campaign gathered 12 719 signatories in support of the demands, held over 350 pickets across nine provinces, and was featured in over 50 media appearances with over 2000 social media posts reaching over half a million South Africans.[12]

In October 2020, the President announced that the ECD workforce would be part of the Presidential Stimulus initiative and R496 million had been allocated to make grants directly available to 108 833 ECD workers (Ramaphosa 2020). In short, the campaign had applied necessary pressure to ensure a commitment that the DSD provide grants directly to those that needed it most. Whilst the payment of relief funds was only partially implemented by the end of March 2021, the momentum built by the campaign has continued. At the time of writing, ECD stakeholders, including lawyers, have continued to raise the alarm over the lack of support to the ECD sector, and have persisted in seeking implementation and accountability.

The second initiative is the Real Reform for ECD Campaign ('Real Reform Campaign'). The campaign was borne out of a

11.It should be noted that the Atlantic Philanthropies report (Marcus & Budlender 2008) has been criticised for, amongst others, employing a narrow framework for assessing the impact of public interest litigation and idealising a 'Rolls Royce' model of litigation (Dugard & Langford 2011:64).

12.Information collated on behalf of the ECD working group of the C19 People's Coalition (unpublished, 2020).

response to the Children's Amendment Bill ('the Bill'), tabled before Parliament in August 2020. Identifying certain core concerns with the Bill, a number of ECD stakeholders saw the opportunity and the need to promote significant ECD legal reform and founded the campaign (Isaacs 2020). The Real Reform Campaign serves as a platform for ECD practitioners, activists and lawyers to work towards securing an enabling and empowering legislative framework (which can bring providers into the regulatory fold and unlock government subsidies for children in their care). The campaign launched a petition, brought attention to the issue in the media, ran workshops on the Bill with ECD practitioners and other stakeholders, and developed 'template' legal submissions which were made available to stakeholders as a resource for their submissions to Parliament. At the time of writing, the Real Reform Campaign had garnered the support of over 180 organisations and had facilitated approximately 1600 submissions to Parliament on the Bill (Parliament of South Africa 2021). Members of the campaign and other stakeholders also coordinated their oral submissions to Parliament in May 2021, so as to highlight the key issues impacting the sector (Parliamentary Monitoring Group 2021).

Whilst these initiatives largely emerged as a reactive response to government policies and actions, they serve as an indication of the willingness and capacity of ECD stakeholders to organise collectively and to utilise legal advocacy as part of campaigns. In addition, even reactive campaigns can develop forward-looking strategic objectives. The Real Reform Campaign, for example, has identified key short-, medium- and long-term goals for ECD legal reform. The challenge is to continue to build and sustain these and other forms of collective organising, which aim to advance the rights of children to quality ECD services and programmes. As we have suggested, legal mobilisation – including strategic litigation and the leveraging of a holistic rights-based claim to ECD – can play a valuable role in such efforts.

Conclusion

Whilst the COVID-19 pandemic has caused chaos and devastation within the ECD sector, the crisis has also resulted in ECD stakeholders utilising litigation and other forms of social mobilisation in efforts to ensure that ECD provisioning can continue. We have noted the role that litigation played in re-opening the ECD sector and in seeking to ensure that the sector could be supported to reopen. We have also suggested ways in which future litigation and legal mobilisation strategies can be developed to further a holistic rights-based approach to ECD in South African jurisprudence. Finally, we have argued that there are opportunities for leveraging litigation as part of a broader array of social mobilisation strategies to advance the realisation of quality ECD for all children in South Africa. As Budlender (2011) reminded us:

> The struggle for a better society is essentially a political struggle. A critical question is how we can use the courts and the law to open up the political process, and make the political process more responsive to ordinary people. In that way, the courts will play their part in ensuring that the people do govern. (p. 599)

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Competing interests

Rubeena Parker and Tess N. Peacock are on the steering committee of the Real Reform for ECD Campaign, serving as representatives of the organisations in which they are respectively employed. Nurina Ally has provided voluntary legal support and advice to the Real Reform for ECD Campaign. The work of the Real Reform for ECD Campaign is related to the research described in this publication.

Rubeena Parker has, in her capacity as an employee of the Equal Education Law Centre, provided legal support to stakeholders regarding issues relating to the #SaveOurECDWorkforce campaign, which is related to the research described in this publication. Tess Peacock and Nurina Ally have provided voluntary advice and support to the campaign.

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Authors' contributions

The authors collectively contributed to the conceptualisation of the core themes, structure, research and writing of the manuscript. Nurina Ally led the process of coordinating author inputs, editing and finalising the manuscript for submission.

Ethical considerations

The study did not obtain or use any material from human participants and has been exempted from requiring ethics approval by the Faculty of Law's Research Ethics Committee (LAW REC) at the University of Cape Town. L0182-2021.

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Data availability

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