

TO : JAN-DANIEL CLAASEN obo SERFONTEIN, VILJOEN &
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IN RE : COVID-19 VACCINE: COMPELLABILITY OF EMPLOYEES

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LEGAL OPINION

EXECUTIVE SUMMARY

Employers are private actors and cannot act beyond the scope of a delineated legal framework in their interaction with employees. The present legal framework makes no specific provision for mandatory medical intervention such as vaccination against disease. The framework does however compel employers to ensure a 'safe' working environment as far as 'reasonably practicable' and creates criminal penalties for non-compliance. What is 'safe' for purposes of legal compliance is a flexible standard and will depend on numerous environmental factors, such as the vulnerability of a given set of employees to Covid-19, or the nature of their interactions with persons other than employees who may enter the workplace. Employees furthermore must be consulted and are a part of ensuring compliance. Employees furthermore have a Constitutional right to bodily integrity. It may be difficult to formally assert this right outside of Court however. Employees are furthermore protected against dismissal on the grounds of discrimination on the basis of religious or political belief. Employers are able to discriminate in such a fashion however, where the belief is inherently incompatible with the requirements of the work in question.

Author(s) are of the opinion that in the vast majority of cases, employers are able to ensure occupational health and safety legislation compliance without requiring employees to vaccinate. It is therefore extremely unlikely that an employer may unilaterally require mandatory vaccination of its employees lawfully. Such conduct will unleash significant litigation, not least in the arena of unfair dismissal. It may however, be possible to persuade a court that for the duration of the Covid-19 pandemic, vaccination is an 'inherent requirement' of certain work, particularly that of healthcare and healthcare workers. In the absence of state-led policy and/or legislation in this regard, employers are advised to consult with employees prior to taking any action.

1. Author hereof has been requested to provide a legal opinion as to whether employees may legally be compelled by their employer to undergo vaccination against the disease known as Covid-19, which disease is caused by the SARS-COV-2 virus.

2. Significant part of the public debate on this issue thus far has focused on the broad considerations of a person's right to bodily integrity and choice versus the interests of society and in particular, the interest of the employer in ensuring a return to normalcy and maximum profitability. Opinions are varied across the international world.¹ The most frequent conclusion appears to be that some kind of balance must be achieved.

3. Whilst the above 'balancing act' provides a broad framework, this opinion will also deal more narrowly with the content of the employer-employee vertical relationship, with reference to the applicable labour legislation and comparable scenarios.

- 3.1 Keep in mind the key distinction between the state mandating vaccination against Covid-19 by using its 'police power' for the common good of its

¹ See generally:

- <https://www.network24.com/Nuus/Gesondheid/covid-entstof-is-dit-jou-wetlike-plig-20210116>
- <https://soundcloud.com/salaamedia/covid-19-vaccine-in-south-africa-can-the-government-compel-its-citizens-to-get-vaccinated>
- <https://www.smh.com.au/politics/federal/bosses-have-the-power-to-force-employees-to-take-the-vaccine-experts-20210101-p56r64.html>
- <https://vanblacklaw.com/articles/can-my-company-compel-compliance-with-an-covid-19-employee-vaccination-policy-its-a-definite-maybe/>
- <https://www.discovery.org/human/2020/05/26/dershowitz-wrong-government-cant-compel-you-to-take-covid-19-vaccine/>

citizens, and the vertical relationship between private employers and their employees.

3.2 Author wishes to point out that state institutions who act as employers are also bound by this framework and enjoy no special capacity purely as organs of state. It is the executive and legislative branch of the state which is distinguished for present purposes.

BACKGROUND & PURPOSE OF OPINION

4. The current situation as regards the global Covid-19 pandemic does not require restating and is widely recognized. It is sufficient to elaborate on the most recent developments as they pertain to what is contained herein and below.

5. Health Minister Zweli Mkhize briefed the public on South Africa's vaccination programme on 3 January 2021 and provided further details to Parliament on 7 January 2021. Government's stated aim is to inoculate primarily healthcare workers with a minimum 500 000 doses procured from the Serum Institute of India by February.² By 21 January 2021, the Minister had informed the press that the roll-out plan was 'on track' but refused to comment on details of which vaccines were to be acquired generally for the remainder of the programme, and where they would be sourced, citing non-disclosure agreements.³

² <https://ewn.co.za/2021/01/07/mkhize-announces-sa-to-secure-1-5-million-vaccine-doses-by-end-feb>
<https://www.gov.za/speeches/minister-zweli-mkhize-update-sars-cov-2-coronavirus-vaccine-rollout-strategy-7-jan-2021>

³ -<https://enca.com/news/mkhize-holds-back-vaccine-procurement-details>

6. Accordingly, despite residual uncertainty, a broad-based programme of vaccination in South Africa is imminent, *alternatively*, the potential for vaccination against Covid-19 is now a reality, *alternatively*, employees may soon receive communication as regards vaccination policy from their employers.⁴
7. Concern regarding the safety, efficacy, and both long-term and short-term side-effects of the various Covid-19 vaccines on the market, whether rightly or wrongly, has been raised by the global public and also in South Africa.⁵
8. Whilst far from clear, it appears at present that the South African government does not envision mandatory vaccination for all citizens, and that no person will be compelled to take the vaccination under state policy or legislation – though it will be encouraged, and the state has outlined an ambitious target for total vaccinations.⁶
9. The fact remains that employers may wish to compel employees to vaccinate despite a lack of government initiative, in order to attempt a return to normalcy in the workplace and thereby reduce costs in connection with currently mandated preventative measures, such as the provision of personal protective equipment (PPE) and the logistics of remote work.

⁴ On the evening of 27 January, a press conference was held and further details provided to the public. It appears that healthcare workers will register for vaccination via SMS and that a database of this information will be maintained. Author was unable to incorporate latest information as opinion had already been settled at this time. However, the information does not affect the legal conclusions herein and largely just contributes to factual matrix.

⁵ <https://www.businessinsider.co.za/by-mid-december-47-of-south-africans-said-they-refuse-a-coronavirus-jab-up-sharply-from-oct-2021-1>

⁶ <https://www.timeslive.co.za/politics/2021-01-07-will-sa-citizens-be-forced-to-get-covid-19-vaccine-zweli-mkhize-answers/>
<https://www.news24.com/news24/southafrica/news/covid-19-vaccines-no-one-in-sa-will-be-forced-to-take-the-jab-says-mkhize-20210107>

10. Client is SOLIDARITY, a trade union, with its main stated function being “to protect its members in the workplace. Solidarity does this through its labour services department who protects thousands of collective and individual members in many different industries across the country.”⁷

11. Client foresees that its members may express concern regarding:

- 11.1 Employers mandating vaccination against Covid-19;
- 11.2 Potential dismissals in the face of refusal to do so;
- 11.3 Implications for best practice and protocol in the face of such policy for its members.

12. Client further foresees potential for litigation on behalf of and in the interest of its members as regards the above.

13. The purpose of this opinion is therefore to:

- 13.1 Sketch the regulatory and statutory environment in which employers may seek to compel vaccination;
- 13.2 Illuminate the rights and duties of employees/employers within this framework;
- 13.3 Clarify the scope of the employer’s power and/or mandate to fulfil its statutory duties;

⁷ <https://solidariteit.co.za/en/who-are-we/>

- 13.4 Identify potential ways in which disputes may arise and what the options of employees in this regard may be;
- 13.5 Conclude whether employers may compel their employees to vaccinate;
- 13.6 Briefly identify strategies for litigation, and;
- 13.7 Ultimately, provide a foundation for potential litigation and/or advice to union members as regards vaccination going forwards.

14. Author therefore turns now to the statutory legislation and other regulatory frameworks within which these inquiries take place.

APPLICABLE LABOUR LEGISLATION: SOURCES OF REGULATION

15. It may be useful to restate the fact that rights like bodily integrity, privacy and freedom of opinion are guaranteed by the South African Constitution⁸ and the principles of natural law. The state has a monopoly on the use of force generally, subject to the above rights. Private actors (including state institutions where they act as employers) are constrained.

15.1 Therefore, to use an absurd example, should one person accost another on the street and jab them with a syringe containing a vaccine, claiming that it is for the common good of society, such conduct would amount to a criminal offence. This is so because *there is no applicable basis for the authority of one citizen over another in this scenario.*

⁸ Sections 12, 14, 15 respectively.

16. The above example is useful to illustrate that authority over a private citizen must be stipulated by an exercise of either state power or a voluntary agreement between two informed and consenting citizens – such as legislation, in the case of the former, or a contract of employment, in the case of the latter. Without such a basis, any action as described above is likely unlawful in the absence of a **proper legal basis and authority therefor.**

17. It follows that the inquiry as to whether an employer may compel an employee to receive medical intervention, such as vaccination, must take place within a legislative framework. The primary sources of such authority and/or power over private actors in the employer-employee relationship are as follows:

- 17.1 Occupational Health and Safety Act 85 of 1993 (**OHSA**) (statute)
- 17.2 Basic Conditions of Employment Act 75 of 1997 (**BCEA**) (statute)
- 17.3 Labour Relations Act 66 of 1995 (**LRA**) (statute)
- 17.4 Employment Equity Act 55 of 1998 (**EEA**) (statute)
- 17.5 Contract of employment (common law and statute)
- 17.6 Constitution⁹
- 17.7 Collective agreements (agreement in terms of above statute)
- 17.8 International standards¹⁰

⁹ Constitution of the Republic of South Africa, 1996

¹⁰ See generally, s23 of the Constitution and the International Labour Organization (ILO) ratifications. An analysis of applicable international law is beyond the scope of this opinion at present. Client may request such if it so wishes.

18. Of the above, the OHSA is most pertinent for present purposes. The OHSA explicitly binds all employers and employees, including state institutions who act as employers, with the notable exception of the mining industry, which is protected by tailored (though substantially similar) legislation.

Legislation generally concerning medical intervention and/or vaccination

19. Before turning to labour legislation, a point should be made as regards the lack of a general vaccination-dispensation in South Africa.

20. Despite the aforementioned distinction set out above regarding the capacity of the state (acting with executive or legislative power) versus the capacity of private actors, mention must be made of the ethics, powers and duties of the medical profession and health care practitioners generally. This is due to the fact that any medical intervention, such as the administration of a vaccine, ineluctably involves a member of such profession. An employer cannot itself administer a vaccine personally.

21. Furthermore, these principles should also be noted for the lack of any provision that directly informs the question of mandatory vaccination, and the fact that their general tenor is one of utmost respect for the consent of the patient.

22. The healthcare profession is regulated by the Health Professions Act 56 of 1974, as well as the National Health Act 61 of 2003. The Health Profession Act makes provision for the issuing of a standard code of ethics by the Health Professions

Council of South Africa (HPCSA),¹¹ a statutory body constituted by section 2 of the Health Professions Act.

23. None of the abovementioned legislation speaks directly to the question of vaccination. The framework is silent in this regard. Of most interest are the ethical duties of healthcare practitioners.

24. As with most professions, which are for the moment still self-regulating to an extent, the health care practitioner is subject to a number of ethical duties, some of which may come into conflict with each other and must be balanced. What is clear from the HPCSA code is that the practitioner has a number of duties related to the situation at hand regarding medical treatment or intervention, and the patient a number of rights:

24.1 “(practitioner shall)...guard against human rights violations of patients, and not allow, participate in or condone any actions that lead to violations of the rights of patients.”¹²

24.2 “(practitioner shall)...respect the right of patients to refuse treatment or to take part in teaching or research.”¹³

24.3 “Every citizen has the right to participate in the development of health policies, whereas everyone has the right to participate in decision-making on matters affecting one’s own health.”¹⁴

¹¹ Available at https://www.hpcsa.co.za/Uploads/Professional_Practice/Ethics_Booklet.pdf

¹² Booklet 1, para 5

¹³ Booklet 1, para 5

¹⁴ Booklet 3 (National Charter on Patients Rights) para 2.2

24.4 “A person may refuse treatment and such refusal shall be verbal or in writing, provided that such refusal does not endanger the health of others.”¹⁵

25. It is not clear under what circumstances these rights may be limited or dispensed with. The HSCPA code does not provide significant guidance, a recurring theme in this enquiry, as seen further below. What is clear however, is that consent and patient participation are cornerstones of medical ethics in South Africa.

National Health Act 2003

26. The relevant provisions of this legislation are to be found under Chapter 2 and are worth quoting at length:

7 Consent of user

(1) Subject to section 8, a health service **may not be provided to a user without the user's informed consent**, unless:

(a) the user is unable to give informed consent and such consent is given by a person

(i) mandated by the user in writing to grant consent on his or her behalf; or

(ii) authorised to give such consent in terms of any law or court order;

(b) the user is unable to give informed consent and no person is mandated or authorised to give such consent, and the consent is given by the spouse or partner of the user or, in the absence of such spouse or partner, a parent, grandparent, an adult child or a brother or a sister of the user, in the specific order as listed;

¹⁵ Booklet 3 (National Charter on Patients Rights) para 2.8

(c) the provision of a health service without informed consent is authorised in terms of any law or a court order;

(d) failure to treat the user, or group of people which includes the user, will result in a serious risk to public health; or

(e) any delay in the provision of the health service to the user might result in his or her death or irreversible damage to his or her health and the user has not expressly, impliedly or by conduct refused that service.

(2) A health care provider must take all reasonable steps to obtain the user's informed consent.

(3) For the purposes of this section 'informed consent' means consent for the provision of a specified health service given by a person with legal capacity to do so and who has been informed as contemplated in section.

8 Participation in decisions

(1) A user has the right to participate in any decision affecting his or her personal health and treatment.

(own emphasis)

27. The above makes clear that the point of departure remains the right of the patient to refuse treatment, as well as the right of the patient to be consulted with and participate in making decisions regarding any treatment, but also that this position may be derogated from under certain (narrow) circumstances. In particular, it appears that the current scenario has great congruency with the exception listed at section 7(d) (refusal would pose great risk to public health).

28. The question that arises from the above is whether a health care practitioner may lawfully administer a vaccine where a patient has been compelled to do so by his employer, but the patient is not amenable/unwilling to undertake such a medical intervention. The answer seems to be no, a practitioner cannot do so, except for under exceptional circumstances – which circumstances would likely also be of application to the employer in the first place, i.e. that the state has enacted legislation enabling them to do so.

29. **From the above it appears that there is a distinct lack of guidance and/or regulation regarding mandatory vaccination in the South African medical regulatory field. This should be borne in mind when analysing the relevant labour legislation – there is no clear authority to the effect that a citizen may be compelled to receive vaccination within the most relevant statute and policy, and it is unlikely that unrelated legislation is capable of an interpretation that supersedes such principles.**

Occupational Healthy and Safety Act

30. From the outset it must be noted that our Courts have ruled that the current pandemic, and the regulation thereof, is a matter for occupational health and safety, and overlaps with public health generally.¹⁶

¹⁶ See generally *Association of Mineworkers and Construction Union v Minister of Mineral Resources and Energy and Others* (J427/2020) ZALCJHB 68; (2020) 41 ILJ 1705 (LC); (2020) 9 BLLRR 929 (LC) and paragraph 30 and 34 in particular.

31. Three key points need to be addressed under the discussion on OHSA, and the author proceeds to do so in turn. The points cumulatively indicate that the majority of employers will face significant hurdles in attempting to compel the vaccination of their employees and that it is *prima facie* impossible to compel employees to vaccinate forthwith.

A) OHSA is punitive and creates criminal liability for non-compliance

32. Stakeholders will be aware that the OHSA creates liability for non-compliance with its provisions via section 38. Breaches of the OHSA may attract significant penalties and even criminal conviction. Employers will likely be wary of incurring these penalties, which may have a ruinous effect given an already precarious economic outlook.

33. The employer's duties to its employees are set out in section 8 of OHSA, and its duties to members of the public who may enter the place of work (customers, for example) are set out in section 9. Section 14 regulates the general duties of the employees themselves. The provisions of sections 8-9 are worth quoting in full:

8. General duties of employers to their employees

(1) Every employer shall provide and maintain, as far as is reasonably practicable, a working environment that is safe and without risk to the health of his employees.

(2) Without derogating from the generality of an employer's duties under subsection (1), the matters to which those duties refer include in particular-

a) the provision and maintenance **of systems of work**, plant and machinery that, as far as is reasonably practicable, are safe and without risks to health;

b) taking such steps as may be **reasonably practicable to eliminate or mitigate any hazard or potential hazard** to the safety or health of employees, before resorting to personal protective equipment;

c) making arrangements for ensuring, as far as is reasonably practicable, the safety and absence of risks to health in connection with the production, processing, use, handling, storage or transport of articles or substances;

d) **establishing, as far as is reasonably practicable, what hazards to the health or safety of persons are attached to any work which is performed**, any article or substance which is produced, processed, used, handled, stored or transported and any plant or machinery which is used in his business, and he shall, as far as is reasonably practicable, further establish what precautionary measures should be taken with respect to such work, article, substance, plant or machinery in order to protect the health and safety of persons, and he shall provide the necessary means to apply such precautionary measures;

e) providing such **information, instructions, training and supervision** as may be necessary to ensure, as far as is reasonably practicable, the health and safety at work of his employees;

f) as far as is reasonably practicable, not permitting any employee to do any work or to produce, process, use, handle, store or transport any article or substance or to operate any plant or machinery, unless the precautionary measures contemplated in paragraphs (b) and (d), or any other precautionary measures which may be prescribed, have been taken;

g) taking all necessary measures to ensure that the requirements of this Act are complied with by every person in his employment or on premises under his control where plant or machinery is used;

h) enforcing such measures as may be necessary in the interest of health and safety;

i) ensuring that work is performed and that plant or machinery is used under the general supervision of a person trained to understand the hazards associated with it and who have the authority to ensure that precautionary measures taken by the employer are implemented; and

causing all employees to be informed regarding the scope of their authority as contemplated in section 37 (1) (b).¹⁷

9. General duties of employers and self-employed persons to persons other than their employees

(1) Every employer shall conduct his undertaking in such a manner as to ensure, as far as is reasonably practicable, that **persons other than those in his employment who may be directly affected by his activities are not thereby**

¹⁷ Section 37 deals with the potential vicarious liability of employees

exposed to hazards to their health or safety.

(2) Every self-employed person shall conduct his undertaking in such a manner as to ensure, as far as is reasonably practicable, that he and other persons who may be directly affected by his activities are not thereby exposed to hazards to their health or safety.

(own emphasis)

34. In terms of section 38 of the OHSA, any person who contravenes or fails to comply with the provisions of sections 8, 9, or 14 is guilty of an offence and shall on conviction be liable to be sentenced to a fine not exceeding R50 000.00 or to imprisonment for a period not exceeding one year or to both such fine and such imprisonment.

35. Employers will further be wary of damages claims instituted by employees who allege that they or those close to them became sick and/or suffered damages due to Covid-19 exposure emanating from insufficient health and safety protocol at their place of employment.

36. The state has created a special avenue of redress for Covid-19 related compensation claims. The Directive for Compensation of Workplace-Acquired Covid-19 must be read in conjunction with the prevailing Compensation for Occupational Injuries and Disease Act 130 of 1993 (COIDA). Of course, this means that compensation will only be awarded if transmission occurred within

the course and scope of employment, as with any occupational compensation claim. Employers may still be personally liable in certain circumstances.

36.1 The above directive has however, provided a handy framework for the determination of which classes of workplace are most at risk for SARS-COV-2 transmission, to be further discussed below.

37. There is furthermore precedent to the effect that employees may bring an application to compel an employer's compliance with section 8 of OHSA by the working of section 158 of the LRA, which allows the Labour Court to ensure compliance with any of its provisions.¹⁸ Whilst the Labour Court has indicated that the correct avenue to follow in enforcing such compliance is via the chief inspector post stipulated by OHSA, it bears noting that beyond criminal liability, employees have options available to them should they feel that their work environment is unsafe.

37.1 Indeed, trade union AMCU had already by May 2020 compelled the Department of Mineral Resources and Energy to comply with occupational health and safety standards, via an application in terms of the Promotion of Administrative Justice Act.¹⁹

37.1.1 AMCU stated that its purpose in bringing the application was to "establish a detailed, national standard to protect the health and

¹⁸ *PSA obo Members v Minister of Health and Others* (J3106/18) [2018] ZALCJHB 345; [2019] 1 BLLR 71 (LC); (2019) 40 ILJ 193 (LC)

¹⁹ *Association of Mineworkers and Construction Union v Minister of Mineral Resources and Energy and Others* (J427/2020) ZALCJHB 68; (2020) 41 ILJ 1705 (LC); (2020) 9 BLLRR 929 (LC)

safety of its members through binding obligations as opposed to the existing broad regulatory measures.”²⁰

37.2 It is not unlikely to think that major sections of the public may wish to compel employers to vaccinate their co-workers in order to ensure their own health. Cognisance should be taken of the fact that this is yet another potential forum for litigation.

38. In summary, the risks attendant on a lack of satisfactory health and safety protocol for employers should not be underestimated. This should be borne in mind when reading what follows.

B) OHSA is vague and open-ended with regards to standardization

39. The OHSA is intended to provide a framework rather than specific instruction. It imposes a legislative duty but does not in and of itself give content to that duty beyond prescribing workplace safety in generalized terms.

40. The content is provided for in regulations that are promulgated in terms of OHSA, and as mandated by OHSA, on an industry specific basis. As Basson *et al* note, “these legislative duties are often broad and non-specific. The regulations issued in terms of OHSA refine these duties into a specific set of

²⁰ Supra para 22

rules providing certainty to employers and employees engaged in differing industries and manufacturing processes.”²¹

41. There are at present twenty-one (21) such sets of regulations issued under OHSA, the vast majority of which are concerned with industries that traditionally involve hazardous work – such as manufacturing involving heavy machinery or explosives.²²

41.1 The regulations are furthermore supplemented by the promulgation of ‘Codes of Good Practice’, which may be promulgated under OHSA as well as the BCEA.

42. Of the 21 regulations, only one is at present even remotely related to the unprecedented pandemic, being the ‘Hazardous Biological Agent Regulations’ (‘HBA’ hereafter) of 2001.

43. Author hereof was able to discern only one mention of a ‘vaccine’ or ‘vaccination’ contained in the above sets of regulations and codes of good practice, such mention being found in the ‘Code of Good Practice on the Protection of Employees During Pregnancy and After the Birth of a Child,’²³ issued in terms of section 87(l)(b) of the BCEA.

²¹ Basson et al, *Essential Labour Law* (2005) 4th ed pp 360

²² Tabulated summary available at <https://www.labourguide.co.za/health-and-safety/1502-summary-of-ohs-act-regulations>

²³ No. R. 1441 13 November 1998

43.1 The above Code notes in its schedule 4 'Biological Hazards' as follows under the labels 'HEPATITIS' and 'RUBELLA':

"General precautions must be taken for all forms of hepatitis. Vaccination is the most effective means available of preventing hepatitis B. Workers must take particular care to avoid mucous membranes and skin coming into contact with potentially contaminated blood or other secretions...."

*"Rubella vaccine is the most effective means of preventing the disease, and susceptible employees **should** be immunised. Pregnancy should be avoided for 3 months after vaccination" (own emphasis)*

43.2 The wording of the above does not suggest that an employer is capable of compelling an employee to vaccinate, but rather speaks to best practice in a specific scenario.

44. The above indicates that the OHSA and its corollaries are silent as to mandatory vaccination, as well as with regards to scenarios such as the current pandemic.

45. The state on 28 August 2020 issued a consolidated directive intended to address the resulting *lacuna* in workplace safety as pertains specifically to the pandemic and in the context of fully re-opening the economy, by collating all that had come before. The directive is titled 'Consolidated Directions on Occupational Health and Safety Measures in Certain Workplaces' and was issued in terms of the

Disaster Management Act of 2001 (the DMA).²⁴ It refers to the HBA regulations and appears to incorporate them by such reference.

45.1 Most employers will be intimately familiar with the cumbersome and weighty safety requirements imposed by this directive and its corollaries, and most consumers will be aware of its more superficial requirements, such as the taking of temperature at the entrance to premises.

45.2 In brief, the directive mandates the following (*inter alia*):

- 45.2.1 conducting a risk assessment
- 45.2.2 minimize number of workers in the workplace
- 45.2.3 minimize contact between workers
- 45.2.4 ensure compliance with appropriate directives in the case of a positive case
- 45.2.5 ensure social distancing
- 45.2.6 ensure queue control
- 45.2.7 symptom screening for workers and consumers
- 45.2.8 provision of sanitizers, disinfectants (free of charge, in sufficient quantities)
- 45.2.9 ensure proper ventilation
- 45.2.10 may not deduct from employee's remuneration in order to enforce above

²⁴ Specifically, regulation 4(10) of the regulations made under s27(2) of said Act.

46. Nevertheless, the above directive is silent on the question of vaccination. Whilst providing sorely needed content to the overarching duty imposed by the OHSA, it does not pronounce on the relative powers and duties of the employer-employee relationship.

47. The directive does however give an indication of when a workplace would be considered 'safe', or the closest approximation thereof, in the context of Covid-19. The directive may therefore be considered a statutory indication of the 'safety' standard, and what would be at minimum 'reasonably practicable' steps for an employer to take to ensure OHSA compliance.

47.1 Importantly, the directive also draws a distinction between employees as regards vulnerability to the virus. A 'vulnerable employee' is defined as any employee with "known or disclosed health issues or comorbidities or any other condition that may place the employee at a higher risk of complications or death than other employees if infected with Covid-19; or above the age of 60 years who is at a higher risk of complications or death if infected."²⁵

48. In *Edwards v National Coal Board*,²⁶ an English case dealing with workplace safety which has been quoted with approval in our Courts, Lord Justice Asquith stated the following as pertaining to the 'reasonably practicable' standard which statute compels employers to strive for:

²⁵ Consolidated Directions on Occupational Health and Safety Measures in Certain Workplaces, section 1, 'Definitions'

²⁶ [1949] 1 All E. R. 743

“Reasonably practicable as traditionally interpreted, is a narrower term than ‘physically possible’ and implies that a computation must be made in which **the quantum of risk is placed in one scale and the sacrifice, whether in money, time or trouble involved in the measure necessary to avert the risk is placed in the other**; and that, if it is shown that there is a gross disproportion between them, the risk being insignificant in relation to the sacrifice, the person upon who the duty is laid discharges the burden of proving that compliance was not reasonably practicable. This computation falls to be made at a point of time anterior to the happening of the incident complained of.”

49. In *Pikitup v SAMWU*,²⁷ the employer had introduced a policy of compelling its drivers to undergo a breathalyser test prior to commencing work due to a stated problem with employees coming to work intoxicated. Such intoxication on duty, argued the employer, contravened the OHSA by creating an unsafe working environment for all involved. The employees objected to the use of the breathalysers, arguing that it was unhygienic and degrading. The matter ultimately went to the Labour Appeal Court, where the Court was called upon to rule on whether the workers’ demand to scrap the test was lawful and thereby merited a strike, and thus, in essence, whether the employer’s imposition of the test was ‘reasonably practicable’ in ensuring OHSA standards. The LAC reasoned that:

“Reasonably practicable means practicable having regard to:

- (a) the severity and scope of the hazard or risk concerned;

²⁷ *Pikitup (Soc) Limited v SAMWU and Others* (JA82/13) [2013] ZALAC 33; [2014] 3 BLLR 217 (LAC); (2014) 35 ILJ 983 (LAC)

- (b) the state of knowledge reasonably available concerning that hazard or risk and of any means of removing or mitigating that hazard or risk;
- (c) the availability and suitability of means to remove or mitigate that hazard or risk; and
- (d) the cost of removing or mitigating that hazard or risk in relation to the benefits deriving therefrom.”

50. And further, at para 52, ruled the following:

“Reasonably practicable is a **variable standard** that must be determined objectively. The employer and to a lesser extent the employee as the duty holders (in terms of sections 8, 9 and 14 of the OHSA) must do a risk assessment and **consider what can or should be done under the circumstances, considering their knowledge of the situation to ensure the health and safety of employees, co-workers and others who might be put in harm’s way, because of their activities.** They must then consider, given the circumstances, **whether it is reasonable to do all that is possible to comply with their duty. In essence, this means that what can be done, should be done, unless it is reasonable in the circumstances to do something less, or in extreme circumstances, more.**” (own emphasis)

51. The Court ultimately confirmed what the lower courts had ruled: that the breathalyser test was not a reasonably practicable measure in ensuring OHSA compliance – and therefore, that the strike protesting the measure was lawful.

52. In reaching this conclusion, the Court reasoned that:

- 52.1 An alcohol and substance abuse policy had already been in place;
- 52.2 The reliability of the testing device was a legitimate concern;

- 52.3 That there were other, less invasive methods of determining whether an employee was intoxicated; and
- 52.4 That the measure was therefore disproportionate in its means to achieving the necessary safety - for which provision had already been made.

53. The above makes clear that vaccination, which - if compelled, may infringe on basic Constitutional rights – would be a disproportionate measure where the safety of employees can be otherwise assured. The relative 'safety' of every workplace is a variable standard, but it is difficult to envision a workplace which, if the directive is complied with, is not sufficiently safe for purposes of OHSA, even if vaccination would be more convenient or cost-effective.

53.1 Stated otherwise: whilst a staff-wide vaccination would presumably eliminate the risk of Covid-19 transmission completely, *this is not the standard which OHSA requires. It requires measures that are 'reasonably practicable', which means in essence measures where the cost of mitigating the risk does not exceed the risk itself for that particular place of work.*

54. In the absence of esoteric instruction regarding risk of infection and viruses, the employer's duty under OHSA reverts to the principle stated aim of ensuring a 'safe' workplace. The pursuant question then, is what constitutes 'safe'. Logically, every single eventuality of human experience cannot be excluded – the employer cannot legislate for *vis maior* acts like earthquakes, for example. The standard is therefore malleable and informed by 'reasonableness'.

55. The *Pikitup* case is highly congruent with the situation at hand. It provides strong authority for the assertion that employees cannot be compelled to undertake invasive measures by their employer and that the standard in this regard is extremely high, even where such measures are aimed at ensuring the safety of employees and the general public. **The precedent herein will be difficult to negate, though there is room for argument as to distinguishability with the Covid-19 pandemic as a more serious and widespread threat than, for example, drunk driving.**

C) OHSA clearly envisions employee consultation and participation

56. Apart from the above two points, it is furthermore abundantly clear that OHSA's general tenor and aim is that of bilateral cooperation, recognizing that workplace safety necessarily includes buy-in from those most affected – employees.²⁸

56.1 The tenor and aims of a given provision should not be underestimated when interpreting statute. As stated in *Cool Ideas v Hubbard*:²⁹ "It is trite that words in a statute must be given their ordinary grammatical meaning, unless doing so would result in an absurdity. Added to this general principle is the rider that (a) a statutory provision should always be interpreted purposively, (b) the relevant statutory provision must be properly

²⁸ See generally s14 of OHSA

²⁹ *Cool Ideas 1186 CC v Hubbard and Another* (CCT 99/13) [2014] ZACC 16; 2014 (4) SA 474 (CC); 2014 (8) BCLR 869 (CC)

contextualized and (c) **all statutes must be construed consistently with the Constitution.**" (own emphasis)

56.2 The above should be borne in mind when reading what follows. The principles indicate that a purposive interpretation of the legal framework, and OHSA in particular, will likely win the day in Court, and that a reading which favours the Constitutional rights of employees may enjoy precedence.

57. To the end of elaborating on the general spirit of bilateralism in OHSA, the Act makes provision for the creation of in-house health and safety committees comprising employees as representatives, who play a key role in the overall compliance process.³⁰ In other words – it is *not for the employer alone to make policy*. OHSA clearly envisions the employee as a stakeholder and therefore participant in policymaking.³¹

58. The above principles were emphasized in the *Pikitup* matter noted above as an essential aspect of resolving the question of what 'reasonably practicable' and proper conduct on the part of the employer was. Its importance should not be underestimated. The Court held the following:

"The OHSA is underpinned by co-operation between employer and employees. It should be viewed through the prism of shared duties and responsibilities which

³⁰ Sections 17, 18, 19, 20

³¹ *supra*

can in **most cases only be achieved if the employees consent and buy-in to the measures.** It does not exclude collective bargaining.”³²

And continued at paragraph 62:

“The provisions of the OHSA are compatible with collective bargaining. As stated above, the Act is **underpinned by mutual cooperation between employer and employees.** Such cooperation can be achieved by way of collective bargaining and in cases where no agreement is reached, by **using the weapons available** to the bargaining parties.”

59. The Court’s reasoning makes indisputably clear that, even beyond the mechanisms created by OHSA, employees *must* have some kind of say in health and safety policy, and are able to enforce their stakeholder status by way of, to name one example, collective bargaining (where a registered trade union is engaged). The legislator has made its intention clear, as confirmed by the Courts.

60. A final point to note before author turns to application of above principles to the facts at hand: section 23 of the OHSA is unequivocal in holding that employees shall not bear the financial burden of ensuring the proper health and safety protocols and practices of the workplace – reinforced by the similar provision of the consolidated Covid-19 occupational standards directive set out above.

³² *Pikitup v SAMWU* at para 64

61. This means that employers are likely to incur the costs of vaccination for their employees should they not form part of the state-sponsored roll-out program, or the employer wishes to act proactively. This has significant implication when determining what is 'reasonably practicable' in terms of workplace safety, particularly in situations where the staff contingent is very large.

Application to facts at hand

62. The above has made clear the following: employers may attract significant legal trouble by not adhering to OHSA and its corollaries, particularly in the Covid-19 context. This incentivizes mandating vaccination.

63. However, adherence to OHSA standards is tricky, given the lack of specific direction. What constitutes a 'safe' and 'risk-free' working environment will differ from employer to employer, depending on environmental factors such as, to say the least, the vulnerability of employees, number of employees, contact with the public, ventilation capacity, ease of symptom screening, and more.

64. Finally, OHSA envisions a collaborative and consultative process of workplace safety. Employees may not be penalized or made subject to financial deductions in order to ensure OHSA compliance, but they are expected to form committees and bear some vicarious liability,³³ circumstance permitting. In short: employees play a part in workplace safety and are therefore not subject to the sole discretion of their employer.

³³ See section 37 generally

65. The above points evince a strong sense of uncertainty and under such circumstances it is extremely unlikely that an employer will be able to unilaterally mandate vaccination in the majority of cases, if not all.

65.1 The one possible exception relates to the argument in regard of vaccination being an 'inherent requirement' of work, to be discussed further below.

66. Employee consultation and case-by-case consideration are of critical importance to protect both the rights of the employees *and* to shelter the employer from liability. What is 'reasonably practicable' for an employer to achieve with regards to workplace safety is thus a flexible standard – and no mandatory medical intervention should be required in the absence of a uniform standard.

67. In the absence of precedent, any speculation as to 'reasonably practicable' measures must be adjudged by the baselines provided by the consolidated Covid-19 workplace safety directive issued last August, as noted above, and with reference to the expounded-upon criteria.

68. The directive on Covid-19 related COIDA claims sets out a four-tier system of descending risk for certain workplaces:³⁴

³⁴ The following summary was taken from an article by Chloe Loubser of Bowmans, available at <https://www.bowmanslaw.com/insights/employment/covid-19-compensation-for-workplace-contracted-covid-19/>

- 68.1 **“Very high exposure risk occupations**, being those with high potential for exposure to known or suspected sources of COVID-19 during specific medical, post mortem or laboratory procedures, including **healthcare employees, morgue employees and laboratory employees** who come into contact with confirmed positive COVID-19 cases or specimens.
- 68.2 **High exposure risk occupations**, being those with high potential of exposure to known or suspected patients with COVID-19, including **healthcare delivery and support employees, medical transport employees moving patients, and mortuary employees** involved in preparing bodies for burial or cremation.
- 68.3 **Medium exposure risk occupations**, being those that require frequent and/or close contact (within 1.5 metres) with people who may be infected with COVID-19, but who are not known or suspected COVID-19 patients, such as **employees employed in schools, and high-population-density work environments such as labour centres, consulting rooms, point of entry personnel and some high-volume retail settings**.
- 68.4 **Low risk occupations**, being those that do not require contact with people known to be or suspected of being infected with COVID-19, nor frequent close contact (within 1.5 metres) with the general public. Employees in this category have **minimal occupational contact with the public and other fellow employees.**”

69. As a point of departure, the fact that the Covid-19 pandemic has had a global impact and contributed to millions of deaths cannot lead to an overestimation of the severity of the threat on a blanket basis.

70. It is highly conceivable that certain workplaces are at far less risk than others, given what is public knowledge regarding the Covid-19 disease and the SARS-COV-2 virus. If one is to conceive of a spectrum, it may be stated (crudely) that at the one extreme is a crowd of obese, elderly persons working in a poorly ventilated mineshaft with zero PPE, and at the other, a group of young, healthy persons working outside on a beach wearing surgical masks and able to constantly sanitise their extremities.

71. Applying the principles elucidated in *Pikitup*³⁵ and with the above in mind, against the baseline standards of the prevailing directive, one may reason as follows as to what constitutes 'reasonably practicable' for projected purposes of OHS compliance.³⁶

71.1 ***Severity and scope of hazard concerned***

³⁵ "Reasonably practicable means practicable having regard to:

- (a) the severity and scope of the hazard or risk concerned;
- (b) the state of knowledge reasonably available concerning that hazard or risk and of any means of removing or mitigating that hazard or risk;
- (c) the availability and suitability of means to remove or mitigate that hazard or risk; and
- (d) the cost of removing or mitigating that hazard or risk in relation to the benefits deriving therefrom."

³⁶ Author notes that a full-spectrum analysis of the various considerations inherent in such planning and workplace planning is beyond his scope and expertise and that reader is advised to supplement the following with appropriate expertise.

71.1.1 As mentioned above, the severity of the hazard (the Covid-19 pandemic and the risk of transmission of the SARS-COV-2 virus in the workplace) has had an international impact and contributed to millions of deaths. On an individualized basis however, the threat is arguably far less drastic. The UK has estimated, for example, that one in three persons who carry SARS-COV-2 are asymptomatic,³⁷ and other studies have suggested far higher rates. It is widely accepted that younger, healthy people have an extremely small chance of becoming dangerously sick.³⁸ South Africa has a case fatality rate of 2.9%.³⁹

71.1.2 The severity of the hazard is therefore highly dependent on the particular vulnerability, or risk-profile, of the staff concerned.

71.2 ***State of knowledge reasonably available concerning that hazard***

71.2.1 Given global efforts to study and understand the virus, it may reasonably be stated that knowledge of the hazard is at present very substantial, though due to the global political atmosphere, often debated and subject to significant scrutiny from all sides.

³⁷ <https://www.gov.uk/government/news/asymptomatic-testing-to-be-rolled-out-across-the-country-starting-this-week>

³⁸ <https://patient.info/news-and-features/coronavirus-what-are-asymptomatic-and-mild-covid-19>

³⁹ https://en.wikipedia.org/wiki/COVID-19_pandemic_death_rates_by_country#Table_of_death_rates

71.2.2 However, the knowledge necessary in terms of preventing transmission in the workplace is asserted by the state itself – and therefore one may safely assume that for purposes of ensuring OHSA compliance, employers have access to the necessary and therefore are able to plan accordingly.

71.3 *Availability and suitability of means to remove or mitigate hazard*

71.3.1 As is evident from the prevailing directive, the availability of means to mitigate the hazard are legion. Whilst a risk-free, 100% effective inoculation would obviously be the ideal, many citizens simply do not buy-in to such a proposal, bringing 'suitability' into question.

71.3.2 The means to mitigate a hazard cannot be said to be 'suitable' where the person subject to such means believes the means to be damaging to their health.

71.3.3 Means of mitigating the hazard, namely, transmission of the virus, are commonly prescribed, and including the wearing of effective masks, social distancing protocol, and efficient hygiene practice, among much else, as set out in the directive.

71.3.4 Author submits that the availability of less invasive means and mechanisms of ensuring OHSA compliance is a cornerstone of the assertion that vaccination cannot be compelled by employers. **It is entirely possible to reasonably ensure the safety of employees and members of the public via these means for purposes of OHSA compliance – else why implement them?**

71.4 ***Cost of removing or mitigating that hazard or risk in relation to the benefits deriving therefrom***

71.4.1 As noted above, should employers seek to compel vaccination on the basis of OHSA compliance, the employer will itself have to bear the costs.

71.4.2 As employers have now put into place the measures necessitated by the Directive, it is feasible that 'safety' for purposes of OHSA can be achieved, especially in the medium and low risk categories. In the absence of an indication of what vaccination will cost, and what the extent (and success rate) of the state programme will be, and given the poor economic climate, it may well be the case that employers cannot justify such an expense.

71.4.3 As it can be shown that the alternative means noted above are sufficient to ensure workplace safety, an employer would have to show extraordinary circumstances to justify mandatory vaccination as a more appropriate method of mitigation than what is presently available, based on the highly invasive nature of vaccination – circumstances which author hereof cannot imagine. The argument that vaccination would ultimately remove the need for other risk-prevention methods and therefore be more cost-effective, is unlikely to withstand scrutiny in the face of Constitutional rights to bodily integrity.

72. Ultimately, all of the above must be considered to some extent by every employer on a case-by-case basis in gauging OHSA compliance. The fact remains that it is extremely difficult to think of a particular workplace that would be unable to sufficiently safeguard their employees without vaccination.

73. What author has attempted to set out above is reasoning that indicates that unless a workplace is extremely and exceptionally vulnerable or at risk, as set out in the Directive, it will be very difficult to justify mandating vaccination as the only way to achieve OHSA compliance, if not impossible. Certain fields of work, such as healthcare, will likely find it most difficult to meet OHSA standards, given their particular circumstances, though this would not alter the fact that vaccination cannot be compelled, and would likely lead to further litigation outside of the workplace, rather than an internal dispute.

74. Judging by the criteria of 'risk' set out above however, it appears that the vast majority of South African workers will fall into the medium and low risk categories.

75. Regardless, the point remains that OHSA compliance is a two-way street and that employees, by virtue of their OHSA representatives or health and safety committees, have a clear right to negotiation, participation, and policy-making in respect of the above criteria, and what can/should be done at their place of work with regards to vaccination for purposes of OHSA compliance.

75.1 It bears repeating at this stage that there is no other basis in law, outside of health and safety regulations, on which an employer can conceivably compel its employees to vaccinate. **The resulting dispute will likely turn not on this specific question, but whether dismissal for refusing to comply with such an unlawful request is lawful and/or fair.**

76. The question at hand here is essentially whether, in ensuring OHSA safety standards, it is reasonably practicable to require an employer to vaccinate against Covid-19 – since this is the single enabling provision an employer might be able to rely on in requesting its employees to vaccinate. **In light of the *Pikitup* case, the answer seems to be no, it is not reasonably practicable – such a measure would be unjustifiably invasive, despite the risk involved to the general public, and cannot be justified where alternative**

means to mitigate risk are available. Whilst there is room in which to maneuver, the employer must utilize it.

77. It is entirely conceivable that these disputes arise after the fact, and that employers do not pay sufficient attention to the nuances of OHSA and introduce mandatory vaccination in any event. Employers may read the above and still feel that they have no other option to ensure OHSA compliance. In such a case, where the bilateralism of OHSA has failed, employees may rely on asserting a Constitutional right.

78. Author therefore turns now briefly to the Constitutional aspects of the question at hand.

CONSTITUTIONAL LIMITATION

79. The right to bodily integrity is guaranteed by s12 of the Constitution. It is a mere component of the broader section, which deals principally with the concepts of 'freedom' and 'security of person' generally. The full text reads as follows:

1. Everyone has the right to freedom and security of the person, which includes the right

- a. not to be deprived of freedom arbitrarily or without just cause;
- b. not to be detained without trial;
- c. to be free from all forms of violence from either public or private sources;
- d. not to be tortured in any way; and

e. not to be treated or punished in a cruel, inhuman or degrading way.

2. Everyone has the right to bodily and psychological integrity, which includes the right

- a. to make decisions concerning reproduction;
- b. to security in and control over their body; and**
- c. not to be subjected to medical or scientific experiments without their informed consent.

(own emphasis)

80. The right to security in and control over one's body is likely a right capable of direct horizontal application, that is to say, applicable as between two private parties (unlike, for example, the right to housing, which may only be claimed against the state).

81. The Bill of Rights and its concomitant guarantees are generally invoked where legislation or policy is created by the state (not as an employer, but in its role as executive). It is not in general to be raised in disputes between private parties as its use would be limited, given that private parties are not generally in the requisite vertical relationship wherein rights may be granted by a party with a monopoly on force. A murderer, for example, is charged under criminal law, not with a contravention of the victim's right to life.

82. It is therefore not as simple as it would appear to base a challenge to a private employers' decision to mandate vaccination against Covid-19 for its employees on

a Constitutional right. The situation would be different had legislation to this effect been promulgated by the State.

83. Stated otherwise: the limitation of constitutional rights cannot take place in a vacuum. Such a determination requires adjudication by a Court. Whilst the direct horizontal applicability of the right to bodily integrity means that private actors are expected and mandated to comport themselves in line with the provisions of the Bill of Rights, the fact remains that the enforceability thereof is a far murkier proposition than the traditional vertical framework, that is to say, where the state acts with state power.

84. The right to bodily integrity is not absolute. Two common examples of lawful limitation spring easily to mind: the arrest and detainment of a person suspected of a crime, or the taking of a blood sample for purposes of investigating such a crime. In both cases, the limitation is justified by statute – in this case, the Criminal Procedure Act of 1977.

84.1 Therefore, a dispute between employer and employee is likely to arise – and the workplace is not a suitable forum for resolving such a dispute, unlike OHSA, which may be asserted in terms of labour law mechanisms.

85. Section 36(1), which allows for the limitation of rights under narrow, exceptional circumstances, reads as follows:

"(1) The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including

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

86. The analysis of whether a given right is unjustifiably limited is a two-stage enquiry – whether the right has actually been infringed, and then whether such infringement is a justifiable limitation.

87. The absolute minimum requirement for that of the second stage is that of a **law of general application**, meaning that any conduct infringing on a right must be duly enabled by legislation, statute, or something similar, which is equally applicable to all citizens. Policy is insufficient and will not satisfy this requirement.⁴⁰ **Any limitation must have some basis for its authority in law.**

87.1 Here already there is a major stumbling block for employers seeking to compel vaccination despite the provisions of OHSA. As illustrated above, the most likely legislation to find application in this scenario is OHSA – legislation which does not have exact descriptions on the duties and limits of the parties to which it applies. As Currie and De Waal explain, "this

⁴⁰ Currie & De Waal *Bill of Rights Handbook* 6th ed pp 155

means that the law must be sufficiently clear accessible and precise that those who are affected by it can ascertain the extent of their rights and obligations.”⁴¹ There is no conceivable way in which OHSA would fully satisfy this standard.

88. Should such a law be promulgated, it will have to meet the standard of the limitation clause – stated broadly, that the limitation must be reasonable and justifiable, and, crucially, **proportional**. This is where the criteria from (a) – (d) above come into play.

89. Currie and De Waal write the following as regards an assessment of whether the section 12 right has been unjustifiably violated (as part of the first stage of the enquiry):

“Once it has been determined that the bodily integrity right has been implicated, the courts will be required to find criteria for distinguishing justifiable from unjustifiable invasions. United States case law suggests the following as a set of rough and preliminary guidelines. In order to avoid arbitrariness, a decision to invade bodily integrity must be **procedurally regular**. For example close body searches must be grounded at least on a requirement of reasonable suspicion. Where possible, a deliberate invasion of bodily integrity **must be preceded by a hearing, if only an informal one**. The principle of necessity should be observed, as should the principle of proportionality. An intrusion must

⁴¹ Currie & De Waal pp 156

avoid inflicting unnecessary physical pain or anxiety. It must not run the risk of disfigurement or injury to health.”⁴²

On the limitation of constitutional rights generally, they write the following:

“It must be emphasized that the existence of a general limitation section does not mean that the rights in the Bill of Rights can be limited for any reason. It is not simply a question of determining whether the benefits of a limitation to others or too the public interest will outweigh the cost to the right-holder. **If rights can be overridden simply on the basis that the general welfare will be served by the restriction then there is little purpose in the Constitutional entrenchment of rights.**”⁴³

“...However important the purpose of the limitation, restrictions on rights will not be justifiable unless there is a good reason for thinking that the restriction would achieve the purpose it is designed to achieve, and that there is not other ‘realistically available’ way in which the purpose can be achieved without restricting rights.”⁴⁴

90. From the above, one may extract the following, bearing in mind that these requirements have not been tested in this particular unprecedented context, and have mostly been viewed within the context of arrest and detainment:

⁴² Currie & De Waal pp 287

⁴³ Currie & De Waal pp 151

⁴⁴ *supra*

- 90.1 The right to bodily integrity is not absolute.
- 90.2 Its paramount status as a component of the right to freedom however, indicates that it will not be lightly infringed, and that the second stage of the enquiry will be a stringent one.
- 90.3 Therefore, the procedural aspect (in violating the right) is of critical importance. **Certainly the above would indicate that an private employer should be incredibly wary of attempting to compel an employee to vaccinate in the absence of enabling legislation or a court judgement.**
- 90.4 The protection of rights in a horizontal setting is far less common than the protection of rights against the state in its legislative or executive capacity – for example, when legislation is challenged.

91. Author wishes to emphasise once more that Constitutional litigation is an esoteric field of law. Sight should not be lost of the practicalities of this unprecedented situation. There is an extreme amount of uncertainty in this sphere at present. A pro-active approach may be warranted, as discussed below, but this remains up to the discretion of client.

92. In concluding this section, it is therefore prudent to offer a thought experiment: should an employee receive instruction to vaccinate against Covid-19, and does not wish to do so, how would such an employee go about asserting the right to bodily integrity? The employee may assert this right to the employer in a communication. The employer may seek legal advice, for it is highly unlikely that the employer is able to determine the precise content and application of this

right. There are few possible outcomes here: the employer may choose not to take the risk and exempt the employee from vaccination, in which case no precedent is set for employees across the country and there is no unitary progress. Or, it may be that the employee is dismissed on grounds of misconduct or operational requirements, for example, and then the matter would go to the Labour Court in any event. It is only at this stage that a true adjudication of Constitutional rights would come into play.

93. This is all to say that Constitutional arguments may find effective application only at a later stage, when they are tested in terms of the Constitution itself. Labour law, on the other hand, presents avenues that may prevent litigation arising in the first place. Despite this, all options should be considered within the broader factual matrix and what is potentially to come.

94. In this case, the limitation falls at the very first hurdle – it has not taken place on the basis of a law of general application. Apart from this issue however, it is quite possible that the further criteria of reasonability, justifiability, and proportionality will be met, given the goal sought to be achieved by the limitation, namely, the effective combat of the Covid-19 pandemic. A full analysis of this issue is outside the scope of the current opinion. **However, it is indisputable that a law of general application must first be promulgated – which an employer cannot do of its own accord.**

95. The author turns now to the protections built into labour legislation which would render a dismissal potentially unfair under the above circumstances unfair in

terms of statutory law. These provisions are probably more readily asserted at a pre-litigation stage due to their concrete content and general familiarity, though any assertion of unfair dismissal would necessarily still require adjudication.

GROUND FOR DISMISSAL AND LABOUR LAW PROTECTION

96. The position where an employee has been dismissed and feels thereby aggrieved (i.e unfairly dismissed) is regulated by the LRA and the EEA, which set out the circumstances under which an employee may be fairly and/or lawfully dismissed and the grounds upon which dismissal would not be lawful. Both Acts offer some measure of protection and guidance to employees as well.

97. As other law practitioners have suggested,⁴⁵ the LRA makes clear that no employee shall be dismissed without good cause and in terms of the applicable legislation. This is a proscribed category, congruent with South Africa's notoriously robust labour protections, in which workers have significant protections.

98. Indeed, section 187(1)(f), a section which lists a number of scenarios where dismissal is deemed to be automatically unfair, specifically notes that a dismissal is deemed unfair where the reason is "that the employer unfairly discriminated against an employee, directly or indirectly, on any arbitrary ground, including, but not limited to race, gender, sex, ethnic or social origin, colour, sexual orientation,

⁴⁵ Jason Whyte *Are SA employers allowed to implement a compulsory Covid-19 vaccine policy?*
<https://www.bizcommunity.com/Article/196/610/212146.html>

age, disability, religion, conscience, belief, political opinion, culture, language, marital status or family responsibility.”

98.1 The section contains further relevant situations, such as section 187(1)(c), which holds that dismissal is unfair where the reason for dismissal is “a refusal by employees to accept a demand in respect of any matter of mutual interest between them and their employer.”⁴⁶

98.2 This provision is directly relevant to our scenario, where it is conceivable that an employer may demand vaccination and an employee refuses. Dismissal flowing from such refusal likely falls square under the above provision and is automatically deemed to be unfair, with the onus of proving otherwise on the employer.

99. The EEA contains a similar protective provision and indeed devotes an entire chapter to the prohibition of unfair discrimination:

5. Elimination of unfair discrimination

Every employer must take steps to promote equal opportunity in the workplace by eliminating unfair discrimination in any employment policy or practice.

6. Prohibition of unfair discrimination

(1) No person may unfairly discriminate, directly or indirectly, against an employee, in any employment policy or practice, on one or more grounds, including race, gender, sex, pregnancy, marital status, family responsibility, ethnic or social origin, colour,

⁴⁶ Whether the matter of mandatory vaccination is one of ‘mutual interest’ is up for debate at this point however, and will likely require adjudication to clarify.

sexual orientation, age, disability, religion, HIV status, conscience, belief, political opinion, culture, language, birth or on any other arbitrary ground.

(2) It is not unfair discrimination to—

- (a) take affirmative action measures consistent with the purpose of this Act; or
- (b) **distinguish, exclude or prefer any person on the basis of an inherent requirement of a job.**

(3) Harassment of an employee is a form of unfair discrimination and is prohibited on any one, or a combination of grounds of unfair discrimination listed in subsection (1).

(4) A difference in terms and conditions of employment between employees of the same employer performing the same or substantially the same work or work of equal value that is directly or indirectly based on any one or more of the grounds listed in subsection (1), is unfair discrimination.

(5) The Minister, after consultation with the Commission, may prescribe the criteria and prescribe the methodology for assessing work of equal value contemplated in subsection (4).

100. The above protections appear to offer *prima facie* protection to those employees who feel strongly against vaccination. An anti-vaccination stance may have to be compartmentalised however, as either a religious or political belief, and it is likely that employees will have to have some kind of basis in the reasons for their adoption of this belief in order to prove discrimination, rather than pure disagreement with an employer in terms of the applicability or morality of vaccination. Regardless, the *prima facie* case for discrimination is self-evident.

101. **Particular and special note should be taken of section 6(2)(b), which is a built-in exception and provides some measure of flexibility for an**

employer. Plainly stated, there are clear grounds in the statute where a belief that is totally incompatible with a particular position will be valid grounds for discrimination – an Orthodox Jewish person for example, will probably not be able to force a butchery to stock only beef and chicken to the exclusion of pork. The provision of a variety of meats is arguably an ‘inherent’ part of the trade of a butcher.⁴⁷

101.1 The LRA contains a similar caveat at section 187(2)(a), which holds that:

(2) Despite subsection (1)(f)—

(a) a dismissal may be fair if the reason for dismissal is based on an inherent requirement of the particular job;

(b) a dismissal based on age is fair if the employee has reached the normal or agreed retirement age for persons employed in that capacity.

102. Both the LRA⁴⁸ and EEA⁴⁹ make provision for dispute-resolution before the CCMA, which may then eventually end up before the Labour Courts. Notably, the EEA makes clear that the employer bears the overall onus of proving that the dismissal was fair.⁵⁰ These caveats have been held to be **absolute defences to**

⁴⁷ Whyte makes this point compellingly in his article supra: “In this regard, the Supreme Court of Appeals has clarified in *Department of Correctional Services v POPCRU & others* that religious and personal beliefs may be trumped by an employer’s legitimate operational requirements or its occupational health and safety obligations. The Court did however emphasise that where a workplace policy offends against a central tenet of a person’s religion or beliefs, the employer was obliged to demonstrate that there was no means by which the employee could be reasonably accommodated or that the employer’s requirement was a fair and inherent requirement of the job”

⁴⁸ Chapter VII

⁴⁹ Section 10 ‘Disputes Concerning this Chapter’

⁵⁰ S11 of EEA

unfair dismissal under appropriate circumstances however, though each case must be adjudicated on its own merits.⁵¹

103. There is however, the possibility that an employer may argue that due to the exceptional, unprecedented nature of the pandemic, and the pressure on the healthcare system, and the relief that vaccination would bring to healthcare workers who would then perhaps not have to comply with certain other measures, that being vaccinated is, **for the period of the pandemic, an inherent requirement of a position in the frontlines of the fight**. This is not necessarily a valid argument, but author hereof is convinced that a court may be persuaded to accept such an argument if it is properly made.

LITIGATION FORECAST AND RECOMMENDATIONS

104. Much of the above is premised on the basis that a Court will be called upon to adjudicate a dispute, whether on Constitutional grounds or unfair dismissal. Client may not be desirous of further litigation. The following is advised with this in mind.

105. **Is advice on a case-by-case basis desirable ('case-specific advice')? This is for the client to determine. There are options available should client wish to avoid ad hoc conflict and fragmented litigation.**⁵²

⁵¹ *Independent Municipal and Allied Trade Union and Another v City of Cape Town* (LC521/03) [2005] ZALC 10; [2005] 10 BLLR 1084 (LC) at para 100

⁵² Client's *locus standi* to bring an application on a broad basis is questionable. Further consultation is necessary should this avenue be pursued.

106. On the basis that employees have a lawful right to take part in the creation and application of health and safety policy under OHSA, collective bargaining and other forms of vertical negotiation will take place. Where such negotiation reaches a deadlock, a dispute may be referred to the CCMA, which will likely be called upon to determine whether the proposals of the employers are congruent with OHSA (that is to say, 'reasonably practicable').

107. This is one way in which the question may be adjudicated. Set against the duty of the employer to ensure such safe working environment on pain of criminal liability, it is likely that dismissals will be frequent where an employer is not adequately aware of the provisions of OHSA. It appears almost certain that such dismissal will also end up before the CCMA, where again the question will arise.

CONCLUSION

108. Whilst there is little in the way of clear-cut answers or precedent to this particular scenario, the above has made clear that in the absence of a specific enabling regime or legislation, it would be extremely difficult for an employer to compel an employee to take a Covid-19 vaccine, if not impossible. This position is the rule. The only leg on which an employer may stand is that of OHSA compliance – and this compliance is a variable standard. At present, it is likely that the only workplace environment where it would be 'reasonably practicable' to require Covid-19 vaccination to the exclusion of all other alternatives, is the healthcare profession, and in particular, employees working with patients directly. Even so, a healthcare worker cannot be 'compelled' outright. The legislature or the

executive will have to address this gap in our law. Furthermore, in the absence of a law of general application, compulsory vaccination is an unjustifiable violation of the right to bodily integrity and the security of the person. However, it is unlikely that the employer and employee will be able to adjudicate such a dispute. It is more likely that disputes will end up before the CCMA and the Labour Court, where such limitation will then come into relief.

Do not hesitate to contact author(s) hereof with further queries or requests for clarification.



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