



10 Mandatory vaccination against Covid-19

Implications for the South African workplace

Kgomotso Mufamadi* , Katleho Letsiri** 

*Faculty of Law,
University of Johannesburg*

Abstract

COVID-19 vaccines have been identified by the World Health Organization as the most effective tool to protect persons against the novel COVID-19 disease, which has had a devastating impact on the global community. The roll-out of COVID-19 vaccines has given rise to various questions and in the employment context, the most pertinent question is whether employers can compel employees to vaccinate. Compulsory vaccination against the disease would constitute compulsory medical treatment, which is an area that is presently not regulated in South African labour legislation. For this reason, the authors will consider the National Health Act 21 of 2003 as more general legislation containing provisions on this area, particularly in the context of informed consent and the circumstances under which the requirement of consent may be limited. The authors will further consider the employer's duty to provide and maintain a safe working environment in terms of the Occupational Health and Safety Act 85 of 1993 in the context of vaccinations and will analyse the provisions of the Consolidated Direction on Occupational Health and Safety Measures in Certain Workplaces issued by the department of employment and labour which contains guidelines for the implementation of mandatory vaccinations policies in the workplace. In considering the above,

* BA, LLB, LLM (Wits). Lecturer: Department of Public Law at the University of Johannesburg.

** LLB, LLM (UJ). Assistant Lecturer: Department of Public Law at the University of Johannesburg.

recommendations will be made as to whether mandatory vaccinations are justifiable in labour law, considering relevant issues such as reasonable accommodation, whether employees may be dismissed for a refusing to vaccinate, liability in the case of adverse reactions to the mandatory vaccine, the human rights implications, and the limitation of rights in terms of section 36 of the Constitution.

1 Introduction

The Occupational Health and Safety Act (OHSA)¹ imposes a duty on employers to provide and maintain, as far as reasonably practicable, a safe working environment for employees as well as other persons who have access to the premises.² In the COVID-19 era, this includes adopting measures that will prevent the spread of the disease including social distancing measures, sanitisation, the wearing of cloth masks and more recently, administering COVID-19 vaccinations—a measure that has been identified by the World Health Organization (WHO) as the most effective tool for protecting people against the disease.³ However, the roll-out of the COVID-19 vaccinations has given rise to various questions in the employment context. The authors will specifically consider the question pertaining to whether employers can compel employees to vaccinate against disease. This would constitute compulsory medical treatment, an area which is not specifically regulated by South African labour legislation, which is in contrast with compulsory medical testing which is regulated in terms of section 7 of the Employment Equity Act.⁴ In the absence of labour legislation regulating this area, the authors will consider the National Health Act⁵ which requires in section 7, one's informed consent prior to receiving medical treatment, unless the failure to treat the individual or a group of people will result in a "serious risk to the public health".⁶ Furthermore, the Department of Employment and Labour issued COVID-19 vaccination Guidelines in the Consolidated Direction on Occupational Health and Safety Measures in Certain Workplaces (OHS directions). In terms of the OHS directions, employers must undertake

1 Act 85 of 1993.

2 s 8 of the OHSA.

3 WHO "COVID-19 and mandatory vaccination: ethical considerations and caveats" at <<https://www.who.int/publications/i/item/WHO-2019-nCoV-Policy-brief-Mandatory-vaccination-2021.1>> (30-11-2021).

4 Act 55 of 1998.

5 Act 61 of 2003.

6 See s 7(1)(d) of the National Health Act.

a risk assessment taking into account *inter alia*, whether it intends to make COVID-19 vaccines mandatory and if so, identify employees who must be vaccinated by virtue of their risk of transmission through their work, or risk of severe COVID-19 or death due to their age or comorbidities. However, employers are still required to ensure that the implementation of a mandatory vaccination plan is reasonable and justifiable, and to further balance the constitutional rights of employees in doing so. It specifically refers to the right to bodily integrity in section 12(2) and the right to freedom of religion, belief and opinion in section 13 of the Constitution.⁷ In considering the above, the writers will make recommendations as to whether it is justifiable in labour law to compel employees to vaccinate and whether employees may be disciplined for refusing to vaccinate.

2 Introduction to COVID-19 and COVID-19 vaccination history

Since its emergence in 2019, the novel COVID-19 has had a fundamental global impact.⁸ The outbreak began in Wuhan, China in December 2019 and it was declared a global pandemic by the WHO on 11 March 2020.⁹ The causative virus, SARS-Cov-2, primarily spreads when an infected person is in close contact with others and the most common symptoms include “acute onset of fever, chills, cough, shortness of breath, and loss of taste or smell”.¹⁰ The disease spreads at an alarmingly rapid rate which is evidenced by the significant number of positive COVID-19 cases globally, and the deaths as a result thereof.¹¹ Governments soon learned that if not properly contained, COVID-19 can have a devastating impact on the human population. Therefore, in order to curb transmission of the disease, many jurisdictions declared

7 The Constitution of the Republic of South Africa, 1996.

8 World Health Organization “Evaluation of COVID-19 vaccines effectiveness interim guidance” at <https://www.who.int/publications/i/item/WHO-2019-nCoV-vaccine_effectiveness-measurement-2021.1> (30-10-2021).

9 See World Health Organization “WHO Director-General’s opening remarks at the media briefing COVID-19—11 March 2020” at <<https://www.who.int/director-general/speeches/detail/who-director-general-s-opening-remarks-at-the-media-briefing-on-Covid-19---11-march-2020>> (30-10-2021).

10 World Health Organization (n 8).

11 As at 14 January 2022, there have been 318 648 834 confirmed cases of COVID-19 including 5 518 343 deaths globally (see WHO Coronavirus (COVID-19) dashboard available online at <<https://covid19.who.int/>> (16-01-2022)).

it a national disaster and imposed national lockdowns and other containment measures. In South Africa, COVID-19 was declared a national disaster in terms of section 27(1) of the Disaster Management Act.¹² The government imposed a national lockdown which entailed the restriction of the movement of persons and goods including confining all persons to their places of residence unless strictly for the purpose of performing essential services, obtaining essential goods or services, collecting a social grant or seeking emergency medical attention.¹³ The WHO further recommended the wearing of cloth masks, the continuous washing of hands and sanitisation as measures that could prevent the spread of the disease,¹⁴ and it later identified vaccines as the most effective tool to protect against COVID-19.¹⁵ It reports that global efforts to develop multiple vaccines in response to the pandemic have been unrivalled in the history of public health as by December 2020, over 200 vaccine candidates were in development.¹⁶ Consequently, governments began to consider making COVID-19 vaccination mandatory as a means to increase vaccination rates and to achieve public health goals.¹⁷ Vaccines generally work by presenting an

12 Act 57 of 2002.

13 Government Gazette 11062 (25 March 2020). The government introduced a five level COVID-19 alert level system to manage the gradual easing of the lockdown which is guided by criteria including the “level of infections and the rate of transmission, the capacity of health facilities, the extent of the implementation of public health interventions and the economic and social impact of continued restrictions”. Alert level 1 indicates a low COVID-19 spread with a high health system readiness; Alert level 2 indicates a moderate COVID-19 spread with a high health system readiness; Alert level 3 indicates a moderate COVID-19 spread with a moderate health system readiness; Alert level 4 indicates a moderate to a high COVID-19 spread with a low to moderate health system readiness; Alert level 5 indicates a high COVID-19 spread with a low health system readiness. The South African national state of disaster began with Alert level 5 and gradually decreased (see <[https://www.gov.za/Covid-19/about/about-alert-system#:~:text=\(a\)%20'Alert%20Level%201,a%20high%20health%20system%20readiness%3B&text=\(d\)%20'Alert%20Level%204,a%20low%20health%20system%20readiness](https://www.gov.za/Covid-19/about/about-alert-system#:~:text=(a)%20'Alert%20Level%201,a%20high%20health%20system%20readiness%3B&text=(d)%20'Alert%20Level%204,a%20low%20health%20system%20readiness)> (22-10-2020)).

14 World Health Organization “Advice for the public: Coronavirus disease (COVID-19)” at <<https://www.who.int/emergencies/diseases/novel-coronavirus-2019/advice-for-public>> (16-01-2022).

15 World Health Organization (n 3).

16 World Health Organization (n 8).

17 World Health Organization (n 3).

antigen to the body's immune system so that when the body encounters infection in the future it has been "trained" to attack the infection.¹⁸

Despite vaccines largely being viewed in a positive light, particularly as an alternative to lockdown provisions, there has also been considerable mistrust and hesitancy associated with the vaccine rollout. Vardas notes that mistrust has been fuelled by the perceived speedy development of the vaccines.¹⁹ Dhai notes that hesitancy results from a myriad of sources including distrust of the state, politicisation of processes around vaccine rollout, reinfection despite vaccination and poor communication with the public.²⁰ Other writers attribute hesitancy to religious and cultural views of the public.²¹ The WHO also attributes hesitancy to unfavourable social influences.²² In relation to Africa especially, Jiva-Doko notes that negative perceptions of vaccines are a result of religious beliefs which associate their use to a lack of trust in God's healing power.²³ Some religious leaders have also reinforced these beliefs by publicly denouncing vaccines in countries like South Africa and Zimbabwe.²⁴ Over and above, this hesitancy or outright refusal may be attributed to health-related risk associated with vaccines.

Despite hesitancy, employers in other jurisdictions have quickly moved towards making vaccines mandatory in the context of certain workplaces. Australia made vaccines mandatory for high-risk care workers and similarly, vaccination is mandatory for home care workers. In France, new laws have given authority to the president to make vaccines mandatory in some workplaces. In the US, in New York, state employees are required to be vaccinated or be tested weekly. This

18 Vardas "Ethics and legalities of vaccines and vaccination" 2021 at <https://www.medicalacademic.co.za/post-summary/?post_referred=27136> (16-01-2022).

19 Vardas (n 18).

20 Dhai "To vaccinate or not to vaccinate: Mandatory COVID-19 vaccination in the workplace" 2021 *South African Journal of Bioethics Law* 42 43.

21 Jiva-Doko "The history of vaccines. An educational resource by the college of physicians of Philadelphia. Cultural perspectives on vaccination" at <www.historyofvaccines.org/content/articles/cultural-perspectives-vaccinations> (16-01-2022).

22 World Health Organization "Behavioural Considerations for Acceptance and Uptake of COVID-19 vaccines". World Health Organization Technical Advisory Group on Behavioural Insights and Science for Health Meeting Report: 15 October 2020.

23 Jiva-Doko (n 21).

24 Dzinamarira *et al* "COVID-19 vaccine roll out in South Africa and Zimbabwe: Urgent need to address community preparedness, fears and hesitancy" 2021 *Vaccines* 9 (250) 1-10.

is similar to regulations in California that provide for weekly testing as an alternative to vaccination.²⁵

International labour standards do not directly address issues surrounding mandatory vaccines and the ILO acknowledges that this will ultimately be regulated by member states themselves. But the ILO does emphasise the need for a broadly consultative approach to matters of occupational health and safety. Overall, in relation to vaccines, it is recommended that if an employer opts for implementation of a mandatory vaccine policy, this must be done in a non-discriminatory manner and in such a way that costs are not attributed to workers.²⁶

3 Compulsory medical treatment in South Africa

Compulsory medical treatment, which encompasses mandatory COVID-19 vaccination, is not specifically regulated in terms of South African labour legislation. This is in contrast with compulsory medical testing which is regulated by section 7 of the Employment Equity Act (EEA). Section 7(1) of the EEA provides that: “[m]edical testing of an employee is prohibited unless—(a) legislation permits or requires the testing; or (b) it is justifiable in light of medical facts, employment conditions, social policy, the fair distribution of employee benefits or the inherent requirements of a job.”

Section 7(2) of the EEA further prohibits the testing of an employee to determine their HIV status unless this is determined to be justifiable by the labour court. In *EWN v Pharmaco Distribution (Pty) Ltd*,²⁷ the labour court considered whether a clause in the employment contract of an employee suffering from bipolar disorder, which requires the employee to undergo medical examination at the discretion of the employer, was lawful and enforceable, and whether the dismissal of the employee for refusing to undergo said medical examination was automatically unfair in terms of section 187(1)(f) of the Labour Relations Act (LRA)²⁸. The court held that the employer could only require the employee to undergo medical testing if the requirements of section 7(1)(b) of the EEA were met and that in the absence of being able to establish that the contractual clause was justifiable under one

25 Dhai (n 20).

26 International Labour Organization “ILO standards and COVID-19 (coronavirus)” at <https://www.ilo.org/wcmsp5/groups/public/---ed_norm/---normes/documents/publication/wcms_780445.pdf> (16-01-2022)

27 *EWN v Pharmaco (Pty) Ltd* 2016 37 ILJ 449 (LC).

28 Act 66 of 1995.

of the exceptions listed in the provision, the clause was unlawful and unenforceable.²⁹ In respect of s 7(2) of the act, the labour court in *Irvin & Johnson Ltd v Trawler & Line Fishing Union*³⁰ held that that the core rights that are affected by HIV testing are the right to security and control over the body, the right not to be subjected to medical or scientific experiments without consent, and the right to privacy.

In contrast, medical treatment is provided for in terms of the National Health Act. Section 7(1)(d) of the act states that: “7(1) [s] subject to section 8, a health service may not be provided to a user without the user’s informed consent, unless—(d) failure to treat the user, or a group of people which includes the user, will result in a serious risk to public health”.

This section becomes particularly important in the context of mandatory COVID-19 vaccination as it speaks to the balancing of the rights of the collective against those of the individual. In light of this section, the failure of an individual to vaccinate against COVID-19 may be deemed a serious risk to public health; therefore, their right of refusal could be limited. This triggers a limitations clause analysis in terms of section 36 of the Constitution,³¹ which will be considered below.

4 The employer’s obligation to provide a safe working environment

4.1 The Occupational Health and Safety Act

In terms of the common law, there is a duty on employers to establish safe working conditions for their employees.³² The duty to provide safe working conditions originates either in the law of delict, or the law of contract, and was reinforced in the OHSA. Section 8(1) of the act requires employers to “provide and maintain, as far as reasonably

29 See (n 27) par 36 and 49.

30 2003 4 BLLR 379 (LC).

31 s 36 states that “(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 the extent of the limitation; (d) the relation between the limitation and its purpose; and (e) less restrictive means to achieve the purpose. (2) Except as provided in subsection (1) or in other provision of the Constitution, no law may limit any right entrenched in the Bill of Rights.”

32 Van Niekerk and Smit (eds) *Law@work* (2019) 97.

practicable, a working environment that is safe and without risk to the health of the employees”. In terms of s 8(2)(b) of the act, employers are required to take “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”. The act further extends the standard of safety to persons other than workers who are affected by the activities of the workplace,³³ which could include consumers, clients and members of the general public.

4.2 The Consolidated Direction on Occupational Health and Safety Measures in Certain Workplaces

In view of the novel pandemic, the minister of employment and labour issued the Consolidated Direction on Occupational Health and Safety Measures in Certain Workplaces (OHS directions) to “address, prevent and combat the spread of COVID-19 in certain workplaces”.³⁴ The OHS directions address the various measures to be implemented by employers in an attempt to curb the spread of the disease, including social distancing, symptom screening, sanitisers, disinfectants and the washing of hands, as well as the compulsory wearing of cloth masks. In respect of vaccination, clause 3 of the OHS directions requires employers to undertake a risk assessment to determine whether it intends to make vaccination mandatory and prescribes that the risk assessment should be completed within 21 days from the commencement of the directions. It states further that should the employer intend to make vaccination mandatory, it must in its determination identify those employees who must be vaccinated by virtue of their risk of transmission through their work or their risk for severe COVID-19 disease or death due to their age or comorbidities. Annexure C of the OHS directions contains guidelines for employers who have elected to make vaccination mandatory, stating at the outset that departures from the guidelines may be justifiable in “proper circumstances”, taking into consideration for example, the size and nature of the workplace. The primacy of collective agreements is highlighted as it is stated that the guidelines are not intended to substitute some. Importantly, the guidelines place a premium on public health imperatives, the constitutional rights of employees and the efficient operation of the employer’s business. Thus, in its determination of a

³³ See preamble to the OHSA.

³⁴ See preamble to the Consolidated Direction on Occupational Health and Safety Measures in Certain Workplaces.

mandatory vaccinations plan, an employer would be required to take adequate consideration of all three factors. Employees should further be notified of the obligation to be vaccinated, the right to refuse vaccination specifically on constitutional or medical grounds,³⁵ and the opportunity to consult a health and safety representative, worker representative or trade union official. The guidelines provide further details in respect of those employees who refuse to be vaccinated on the aforementioned grounds, and places an obligation on employers to counsel the employee and allow the employee to seek guidance from a health and safety representative, worker representative or trade union official, to refer the employee for further medical evaluation should there be a medical contraindication for vaccination, and if necessary, take steps to reasonably accommodate the employee in a position that does not require the employee to be vaccinated.³⁶

4.3 Reasonable accommodation

The guidelines refer to the concept of “reasonable accommodation” which predominantly finds application in the context of the employment of persons with disabilities in the workplace. Reasonable accommodation is defined in section 1 of the EEA to mean “any modification or adjustment to a job or to the working environment that will enable a person with a disability to have access to, participate in or advance in employment”. The definition in the guidelines mirrors the EEA definition and here reasonable accommodation is defined as “any modification or adjustment to a job or to the working environment that will allow an employee who fails or refuses to be vaccinated to remain in employment and incorporates the relevant portions of the Code of Good Practice: Employment of Person with Disabilities published in terms

35 Constitutional grounds include the right to bodily integrity in terms of s 12(2) and the right to freedom of religion, belief and opinion in s 13 of the Constitution whereas medical grounds are defined as “an immediate allergic reaction of any severity to a previous dose or a known (diagnosed) allergy to a component of the COVID-19 vaccine”.

36 In terms of the guidelines, “reasonable accommodation” is defined as any modification or adjustment to a job or to the working environment that will allow an employee who fails or refuses to be vaccinated to remain in employment and incorporates the relevant portions of the Code of Good Practice: Employment of People with Disabilities published in terms of the EEA. This might include an adjustment that permits the employee to work offsite or at home or in isolation within the workplace such as an office or a warehouse or working outside of ordinary working hours. In instances of limited contact with others in the workplace, it might include a requirement that the employee wears a N95 mask.

of the Employment Equity Act, 1999 (Act No. 97 of 1999)).³⁷ Evidently, employees who refuse to vaccinate against COVID-19 are, in terms of the guidelines, likened to persons with disabilities in the workplace which triggers the application of relevant provisions of the code. The code states that reasonable accommodation may be temporary or permanent, and may include *inter alia*, re-organising workstations, restructuring jobs so that non-essential functions are re-assigned, and adjusting working conditions, including working time and leave.³⁸ Reasonable accommodation in the context of employees who refuse to vaccinate would include measures that permit the employee to work offsite, at home, or in isolation within the workplace such as an office or a warehouse outside ordinary working hours.³⁹ The extent of reasonable accommodation is, however, limited in the code as it states that the employer need not reasonably accommodate the employee if this would impose an unjustifiable hardship on the business of the employer.⁴⁰ Importantly, the code states that an accommodation that imposes an unjustifiable hardship for one employer may not be so for another.⁴¹ It may, therefore, be challenging for an employer to reasonably accommodate an unvaccinated employee in the manner recommended by the guidelines, whose job requires the provision of personal services that result in substantial contact with others, such as restaurants and hospitals.⁴² In these circumstances, the termination of the employment relationship may be justifiable.⁴³

37 para 5(3) of Annexure C of the Consolidated Direction on Occupational Health and Safety Measures in the Workplace.

38 Item 6.8 and 6.9 of the Code of Good Practice: Employment of Person with Disabilities.

39 para 5(3) of Annexure C of the Consolidated Direction on Occupational Health and Safety Measures in the Workplace.

40 Item 6.11 of the Code of Good Practice: Employment of Person with Disabilities. “Unjustifiable hardship” is defined in item 6.12 of the code as “any action that requires significant or considerable difficulty or expense. This involves considering, amongst other things, the effectiveness of the accommodation and the extent to which it would seriously disrupt the operation of the business”.

41 Item 6.13 of the Code of Good Practice: Employment of Person with Disabilities.

42 Botha “Mandatory vaccinations in the workplace: Lessons from COVID-19” 2021 *Industrial Law Journal* 2065 2073.

43 Botha (n 42).

5 Liability in the case of adverse reactions to mandatory COVID-19 vaccination

At common law, an employee who contracts an illness or is injured during the course and scope of employment is entitled to institute delictual action against the employer.⁴⁴ This position does not guarantee that the employer will be in a financial position to pay the awarded compensation; therefore, in order to remedy such instances, the Compensation for Occupational Injuries and Diseases Act⁴⁵ (COIDA) was introduced.⁴⁶ COIDA specifically regulates compensation for work-related illness, injury and death in South Africa.⁴⁷ It establishes the compensation fund in terms of which employers are obligated to contribute and provides a system of no-fault compensation for employees who contract diseases or injuries that arise in the course of their employment.⁴⁸ In *Jooste v Score Supermarket Trading (Pty) Ltd (Minister of Labour Intervening)*⁴⁹ the court described COIDA as “important social legislation which has a significant impact on the sensitive and intricate relationship amongst employers, employees and society at large. The state has chosen to intervene in that relationship by legislation and to effect a particular balance which it considers appropriate”.⁵⁰

COIDA becomes relevant with reference to COVID-19 in the workplace, particularly in those circumstances where employees contract the disease at work, and for our purposes, where employees possibly experience adverse reactions or side effects to the COVID-19 vaccination administered in terms of a mandatory workplace vaccination policy. What recourse would such employees then have? The South African government has attempted to address this issue in view of the provisions of COIDA. In October 2021, the compensation fund commissioner issued a notice stating that the compensation

44 Van Niekerk and Smit (n 32) 516.

45 Act 130 of 1993.

46 s 35(1) of COIDA provides that “No action shall lie by an employee or any dependant of an employee for the recovery of damages in respect of any occupational injury or disease resulting in the disablement or death of such an employee against such employee’s employer, and no facility for compensation on the part of such employer shall arise save under the provisions of this act in respect of such disablement or death”. See also Van Niekerk and Smit (n 32).

47 Van Niekerk and Smit (n 32).

48 s 15 of COIDA.

49 1999 2 SA 1 (CC).

50 the *Jooste* case (n 49) par 9.

fund will cover employees for injuries, illnesses or death as a result of receiving the COVID-19 vaccine. This is, however, subject to several qualifications including that the employee must be required to vaccinate as an inherent requirement of employment or where vaccination is required based on the risk assessment conducted in terms of the OHS Directions.⁵¹ Other requirements include that the employee must have been vaccinated with SAHPRA-approved COVID-19 vaccines; the chronological sequence between the vaccine inoculation and the development of symptoms and clinical signs must be provided; evidence must be provided of the employer's risk assessment and vaccination plan as set out in paragraph 3(1)(a)(i), (ii) and (b) of the OHS directions; the employee must have presented symptoms and clinical signs that are generally recognised as side effects of the COVID-19 vaccine and; additional tests may be required to assess the presence of abnormalities of any organ affected.⁵²

The notice interestingly mentions the concept of an "inherent job requirement" which seemingly introduces a new basis upon which employers may require employees to be inoculated. This is because the concept does not appear in the OHS directions and guidelines, but it is stated that the operational requirements of the employer must be considered in the determination of a vaccination plan. This is in fact not equivalent to the inherent requirements of an employee's job. The concept of inherent job requirements is primarily used in labour law as a defence against claims of discrimination. Section 6(2)(b) of the EEA provides that "it is not unfair discrimination to distinguish, exclude or prefer any person on the basis of an inherent requirement of a job". However, the act does not define what constitutes an inherent job requirement, thus, leaving it to the courts to determine its meaning. Essentially, an inherent requirement must be an essential and indispensable characteristic that the employee must possess in order to perform the essential functions of the job.⁵³ The indication from previous court decisions on the subject is that this defence will be strictly interpreted.⁵⁴ Therefore, it may be difficult for employers to

51 "Notice on compensation for COVID-19 vaccination side effects published in terms of section 6A(b) of Compensation for Occupational Injuries and Diseases Act 130 of 1993 as amended" *Government Gazette* 45356 (22-10-2021).

52 *Ibid.*

53 Govindjee and Van der Walt *Labour Law in Context* (eds) (2017) 71.

54 In *TDF Network Africa (Pty) Ltd v Faris* 2019 2 BLLR 127 (LAC) par 36-38, the court held that "(c)onsidering the exceptional nature of the defence, the requirement must be strictly construed In general, the requirement

prove that an employee has lost the inherent ability to perform their core duties due to being unvaccinated. It is further evident from the requirements that an employee would not be able to claim from the compensation fund if the employer is unable to furnish proof of the risk assessment and vaccination plan as required by the OHS directions.

6 A new legal framework: The Code of Good Practice, 2022

The Code of Good Practice: Managing Exposure to SARS-COV in the Workplace, 2022 (the code) was published by the minister on 15 March 2022. The code was introduced due to the impending expiry of the declaration of the national state of disaster which meant that the OHS direction issued in terms of the Disaster Management Act would cease to have legal effect.⁵⁵ The code is not binding; however, persons such as employers, judges and arbitrators are required to take the provisions of the code into account when interpreting any employment law. The code must be read with the provisions of the Regulations for Hazardous Biological Agents, 2022 (“HBA Regulations) in which coronavirus is listed as a class 3 hazardous biological agent.⁵⁶ The code largely mirrors the provisions of the OHS direction, with a few significant differences. Employers are still required to undertake a risk assessment. However, a distinction is made between provisions which must be included, and those that are optional.⁵⁷ Measures such as social distancing, PPE and facecloth masks are optional in terms of the code,⁵⁸ which in turn suggests that these may no longer be strictly required by employers. Unlike the OHS direction, the code makes no mention of specific categories of employees who must be vaccinated,

must be rationally connected to the performance of the job. This means that the requirement should have been adopted in a genuine and good faith belief that it was necessary to the fulfilment of a legitimate work-related purpose and must be reasonably necessary to the accomplishment of that purpose”. See also *Woolworths (Pty) Ltd v Whitehead (Women’s Legal Centre Trust Intervening)* 2000 3 SA 529 (LAC); *Hoffman v South African Airways* 2001 1 SA 1 (CC); *Independent Municipal and Allied Workers Union v City of Cape Town* 2005 26 ILJ 1404 (LC); *Dlamini v Green Four Security* 2006 27 *Industrial Law Journal* 2098 (LC).

55 See chapter 1 of the Code of Good Practice: Managing Exposure to SARS-CoOV in the Workplace, 2022.

56 See chapter 1 of the Code of Good Practice: Managing Exposure to SARS-CoOV in the Workplace, 2022.

57 Items 6(1) and 6(2) of the Code of Good Practice: Managing Exposure to SARS-CoOV in the Workplace, 2022.

58 Item 6(2)(a)–(d) of the Code of Good Practice: Managing Exposure to SARS-CoOV in the Workplace, 2022.

such as employees who are at risk of transmission through their work, severe COVID-19 or death due to age or comorbidities. Employers are permitted to require employees to disclose their vaccination status and produce a vaccination certificate,⁵⁹ and provision is also made for those instances where an employee experiences contra-indications to the vaccine.⁶⁰ In respect of the latter, the employer, upon receipt of the employee's medical certificate, may refer the employee to a confirmatory medical evaluation at the employers cost.⁶¹ Employers who accept the employees' contra-indications to the vaccine are then obliged to reasonably accommodate said employees in a position that does not require them to vaccinate.⁶² The code further makes provision for the employee's right of refusal to work if, with reasonable justification, circumstances arise which pose an imminent and serious risk of exposure to COVID-19.⁶³ This is a welcomed inclusion in the code as the right of refusal to work was only previously contained in the Mine Health and Safety Act.⁶⁴

7 Dismissals: Incapacity, misconduct or operational requirements?

As it stands, there are different forms of dismissal which may inevitably come into play should employers create mandatory vaccine policies, depending on the nature and wording of a particular policy. Where an employee cannot perform their role due to refusal to vaccinate, they may be said to be incapacitated, in that they would be unable to perform their work in line with the requirements of their job.⁶⁵ They may also be dismissed for operational requirements as a "no fault" form of dismissal, as their refusal may be misaligned with the employer's operational or similar needs relating to, for example, occupational health and safety.⁶⁶ Third, a refusal to vaccinate may amount to insubordination in that the employee would be refusing to obey a lawful instruction.⁶⁷ And lastly, an employee may believe the

59 See (n 55) item 12(2).

60 See (n 55) Item 12(3).

61 See (n 55) Item 12(5).

62 See (n 55) Item 12(6).

63 See (n 55) Item 15(1).

64 Act 29 of 1996.

65 Item 10 of the Code of Good Practice: Dismissal.

66 Item 2 Notice of Code of Good Practice on Dismissal Based on Operational Requirements.

67 See (n 65) item 7.

instruction to vaccinate renders the working environment intolerable and, thus, is subject to a constructive dismissal.⁶⁸

With all of these possibilities, a few general principles will apply. First in the situations relating to incapacity and operational requirements, the employer would need to do all that it can to reasonably accommodate the employee.⁶⁹ This also aligns to the OHS directions issued by the Department of Labour noted earlier in this discussion. This is when it would be necessary to consider alternatives to dismissal such as the employee working from home, wearing a face covering, testing regularly or working in a different part of the building from other workers. In line with both of these forms of dismissal and in line with ILO guidelines, the ideal set of circumstances ought to be determined through a consultative process with employees and not unilaterally by the employer.⁷⁰

Regarding a dismissal for insubordination as well as constructive dismissal, ultimately it would need to be determined whether the instruction to vaccinate would be lawful in the particular circumstances. This brings us to another critical consideration that can render any dismissal substantively unfair—whether or not the reason for the dismissal amounts to unfair discrimination.⁷¹ If an employee's dismissal carries this underlying element, he or she would have been the victim of an automatically unfair dismissal which carries possible compensation of up to 24 months wages. But what would constitute unfair discrimination comes down to an assessment of firstly, whether the employee has been discriminated against, or put simply, treated differently based on any ground listed in section 9 of the Constitution and then whether or not that discrimination is justifiable in terms of section 36 of the Constitution.

8 Human Rights Implications

Clause 3(4) of the OHS directions, when highlighting that employers must ultimately elect how they deal with mandatory vaccines, must take into account their employees' constitutional rights to bodily integrity and their rights to freedom of religion, belief and opinion.⁷² But most rights in the constitution may be limited in terms of the

68 s 186(1)(e) of the LRA.

69 See (n 65) Item 3.

70 See (n 55).

71 s 187(f) of the LRA.

72 Dhai (n 20).

limitations clause as outlined in section 36.⁷³ Broadly speaking, it is important for an employer, and then presiding officers, to take a rights based approach when considering mandatory vaccines and said approach would necessarily involve a section 36 analysis at some stage of the enquiry.

Karim and Kruger note that there is often tension between individual human rights and the achievement of public health objectives.⁷⁴ It is not uncommon for public health measures in the wake of disease to limit human rights. An early and extreme example is the isolation of ships on those on board for 40 days to prevent the spread of the Black Death during the 1300s, which included preventing access to food and water⁷⁵ as well as the development of leper colonies.⁷⁶

Karim and Kruger, however, argue that a better approach involves balancing disease control with human rights in such a way that one may compliment the other, rather than the two being at odds.⁷⁷ Mann *et al* proposes considering human rights as a dimension of public health.⁷⁸ They propose a three-stage framework in this regard which Karim and Kruger directly associate with proportionality as envisaged in section 36. In particular, the questions the framework raises in relation to whether incursions on rights are justifiable in light of the public health concern.⁷⁹

The core rights implicated in dismissals relating to covid vaccines are the right to bodily integrity and the right the religious freedom. In 2020, the high court had an opportunity to grapple with the balance between public health and the right to religious freedom in the wake of the COVID-19 pandemic in *Mohamed v The President of the Republic of South Africa*.⁸⁰ The matter dealt with a group of Muslim litigants who believed their right to religious freedom, amongst others, was violated by lockdown regulations which restricted their movements. They argued that their religious practices necessitated that they congregate in prayer which was expressly prohibited by lockdown regulations. The

73 s 36 of the Constitution.

74 Karim and Kruger “Which Rights? Whose Rights? Public Health and Human Rights through the Lens of South Africa’s COVID-19 Jurisprudence” 2021 *Constitutional Court Review* 533 536.

75 Sedhev “The Origin of Quarantine” 2002 *Clinical Infectious Diseases* 1071 1072.

76 Karim and Kruger (n 74).

77 Karim and Kruger (n 74).

78 Mann *et al* “Health and Human Rights” 1994 *Health and Human Rights* 6 8.

79 Karim and Kruger (n 74) 544.

80 2020 5 SA 553 (GP).

respondents argued that the restrictions were necessary to curb the infection rate and prevent the healthcare system from being completely overwhelmed as a result. The court, in denying the applicants' petition to be exempted from the regulations held that:

“Every citizen is called upon to make sacrifices to their fundamental rights entrenched in the Constitution. They are called upon to do so in the name of ‘the greater good’, the spirit of ‘ubuntu’ and they are called upon to do so in ways that impact on their livelihoods, their way of life and their economic security and freedom. Every citizen of this country needs to play his/her part in stemming the tide of what can only be regarded as an insidious and relentless pandemic.”

This judgment demonstrates the way in which a court may consider the balancing of rights in the context of COVID-19, but it differs considerably from the context of mandatory vaccination. Particularly because, as section 36 requires, the state and employers must consider whether there are less restrictive means to achieve the intended purpose. In *One South Africa Movement and Another v President of the Republic of South Africa*,⁸¹ the applicants sought an order stopping the re-opening schools which they argued would compromise public health objectives. Karim and Kruger note that the court's approach was one which sought to balance public health objectives against other rights and, in its outcome, held that it would be permissible to adopt less stringent public health objectives to support the realisation of other rights.⁸² The court held as follows:

“Thus, while the initial concern and response to the virus was largely and understandably a public health one, with time the impact of the virus on issues such as the economic survival of nations and their citizens, and the simple ability to live a meaningful and decent life, has come sharply into focus. The ability of governments, in particular those in the developing world, to respond holistically to the needs and well-being of their citizens has come under increased pressure. This has been exacerbated by the inevitable recognition over time that the virus will be with us for some time and that a cure in the form of a vaccine is still somewhere in the future.”⁸³

81 2020 5 SA 576 (GP).

82 Karim and Kruger (n 74) 552.

83 the *One South Africa Movement* case (n 81) par 2.

The court further took the view that it is possible to protect both lives and livelihoods without preferring one over the other in adopting less restrictive public health measure.⁸⁴ This judgment is positioned much closer to our current reality in the wake of COVID-19, wherein in the midst of less restrictive overall lockdown measures, it becomes critically important for the state and for employers to become more creative in the way in which it approaches the balancing of rights. It cannot be reasonable to adopt a blanket approach in a workplace when the state itself has adopted an approach of relatively flexibility in its current approach and has further recommended a flexible and accommodative approach to employers in an effort to balance the interests of workers and public health objectives.

8 Commission for Conciliation, Mediation and Arbitration (CCMA) awards on mandatory vaccination

The CCMA has had an opportunity to consider the merits in relation to mandatory vaccines. It is worth considering the outcomes of these awards as they may provide a roadmap for how matters of this nature should, or perhaps, should not be dealt with in future.

In *Theresa Mulderij v Goldrush Group*,⁸⁵ the applicant was a business related and training officer who was dismissed by the respondent on the grounds of incapacity in that she refused to comply with the respondent's Mandatory Vaccination Policy.⁸⁶ The applicant indicated to the company that she had no intention of ever being vaccinated.⁸⁷ She based her non-compliance on section 12(2) of the constitution which provides that every person has the right to bodily integrity.⁸⁸ She was also of the view that the vaccines does not stop the spread or contraction of COVID-19 but merely serves to minimise the severity of its symptoms and side effects.⁸⁹

The respondent argued that due to the nature of the applicant's duties, there was no other position she could occupy. The applicant also interacted with site-owners as well as other employees.⁹⁰ The commissioner in this matter did not spend a considerable amount of time justifying their finding save to say that "in my own sense

84 the *One South Africa Movement* case (n 81) par 98.

85 CCMA case number GAJB24054-21, award issued 21 January 2022.

86 the *Theresa Mulderij* case (n 85) par 4-5.

87 the *Theresa Mulderij* case (n 85) par 7.

88 the *Theresa Mulderij* case (n 85) par 22.1.

89 the *Theresa Mulderij* case (n 85) par 22.3.

90 the *Theresa Mulderij* case (n 85) par 20.

of fairness, I can only conclude that the applicant is permanently incapacitated on the basis of her decision to not getting vaccinated and [by] implication refusing to participate in the creation of a safe working environment.”⁹¹

It may have been useful to spend more time considering the work of the applicant. Because she was a front facing employee who interacts with external and internal stakeholders, subjecting her to mandatory vaccination may have been justifiable in this instance.

In *Gideon J Kok v Ndaka Security and Services*⁹² the applicant was a safety practitioner working for a private security company which rendered services to, amongst others, Sasol Ltd. In the matter, the applicant alleged that he was subjected to an unfair labour practice as he was instructed to only return to work once vaccinated. The alternative was that he submits to weekly COVID-19 testing. Sasol, as a client of the respondent, required 100% vaccination rate at their premises where the applicant rendered service.⁹³

Initially the applicant submitted test results but he bore the cost of these and eventually was no longer willing to undergo the said weekly testing.⁹⁴ The applicant’s refusal to comply was also based on section 12 of the Constitution. Despite the employer insisting the applicant stay away from work, they continued to pay him his full salary.

The commissioner in this matter performed an analysis which was based broadly on the requirements outlined in section 36 of the Constitution, which may provide future presiding officers with useful guidelines. Commissioner Venter noted that section 12 contains a very important right and that, in this matter, the limitation is also very important. When considering the nature of the limitation, the commissioner stated that there was a very limited chance of adverse effects from being vaccinated. He further noted that there was a clear and demonstrable relation between the limitation and its purpose. Lastly he noted there were less restrictive means such as face masks but that vaccination appeared to be a last resort.⁹⁵

The commissioner also considered the nature of the work performed by the applicant and the context within which he operates. He noted that security companies are on the front line. In addition, the applicant works in an open office shared by 10 colleagues. The applicant,

91 the *Theresa Mulderij* case (n 85) par 27.

92 CCMA Case number FSWK2448-21, award issued 25 January 2022.

93 the *Kok* case (n 92) par 7.

94 the *Kok* case (n 92) par 11.5.

95 the *Kok* case (n 92) par 38.

as part of his job, was required to visit all of the company's sites and interact with personnel. In addition, the applicant himself had once contracted COVID-19 and through contact tracing it was determined that he may have passed the virus to nine of his colleagues.⁹⁶ As a result of the aforesaid, the commissioner determined that the suspension of the applicant was fair.⁹⁷

9 Conclusion

Lastly, and significantly, the court in *Democratic Alliance v Minister of Co-operative Governance and Traditional Affairs*⁹⁸ emphasised the following:

“We must not lose sight of the fact that rights enshrined in the Bill of Rights must be protected and may not be unjustifiably infringed. It is for the legislature to ensure that, when necessary, guidance is provided as to when limitation of rights will be justifiable. It is therefore not ordinarily sufficient for the legislature merely to say that discretionary powers that may be exercised in a manner that could limit rights should be read in a manner consistent with the Constitution in the light of the Constitutional obligations placed on such officials to respect the Constitution. Such an approach would often not promote the spirit, purport and objects of the Bill of Rights. Guidance will often be required to ensure that the Constitution takes root in the daily practice of governance. Where necessary, such guidance must be given. Guidance could be provided either in the legislation itself, or where appropriate by a legislative requirement that delegated legislation be properly enacted by a competent authority.”⁹⁹

For the authors, this approach is of critical significance when considering the implications of COVID-19 on the workplace. Already there is considerable debate and confusion as to whether it will be justifiable to dismiss employees for refusing to vaccinate. Whilst the writers are of the view that it is not, in light of the approach the directions took in making dismissal a measure of absolute last resort, the directions unfortunately falls short in prohibiting dismissal outright in an effort to protect the rights of workers to bodily

96 the *Kok* case (n 92) par 41–42.

97 the *Kok* case (n 92) par 58.

98 Case no. 22311/2020 (ZAGPPHC) (unreported) 168.

99 the *Democratic Alliance* case (n 98) par 75.

integrity and religious freedom. The directions make clear and helpful suggestions, which the writers believe constitute “less restrictive means” as envisaged in section 36 of the Constitution. However, the reality is the directions leaves it to employers to determine what constitutes public health objectives, what health and safety measures are necessary within their context and what “less restrictive means” are—all determinations which one wonders if all employers are adequately equipped to make without clear direction from the state. It appears as though it will be up to the courts to expressly draw lines and prescribe the ways in which workers rights must be balanced against the state and employer’s health and safety objectives.

