

**WEIGHING IN ON MANDATORY VACCINATIONS IN THE WORKPLACE: A
CONSTITUTIONAL SCRUTINY**

by

CHILOANE DANNY KATLEGO

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SUPERVISOR: Adv. MJ Mangammbi

CO-SUPERVISOR: Ms. LL Letsoalo

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Abstract

The study investigates the constitutionality of the mandatory vaccination in the workplace, drawing lessons from the Covid-19 pandemic. In essence, the study scrutinises mandatory vaccination from a constitutional and labour law perspective, so as to determine whether constitutional rights are violated when vaccinations are mandatory in the workplace. The study sets out the nexus between mandatory vaccinations in the workplace, and the employer's obligation to provide a safe working environment, as set out in the Constitution and the Occupation Health and Safety Act 85 of 1993. The enquiry emanates from the enactment of the Consolidated Direction on Occupational Health and Safety Measures in Certain Workplaces 2021 by the Department of Employment and Labour, issued in response to the quest to ensure safety in the workplace during the Covid-19 pandemic, in an attempt to minimize the spread of Covid-19 infections. The implication of the findings is that although not all rights are absolute, during pandemics, disaster management regulations must adhere to constitutional values and principles. Furthermore, there are conflicting interests in as far as protection of rights is concerned in a national state of disaster, such as Covid-19 pandemic. Therefore, the study establishes and makes a great contribution to the debate on the significance and constitutionality of mandatory vaccinations in the workplace.

Key words: mandatory vaccination; safe working environment; workplace laws; occupational health and safety.

Declaration by student

I, **Danny Katlego Chiloane**, do hereby declare that the mini-dissertation "Weighing in on Mandatory Vaccinations in the Workplace: A Constitutional Scrutiny" which I have submitted at the University of Limpopo in partial fulfilment of the Master of Laws degree – Labour Law is, in its entirety, my own work and has not been submitted by me at this or any other institution, and that all sources that I have made reference to have been duly cited and acknowledged.



DANNY KATLEGO CHILOANE

24/11/2023

DATE

Dedication

A special dedication to everyone who has succumbed to Covid-19 and fought through and to all the individuals who lost their jobs as a result of having refused to vaccinate. To all those who lost their lives due to Covid-19, may their souls rest in perfect peace. A special dedication to my family, my beloved Rudolph Mnisi, my colleagues at Moja Sibiya Attorneys Inc., and all my friends, in particular Chantel Lubambo, Dimphe Ramodike and Precious Maolana; who constantly encouraged me to press on till the end. My win is their win. Last but not least, I thank God for all the strength. It was not easy, but I believed, and it all worked out for the good. I commend myself for producing this amazing work.

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Abbreviations

CC	: Constitutional Court
CCMA	: Commission for Conciliation, Mediation and Arbitration
COIDA	: Compensation for Occupational Injuries and Diseases Act
Covid-19	: Coronavirus disease of 2019
HHRJ	: Health and Human Rights Journal
JHSF	: Journal of the Helen Suzman Foundation
JICLT	: Journal for International Commercial Law and Technology
LRA	: Labour Relations Act
MISA	: Media Institute of Southern Africa
OHS Act	: Occupational Health and Safety Act
PELJ	: Potchefstroom Electronic Journal
SAHRC	: South African Human Rights Commission
SAJBL	: South African Journal of Bioethics and Law
SAJHR	: South African Journal for Human Rights
UNISA	: University of South Africa

CHAPTER 1:

INTRODUCTION AND BACKGROUND

1 Introduction

The coronavirus pandemic (hereinafter, Covid-19) has not only had an impact on the economy of the Republic of South Africa, but also affected the day-to-day working conditions in the workplace.¹ It further presented certain regulatory lessons, which have also had an impact in the workplace environment. With lockdown regulations introduced and implemented as a result thereof,² there was significant changes in the manner in which constitutional rights in the workplace were considered, realised, and protected. This was observed on the manner in which regulations were passed, such as strict measures of wearing masks and observing Covid-19 protocols to minimize the spread of the virus in the workplace.³

In response to the Covid-19 pandemic and its impact in various industries, the government managed to secure the Covid-19 vaccination to curb the risk of infections, as there has been less hope for the restoration of the country's economy due to the rise in infections.⁴ The Department of Employment and Labour then issued Amended Consolidated Direction on Occupational Health and Safety Measure in Certain Workplaces, gazetted on 11 June 2021 (hereinafter, Consolidated Direction 2021) with regards to vaccinations in the workplace.⁵ The latter was issued in line with section 8 of the Occupational Health and Safety Act 85 of 1993 (OHS Act) and section 24 of the

¹ Tušl Martin *et al.*, 'Impact of The COVID-19 Crisis on Work and Private Life, Mental Well-Being and Self-rated Health in German and Swiss Employees: A Cross-Sectional Online Survey' (2021) *BMC Public Health* 2.

² Hamadziripi Friedrich and Chimitira Howard, '202124The Socio-Economic Effects of the COVID-19 National Lockdown on South Africa and its Response to the COVID-19 Pandemic' (2021) *Acta Universitatis Danubius Juridica* 32.

³ Chitimira Howard and Animashaun Oyesola, 'The Adequacy of Nigeria, South Africa and Other Sub-Saharan Countries' Response to the COVID-19 Pandemic and Unemployment' (2021) *Acta Universitatis Danubius Juridica* 44.

⁴ Blecher S. Mark *et al.*, 'The South African Government's COVID-19 Response: Protecting Lives and Livelihoods' (2021) *South African Health Review* 6-7.

⁵ Government Notice R.499 of 2021.

Constitution of the Republic of South Africa, 1996 (the Constitution), which both make provisions for a safe working environment.⁶

The Consolidated Direction 2021 called upon employers to undertake a risk assessment strategy, through which they were required to ensure that they give effect to the measures put in place by the Consolidated Direction 2021.⁷ However, the latter did not stipulate, and it is not clear whether employers are empowered to dismiss employees who refuse to receive the vaccinations, where they are mandatory in the workplace. Moreover, the Consolidated Direction 2021 was mute on the protection of employees who may refuse to vaccinate against abuse of the power of election by employers.

While the author acknowledges that every employee, vaccinated or not, have rights which must be protected, mandatory vaccinations raise the question on whether it is constitutionally permissible to coerce employees into obtaining health care services, with consideration to labour laws. On the other hand, the author also acknowledges the duty imposed on employers to maintain and provide a safe working environment, as far as it is reasonably practicable. Thus, the study seeks to investigate the constitutionality of the mandatory vaccinations in the workplace and to determine whether there is a relationship between mandatory vaccination and the need and/or to maintain and provide a safe working environment in the workplace.

It should be noted that there are currently no reported cases of Covid-19 infections. Furthermore, there is currently no law mandating vaccination in the workplace and the Department of Employment and Labour is also mute on the issue of mandatory vaccinations. Therefore, the main purpose of the study is to draw the attention of law makers, including policy makes in the workplace, to the lessons that can be learnt from the implementation of mandatory vaccinations, in case of future pandemics such as Covid-19, taking cognisance to the constitutional rights of all parties concerned.

⁶ Section 8 of the Occupational Health and Safety Act 85 of 1993 (Hereafter the OHS Act) provide that an employer must, where applicable, provide and maintain safe, healthy work environment that id without risk to employees. Section 24 of the Constitution provides that everyone has the right to an environment that is not harmful to their or wellbeing.

⁷ Direction 3(1) of the Consolidated Direction on Occupational Health and Safety Measures in certain Workplaces, 2021.

2 The background of the study

Regulatory and policy contestation emerged when the Department of Employment and Labour issued the Consolidated Direction 2021 which sought to introduce the framework for mandatory vaccination in the workplace during the Covid-19 pandemic. Whereas employers were required to implement an individual risk assessment in line with the Consolidated Direction 2021, the latter only provided guidelines which employers were required to adhere to when electing to implement and enforce mandatory Covid-19 vaccination policies.

As already mentioned above, employers were firstly required to implement a risk assessment strategy, considering the operational requirements of the workplace.⁸ This meant that employers were expected to take into consideration its general duties under the OHS Act. Although the Consolidated Direction 2021 did not oblige employers to implement mandatory vaccinations policies, it gave them the autonomy to do so. This meant that employers were granted an option to make vaccination compulsory in the workplace, in line with their duties under the provisions of the OHS Act. The duties under the OHS Act include the duty to provide a working environment that is safe and without risk to the health of employees and persons other than those in the workplace, who may be directly or indirectly affected by the workplace activities, to ensure that they are not exposed to hazards that might threaten their health or safety.⁹

Secondly, once the risk assessment had been conducted and the employers make vaccination mandatory, it was the responsibility of the employer to identify which of its employees will be required to be vaccinated.¹⁰ In determining whether an employee should be vaccinated, employers were required to identify those employees whose work posed a "risk of transmission or a risk of severe Covid-19 disease or death due to their age or comorbidities".¹¹ In other words, not every employee posed a risk,

⁸ Direction 3(1)(a)(1) of the *Consolidated Direction 2020*.

⁹See footnote 6 above.

¹⁰ Direction 3(1)(a)(ii) of the *Consolidated Direction 2021*.

¹¹ *Ibid.*

especially those who work from home or whose work is such that they do not come into close working contact with other employees.

Lastly, having identified the employees who are required to be vaccinated, employers were then required to amend their plan to include the measures to implement vaccination of those employees as and when Covid-19 vaccines became available in respect of those employees, considering the Guidelines set out in Annexure C of the Consolidated Direction 2021.¹² However, on application of the law, there was and nor there is authoritative or precedent in South Africa declaring that mandatory vaccination is permissible in the workplace, although there is a common law and statutory duty placed on employers to provide a safe working environment. Thus, employers were required to take precautionary steps, as far as it is 'reasonably practicable', to safeguard its employees, having cognisance to the rights enshrined in the Bill of Rights.

A number of employers in different sectors elected to implement mandatory vaccination policies in their respective workplace. The implication of the implementations was that a number of employees were dismissed for refusing to vaccinate. In one case, *Kgomotso Tshatshu v Baroque Medical (Pty) Ltd*,¹³ the Commission of Conciliation, Mediation and Arbitration (CCMA) held that the dismissal of the employee was substantively unfair in that there is no law in place which permits such mandatory vaccination policy.¹⁴

3 Problem statement

The question on whether vaccinations in the workplace should be made mandatory during a pandemic remain moot in the employment sector. Whereas others are of a perspective that mandatory vaccination impedes on constitutional rights such as human dignity, equality, freedom of security, belief or opinion, or medical care; others have readily and willingly accepted the vaccination. It is undisputed, as set out in the Constitution, that not all rights in the Constitution are absolute. As such, there is an

¹² Direction 3(1)(b)(i) and (ii) of the *Consolidated Direction 2021*.

¹³ Case Number GAJB20811-21.

¹⁴ Para 40.

inherent need to weigh the concerned constitutional rights challenged against an employer's legislative duty to provide a safe working environment.

This requires a consideration of the inherent duty imposed by the Constitution and labour laws; in order to determine whether vaccinations can be mandatory to realise the right to a safe working environment in the event of a pandemic in South Africa.

4 Research methodology

The study will make use of a qualitative approach, incorporating a doctrinal method, focusing on the applicable primary and secondary sources of law which include, but not limited to, the Constitution, labour laws and regulations, case law, journal articles, books, policy documents and media articles. The focus thereof will be on the analysis of the sources pertinent to the study.

5 Aims and objectives

5.1 Aims of the study

The study aims to investigate and evaluate the constitutionality and significance of mandatory vaccination in the workplace, drawing lessons from the Covid-19 pandemic as outlined in the Amended Consolidated Direction 2021, weighed against the employer's constitutional and legislative obligation to provide a safe working environment.

5.2 Objectives of the study

- To outline the underlying reasons for the implementation of mandatory vaccination in the workplace during the Covid-19 pandemic.
- To outline the extent of an employer's constitutional and legislative obligation to provide a safe working environment.
- To investigate the rationale for refusal to receive the Covid-19 vaccination, and mandatory vaccinations in the workplace in general.
- To analyse the constitutional rights of employees, whether vaccinated or not, challenged by mandatory vaccinations in the workplace.

6 Research questions

- What is the nexus between the mandatory vaccination and the right to a safe working environment in a constitutional and legislative perspective?
- Does mandatory vaccination impede on any constitutional rights of employees?
- What lessons can we draw for future pandemics?

7 Literature review

7.1 The legal right to a safe working environment

The Constitution of the Republic of South Africa affords everyone the right to an environment that is not harmful to their health or wellbeing.¹⁵ This place an obligation on the employer to ensure that the working environment is safe as contemplated in the section 8 of the OHS Act.¹⁶ Ensuring the protection of all employees requires the employer to take cognisance of all the employees' health concerns. As it stands, implementing mandatory vaccination in the workplace may have been seen as a measure to protect the health of employees in the workplace. However, as far as certain employees were not willing to take the vaccine, it became a challenge to fulfil this obligation. Consequently, what happened next was left in the discretion of the employer, which action taken would be expected to be in line with the Consolidated Direction 2021 and section 8 of the OHS Act.

Addressing the refusal to receive the vaccine requires the rights of the employees to be weighed and/or balanced against constitutional rights, which will then call for the application of the limitation of constitutional rights.¹⁷ This is due to the fact that while some employees may reject the vaccination, other employees still retain the right to have a safe working environment which the employer has an obligation to respect, promote, and protect as set out in section 24 of the Constitution and section 8 of the

¹⁵ See section 24 of the Constitution.

¹⁶ See footnote 6 above.

¹⁷ Section 36 provides that the rights in the Bill of Rights can be limited if such limitation is reasonable and justifiable in an open and democratic society that is based on human dignity, equality, and freedom. It further provides factors which any other person or the court must take into account if a right is to be limited, which include the nature of the right; the importance of the purpose of limiting the right; the nature and extent of limitation of the right; the relation between the limitation and its purpose; and other relaxed ways to achieve the same purpose.

OHS Act.¹⁸ George and George addressed the duty vested on an employer to create a healthy workplace environment that will not pose a risk of harm to any of the employees' wellbeing.¹⁹ This duty includes the need to put in place measures to minimise the spread of Covid-19.

According to George and George, establishing a safe working environment requires the employer to be cautious when implementing medical testing of employees pertaining to Covid-19 since such medical testing must be justified.²⁰ To establish a safe working environment, the employer will have to establish a community of trust and respect within his workplace. To do so, the employer will have to educate his employees and give them more information about the vaccine and its importance in keeping the workplace environment safe for everyone. While other employees are concerned about the severe side effects of the vaccine, others see the refusal to vaccinate as a threat to their health.

In every given circumstance, it can be argued that vaccinated employees would not accept to work in the same environment with those who are not vaccinated. Moreover, it is the duty of the employer to weigh all rights concerned and balance them in accordance with the workplace risk assessment strategy as he or she would have implemented in terms of the Consolidated Direction 2021.

7.2 Balancing of competing rights (Rights alleged to be violated by Covid-19 vaccine)

Several rights are said to be affected by the imposition of mandatory covid-19 vaccinations. These include the right to bodily integrity as well as the right to freedom of religion, belief, and opinion.²¹ It is also imperative that employers cogitate the interests of anti-vaxxers, whose right to bodily integrity may be limited by compulsory

¹⁸ See footnote 6 above.

¹⁹ George Robin and George Ann, 'Prevention of COVID-19 in the workplace' (2020) *South African Media Journal* 1.

²⁰ *Ibid.*

²¹ Section 12(2)(c) of the Constitution provides that everyone has the right to bodily and psychological integrity, which includes the right not to be subjected to medical or scientific experiments without their informed consent.

Section 15(1) provides that everyone has the right to freedom of conscience, religion, thought, belief, and opinion.

vaccination programmes. In so doing, employers must weigh this against the interests of the broader workplace community as well as the society the company operates in.²² On the other hand, Solidarity and its affiliates have continually emphasised the rights to bodily integrity and freedom of religion, belief, and opinion would be undermined with mandatory vaccination.²³ Thus, the need to weigh or balance constitutional rights becomes an important subject in this study.

Without implying that other rights are not as important, the right to human dignity is the one right that must be carefully balanced and realised fairly. Section 10 of the Constitution clearly states that everyone has inherent dignity and that everyone has a right to have their dignity respected and protected. Most importantly, human dignity is a founding value and principle of democracy in South Africa.²⁴ As such, the right to human dignity remains a fundamental, justiciable, and enforceable right that informs the interpretation of almost all other fundamental rights.²⁵ The refusal and acceptance of the mandatory vaccine are both influenced by the right to bodily integrity and human dignity. As such, when balancing the right violated by mandatory vaccination, the employer may have to pay careful consideration of human dignity as a fundamental right.

It is without doubt that the constitutional rights listed above are not absolute. The rights in the Bill of Rights are subject to a limitation, in so far as such limitation is done in terms of law of general application, in line with the provisions of section 36 of the Constitution.²⁶ However, there are authors like Dhali who argue that compelling workers in certain workplaces to take the vaccine that is available and approved by the South African health Products Regulatory Authority, would be 'reasonable and

²² Daily News, 'Vaccinations And The Right To Bodily Integrity' *South African Lawyer* 2021 < Vaccinations and the right to bodily integrity (southafricanlawyer.co.za) > accessed 10 March 2023.

²³ *Ibid.*

²⁴ See section 1 and 7 and the *Constitution*.

²⁵ Louw J. Pierre, 'Human Dignity: The Critically Essential, Universal And Encompassing Axiom For Legal And Political Jurisprudence In Governance Of The State - And - Of Mankind' (2013) *UNISA* 4.

²⁶ Section 36 provides that the rights in the Bill of Rights can only be limited if such limitation is done in term of law of general application to the extent that such limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors including (a) the nature of the right, (b) the importance of the purpose of the limitation, (c) the nature and extent of the limitation, (d) the relation between the limitation and its purpose, and, (e) less restrictive means to achieve the purpose.

justifiable'.²⁷ However, Dhai's view cannot be accepted bluntly because the right to a safe working environment is broad.

Interpretation of this right requires a careful consideration of the nature and circumstance of a given workplace safety case. It is imperative that the rights afforded to both anti-vaxxers and pro-vaxxers be equally considered, balanced, and equally limited. Otherwise, a limitation of all constitutional rights of an employee who refuses to be vaccinated would only conform to the constitutional standard if balanced against the rights of other employees and the employer's obligation to maintain a safe working environment. Hence the decision to limit constitutional rights should be done in good faith, fairly and reasonably. Employees should not be compelled to accept the vaccine but encouraged to and supported in a manner that expresses respect for their constitutional right to choose freely.

7.3 Reaction of employees toward mandatory vaccination

There have been speculations on the effectiveness and health implications of the Covid-19 vaccine in South Africa. Experts made a review on the vaccine and S. Cooper *et al* indicate that in South Africa, about one-third of the adult population is cautious towards the vaccine.²⁸ They set out the factors that lead to reluctance to be associated with race, age, education, politics, geographical location, and employment.²⁹ It is also speculated that men are most unlikely to receive the vaccine as opposed to women.³⁰ According to Robson,³¹ other factors that influences men to reject the vaccine ranges from ideas about masculinity and health, and that ideas about health system are a place for women, and ability to avoid the risk of infection.

²⁷ Dhai Ames, 'To Vaccinate Or Not To Vaccinate: Mandatory COVID-19 Vaccination In The Workplace' (2021) *SAJBL* 42.

²⁸ Cooper Sara *et al.*, 'Covid-19 Vaccine Hesitancy In South Africa: How Can We Maximize Uptake Of COVID-19 Vaccines?' (2021) 20(8) *Expert Review of Vaccines* 921,933.

²⁹ *Ibid*, 921, 933.

³⁰ Gibbs Andrew, 'Why Are South African Men Hesitant About Getting Vaccinated For Covid-19?' (2021) *IOL* < Why are South African men hesitant about getting vaccinated for Covid-19? (iol.co.za) > Accessed 18 January 2023.

³¹ Robson David, 'Why Some People Don't Want A Covid-19 Vaccine' (2021) *BBC FUTURE* < Why some people don't want a Covid-19 vaccine - BBC Future > accessed 10 March 2023.

Ballan³² argues that mandatory vaccination has no place in a free society. He argues that public health policy should not be seen to be compelling the acceptance of the vaccine, but rather promoting free participation.³³ Moreover, the role of public health agencies is to provide the public with accurate information and respect individuals and communities to make their own decision. Indeed, the different opinions held about the vaccine may be another reason employees are hesitant to receive the vaccine. Anti-vaxxers believe mandatory vaccination impedes on their constitutional rights. They believe the vaccine is against their beliefs and as such, mandating the vaccine will impede on their right to freedom of choice, bodily integrity, dignity, and others in as far as receipt of medical treatment is concerned.

7.4 The impact of mandatory vaccination on employees in the workplace

Case law and reports indicate that the most possible consequence for refusal to receive the vaccination would be dismissal. However, the Consolidated Direction 2021 suggests possible ways of arranging a working environment for vaccinated and anti-vaccinated employees such as allowing such employees to work at home and/or consult with the employee further, provide guidance or accommodate such employee(s) in another position.³⁴ It is also apparent that an employee who has been dismissed for refusal to vaccinate is most unlikely to secure another employment.³⁵

The CCMA case of *Theresa Mulderij v Goldrush groups*,³⁶ was the first case of public debate in South Africa where an employee was dismissed for refusing to vaccinate.³⁷ In this case, Goldrush group (the respondent) introduced a mandatory vaccination policy after extensive consultation with employees.³⁸ The Group Business-related and Training Officer (Theresa Mulderij) refused to be vaccinated on the basis of her right

³² Ballan Abir, 'Mandatory Vaccination: The Greater Evil Of Society' (2021) *BizNews* < Mandatory vaccination has no place in a free society - PANDA - BizNews.com > accessed 20 October 2023.

³³ *Ibid.*

³⁴ Direction 3(2) of the *Consolidated Direction 2021*.

Direction 4(1)(i) of the *Consolidated Direction 2021*.

³⁵ Du Plessis Gideon, 'You May Refuse To Be Vaccinated, But Mind The Consequences' 2021 *BusinessDay* < You may refuse to be vaccinated but mind the consequences (businesslive.co.za) > accessed 20 January 2023.

³⁶ Case Number GAJB 24054-21.

³⁷ Para 2.

³⁸ Para 11.

to bodily integrity in terms of section 12(2) of the Constitution due to the concerns she had about the side-effects of the vaccination.³⁹ The CCMA ruled in favour of the employer and held that the employee was permanently incapacitated on the basis of her decision not to be vaccinated and thereby “refusing to participate in the creation of a safe working environment”.⁴⁰ For this reason, the dismissal of the employee was found to be substantively fair.⁴¹

This decision raises the assumption that a similar approach may be taken in future, by other employers especially if we have another pandemic that poses risk to the health of the workplace community. Furthermore, this raises the question on whether dismissal, according to labour laws, is or should be the first approach employers adopt when dealing with employees who refuse to be vaccinated. Therefore, it should be established whether the dismissal in these instances is, according to labour laws and the Constitution, permissible, reasonable, and justifiable.

8 Chapter Outline

The study comprises of five chapters which are structured as follows:

Chapter one (1) is introduction and background of the study. It introduces the topic, lays out the problem of the study, sets out the aims and objectives of the study, research methodology and explores the different literatures relevant to the study.

Chapter two (2) sets out the legislative framework on the right to a safe working environment. In this chapter, the author makes reference to section 24 of the Constitution, section 8 of the OHS Act, the Amended Consolidated Direction 2021, and other relevant authorities, in order to draw a nexus between mandatory vaccinations and the right to a safe working environment.

Chapter three (3) explores the prevailing challenges of the implementation of mandatory vaccination in the workplace, in as far the Constitution is concerned. This chapter focuses on the views expressed by employees who refuses to vaccinate and

³⁹ Para 22.1.

⁴⁰ Para 22.2.

⁴¹ Para 28.

those of the general public. Reference is given to case law dealing with mandatory vaccination in the workplace and its effect on the employees.

Chapter four (4) analyses Direction 3(1) of the Amended Consolidated Direction 2021 to determine whether mandatory vaccinations impede on any constitutional rights. In this chapter, mandatory vaccination is weighed against the Constitution, precisely the Bill of Rights, enshrined Chapter 2 of the Constitution.

And lastly, chapter five (5) makes conclusions and recommendations.

CHAPTER 2:

A REGULATORY OVERVIEW OF MANDATORY VACCINATIONS IN THE WORKPLACE AND THE DUTY TO PROVIDE A SAFE WORKING ENVIRONMENT

2.1 Introduction

It is common cause that the implementation of the Consolidated Direction 2021 was to give effect to section 8 of the OHS Act. Section 8 places an obligation on employers to promote and provide a safe working environment. This obligation is primarily imposed by section 24 of the Constitution and inherently imposed by common law. The scope of this obligation is to oblige employers to take reasonable measures to ensure that the work environment is safe for all employees and that the actual mode of conducting work is poses no risk to their health and wellbeing.⁴²

Having regard to the foregoing, this chapter investigate the purpose served by mandatory vaccination in the workplace as far as the duty to provide a safe working environment is concerned. To determine the relationship, this chapter explores and discusses relevant laws which explain the duty to provide a safe working environment, more especially during state of disaster, such as a Covid-19 Pandemic. In determining the relationship between mandatory vaccination and the duty to provide a safe work environment, the Constitution and relevant legislation are discussed below.

2.2 The constitutional right to a safe working environment

The Constitution of the Republic of South Africa affords everyone the right to a safe living (working environment is as far as the workplace is concerned) environment.⁴³ In the workplace, employers inherit a duty to safeguard and ensure the realisation of this right, to the extent that the working environment does not pose any risk or threat to the wellbeing of employees. On the other hand, for employees with health conditions which pose risks of infection to employees in good health, the employer is

⁴² Tshoose Itumeleng, 'Employer's Duty to Provide a Safe Working Environment: A South African Perspective' (2011) *Journal of International Commercial Law and Technology* 165.

⁴³ Section 24 of the Constitution. The section is fully discussed in this section.

required to allow the employees whose health is compromised to take sick leave, of which by so doing, the employer will have actively taken a reasonable measure to minimise the risk of infections, depending on the illnesses.⁴⁴

This practice was observed throughout the period of the Covid-19 pandemic, wherein individuals who contract Covid-19 were quarantined from those who are not infected, to minimise the spread of the virus. Hence one would infer that implementation of mandatory vaccination in the workplace was a precautionary measure to ensure that employees' health is not compromised, and that all employees are able to report to work even during the pandemic. Therefore, the constitutional right to a safe environment plays a crucial role in this regard, as the Constitution is the principal point of reference in determining the purpose for which mandatory vaccinations are sought.

Section 24 of the Constitution enshrines the right to a safe working environment. It generally provides that everyone has the right to an environment that is not harmful to their health or wellbeing, and further provides that the environment must be protected through enactment of reasonable legislative and other. This provision, though does not specifically refer to the workplace, raises a reciprocal duty on both employers and employees to safeguard the working environment. This means that both parties expected to refrain from activities which may pose a risk to the health of another. During the Covid-19 pandemic, an employer or employee who reported to work infected with Covid-19 compromised the health of other workers in the workplace.

The wording of section 24 creates a meaningful nexus between the environment, human health, and well-being. According to Du Plessis,⁴⁵ the linkage lies in that human health and well-being depend on the quality of the environment.⁴⁶ They are influenced by the environmental conditions, both positively and negatively, with significant

⁴⁴ Olivier Johan *et. al.*, 'The Coronavirus: Implications For Employers In South Africa' (2020) Webber Wentzel < <https://www.webberwentzel.com/News/Pages/the-coronavirus-implications-for-employers-in-south-africa.aspx> > accessed 18 July 2023.

⁴⁵ Du Plessis Anél, 'The Promise Of 'Well-Being' In Section 24 of The Constitution of South Africa' (2018) *SAJHR* vol 34 193.

⁴⁶ *Ibid*, para. 191 – 208.

economic and social consequences.⁴⁷ Moreover, health is unarguably a component of environmental concern and falls within the ambit of section 24.⁴⁸ In the very same way, it is inferred that Covid-19 influenced the implementation of mandatory vaccination in the workplace, which aim was to ensure the realisation of the constitutional right in section 24. As such, an argument that there is a clear nexus between the Covid-19 vaccine and the need to keep the working environment safe for all employees can be valid.

In order to ensure the realisation of the provision of section 24, it is an employer's duty to act in a manner prescribed by the existing authorities.⁴⁹ There is a retrospective and correction need for all employers to align the labour law obligations with those imposed by the Constitution to achieve the underlying duty.⁵⁰ This means that enactment of this provision, which is also depicted as a fundamental right, is expressed and termed in a manner which presupposes the eradication of the past or previous exposure of employees and other people who were not afforded the right to a healthy environment.⁵¹

Bringing Covid-19 vaccine in the picture, the discretion to implement mandatory vaccination afforded employers an opportunity to safeguard the workplace. Despite lack or limited resources to protect employees from contracting Covid-19, mandatory vaccination can be seen as an initiative to fulfil the obligation imposed by section 24 in the workplace. However, the main challenge is the manner in which mandatory vaccination were implemented, noting that there is no law governing such implementation. In the case of *Government of the Republic of South Africa and Others v Grootboom and Others*,⁵² Yacoob J held as follows:

⁴⁷ See footnote 41 above.

⁴⁸ *Trustees for the time being of Groundwork Trust and Another v Minister of Environmental Affairs and Others* (2022) SA 208 (HC), para. 22.2. (Glazewsk Jan, *Environmental Law in South Africa* (Butterworths 2000) 5, 16.)

⁴⁹ Existing authorities refers to section 24 of the Constitution, section 8 of the OHS Act, the Consolidated Direction 2021, and other legislation applicable to the topic of mandatory vaccinations in the workplace a maintenance of a safe working environment.

⁵⁰ Bushoff Tinus, 'Health and Safety' *Labour Guide* < <https://www.labourguide.co.za/health-and-safety/379-health-a-safety-and-the-employee> > accessed 18 July 2023.

⁵¹ *Ibid.*

⁵² (2001) 1 SA 46 (CC).

Legislative measures by themselves are not likely to constitute constitutional compliance. Mere legislation is not enough. The state is obliged to act to achieve the intended result, and the legislative measures will invariably have to be supported by appropriate, well-directed policies and programmes implemented by the executive. These policies and programmes must be reasonable both in their conception and their implementation.⁵³

The decision infers that every policy that is implemented to ensure the realisation of the right to a safe working environment should be weighed against existing policies regulating safe working environments. Although some argue mandatory vaccination impedes on their constitutional rights, to some extent, mandatory vaccination in the workplace can be deemed to have been primarily aimed at advancing the provision of section 24. Therefore, it was imperative that its implementation be weighed against the Constitution to ensure that such implementation does not transgress other constitutional rights.

2.3 Occupation Health and Safety Act 85 of 1993 (OHS Act)

Section 8 of the OHS Act places an obligation on employers to maintain, as far as reasonable and practical, a work environment that is safe and without risk to the health of employees.⁵⁴ This means that the employer must take reasonable measures to eliminate any factors that may cause harm or injury and/or pose a risk to the health of its employees. This provision is the fundamental basis under which the Consolidated Direction 2021 was enacted. This means that the basis for the implementation of mandatory vaccination in the workplace was to give effect to the obligation to maintain a healthy and safe working environment.

It is of common knowledge that Covid-19 compromised the working environment in that employees were exposed to each other, with little or no knowledge of either of them having contracted Covid-19. Covid-19 could easily be passed on from one employee to another. Section 8 thus requires employers to communicate the risks and dangers that are most likely to cause harm to designated employees, such as the prevalence of Covid-19 and the risks of any employee being infected.⁵⁵ Hence the

⁵³ *Ibid*, para 42.

⁵⁴ Section 8(1) of the OHS Act.

⁵⁵ Section 8(2)(e) of the OHS Act.

Consolidated Direction 2021 required employers to advise, counsel and accommodate their employees, and to provide them with the necessary support and insight on how to prevent the risk of contracting Covid-19 in the workplace. In light of the aforementioned, a conclusion can be drawn that indeed there is a nexus between mandatory vaccination and the duty to provide a safe working environment.

In the case *Kok v Ndaka Security and Services*,⁵⁶ the CCMA confirmed that the duty imposed on the employer under Section 8(1) is clear and unambiguous and imposes a statutory duty on all employers to take practical measures to ensure a healthy and safe working environment.⁵⁷ However, this duty imposed on the employer is not without limits. The Act provides that the employer should provide a safe working environment in as far as it is "*reasonably practicable*".⁵⁸ In as far as the department of Employment and Labour is concerned, implementation of mandatory vaccination in the workplace was reasonably practicable. The author holds this view because the vaccine was readily available, for which employees were not expected to pay to receive same. Therefore, implementation of mandatory vaccination could be easily and reasonably achieved, considering the availability and accessibility of the vaccine.

It appears from the wording of section 8 and the reading of the Consolidated Direction 2021 that employers are and were (during the Covid-19 pandemic) required to undertake a risk assessment in order to ascertain internal and external factors that might expose their employees to a potential threat of harm.⁵⁹ Covid-19 by its very nature exposed all employees to a potential threat of harm which was fatal. This means that amongst many others, the employer was reasonably required to do the following in order to discharge the statutory obligation imposed by section 8 and to determine the pressing need to impose mandatory vaccination in the workplace;

- Identify potential hazards which may be present while work is being done, such as employees showing symptoms of Covid-19 in the premises;

⁵⁶ Case Number FSWK2448-21.

⁵⁷ Para 51.

⁵⁸ The provisions of section 8(2) of the OHS Act in general.

⁵⁹ Section 8(2)(d) of the OHS Act.

- Establish precautionary measures and the means to implement them, such as determining the extent of the availability of the vaccine and how and where employees can access it;
- Inform employees of these hazards by providing adequate training, supervision, and protective tools;
- Implement policies to ensure compliance and make them known to employees, such as implementation of the mandatory vaccination policy and make it known to all employees;
- Consistently inspect the workspaces to ensure the use of protective tools in a proper manner, such as ensuring all sanitisers and face masks are readily available and actively in use by all employees, at all times.⁶⁰

Once all the above requirements are satisfied and administered, the employer would then be considered to have taken reasonable steps, within its available resources, to ensure that its workplace is sufficiently safe and free from any potential harm to its employees. This in itself is enough to draw a conclusion that the reason for the implementation of mandatory vaccination was a reasonable step, in as far as Covid-19 vaccine is available and free, to ensure the working environment poses no risk to the health of the employees. The risk of harm would, when the reason for which mandatory vaccination is expressed to employees, be sufficiently minimised when employees receive the vaccine. This therefore means, an achievement of 100% of the staff members receiving Covid-19 vaccine would have been a fulfilment of the obligation to maintain a healthy and safe working environment. As such, the employees would be at a less or no risk of contracting Covid-19 in the workplace, and subsequently infecting one another.

2.4 Compensation for Injuries and Diseases Act 61 of 1997 (COIDA)

COIDA seeks to provide recourse for the compensation of employees who contract diseases or sustain injuries during the course of their scope of work.⁶¹ The possibilities of employees contracting illnesses or sustaining injuries may render the employees

⁶⁰ See footnote 40 above, pg. 170 - 171.

⁶¹ Preamble of the Compensation for Injuries and Diseases Act 61 of 1997 (Hereafter referred to as COIDA).

incapable of performing their duties, which in most cases may have financial implications on the employer. COIDA seeks to exempt employers from a financial burden of having to compensate employees in the event the employee is injured or contracts a disease in the workplace.

As learned from Covid-19, the common question surrounded whether an employer who implemented the mandatory vaccination would be required to compensate employees who voluntarily vaccinated or acted on the implemented policy. If the answer to this question is in the affirmative, this meant that an employee who was not vaccinated would not be protected, and the employer would not be held liable in the event they contract the illness in the workplace while not vaccinated. Further uncertainties related to whether employees, either vaccinated or unvaccinated will be allowed to claim for compensation under COIDA. Answers to these questions were imperative, and still are, in the event we find ourselves in a similar position in the future.

However, what remains important is for employers to offer physical and psychological support structure for all their vulnerable employees. This was also stressed by Van Rensburg that 'managing these hazards to create a healthy and safe work environment will have a positive effect on the health and productivity of the employee and ultimately have a positive effect on the workplace and output at work'.⁶²

2.5 The impact of the Covid-19 pandemic on the application of legal framework pertaining to a safe working environment

The Covid-19 pandemic has brought about a gradual shift in how we work and a potential change of future workplaces.⁶³ We have seen during the pandemic a change in hybrid working system to a remote working system.⁶⁴ It appears that now employers are considering having a progressive change in how employees tender their services, more especially with the evolving fourth industrial revolution. Meetings are now held

⁶² Van Rensburg Lindie Jansen, 'An Investigation of The Psychosocial Work Environment Of Ministers In The Dutch Reformed Church, In The Western Cape And Kwazulu-Natal' 2015 *CORE* 8.

⁶³ de Lucas Ancillo Antonio *et al.*, 'Workplace Change Within The COVID-19 Context: The New (Next) Normal' (2023) *Technology Forecasting & Social Change* 2.

⁶⁴ Yang Longqi *et al.*, 'The Effects of Remote Work on Collaboration Among Information Workers' (2022) *Nature Human Behaviour* 43.

virtually, and employees work from the comfort of their homes. The question which arises is whether the legal framework above is robust enough to deal with issues of future pandemics similar to Covid-19, most likely to impact the workforce.

It appears that the gradual change in the manner in which work was tendered by employees during the Covid-19 pandemic was not only an effective response to the threat of the pandemic in the workplace but an opportunity to adopt the remote working system, which was previously available to designated employees, but not an option to the majority.⁶⁵ Therefore, the inference we can draw from the above is that adoption of the remote working system will eliminate issues pertaining to the safety of the working environment, as required by section 24 of the Constitution; exempt employers from the duty to maintain a working environment which is without risk to the health of employees, as required by section 8 of the OHS Act; and minimise potential claims which may directly be levied against employers as result of work related injuries sustained and illnesses contracted during the scope of work.

2.6 Conclusion

It is evident that employers are legally compelled to comply and adhere to the provisions of the legislation put in place to safeguard employees' health and wellbeing in the workplace. The relevance of this obligation is not only stretched to the implementation of policies that regulates safety and wellness in the workplace, but further extends to their enforcement in that employers are obliged to implement measures to safeguard employees, in addition to existing policies. Having drawn a conclusion that the implementation of mandatory vaccination in the workplace was a reasonable measure to ensure the fulfilment of the obligation to provide a safe working environment, on the other hand, employers were equally required to comply with the Constitution and the OHS Act. Hence the implementation of mandatory vaccination was required to be done in a manner that expresses protection and/or respect to the interests of all employees, with the main purpose of safeguarding their health and well-being.

⁶⁵ De Vincenzi Clara *et al.*, 'Consequences of COVID-19 on Employees in Remote Working: Challenges, Risks and Opportunities An Evidence-Based Literature Review' (2022) *International Journal of Environmental Research and Public Health* 12.

CHAPTER 3:

THE RATIONALE FOR EMPLOYEES' REFUSAL TO VACCINATE AND THE JURISPRUDENCE OF THE JUDICIARY

3.1 Introduction

The employment industry was heavily hit by the Covid-19 pandemic which caused a great destruction on the day-to-day work activities.⁶⁶ Employers were further greatly affected by implemented lockdown restrictions which also lead to reduced productivity, resulting in a decrease in wages for employees in private sectors and agriculture.⁶⁷ To restore productivity and gradually ensure all workers return to work, employers were faced with an obligation to ensure precautionary measures were carefully taken to ensure that the work environment is safe for the return of employees to their respective workplace.⁶⁸ As a result, certain employers implemented mandatory vaccination policy in their respective workplace.

A close scrutiny of employers' argument for the implementation of mandatory vaccination is the compelling need to protect and safeguard employees against the contraction of Covid-19. Other employers' reason related to the need to ensure that all employees reported to work and to alleviate the risk of employees excessively taking sick leave. On the other hand, employees held and based their refusal to vaccinate with reference to their constitutional rights and sought protection in that regard. This chapter thus seeks to analyse the rationale for employees' refusal to vaccinate. The chapter further analyses the court's jurisprudence on the issue of refusal to vaccinate for constitutional reasons.

3.2 Implementation of mandatory vaccination in the workplace

As already alluded in chapter 1 above, the Consolidated Direction 2021 has conferred a discretionary power upon employers to undertake a risk assessment and adopt or implement mandatory vaccination in their various workplaces, if necessary. Certain

⁶⁶ See footnote 1 above.

⁶⁷ Baboolal-Frank, R, 'The Implications of Covid-19 In The Workplace In South Africa' (2021) *Journal of Legal, Ethics and Regulatory Issues* 2.

⁶⁸ *Ibid.*

employers introduced mandatory vaccination policies, mandating their employees to receive the Covid-19 vaccine, failing which, such employees would run a potential risk of losing their job. It is undisputable that the Consolidated Direction 2021 itself does not prohibit dismissal action. However, employers were encouraged to explore other available options, such as counselling the employee,⁶⁹ referring the employee for medical evaluation,⁷⁰ and/or taking steps to reasonably accommodate the employees in positions or environment which would not require the employees to be vaccinated, such as working from home.⁷¹

In an instance where dismissal is invoked, such dismissal would have to be carried in line with such workplace's operational requirement.⁷² Consequently, implementation of the mandatory vaccination policies left certain employees vulnerable, having to choose between their personal beliefs and securing their jobs. However, a number of employees stood their ground and refused to vaccinate, regardless of the circumstances and possibilities of being discipline and eventually being dismissed, as we will see from the case law below. The discussion that follows explores various employees' rationale for refusing to vaccinate and the jurisprudence of the court on whether the actions taken by employers as a result of such refusal were fair or not.

3.3 Mandatory vaccination and bodily integrity

In the case of *Mulderij v Goldrush Group*,⁷³ Goldrush Group (the Respondent) implemented a mandatory vaccination policy,⁷⁴ after thorough consultation with its employees,⁷⁵ and employed the services of a lecturer in traditional health and a Human Rights Commissioner to assist in clarifying any questions the employees might have.⁷⁶

⁶⁹ Annexure C 2(a) the Consolidated Direction 2021 72.

⁷⁰ Annexure C 2(b) of the Consolidated Direction 2021 72.

⁷¹ Annexure C 2(c) of the Consolidated Direction of 2021 73.

⁷² Deale Patrick, 'NO JAB – NO JOB: Can An Employee Be Dismissed For Refusing To Be Vaccinated?' (2021) *Deale Attorneys* < <https://deale.co.za/no-jab-no-job-can-an-employee-be-dismissed-for-refusing-to-be-vaccinated/> > accessed on 17 August 2023.

⁷³ Case Number GAJB24054-21.

⁷⁴ Para 5 and 11.

⁷⁵ Para 16.

⁷⁶ Para 18.

However, Mulderij (the Applicant) refused to vaccinate based on a constitutional ground of bodily integrity.⁷⁷

After having considered all means to accommodate the Applicant in the *Mulderij* case, the Respondent was without any other solution since there was no alternative role the Applicant could perform without risking the safety of the other employees and external site-owners.⁷⁸ The Respondent conducted a hearing, the outcome of which the employee was declared permanently incapacitated by the presiding officer, as a result of refusal to vaccinate,⁷⁹ and consequently concluded that the applicant's dismissal was substantively fair.⁸⁰

The Commissioner relied on the statement made by Judge Roland Sutherland, in his memo to his colleagues on the vaccinations in the workplace, in which he stated as follows:

There has been yet, only a mild protest that this violates freedom of choice... in my view this is the wrong question. The proper question is whether an individual is sufficiently civic minded to appreciate that a duty of care is owed to colleagues and others with whom contact is made to safeguard them from harm. If one wishes to be an active member of a community, then the incontrovertible legitimate interest of the community must trump the preferences of the individual.⁸¹

The Commissioner dismissed the matter and ruled that the Applicant's dismissal was substantively fair,⁸² based on incapacity because of the Applicant's refusal to vaccinate. The CCMA dealt with the same issue in the case of *Greyden v Duncan Korabie Attorneys*,⁸³ wherein Mr Greyden (the employee) alleged that mandatory vaccination violated his right to bodily integrity.⁸⁴ Moreover, the employees of Duncan Korabie Attorneys were unable to work remotely.⁸⁵ The employer, Duncan Korabie Attorneys held meetings with the employees to discuss the need to vaccinate.⁸⁶ The

⁷⁷ Para 22.1.

⁷⁸ Para 20.

⁷⁹ Para 27.

⁸⁰ Para 28.

⁸¹ Para 26.

⁸² Para 29.1.

⁸³ Case Number WECT13114-21.

⁸⁴ Para 54.

⁸⁵ Para 27.

⁸⁶ Para 28.

Commissioner in the CCMA held that the dismissal was procedurally unfair but was indeed substantively fair.⁸⁷

3.4 Mandatory vaccination and the right to freedom of security

In the case of *Kok v Ndaka Security and Services*,⁸⁸ Mr Kok (the Applicant) referred an unfair labour practice dispute alleging that his employer had suspended him unfairly and that such suspension amounted to an unfair labour practice.⁸⁹ The Applicant was employed by Ndaka Security and Services (the Respondent) as a Safety Practitioner⁹⁰ and as part of its duties, identified safety risks on Sasol Ltd site.⁹¹ The applicant was suspended by the respondent for alleged misconduct⁹² relating to his refusal to vaccinate for various constitutional reasons.⁹³ The Respondent gave the Applicant an option to provide a weekly negative Covid-19 test,⁹⁴ of which the Applicant only complied several times but later refused to continue providing because he had to pay for the tests from his own pocket. The Applicant argued that this amounted to an unfair labour practice, and that the vaccination requirement contravened his right to freedom of security.

In its submissions, the Respondent submitted that all other employees were vaccinated. Those who were not vaccinated were at home, under “no work, no pay” principle. The Respondent further submitted that it undertook a risk assessment, and the Applicant was identified as an employee required to vaccinate because he shared an office with ten other employees, who had already vaccinated. The Applicant argued that his suspension was unfair because there was no legislation in force that mandated employees to be vaccinated.

The CCMA ruled that the OHS Act compels employers to provide safe workplaces and that the Respondent’s vaccination requirement was in the fulfilment of this statutory obligation. In the Commissioner’s view, the Respondent complied with the Minister’s

⁸⁷ Para 92.

⁸⁸ Case Number FSWK2448-21.

⁸⁹ Case Number FSWK2448-2, Para 4.2.

⁹⁰ Para 11.1.

⁹¹ Para 11.3.

⁹² Para 12.8.

⁹³ Para 12.1 – 12.3.

⁹⁴ Para 11.5.

directives, which although do not make Covid-19 vaccination mandatory, confers a discretionary power on employers to consider its duties imposed by the OHS Act. The CCMA found that the requirement to vaccinate is nothing less than a reasonable and practicable step that every employer is required and compelled to take. Thus, the Commissioner ruled that the suspension of the Applicant for refusing to be vaccinated was fair and in line with the OHS Act.

3.5 The ground of existing medical conditions, personal views of the vaccine and religious beliefs

In the case of *Bessick v Baroque Medical (Pty) Ltd (Bessick case)*,⁹⁵ Ms. Bessick (the employee) was employed as an invoicing clerk for Baroque Medical (Pty) Ltd (the employer).⁹⁶ The employer advised its entire staff complement of its mandatory vaccination policy.⁹⁷ The employee expressed her unwillingness to vaccinate based on the grounds of existing medical conditions, personal views of the vaccine and religious beliefs.⁹⁸ The employer issued the employee with a notice of retrenchment based on operational requirements.⁹⁹ Regardless of the notice, the employee continued to refuse to vaccinate and was eventually dismissed on the same ground.¹⁰⁰

The employee challenged the fairness of her dismissal at the CCMA and the CCMA found that the employer's mandatory vaccination policy was imposed to safeguard its employees.¹⁰¹ The CCMA ruled in favour of the employer and held that the operational requirements of the employer necessitated the vaccination¹⁰² and the employer's refusal to vaccinate fell short of the requirement, thus the dismissal was fair.¹⁰³

⁹⁵ Case Number WECT13083-21.

⁹⁶ Para 3.

⁹⁷ Para 6.

⁹⁸ Para 9.

⁹⁹ Para 18.

¹⁰⁰ Para 34.

¹⁰¹ Para 54.

¹⁰² *Ibid.*

¹⁰³ Para 78.

3.6. Previous reaction to vaccines and person views on the vaccination

The *Kgomotso Tshatshu v Baroque Medical (Pty) Ltd*,¹⁰⁴ is one case wherein the CCMA that took a different approach from the aforementioned cases. Ms. Tshatshu (the employee) was employed as a senior inventory controller for Baroque Medical (Pty) Ltd (the employer).¹⁰⁵ The employer implemented a mandatory vaccination policy in its workplace,¹⁰⁶ to ensure that its employees were not infected by Covid-19 and to further ensure business continuity by reducing Covid-19 related absenteeism.¹⁰⁷ This was also in fulfilment of the statutory and common law obligation to provide a safe working environment.¹⁰⁸ The employee refused to vaccinate based on an adverse reaction to a flu injection 10 years ago and she was also of the view that the vaccines were on trial.¹⁰⁹ The employee was consequently retrenched for operational requirement without severance pay.¹¹⁰

In determining the validity of mandatory vaccination policy, the Commissioner stated that whilst the Code of Good Practice on Managing Covid-19 permits such a policy under certain circumstances, it does not make provision for a “blanket mandatory policy”.¹¹¹ Furthermore, the Commissioner stated that there is no law in place, anywhere in the world which permits such a policy.¹¹² The Commissioner also criticised the employer for not leading evidence as to why it could not afford to endure Covid-19-related absenteeism, stating that all employers experience sick leave, some occasioned by Covid-19.¹¹³ This evidence would speak directly to whether, operationally and from a health and safety perspective, the employer had a valid operational requirement to impose mandatory vaccination.

Moreover, the Commissioner stated that the implementation of such types of policy are illogical as the employees *do not live in a cocoon* and would come into contact

¹⁰⁴ Case Number GAJB20811-21.

¹⁰⁵ Para 26.

¹⁰⁶ Para 13.

¹⁰⁷ Para 14.

¹⁰⁸ *Ibid.*

¹⁰⁹ Para 17.

¹¹⁰ Para 8.

¹¹¹ Para 46.

¹¹² Para 40.

¹¹³ Para 50.

with numerous people, who are not subject to a mandatory vaccination policy on a daily basis, and therefore, still be at risk of contracting Covid-19, and having to work from home or take leave.¹¹⁴ The Commissioner thus found that the rule regarding mandatory vaccination was unreasonable¹¹⁵ and held that the dismissal of the employee was substantively unfair and unconstitutional.¹¹⁶

3.7 The impact of the implementation of mandatory vaccination on employees

The most undue impact of the Covid-19 pandemic was an increment of unemployment in many countries affected by the pandemic. A number of employees suffered job losses as companies were forced to retrench employees, influenced by the dramatic economic downturns caused by business closure.¹¹⁷ However, with the implementation of mandatory vaccination as an attempt to combat Covid-19 infections, it did not leave employees safe of the threat of losing their jobs. As seen from the case law above, employers exercised an election to dismiss employees who refused to vaccinate. Whereas mandatory vaccination was primarily imposed on healthcare workers, as they were duty bound to protect patients and prevent patients from succumbing to the virus,¹¹⁸ the imposition also led to minimal job losses in the primary care workforce.¹¹⁹ Therefore, the inference that can be drawn is that in as much as mandatory vaccinations were implemented to combat the spread of Covid-19 infections, it negatively affected the workforce in that employees who refused to vaccinate lost their job in the process.

3.8 Responses to mandatory vaccination in the workplace

It is obvious that the implementation of the Consolidated Direction 2021 brought about a controversy relating to reasons for which Covid-19 vaccine was sought to be

¹¹⁴ Para 52.

¹¹⁵ Para 59.

¹¹⁶ Para 61.

¹¹⁷ Cotofan Maria *et al.*, 'Work and Well-being During COVID-19: Impact, Inequalities, Resilience, and the Future of Work' (2021) *World Happiness Report* 155.

¹¹⁸ Moodley Keymanthri, 'The Ethics Behind Mandatory COVID-19 Vaccination Post-Omicron: The South African Context' (2022) Volume 118 *South African Journal of Science* 3.

¹¹⁹ Hatch A. Brigit *et al.*, 'Impact of The COVID-19 Vaccination Mandate on The Primary Care Workforce and Differences Between Rural and Urban Settings to Inform Future Policy Decision-Making' (2023) *PLoS ONE* 2.

mandated. In as far as the Constitution is concerned, employees were within their constitutional rights to accept or reject the vaccine. In essence, the Constitution requires that everyone's dignity be respected and protected.¹²⁰ In a constitutional perspective, dignity of an individual refers to the latter's self-respect, his values and worth as a human. It is common cause that employees' refusal to vaccine emanates from their subjective opinions, values, and beliefs, which is associated with one's dignity. Most importantly, everyone is equal before the law and is entitled to equal protection of the law, vaccinated or not.

It appears that the primary purpose for the call for employees to vaccinate was to ensure that the workplace was safe for both employees and employers. In a constitutional perspective, the employees were justified in refusing to vaccinate, receiving protection from the Constitution. However, On the other hand, an act of no concern on the protection of employees by employers would still be regarded as failure to comply with a legislative obligation. Thus, it was imperative for employees and the general public, whether choosing to vaccinate or not, to keep an open mind to the purpose to which the Covid-19 vaccine was sought to be compulsory.

Similarly, employers were also reasonably expected to bear in mind, as was stated by the Commissioner in the *Tshatshu* case, that employees do not live in a cocoon and would always come into contact with numerous people outside the workplace, who would not be vaccinated. As such, reasonable employers would have been cautious and considerate in dealing with employees who refused to vaccinate. Although they were not prohibited from punishing the employees who refused to vaccinate, employers were required to comply with the guiding provisions of Direction 4(1)(b) and annexure C of the Consolidated Direction 2021. This would be to provide the necessary assistance or training, as the need to do so arose.¹²¹ One can only know the solution to a problem they are well informed of.

¹²⁰ Section 10 of the Constitution.

¹²¹ Direction 4(1)(b) of the Consolidated Direction 2021 provides that every employer must establish the administrative measures that includes requiring employees to disclose whether they have any of the health issues, comorbidities or conditions contemplated in the definition of vulnerable employees and thereafter take special measures to mitigate the risk of SARS-CoV-2 infection for those employees in accordance with Department of Health's Guidelines to facilitate their safe return to work or their working from home.

3.9 Responses to court jurisprudence on mandatory vaccination

The CCMA rulings on the dismissal of employees who refused to vaccinate have triggered the author to doubt the consistency in the interpretation and application of the existing labour laws. CCMA handed down contradicting rulings, which to some extent raise issues of prejudice to those suffered and fell short of statutory protection because of the negative rulings. The author primarily criticises the Commissioner's finding in the *Bessick* case, wherein the Commissioner found that the employer's operational requirement necessitated mandatory vaccination and that the dismissal of the employee was fair.¹²² The author argues that the Commissioner erred in this regard.

The view that mandatory vaccination was the employer's operational requirement was unfounded and illogical. Moreover, classifying mandatory vaccination to be a component of the employer's operational requirement was an error of law in that mandatory vaccination is not catered for in the definition of dismissal for operational requirement. Although a workplace may have existing policies in place, such policy should not interfere with the employees' constitutional rights and their personal interest.

The Constitution should be the first point of reference to ensure fairness and equality within the workplace. The principal issue in almost all the cases which dealt with dismissal of employees for refusal to vaccinate was never whether there is a law in force justifying mandatory vaccination but the fairness of dismissal or retrenchment of such employees who refused to vaccinate. Fairness is an important value of the constitution and plays a crucial role in the issue of mandatory vaccination.

The author argues that the decision of the Commissioner was not that of a reasonable decision maker in that he failed to consider the provisions of Direction 4(1)(b).¹²³ The employee did disclose to the employer that he has an existing medical condition, as well as his discrepancies regarding the vaccination. It should not have come as a shock that the employee had no belief in the effectiveness of the vaccine. A reasonable

¹²² See footnote 151 and 152 above.

¹²³ See footnote 128 above.

employer should be able to consider the interests of its employees in its quest to maintain a healthy working relationship.

In the *Bessick* case, the employee fell within the category of “vulnerable employee”, which required the employer to take special measures as contemplated in Direction 4 and annexure C of the Consolidated Direction 2021. The Direction required the employer to take reasonable or special measures to accommodate the employees, or any necessary measure to educate the employees on the dangers of the virus¹²⁴ and the nature or benefits of the Covid-19 vaccines¹²⁵ as required by the Consolidated Direction 2021. However, Notwithstanding the Commissioner’s failure to acknowledge that mandatory vaccinations are implemented by employers in fulfilment of their duty to provide a safe working environment as envisaged in the OHS Act in the *Tshatshu* case, the author supports the Commissioner’s assertion that the implementation of mandatory vaccination in a specific workplace serves no purpose in that the very same employees are still exposed to the public, which are most likely to contract the virus, regardless of having vaccinated or not.

Thus, it may seem to be completely impracticable to require employees to adhere to mandatory vaccination policies, meanwhile other employees (special employees) are afforded an opportunity to work at the comfort of their homes. This will therefore mean that section 9 and 10 of the Constitution would have failed in that the policy would not have been applied equally, and without due respect and protection of the dignity of the employees. Having regard to the foregoing, there is a need to weigh or balance all rights, having regard to the equality clause and section 8 of the Constitution.¹²⁶ The uncertainties pertaining to the Covid-19 vaccine and the failed implementation of mandatory vaccination should serve as a valuable lesson in case of future pandemics, which may negatively affect the workplace.

¹²⁴ Direction 4(1)(I)(i) of the Consolidated Direction 2021.

¹²⁵ Direction 4(1)(I)(ii) of the Consolidated Direction 2021.

¹²⁶ Section 8(1) provides that the Bill of Rights applies to all law, and binds the legislature, the executive, the judiciary, and all organs of state.

3.10 Conclusion

It is evident that the rationale pertaining to the refusal to vaccine emanated from the manner in which the implementation of mandatory Covid-19 vaccination was communicated to the employees, including employers' attitude toward employees' complaints and/or reluctance to receive the vaccine. It is important that when drafting regulations for mandatory vaccinations, regulators should and the judiciary who apply these laws should consider the constitutional obligation to respect, protect, promote, and fulfil the rights in the Bill of Rights.¹²⁷ This duty can only be fulfilled by consistent application of the law, having regards to the interests of those entitled to enjoy the rights enshrined in the Bill of Rights. Whether vaccinated or not, everyone is entitled to equal protection of the law, and it will be in the interest of justice and the realization of the right to equality when the law is consistently applied, and rights are equally protected.

¹²⁷ Section 7(2) of the Constitution.

CHAPTER 4:
**THE CONSTITUTIONAL SCRUTINY OF MANDATORY VACCINATIONS IN THE
WORKPLACE**

4.1 Introduction

In the previous chapter, the author explored distinct reasons pertaining to the refusal of employees to receive and accept mandatory vaccine and/or its implementation. It was averred that the implementation of the Consolidated Direction 2021 gave rise to contradicting discussions and debates pertaining to the common constitutional grounds for the rejection of the mandatory vaccine in the workplace. Having explored and criticised some of the CCMA's decisions pertaining to the dismissal of such refusing employees, the author in this chapter investigates whether indeed mandatory vaccination impedes on constitutional rights. In this chapter, the author discusses the rights concerned and gives an overview on the question of constitutionality of the vaccine.

4.2 The basis for the constitutional scrutiny

The amended Consolidated Direction, which took force on 11 June 2021 make provisions which are a fundamental basis for this study. As already mentioned above, the former conferred discretionary powers on employers in certain workplaces to choose whether they want to make the distribution of the vaccination in their workplace compulsory. Direction 3(1) of the amended Direction makes the following provisions:

Every employer must –

- (a) undertake a risk assessment –
 - (i) to give effect to the minimum measures required by these Directions, taking into account the specific circumstances of the workplace and the requirements of the OHS regulations for Hazardous Biological Agents; and
 - (ii) Within 21 days of the coming into force of the amendment to this Direction, in accordance with sections 8 and 9 of the OHS, taking into account the operational requirements of the workplace, whether it intends to make vaccination mandatory and, if so, to identify those employees who by virtue of the risk of transmission through their work or their risk

for severe COVID-19 disease or death due to their age or comorbidities that must be vaccinated;

- (b) based on these risk assessments, develop a plan, or amend an existing plan –
 - (i) outlining the protective measures in place for the phased return of its employees before opening; and
 - (ii) outlining the measures that the employer intends to implement in respect of the vaccination of its employees in accordance with this Direction and taking into account the Guidelines in Annexure C.¹²⁸

As observed from the CCMA case law in the previous chapter, certain employers acted upon the Consolidated Direction 2021 and implemented mandatory vaccination policies. We have also learnt of the consequences such as 'dismissal' that followed as a result of refusal to comply with the employer's mandatory vaccination policies. We further observed that the main concern of the employees who refused was that the vaccine impeded on their constitutional rights. It should be ascertained whether indeed the vaccine impeded on the rights concerned and the author does so below.

It is important to note that one of the elements that limits the powers of government is *due process of law*.¹²⁹ The principle of *due process* means that the laws must be fair and must be followed properly before someone's life, liberty, or property is taken from them.¹³⁰ As already mentioned in chapter 1, constitutional rights that are most likely to be affected by the Consolidated Direction 2021 are the right to bodily integrity (section 12(2)) and the right to freedom of thought, religion, conscience and opinion (section 15).¹³¹

In a country like South Africa, the principle of liberty is of paramount important, more especially since we have constitutional democracy. Libertarians argues that liberal societies ought to regulate acts which violate the rights of others, but not purely self-regarding acts.¹³² Having regard to the foregoing, the author then turn to analyse how

¹²⁸ See footnote 13 above.

¹²⁹ Center for Civic Education, 'Constitutional Democracy: An Outline of Essential Elements' anon < <https://www.civiced.org/lesson-plans/constitutional-democracy> > accessed on 11 August 2023.

¹³⁰ Lou Frey Institute, 'Constitutional Rights and Their Impact' (2017) *Civics360* 1.

¹³¹ Refer to footnote 71 above and chapter 1, footnote 21.

¹³² White F. Ronald, 'The Liberty Principle' anon < <http://faculty.msj.edu/whiter/liberty.htm#:~:text=LIBERTY%20PRINCIPLE&text=Liberty%20is%20th>

the realisation of constitutional rights in the workplace concerned may be influenced by mandatory vaccination, which in turn may or may not result in impediment of constitutional rights.

4.3 Analysing the impact of mandatory vaccination on Constitutional rights

4.3.1 Section 12(2): the right to bodily integrity

The Constitution affords everyone the right to bodily and psychological integrity,¹³³ which includes the right not to be subjected to medical or scientific experiments without their informed consent.¹³⁴ Whereas medical care is a constitutionally protected right, which emanates from the provision of social security,¹³⁵ section 12(2) makes it unlawful to force individuals to undertake medical assessment against their will. Furthermore, whereas section 27 affords everyone the right to health care services, individuals have a discretion to choose whether they wish to receive and accept those services. As such, administration of health care services to an individual that has expressed no interest in such services would be a contravention of section 12(2).

However, section 12(2) has in various occasions been limited to ensure the realization of section 27 of the Constitution. On all occasions, the main reason for the limitation of section 12(2) is of public interest.¹³⁶ For example, in the case of *Minister of Safety and Security and Another v Gaqa*,¹³⁷ a bullet had to be removed from the leg of the respondent, Mr Gaqa, for ballistics test purposes.¹³⁸ However the respondent told the treating doctor, Dr Linda, that he does not want the bullet removed.¹³⁹ The bullet in the leg of Mr Gaqa was the only evidence which could or could not link Mr Gaqa to the murderers.¹⁴⁰ The court granted an order that reasonable force, including surgical

e%20principle%20of,liberty%20are%20mutually%20supporting%20principles. > accessed on 12 August 2023.

¹³³ Section 12(2).

¹³⁴ Section 12(2)(c).

¹³⁵ See section 27 of the Constitution.

¹³⁶ Calitz Tanya, 'Constitutional Rights in South Africa Protect Against Mandatory COVID-19 Vaccination' (2021) *Health and Human Rights Journal* < <https://www.hhrjournal.org/2021/04/constitutional-rights-in-south-africa-protect-against-mandatory-covid-19-vaccination/> > accessed on 13 August 2023.

¹³⁷ (2002) (9) SA 190 (HC).

¹³⁸ Pg. 1 of the Judgment.

¹³⁹ Pg. 3.

¹⁴⁰ Pg. 4.

procedure be used to remove the bullet from Mr Gaqa.¹⁴¹ Mr Gaqa was ordered to present himself for surgery and to furnish the necessary consent required for performance of surgical procedures.¹⁴²

In the same lenses, mandatory vaccination can pass the constitutionality test when administered in the interest of all employees. This would be apparent, for example, in medical facilities where the healthcare practitioners were most vulnerable and easily exposed to Covid-19. Furthermore, the very same practitioners would interact with members of the public in administration of health care services that they would offer to those who tested positive for Covid-19. In this instance, mandatory vaccination would be administered in the interest of the public, to prevent the risk of the practitioners infecting each other and spreading Covid-19 to their patients. Consequently, the limitation of their right to bodily integrity would be justified and relevant given the circumstances for the benefit of the general public.

Furthermore, in the case of *Minister of Health of the Province of the Western Cape v Goliath and Others (Goliath case)*,¹⁴³ the court compelled the surviving respondents to receive treatment for tuberculosis against their will.¹⁴⁴ The consideration of public interest in this case appears to have been in fulfilment of an obligation as imposed by section 24 of the Constitution to ensure that the environment is kept safe for the benefit of everyone living in it.¹⁴⁵ It is drawn from these decisions that in certain instances, the public interest supersedes the right to bodily and psychological integrity.

The question is whether the same approach was being adopted within the employment sector, justifying the implementation of mandatory vaccination policies in the workplace. And can the same approach be adopted in future, should there be a pandemic similar to Covid-19? With reference to the aforementioned judicial authority, the answer can be in the affirmative as such regulations and policy frameworks would be in the public interest. Only then, the limitation of section 12 thereof would be justifiable in that regards. However, it would be very important that there be authority

¹⁴¹ Pg. 10.

¹⁴² Pg. 10 – 11.

¹⁴³ (2009) (2) SA 248 (HC).

¹⁴⁴ Para 86 and 88.

¹⁴⁵ Section 24(1)(b).

justifying the implementation of mandatory vaccination policies, which would also give protection to the constitutional rights of all employees. It is important that the right to a safe working environment, and regulations set to achieve this right must be weighed against the constitutional rights of the larger society, having regards to their interests thereof.

4.3.2 Section 15: the right to freedom of thought, religion and conscience and opinion

Section 15 affords everyone the right to think freely, affiliate or be a member or part of any religion of choice, follow their conscience and have their opinion heard and respected.¹⁴⁶ The freedom to think and give opinions must be constitutionally sound and free from any malice or misrepresentation of the true facts. However, a right can be limited when its realization impedes on other constitutional rights or presents harm to other people. Mandatory vaccination would be constitutional if it could be proven that the implementation of such would not transgress employees' religious beliefs.¹⁴⁷ Even though possibilities of transgression were apparent, the necessary accommodation as recommended by the Consolidated Direction 2021 would suffice.

However, if it could be found that one's freedom of thought or opinion on mandatory vaccination was simply for personal and unfounded reasons, a limitation in this regard would be justified. Hence it is important that a thought, belief, conscience, or opinion be of bona fide nature and reasons and not be on mere misrepresentation or misleading grounds.

4.4 The constitutionality of mandatory vaccination in the workplace

The question that arises, which is the foundation of this chapter is whether mandatory vaccination in the workplace impedes on any constitutional rights. The author is of the view that the rights of the employees, whether vaccinated or not, were affected by

¹⁴⁶ Section 15(1) of the Constitution.

¹⁴⁷ Cooper Emily, 'Right to Freedom of Religion, Belief and Opinion' in Geoffrey Allsop, Bongzi Maseko, Emily Cooper and Eshed Cohen (2nd edition), *Constitutional Law For Students* (University of Cape Town 2020) 413:

(Also see David Bilchitz 'The Tension Between Freedom of Religion and Equality in Liberal Constitutionalism' (2011) *The Journal of the Helen Suzman Foundation* 11).

mandatory vaccination. With every case, as should be dealt with according to its own merits, some rights would have to be limited to cater for the interest of other employees. Some employers adopted the mandatory Covid-19 vaccine policies to realise a safe working environment in line with the guiding provisions of the Consolidated Direction 2021. It is important that when regulations such as these are set, regulators and those who apply and enforce these laws should ensure that the implementation results in justified limitation of the constitutional rights concerned.

According to section 36 of the Constitution, the limitation of a constitutional right will be justified if such limitation is applicable to all people and not just a specific individual or a classified group. Furthermore, the limitation will be acceptable when the reasons thereof are reasonable and justifiable in an open democratic society. The issue of limitation is discussed on paragraph 4.6 below. It appears that mandatory vaccination as contemplated in the Consolidated Direction 2021 was proposed in the interest of the public, although its due implementation on a constitutional test, impeded on section 12(2)(c) and 15 of the Constitution. However, having reference to the section 24 of Constitution and section 8 of the OHS Act, it would seem justifiable to employ measures such as mandatory vaccination during the prevalence of deadly pandemics such Covid-19.

This can be justified on the grounds that the purpose for which Covid-19 vaccine was sought to be mandated was to protect employees against the possibilities of contracting Covid-19 at work. It is of public knowledge that a huge percentage of individuals who contracted Covid-19 lost their lives. These fatalities rendered Covid-19 a deadly disease which required urgent intervention. Since public interest requires the government (and to some extent, employers) to take reasonable measures to preserve life, this common law obligation is more than a justifying ground for limiting the rights of the anti-vaxxed, in an open and constitutional democracy. Hence the government and employers are put at ease as the current jurisprudence on this topic contends that there is no conflict between human rights and mandatory vaccination.¹⁴⁸

¹⁴⁸ King Jeff and Ferraz Octávio Luiz Motta, 'Legal, Constitutional, and Ethical Principles for Mandatory Vaccination Requirements for Covid-19' (2021) < <https://lexatlas-c19.org/vaccination-principles/> > accessed on 14 August 2023.

King and Ferraz argued that mandatory vaccination requirements were a means of protecting internationally recognized right to life, health, education, and work.¹⁴⁹ This therefore means that an employer who adopted mandatory vaccination as a prerequisite in the workplace did not only act in realisation of the rights concerned but further intended to provide a safe working environment as required and obligated by the Constitution and labour laws. As such, failing to take precautionary measures to prevent the spread of Covid-19 would result in more fatalities in workplace, which would consequently result in reduced productivity or access to the workplace, as having been observed during level 5 of the lockdown.

Nevertheless, every employee should have been at liberty to accept or reject the vaccine. It would thus be unfair and constitutionally unsound to deny individuals their constitutional entitlement of security of person. The choice to vaccinate should have remained a personal decision. Furthermore, institutions such as the South African Human Rights Commission (SAHRC) supported mandatory vaccination because they believed that the benefits thereof outweighed people defending their rights, such as the right to bodily integrity, and perpetuating the suffering of the whole nation.¹⁵⁰ Accordingly, it is argued herein that the Consolidated Direction 2021 was legally enforceable and that mandatory vaccination was constitutionally sound under the circumstance of the Covid-19 pandemic.¹⁵¹

However, even though this would be the case, the Consolidated Direction 2021 still required employers to consider accommodating employees who argued otherwise and consequently refused to vaccinate by offering them counselling and support, instead of terminating their employment.¹⁵² This means that employers were not to use their superiority, and consequently acting unreasonably on account of the Consolidated Direction 2021, especially since it did not prohibit them from dismissing employees.

¹⁴⁹ *Ibid.*

¹⁵⁰ South African Human Rights Commission, 'Mandatory Covid-19 vaccination not really infringement on your rights' (2021) < <https://www.sahrc.org.za/index.php/sahrc-media/news/item/2850-mandatory-covid-19-vaccination-not-really-infringement-on-your-rights-sahrc> > accessed on 14 August 2023.

¹⁵¹ *Ibid.*

¹⁵² Annexure C 2(a) of the Consolidated Direction 2021 72.

As such, the discretionary powers of the employer must, in such circumstances, be weighed against the Constitution and labour laws.

4.5 The limitation clause

It has already been alluded in the previous chapters that not all the rights in the Constitution are absolute. The rights in the Constitution are subject to limitation in terms of section 36 of the Constitution. Section 36 provides that 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, considering all relevant factors. According to Rautenbach,¹⁵³ the term 'law of general application' gives effect to the aspect of rule of law and legality, which in essence means that limitation or rights should be in line with existing legal rules.¹⁵⁴

Moreover, discharging reasonability and justification of a limitation depends on the circumstance of the case, given the purpose for which the right is limited.¹⁵⁵ The Constitutional Court in the case of *S v Gwadiiso* held that the more substantial the inroad into fundamental rights, the more persuasive the grounds of justification must be.¹⁵⁶ For example, the right to a safe working environment may be limited in a specific workplace due to the fact that an employer lacks funds to provide safety equipment and employees willingly continues to work without such equipment. Lack of funds may be perceived as a justifiable ground for failure to provide a safe working environment, which then amounts to limitation of the right. As we have also seen in the *Goliath* case in chapter 3,¹⁵⁷ the right to bodily integrity was limited by forcing Mr Goliath to receive treatment for TB, even after he had refused and was within his constitutional right to receive treatment.

¹⁵³ Rautenbach Ignatius Michael, 'Proportionality and The Limitation Clauses Of The South African Bill Of Rights' (2014) *Potchefstroom Electronic Law Journal* 2249.

¹⁵⁴ Para 2249.

¹⁵⁵ Para 2250.

¹⁵⁶ (1996) 1 SA 388 (CC), para 18.

¹⁵⁷ See footnote 131 above.

Moreover, obligation imposed on the employer is subject to a limitation condition in that the obligation is applicable in as far it is “reasonably practicable”.¹⁵⁸ The court in the case of *Pikitup Johannesburg (Pty) Ltd v South African Municipal Workers' Union and Another*,¹⁵⁹ held that there is no standard as to what is reasonably practicable.¹⁶⁰ Each case will have to be determined on its own facts and circumstances. As can be seen from the definition of “reasonably practicable”, it involves weighing different considerations from risk evaluation, means of removing or avoiding the risk, resource availability and a cost-benefit analysis.¹⁶¹ Most importantly, the limitation clause serves and function as a reminder that the rights enshrined in the Constitution are not absolute.¹⁶² This therefore means that the right to a safe working environment has to be exercised with due regards and respect to the rights of others. Equally, the rights of anti-vaxxers were to be considered, with due regard and respect to the rights of the other employees. However, this will be achieved when there is a constitutional balance in the application and protection of all rights.

4.6 Conclusion

It can be inferred that our perception of mandatory vaccination was greatly influenced by our individual actions.¹⁶³ What we individually perceive as just and appropriate may be considered unreasonable and unprecedented by others. It is therefore evident that the interest of public remains of paramount importance. This therefore means that an inference can be drawn that the implementation of the Consolidated Direction 2021 was aimed at the protection and safeguard of to the interest of both employers and employees. Hence it was important that an employer abide by the provisions of the Consolidated Direction 2021 when implementation a mandatory vaccination policy in order to have regard to the interests of its employees.

¹⁵⁸ Section 8(2) of the OHS Act.

¹⁵⁹ (2016) 37 ILJ 1710 (LC).

¹⁶⁰ Para 42.

¹⁶¹ *Ibid.*

¹⁶² Woolman Stu and Botha Henk, 'Limitations' in Woolman Stu (University of Witwatersrand 2nd Edition) *Constitution Law of South Africa* (2013) 34,47

¹⁶³ Karim Safura Abdool, 'Covid Vaccine Mandates Don't Have to Undermine Your Rights' (2021) < <https://www.wits.ac.za/covid19/covid19-news/latest/covid-vaccine-mandates-dont-have-to-undermine-your-rights.html> > accessed on 14 August 2023.

However, We learnt that there was a need to weigh the mandatory vaccination policies against the constitutional requirements, which the employers who elected to mandate vaccination failed to do. It would have been practicable and constitutionally permissible for employers to implement mandatory vaccination policies if they could show that in so doing, they had regard to employees' constitutional rights as required by Direction 3(4) of the Consolidated Direction 2021.¹⁶⁴

¹⁶⁴ Direction 3(4) requires the employer who wishes to implement mandatory vaccination to consider the rights of its employees to bodily integrity enshrined in section 12(2) and the right to freedom of religion, belief and opinion enshrined in section 13 of the Constitution.

CHAPTER 5:

CONCLUSION AND RECOMMENDATIONS

5.1 Conclusion

The study was aimed at drawing valuable lessons from the Covid-19 pandemic, which resulted in the proposition of having mandatory vaccinations in the workplace.¹⁶⁵ To better understand the purpose for which mandatory vaccination was sought, the study explored mandatory vaccination versus the obligation placed on employers to provide a working environment, notwithstanding the fact that the latter is a constitutional right to a greater extent.¹⁶⁶ The author took into consideration the fact that there are employees who refused to vaccinate and visited the reasons for such refusal.¹⁶⁷ Having noted that the main reason employees refused to vaccinate was because the Covid-19 vaccine violated their constitutional rights, the author scrutinized the rights concerned to determine whether they are indeed impeded by the implementation of mandatory vaccination, having regard to the limitation clause.¹⁶⁸

The study shows that there is a nexus between the existing duty to provide a safe working environment and the purpose for which mandatory vaccination was sought.¹⁶⁹ The findings are that the enactment of the Consolidated Direction 2021 was founded to give effect to Section 8 of the OHS Act. This therefore means the duty to provide and maintain a safe working environment, more especially during the Covid-19 pandemic, influenced the implementation of mandatory vaccination in the workplace.¹⁷⁰

It was imperative that the study refers to the Constitution as the supreme law of the country and a paramount source of law in this study. A close scrutiny of section 24 of the Constitution also places a similar obligation to employers to provide a safe working environment in the workplace, although it is not a direct obligation. The study thus

¹⁶⁵ See Chapter 1 above, footnote 4.

¹⁶⁶ See Chapter 2 above.

¹⁶⁷ See Chapter 3 above.

¹⁶⁸ See Chapter 4 above.

¹⁶⁹ See Chapter 2, para. 2.2.

¹⁷⁰ See Chapter 2, para. 2.3.

draws a conclusion that the implementation of mandatory vaccination during a national state of disaster found relevance through section 24 of the Constitution in as far as a provision of a safe environment was concerned. As such, it is a proven fact that there was a relationship and nexus between mandatory vaccination and the duty and/or right to a safe working environment.

On the other hand, during the stages of the implementation of mandatory vaccination, employers advanced an argument that the vaccine was necessary and that constitutional rights were not absolute and thus subject to the limitation clause.¹⁷¹ These contentions required a need to weigh in constitutional rights of all employees in the workplace, in relation to general duties of the employer, with the primarily purpose to maintain and provide a safe working environment in order to give effect to necessity of mandatory vaccination. However, the balancing right remains the right to equality. Everyone must be afforded an equal opportunity to enjoy the protection afforded to them by existing authorities.¹⁷²

However, the dilemma associated with protecting the rights of all employees is that the decision to and not to take precautionary steps to ensure that the working environment is safe for all employees has a direct negative impact on both employers and their employees.¹⁷³ As learnt from the previous chapters, certain employees held mandatory vaccination policies to be in violation to their constitutional rights which brought about a difficulty in enforcing mandatory vaccination policies. On the other hand, had employers failed to take practicable and reasonable steps to safeguard the working environment, this would have been regarded as failure to fulfil the obligation to provide a safe working environment. Consequently, this would have been perceived as a violation of section 24 of the Constitution especially having regards to the nature of the illness. Therefore, in light of the aforementioned, it is crucial that all rights must be equally realized and protected to fulfil the obligation enshrined in section 7(2) of the Constitution.¹⁷⁴

¹⁷¹ See Chapter 3 above.

¹⁷² See para. 3.10 above.

¹⁷³ See paragraph 3.8 above.

¹⁷⁴ See paragraph 3.10 above.

It was a main point of discussion in the previous chapter that the rights alleged to be impeded by the implementation of mandatory Covid-19 vaccination policies in the workplace are not absolute.¹⁷⁵ Reference was given to section 36 of the Constitution which deals with the limitation of constitutional right.¹⁷⁶ The implementation of mandatory Covid-19 vaccination policies in the workplace according to the finding of the study passed the test for its constitutionality, having reference to the authority pertaining to provisions of safe environment.¹⁷⁷

As already mentioned above, failure to take practicable and reasonable steps to safeguard the working environment by employers would have been regarded as unfulfillment of the obligation to provide a safe working environment and a violation to the Constitutional right to a safe environment.¹⁷⁸ As such, it may be concluded that limitation of the rights concerned would have been necessary and relevant in an open democratic society, to fulfil the duty to keep the working environment safe for all employees, free from the threat of Covid-19 infections.¹⁷⁹ Moreover, mandatory vaccination was necessary to achieve a balance in the realisation and protection of constitutional rights, having regard to general interests of the greater public, despite the uncertainties regarding its effectiveness.¹⁸⁰

5.2 Recommendations

In light of the above findings and assertions, the author makes the following recommendations:

5.2.1 Implementation of human rights awareness campaigns and/or programmes in the workforce

Generally, employers are not legal practitioners, unless they are in the legal profession. As a result, they may not be well informed on what is considered constitutionally unsound. As such, the author recommends that in future, the Department of Employment and Labour should implement, in as far as reasonably applicable, human

¹⁷⁵ See chapter 4 above.

¹⁷⁶ See para. 4.6 above.

¹⁷⁷ *Ibid.*

¹⁷⁸ See Chapter 2 above.

¹⁷⁹ See para 4.5 above.

¹⁸⁰ See para. 4.4 above.

rights and self-awareness training to all prospective employers. Furthermore, each employer should be affiliated with the Universal Declaration of Human Rights and become activists of human rights by virtue of their employment relationship with their employees; and create a sustainable human rights environment in the workplace. To achieve this, employers can, from time-to-time, issue human rights awareness handout or fliers to their employees, to educate them about their human rights in general.

5.2.2 Implementation of dynamic communication awareness training on policies and procedures

One of the main issues that causes a reluctance and acceptance of employment policies, such as the implemented mandatory Covid-19 policies is the lack of proper communication and awareness of such policies and the reasons for which they are promulgated and enforced. To ensure compliance and to minimise repulsive behaviour towards such policies, employers should inform their employees within a reasonable time of their intentions to implement such policies. To achieve this, employers must conduct workshops and necessary training, wherein they will outline importance of policies and importance of compliance. Employers can further conduct surveys, in which aim is to ascertain the employees' view on proposed policies, to ensure that such policy cater for both company and employees' interest. Thus, it will be imperative that in future, regulators should properly communicate every regulation to both employers and employees and their intended purposes.

5.2.3 Regulators should ensure that future Directions (regulations) are not passively mute

The reading of the Consolidated Direction 2021 conferred discretionary powers on employers to choose if they want to implement mandatory vaccination in their workplace. However, there was no restriction or limitation to the extent on which the discretion may be used. For an example, the Consolidated Direction 2021 did not prohibit employers from dismissing employers who refused to vaccinate. It further did not provide for remedies or recourse in case of breach. Thus, the author recommends that enactment of Directions by the department of Employment and Labour should

executed with compliance with the Employment Equity Act 55 of 1998, as amended.¹⁸¹ Therefore, in future, regulators should take care to provide for limitation and remedies in order to allow careful compliance with the Directions issued.

5.2.4 Facilitation of better employer-employee and employee-employee working relationships in the workplace

As already mentioned above, any unfavourable working condition is a threat to the mental health of the employees. Moreover, mental health and sanity remains most vulnerable and when not protected, may consequently affect an employee's work performance and capacity. Employers should create a support system to enable employees to engage and encourage one another by offering a helping hand. Furthermore, employers should listen to the needs of their employees and create an environment of positive change and feedback. It is such working environments that would make it easy for employees to accept policies such as those that implement mandatory vaccinations in the workplace.

¹⁸¹ Section 54 of the Employment Equity Act 55 of 1998, as amended, empowers the Minister of Employment and Labour to issue Codes of Good practice on the advice of Commission of Employment Equity. Therefore, the Minister should ensure that every Direction enactment makes provision regarding the code of good practice and the scope of the exercise of power to the designated employers. (On the other hand, section 42 deals with the assessment of compliance with employment equity plan by designated employers. The Minister should further ensure that there is strict compliance with enacted Directions and ensure that designated employers do not subject employees to unfair labour practices or do as they wish. An abuse of power in the employment relationship between an employer and employee, to an extent, can amount to an unfair labour practice.

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