

THE LEGALITY OF MANDATORY COVID VACCINATIONS

PART 2

-Lezanne Taylor- Senior Attorney

Ongoing considerations pertaining to this aspect, has been evaluated, and decided upon in a recent arbitration before the Council for Conciliation, Mediation and Arbitrations [*hereinafter referred to as the “CCMA”*].

The CCMA has dismissed an application of an employee of the Gold Rush Group¹ after she was fired for opting not to be vaccinated against COVID-19. The CCMA upon hearing the referral from Me Theresa Mulderij, ruled that her dismissal was substantively fair as she did not comply with regulations of the company’s mandatory vaccination policy. Me Mulderij were found to be permanently incapacitated, and it was stated in the award that the employee was dismissed on grounds that she did not create a safe working environment for her colleagues.

This ruling by the CCMA could be seen and applied as a landmark ruling, which ruling can be utilized and relied upon by parties in other cases pertaining to employees who refuse to take the vaccine in companies that have a mandatory vaccine policy.

Although the pending concept of lawfulness of mandatory vaccinations, has brought about some clarity, the assumed clarity is far from being sure.

It is predicted that various other matters will now follow suit, as recently the University of the Free State were also served with court papers with regard to this university’s “apparent” controversial policy of compelling students and employees to get the Covid-19 vaccination. At a media conference, Solidarity announced its plans to file several other court cases regarding mandatory vaccinations in the workplace. According to Solidarity, its first case against Small Enterprise Employers of South Africa (SEESA) will be heard in the Labour Court in Johannesburg on 27 January 2022².

In light of this contended controversy, we reiterate that legal frameworks are important, and should accordingly be considered:

The OSHA Act:

- (i) Direction 3(1) (ii) of the *directive on COVID-19 vaccination in certain workplaces, wherein employers in terms of the consolidated direction on occupational health and safety measures must come up with reasonable resolutions so that all parties are accommodated should employees refuse COVID-19 vaccinations on Medical and Constitutional grounds.*
- (ii) Section 3(4) affirms that the employer must consider the Constitutional rights of their employees to bodily integrity and the right to freedom of religion, belief, and opinion.
- (iii) Section 3(4) prescribes that everyone is entitled to an environment that is not harmful to their health or wellbeing (section 24(a) of the SA Constitution).

National Health Act No. 61 of 2003 [“NHA”]:

- (i) Section 2(c) of the NHA³ refers to the importance of considering the rights of ‘the people of South Africa to an environment that is not harmful to their health or well-being’.

¹ *Goldrush Group v Theresa Mulderij - GAJB 24054-21 (dated 25 January 2022)*

² <https://solidariteit.co.za/en/court-case-against-ufs-over-mandatory-vaccination/> - dated 19 January 2022

³ 2. The objects of this Act are to regulate national health and to provide uniformity in respect of health services across the nation by- (a) establishing a national health system which- (i) encompasses public and private providers of health services; and (ii) provides in an equitable manner the population of the Republic with the (b) setting out the rights and duties of health care providers, health workers, health establishments and users; and (c) protecting, respecting, promoting and fulfilling the rights of (i) the people of South Africa to the progressive realization of the constitutional right of access to health care services, including reproductive health care; (ii) the people of South Africa to an environment that is not harmful to their health or well-

- (ii) The Act requires all healthcare personnel to ensure that healthcare users give informed consent [section 7 of the NHA]⁴ and sets out the information that is required to be provided to such users beforehand [section 6(1) of the NHA]⁵.

The Employment Equity act, 55 of 1998 [“EEA”]

Further legislative framework

- (i) The further legislative framework within which the questions posed should be considered is inclusive but not limited to
- (a) The Basic Conditions of Employment Act, 75 of 1997 [“**BCEA**”];
 - (b) The Labour Relations Act, 66 of 1995 [“**LRA**”];
 - (c) The Contract of Employment – [“**Common Law and Statute**”];
 - (d) The Constitution of South Africa, 108 of 1996 [“**Constitution**”];
 - (e) Collective Agreements, *where applicable*;
 - (f) International Standard;

Many still view mandatory vaccinations in contravention with the constitution and citizen’s constitutional rights. In view of the supposed contraventions, we have reviewed various aspects in our earlier article, which aspects can be re-iterated herein.

This aspect however has also recently been referred to the Constitutional Court. The IOL⁶, on 6 January 2022 reported that the “...*Constitutional Court has been approached to urgently decide whether or not the implementation of mandatory Covid-19 vaccines is ultra vires and derogates non-derogable constitutional rights. The non-profit organisation, National Black Consumer Council (NBCC), which says it is not anti-vaccine but pro-choice, has filed an urgent application at the apex court and has also issued a stern warning to companies forcing their employees to get vaccinated. In the application served on the Presidency’s legal and executive services unit on Monday, 3 January 2022 the NBCC secretary-general Dr Raynauld Russon told the Constitutional Court that the urgency is based on the fact that certain employers are introducing mandatory vaccination from January 1, 2022...*”. The latter matter however stands to still be determined.

The recent decision in the CCMA might give some clarity on the ongoing controversy of mandatory vaccinations, however it is foreseen that other litigation, by various other employees will follow suit. As mentioned, the University of the Free State and Constitutional referral under NBCC await

being; (iii) children to basic nutrition and basic health care services contemplated in section 28(1)(c) of the Constitution; and (iv) vulnerable groups such as women, children, older persons and persons with disabilities. best possible health services that available resources can afford

⁴ Consent of user 7. (1) Subject to section 8, a health service may not be provided to a user without the user’s informed consent. unless- (a) the user is unable to give informed consent and such consent is given by a person- (i) mandated by the user in writing to grant consent on his or her behalf; or (ii) authorized to give such consent in terms of any law or court order; ‘(b) the user is unable to give informed consent and no person is mandated or authorized to give such consent, and the consent is given by the spouse or partner of the user or, in the absence of such spouse or partner, a parent, grandparent, an adult child or a brother or a sister of the user, in the specific order as listed; (c) the provision of a health service without informed consent is authorized in terms of any law or a court order; 35 (d) failure to treat the user, or group of people which includes the user, will result in a serious risk to public health; or (e) any delay in the provision of the health service to the user might result in his her death or irreversible damage to his or her health and the user has not expressly, implied or by conduct refused the service.

⁵ User to have full knowledge 6. (1) Every health care provider must inform a user of- (a) the user’s health status except in circumstances where there is substantial evidence that the disclosure of the user’s health status would be contrary to the best interests of the user; the range of diagnostic procedures and treatment options generally available to the user; (c) the benefits, risks, and consequences generally associated with each option; and the user’s right to refuse health services and explain the implications, risks, obligations of such refusal

⁶ <https://www.iol.co.za/news/politics/constitutional-court-could-have-final-say-on-mandatory-covid-19-vaccination-71aebf46-c700-40d4-8501-93d1ba224c59> dated 6 January 2022

determination. In light of the ever-urgent legal question of whether mandatory vaccinations are legal and enforceable, this aspect should be seen as still seeking urgent guidance from the upper courts.

Lezanne Taylor

Senior Attorney at JR Attorneys Inc

26 January 2022