

## NOTES / AANTEKENINGE

### The Constitutionality of Mandatory COVID-19 Vaccinations

#### 1 Introduction

South Africa is a democratic society founded on the principles provided in the Constitution of the Republic of South Africa, 1996 (refer to the Preamble of the Constitution). The Constitution is the supreme law and any act or conduct that is inconsistent with the provisions and values of the Constitution is invalid (s 2 of the Constitution). The Constitution ensures the protection of 27 constitutional rights specified in Chapter II – that is, the Bill of Rights. The Bill of Rights, as the cornerstone of South Africa's democracy, affirms the democratic values of human dignity, equality, and freedom (ss 1(a) and 7(1)). Section 7(2) of the Constitution obliges the State to respect, protect, promote and fulfil the rights in the Bill of Rights. These rights include the right to human dignity (s 10), the right to life (s 11), the right to freedom and security (including the right to bodily and psychological integrity to make decisions about health and treatment) (s 12), the right to privacy (s 14), the right to freedom of religion, belief and opinion (s 15), and the right to fair labour practices (s 23(1)). In *NEHAWU v University of Cape Town* (2003 24 ILJ 95 (CC)), the Constitutional Court confirmed that the right to fair labour practices extends to both employers and employees. This right could, for example, impact employers by compelling employees to report for duty despite the possibility of their being infected at the workplace, and despite the right to an environment that is not harmful to their health or well-being (s 24(a)). Rights are not absolute: there are instances when the rights guaranteed by the Constitution may be limited on reasonable and justifiable grounds, as is explained below (s 36).

Employers have, in some cases, implemented mandatory vaccination policies against COVID-19. Such measures limit an individual's constitutional rights, as provided for in the Bill of Rights. The question this note seeks to answer is whether dismissing an employee who refuses to be vaccinated against COVID-19 is constitutional. This article does not intend to discuss all the rights provided for in the Constitution, but rather merely the relevant rights raised as a defence by dismissed employees who refuse to be vaccinated against COVID-19.

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## 2 The right to freedom of religion, belief and opinion

Dismissed employees who refuse to be vaccinated against COVID-19 often raise in defence the argument that it infringes a critical right – the right to freedom of religion, belief and opinion (s 15(1) of the Constitution). This issue was addressed in the case of *Cecilia Bessick v Baroque Medical (Pty) Ltd* (WECT13083-21), where the commissioner had to determine whether the applicant was wrongfully terminated for refusing vaccination. The respondent, a medical supplier, had implemented a mandatory COVID-19 vaccination policy for its employees, but the applicant refused to comply, based on medical, personal and religious grounds. During the disciplinary enquiry, it was found that the applicant's medical grounds remained unsubstantiated, and the commissioner determined that her personal and religious grounds were without validity. Consequently, she was retrenched, based on operational requirements. The commissioner found that the applicant's refusal to comply with the respondent's mandatory vaccination policy resulted in her being unable to continue performing her duties; the respondent had thus committed no wrongdoing in terminating the applicant's services owing to its operational requirements. Therefore, the commissioner found her dismissal to be substantively fair. It is important to note that section 15(1) of the Constitution protects the right to freedom of religion, belief and opinion. This case thus serves as an example of how this right can be balanced against an employer's operational requirements.

The *Cecilia Bessick* case shows that mandatory vaccinations infringe upon a person's right to freedom of religion, belief and opinion. Since an individual is free to refuse to undergo medical treatment because of their religious beliefs, compulsory vaccination would infringe upon that right (*EWN v Pharmaco Distribution (Pty) Ltd* (LC) (unreported case no JS654/10, 22-9-2015); see also, Ndou "Dismissal for Failure to Submit for Medical Treatment" 2016 *De Jure* 45–46). However, no right is absolute: a right is always capable of being limited if there be a compelling public interest in such limitation.

## 3 The right to bodily integrity

The employee's right to bodily integrity is guaranteed by the Constitution (s 12(2)). Section 12(2) provides: "Everyone has the right to bodily and psychological integrity, which includes the right– ... (b) to security in and control over their body." In the case of *Kgomotso Tshutsha v Baroque Medical (Pty) Ltd* ((GABJ 20811-21) dated 2022-06-22), the applicant had been dismissed for raising a defence against vaccination, and claimed that mandatory vaccination was an infringement of her right to bodily integrity. The commissioner decided that the dismissal of the employee who refused vaccination against COVID-19 was unconstitutional, and therefore that the employee had been unfairly dismissed. The respondent had implemented a mandatory vaccination policy requiring all its employees to be vaccinated,

and alleged that the vaccination of its employees was an operational requirement, as the respondent believed that vaccinated persons were less likely to miss work owing to illness. The applicant refused to be vaccinated based on medical grounds, owing to an alleged adverse reaction to the influenza vaccine ten years previously. The applicant was requested to provide proof, which in this instance was a medical certificate confirming the employee's adverse reaction to the influenza vaccine. However, the certificates produced were not accepted by the employer; based on operational requirements, the applicant was dismissed for refusing to be vaccinated, and no severance pay was paid to the applicant by the employer.

The commissioner had to determine whether the respondent's decision to dismiss the applicant in terms of section 189 of the Labour Relations Act (66 of 1995) was fair. In his decision, the commissioner discussed the reasonableness of the respondent's vaccination policy, the issue of severance pay, and whether the dismissal was substantively fair.

The commissioner held that the respondent had failed to show any evidence of the effectiveness of the implementation of a blanket mandatory vaccination policy in any other organisation. It was further held that the Consolidated Direction on Occupational Health and Safety Measures in Certain Workplaces issued on 11 June 2021 by the Minister of Cooperation Governance and Traditional Affairs in South Africa that was still in force at the time of this dispute did not provide for or permit a blanket mandatory vaccination policy. As such, the commissioner held that the respondent's decision was substantively unfair, and that the applicant was entitled to severance pay. The mandatory vaccination policy was declared to be unconstitutional.

Section 12(2) of the Constitution provides that an employee is free to refuse medical treatment or surgery without consent (*EWN v Pharmaco Distribution (Pty) Ltd supra*; see also Ndou 2016 *De Jure* 45–46); the same applies to an employee who refuses to be vaccinated. Section 12(1) and (2) guarantees every worker the right to "freedom of security of person", which includes "control over their body". This is bolstered by the provision that no one may be subjected to medical or scientific experiments without their informed consent.

## **4 The right to equality**

One of the pressing questions that has yet to be answered is whether an employer's directive to an employee to receive the COVID-19 vaccine constitutes an act of unfair discrimination. It is crucial to note that South Africa adheres to the principle of substantive equality, which emphasises the importance of achieving equality in outcomes rather than merely treating individuals equally. Substantive equality acknowledges that it is not the fact of difference that is problematic but rather the harm that flows from such difference. This acknowledgement was reiterated by the court in *President of*

*the Republic of South Africa v Hugo* (1997 (4) SA 1 (CC)), when it held that the goal of equality in society cannot be achieved by insisting on identical treatment; each case requires a careful, thorough understanding of the impact of discriminatory action upon the particular persons concerned to determine whether or not its overall impact is one that impinges upon the equality clause (*PRSA v Hugo supra* par 41; Loenen “The Equality Clause in the South African Constitution: Some Remarks from a Comparative Perspective” 1997 13 *South African Journal on Human Rights* 401–405). At its core, the equality guarantee protects individuals’ human dignity. The Constitutional Court has held that a gross invasion of self-worth constitutes a violation of dignity and therefore of equality (*National Coalition for Gay and Lesbian Equality v Minister of Justice* 1998 (12) BCLR 1517 (CC) par 45–53). The court held that the recognition of the right to dignity is an acknowledgement of the intrinsic worth of human beings, as they are entitled to be treated as worthy of respect and concern (*S v Makwanyane* 1995 (3) SA 391 (CC) par 328). The value of dignity plays a central role in the equality right, as it guides its application. It is through the interpretation and meaning of the values of dignity and equality that the court has developed a context for this right. The meaning ascribed to dignity by the courts in relation to equality is that people are equal in their inherent dignity. When a person is forced to be vaccinated against COVID-19, one may argue that the right to human dignity has been infringed. What then needs to be established is whether such an infringement is based on the justifiable grounds that are recognised by the South African Constitution. Section 9 of the Constitution entrenches the right to equality as follows:

- “(1) Everyone is equal before the law and has the right to equal protection and benefit of the law.
- (2) Equality includes the full and equal enjoyment of all rights and freedoms. To promote the achievement of equality, legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination may be taken.
- (3) The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.
- (4) No person may unfairly discriminate directly or indirectly against anyone on one or more grounds in terms of subsection (3) National legislation must be enacted to prevent or prohibit unfair discrimination.
- (5) Discrimination on one or more of the grounds listed in subsection (3) is unfair unless it is established that the discrimination is fair.”

It is widely acknowledged that South Africa has developed a comprehensive framework of labour-related legislation, including the Employment Equity Act (55 of 1998) (EEA), to address discrimination in the workplace. This legislation aligns with the overarching objective of section 9(4) of the Constitution. Section 6(1) of the EEA stipulates:

“No person may unfairly discriminate, directly or indirectly, against an employee in any employment policy or practice on one or more grounds, including race, gender, sex, pregnancy, marital status, family responsibility, ethnic or social origin, colour, sexual orientation, age, disability, religion, HIV

status, conscience, belief, political opinion, culture, language, birth, or on any other arbitrary ground.”

It is essential to note that there must be a clear nexus between the policy or practice and the ground that has been identified to ensure compliance with the legislation.

Different legal tests apply to different situations when unfair discrimination is alleged (De Vos and Freedman *South African Constitutional Law in Context* (2022) 429). Therefore, an equality complaint lodged by a complainant leads to an enquiry in which legal tests are applied (De Vos *et al South African Constitutional Law in Context* 429). A court faced with such a complaint has to identify whether the set of facts deals with different treatment between people or groups of people under section 9(1), (2) or (3) of the Constitution (*Prinsloo v Van der Linde* 1997 (3) SA 1012 par 24; see also Currie and De Waal *The Bill of Rights Handbook* (2013) 218). These three subsections apply in different situations and therefore a court is required to apply a different legal test in each case. The implementation of mandatory vaccination legislation and/or policies may be challenged on grounds that it indirectly discriminates against individuals or groups, in this case, employees who refuse to be vaccinated against COVID-19.

When faced with an enquiry into an alleged violation of the equality clause, the *Harksen* test of the Constitutional Court (*Harksen v Lane NO* 2009 (6) SA 541 (CC)) is applied:

- “(a) Does the provision differentiate between people or categories of people? If so, does the differentiation bear a rational connection to a legitimate government purpose? If it does not, then there is a violation of section 8(1). Even if it does bear a rational connection, it might nevertheless amount to discrimination.
- (b) Does the differentiation amount to unfair discrimination? This requires a two-stage analysis:
  - (i) Firstly, does the differentiation amount to ‘discrimination’? If it is on a specified ground, then discrimination will have been established. If it is not on a specified ground, then whether or not there is discrimination will depend upon whether, objectively, the ground is based on attributes and characteristics which have the potential to impair the fundamental human dignity of persons as human beings or to affect them adversely in a comparably serious manner.
  - (ii) If the differentiation amounts to ‘discrimination’, does it amount to ‘unfair discrimination’? If it has been found to have been on a specified ground, then unfairness will be presumed. If on an unspecified ground, unfairness will have to be established by the complainant. The test of unfairness focuses primarily on the impact of the discrimination on the complainant and others in his or her situation.

If at the end of this stage of the enquiry, the differentiation is found not to be unfair, then there will be no violation of section 8(2).

- (c) If the discrimination is found to be unfair then a determination will have to be made as to whether the provision can be justified under the limitations clause.” (*Harksen v Lane supra* par 53)

When unfair discrimination is alleged, an initial determination is required as to whether there has been discrimination, and then an enquiry must

investigate whether the discrimination is unfair based on the listed grounds in section 9(3) or on the basis of grounds that are not specified in that subsection (unlisted or analogous grounds) or section 6(1) of the EEA (*Harksen v Lane supra* par 46). Thereafter, if the determination is that the discrimination is unfair, justification in terms of section 36 of the Constitution is still possible, although highly unlikely (Currie and De Waal *The Bill of Rights Handbook* 217–218). The law does not prevent the State or employers from treating some people differently from others (Currie and De Waal *The Bill of Rights Handbook* 218). The court in *Prinsloo* explained that it is impossible for a state to regulate the affairs of its inhabitants without differentiation and making classifications that treat people differently from each other (*Prinsloo v Van der Linde supra* par 24; see also Currie and De Waal *The Bill of Rights Handbook* 218). This is because of the notion of substantive equality discussed above, which does not require everyone to be treated the same. Hence, a law or conduct that differentiates between groups of people will be valid if it does not deny equal protection or benefit of the law. Not all forms of differentiation amount to unequal treatment (*Prinsloo v Van der Linde supra* par 24; see also Currie and De Waal *The Bill of Rights Handbook* 218).

## 5 The limitation clause

Section 36 of the Constitution provides for the limitation of rights. It provides that rights provided for in the Bill of Rights may be limited in terms of a “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” (s 36(1)). These factors include: the nature of the right (s 36(1)(a)); the importance of the purpose of the limitation (s 36(1)(b)); the nature and extent of the limitation (s 36(1)(c)); the relation between the limitation and its purpose (s 36(1)(d)); and less restrictive means to achieve the purpose (s 36(1)(e)). The Constitution’s general limitation clause does not imply that any law can limit the provisions of the Constitution at any time (Currie and De Waal *The Bill of Rights Handbook* 151). Section 36 requires that a valid reason for the limitation of an individual’s rights as provided by the Bill of Rights must exist (Currie and De Waal *The Bill of Rights Handbook* 151). It is within this context that this article now examines the test used to determine reasonableness and justification in an open and democratic society regarding employees dismissed for refusing to be vaccinated against COVID-19.

Any mandatory vaccination policy introduced by an employer will infringe upon a person’s constitutionally protected right. However, mandatory vaccination policies and the Code of Good Practice: Managing Exposure to SARS-COV in the Workplace, 2022 are not laws of general application as envisaged in terms of section 36(1) of the Constitution. That is why section 9 of the Constitution can apply to mandatory vaccination policies. In *Akani Garden Route (Pty) Ltd v Pinnacle Point Casino (Pty) Ltd* ([2001] ZASCA

59), Harms JA distinguished between policies and laws. He stated:

"The word 'policy' is inherently vague and may bear different meanings. It appears to me to serve little purpose to quote dictionaries defining the word. To draw the distinction between what is policy and what is not with reference to specificity is, in my view, not always very helpful or necessarily correct. For example, a decision that children below the age of six are ineligible for admission to a school can fairly be called a 'policy' and merely because the age is fixed does not make it less of a policy than a decision that young children are ineligible, even though the word 'young' has a measure of elasticity in it. Any course or program of action adopted by a government may consist of general or specific provisions. Because of this I do not consider it prudent to define the word either in general or in the context of the Act. I prefer to begin by stating the obvious, namely that laws, regulations and rules are legislative instruments, whereas policy determinations are not. As a matter of sound government, in order to bind the public, policy should normally be reflected in such instruments. Policy determinations cannot override, amend or be in conflict with laws (including subordinate legislation). Otherwise the separation between Legislature and Executive will disappear." (*Akani Garden Route supra* par 7)

Nonetheless, in light of these findings, there remains a need to discuss the test of when a law of general application that infringes fundamental rights is reasonable and justifiable. If a law of general application is given legal effect, the first step of the test is to determine whether a breach of fundamental rights has been established; and thereafter, whether such a breach is reasonable and justifiable in terms of section 36 of the Constitution (*S v Zuma* [1995] ZACC 1 par 21; *S v Makwanyane* [1995] ZACC 3 par 100). If the offending regulations fail this test, they must be declared to be invalid to the extent of their inconsistency with the Constitution (s 172(1)(a) of the Constitution). If it is just and equitable to do so, a court may limit the retrospective effect of the declaration of invalidity or suspend it for a period to allow the competent authority (for example, Parliament) to correct the defect (s 172(1)(b) of the Constitution). If the respondents justify the infringement or infringements of fundamental rights, the regulations are valid, their impact on fundamental rights having been sanctioned by the Constitution. It has been held that this approach holds good for the application of section 36(1) as well. In *National Coalition for Gay and Lesbian Equality v Minister of Justice* ([1998] ZACC 15), Ackermann J stated:

"The relevant considerations in the balancing process are now expressly stated in s 36(1) of the 1996 Constitution to include those itemised in paras (a)–(e) thereof. In my view, this does not in any material respect alter the approach expounded in *Makwanyane*, save that para (e) requires that account be taken in each limitation evaluation of 'less restrictive means to achieve the purpose (of the limitation)'. Although s 36(1) does not expressly mention the importance of the right, this is a factor which must of necessity be taken into account in any proportionality evaluation.

The balancing of different interests must still take place. On the one hand there is the right infringed; its nature; its importance in an open and democratic society based on human dignity, equality and freedom; and the nature and extent of the limitation. On the other hand there is the importance of the purpose of the limitation. In the balancing process and in the evaluation of proportionality one is enjoined to consider the relation between the

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limitation and its purpose as well as the existence of less restrictive means to achieve this purpose." (*National Coalition for Gay and Lesbian Equality v Minister of Justice supra* par 58)

What is important in this justifiability enquiry is whether the importance of the purpose of the limitation outweighs the interests protected by the right and, if so, whether the limitation is the least restrictive means to achieve that purpose.

## 6 Conclusion

This article has discussed the constitutionality of mandatory COVID-19 vaccinations for employees and argued that such policies violate fundamental rights enshrined in the Constitution. It has further examined the constitutional rights relevant to the COVID-19 situation, including the right to bodily integrity, the right to equality, and the right to freedom of religion, belief and opinion. It has argued that the constitutionality of mandatory policies in relation to employees who refuse to be vaccinated against COVID-19 is a complex issue. Section 9 of the Constitution prohibits unfair discrimination but allows for fair discrimination. Discrimination based on a listed ground is presumed to be unfair and unconstitutional under section 9(5) of the Constitution, whereas discrimination based on an unlisted ground must be proved to be unfair. In essence, unfair discrimination is defined as unequal treatment of individuals that impairs their dignity as human beings, who are inherently equal with respect to their constitutional rights. In the context of employees who refuse to be vaccinated against COVID-19, the equality clause and section 36 of the Constitution could be applied.

However, what constitutes reasonable and justifiable measures in a democratic society regarding such employees will depend on the specific facts of each case, and the outcomes of applying the equality test, as provided for in the *Harksen* case and section 36 of the Constitution, whichever is applicable. Ultimately, the article argues that mandatory COVID-19 vaccination policies for employees are unconstitutional, as they infringe upon the fundamental rights of employees. The article recommends that employers, rather than mandating vaccination, should consider alternative measures such as education and awareness campaigns to encourage employees to be vaccinated.

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