



Arbitration Award

Case Number: FSWK2448-21

Commissioner: Petrus Michael Venter

Date of Award: 25-Jan-2022

In the **ARBITRATION** between

Gideon J Kok

(Union/Applicant)

and

Ndaka Security and Services

(Respondent)

APPROVED

DETAILS OF HEARING AND REPRESENTATION:

- 1 This is the award in the arbitration that was held under the auspices of the CCMA that took place at the Casa Mia Guest House in Sasolburg on **21 January 2022**. Parties had an opportunity to submit written closing arguments by no later than **25 January 2022**.
- 2 The Applicant was in attendance and presented his own case whilst the Respondent was represented by its Chief Operating Officer, Mr Tatana.
- 3 The matter was electronically recorded and handwritten notes were also kept. No Interpreter was required.

ISSUES TO BE DECIDED:

- 4.1 I am called upon to determine whether the Respondent committed an unfair labour practice in terms of section 186(2)(b) of the Labour Relations Act, 66 of 1995 (hereafter referred to as the "LRA").
- 4.2 The Applicant claims that he was suspended from duty and that his suspension constitutes an unfair labour practice.

BACKGROUND TO THE DISPUTE:

- 5 The Applicant is employed as a Safety Practitioner since 26 August 2019.
- 6 The Respondent is a private security company that renders security services to, amongst others, Sasol Ltd in Sasolburg.
- 7 The Applicant's claim is, in essence and in broad terms, that he is subjected to an unfair labour practice as he was instructed to only return to his workplace once he has been vaccinated against COVID-19 alternative he should submit a weekly COVID-19 test result. The decision to send him home was preceded by a decision of their client, Sasol Ltd, to require a 100% vaccination rate. He is therefore unable to enter the Sasol Ltd site and was subsequently informed to remain at his residence.

- 8 On 19 January 2022, I directed the parties to exchange their bundles of documents prior to these proceedings. Parties duly complied. The Applicant indicated on the same day, 19 January 2022, that he wished to be assisted by an official from a trade union and that postponement would be sought. The Applicant was advised to apply during these proceedings, but abandoned the request and indicated that he is not going to make use of any representative.
- 9 The Applicant referred an unfair labour practice dispute to the CCMA on 3 November 2021. Parties appeared on 13 December 2021 and the presiding Commissioner issued a ruling that the matter should be determined as a "Red-Line" case by the CCMA's national office.
- 10 Both parties submitted Bundles of Documents that were marked as **Exhibit A** (from the Applicant) and **Exhibit R, B, C1 and C2** (from the Respondent). There were no objections against any of the documentation that was submitted during the opening as well as during the proceedings.
- 11 The following facts were common cause between the parties:
- 11.1 The Applicant was employed, in a permanent position, as a Safety Practitioner on 26 August 2019 and he earns R 26 000-00 per month.
- 11.2 The Respondent is in the private security industry and renders a service to Sasol Ltd (their client). The Service Level Agreement came into existence during September 2019 and was for a period of 5 years.
- 11.3 The Employer makes use of an office on the premises of Sasol Ltd and runs operations on the Sasol Ltd site from this office. The site has approximately 36 different guard posts and the Applicant must, amongst others, identify safety risks on site. The Applicant reports to the Safety Manager, Ms Bredenkamp.
- 11.4 The Applicant's access card was blocked with effect from 1 November 2021 and he is unable to enter the working premises. The Applicant is denied access as he is not willing to be vaccinated against COVID-19.
- 11.5 The Applicant was offered an alternative in submitting a weekly negative COVID-19 test result. He made use of this on some occasions, but is no longer willing to submit same as he must pay for the testing.
- 11.6 The Applicant received his full salary at the end of November and December 2021. The Respondent also indicated that the Applicant will be paid at the end of January 2022 as well.

SURVEY OF EVIDENCE AND ARGUMENTS:

Evidence by Applicant:

12 **Mr Gideon Jacobus Kok** testified under oath and his evidence was, in essence, as follows:

12.1 He was employed as indicated above. He was not willing to be vaccinated against COVID-19 for various reasons. He believed it was unfair to deny him access to his workplace as there was no legislation in place that compelled any employee to be vaccinated. To compel employees would be contrary to the Constitution of South Africa, Act 108 of 1996 (the "Constitution"), the National Health Act, 61 of 2003 (the "National Health Act") as well as the Consolidated Directives issued by the Minister of Employment and Labour.

12.3 The Applicant testified that section 12 of the Constitution protected everyone's right to freedom and security. He was furthermore a devout Christian who had already recovered from COVID-19. He took medication when he was ill, but only recovered once he stopped taking medication and started to rely on his body's natural immunity and his faith.

12.4 Employees were informed of the Respondent's decision to achieve a 100% vaccination rate. He made contact with Mr Tatana on 4 September 2021 (Exhibit A, page 7). They were subsequently informed on 30 September 2021 to be vaccinated or face an unpleasant conversation (Exhibit A, page 10). He requested further particulars on 12 October 2021 (Exhibit A, page 10) and also that the Respondent sign an indemnity form should he fall ill or pass away as a result of the vaccination. Mr Tatana replied that the Respondent would not be signing his indemnity form (Exhibit A, page 10).

12.5 On 25 October 2021, he also received an email that indicated that he may not endanger other employees. On 27 October 2021, Mr Tatana circulated another email and enquired about the number of employees that received the vaccination (Exhibit A, page 11).

12.6 He was invited to a conference call that took place on 29 October 2021. The meeting was also attended by Mr Tatana, Mr Madonsela (HR) and Ms Bredenkamp. He was informed that his access would be denied and that he would only be able to enter the premises if he was able to submit a weekly COVID- 19 negative test result. He was subsequently denied access, made entries in the Occurrence Register at the entrance of the workplace and took photos to show that he reported for work.

- 12.6 He was also visited by Mr Roothman from their head office on 4 November 2021. They met for coffee at a coffee shop and Mr Roothman also tried to persuade him to be vaccinated.
- 12.7 The Applicant also referred to certain documentation in confirming that the matter was discussed with the Respondent after abovementioned coffee meeting. He also had a fall-out with a certain Mr Mbebe as the latter did not observe COVID-19 protocols.
- 12.8 On 22 November 2021 he was also informed that he was suspended for alleged misconduct. He regarded this as part of the vendetta against him. He was called to a disciplinary hearing that took place on 14 and 17 December 2021. Up to date the matter was not finalized as he was still awaiting the outcome.
- 12.9 The Applicant explained that he was not aware of a Risk Assessment that was performed and he also held the view that the Respondent could have resorted to alternative measures. There were other employees who also refused to be vaccinated and some were still at work. The vaccination was furthermore not approved yet and was still in an experimental phase. The vaccination would also not prevent the spread of COVID-19 nor would it cure any person.
- 12.10 During cross-examination, the Applicant was shown certain communication from Sasol Ltd and he conceded that the Respondent was under pressure from the client. He denied that his COVID-19 status resulted in other employees contracting the disease and he explained that they could have been in contact with the virus at other places.
- 12.11 The Applicant explained that the Service Level Agreement with Sasol Ltd was never amended and it was not a requirement from Sasol Ltd that contractors had to be vaccinated. He was of the opinion that security personnel were not essential services in terms of the LRA and that there was no commercial rationale for forced vaccination.
- 12.5 The Applicant admitted that the Consolidated Directives from the Minister of Employment and Labour could be regarded as a form of legislation and he agreed that strong measures could be taken, but this did not include being denied access to the workplace. He also conceded that COVID-19 fell within the definition of a biological agent in safety legislation.
- 12.6 The Applicant sought an order compelling the Respondent to allow him to enter the workplace.

12.7 In his written heads of argument the Applicant reiterated his case and argued that there is no law that can force any employee to be vaccinated and that the National Health Act also prohibits mandatory treatment. The Applicant also argued that his position was not a high-risk position although this aspect was never disputed when the Respondent presented evidence.

Evidence by the Respondent:

13 **Ms Annah Talama Mothwa** testified under oath and her evidence was, in essence, as follows:

13.1 She was employed as the Respondent's Shared Manager and Operations General Manager. She was therefore responsible for compliance of COVID-19 related issues within the company.

13.2 With the outbreak of the pandemic the Respondent did three separate Risk Assessments during May 2020, June 2020 and October 2021. The Department of Employment and Labour issued directives and a template and the Respondent acted accordingly. The last Risk Assessment had to be completed no later than 21 days of the Consolidated Directive of 11 June 2021. The Respondent was late with the last submission, but engaged the Department. Exhibits C1 and C2 showed the documentary Risk Assessments that were done.

13.3 The witness explained that the Respondent was regarded as an essential service in terms of Annexure B of the Regulations under the Disaster Management Act, 57 of 2002 of 25 March 2020 (the "Disaster Management Act"). This implied that their employees worked on the front-line and had close contact with other employees and members of the public.

13.4 The witness testified that the Consolidated Directive of 11 June 2021 granted a discretion to employers when deciding on the issue of compulsory vaccination. It did not prohibit compulsory vaccination but prescribed a certain process to follow. The Respondent followed due process and submitted three Risk Assessments (Exhibit R, pages 30, 70 and C1 and C2). The Applicant was identified as an employee who was required to be vaccinated. He shared an office with approximately ten other employees and worked in close contact with others. He contracted COVID-19 some months earlier and contact tracing revealed that there was a huge possibility that several colleagues contracted the disease from him. The entire office had to close as the employees had to self-isolate.

- 13.4 Every position was duly considered and the use of space in offices was a crucial factor. Two employees were asked to remain at home with the "no work no pay" principle whereas another employee chose to submit a weekly COVID-19 negative certificate. One employee worked in an isolated office.
- 13.5 It was not possible to allow the Applicant to work from home or in an isolated office as his duties differed. He had to be physically involved with guards, the client and the public. All these issues formed part of their prevention plan.
- 13.6 The Respondent was under huge pressure from Sasol Ltd to achieve a 100% vaccination rate and I was referred to correspondence in this regard. See Exhibit R pages 115 to 120. It would have been disastrous for the Respondent to ignore the requirement from their primary client and the closure of offices also hampered security services.
- 13.7 As a result of the Risk Assessment a plan was introduced and the Respondent's leave policy was amended to cater for the pandemic. The Respondent also engaged the trade unions and an agreement was reached. The agreement was currently being circulated for signature. The Applicant was duly consulted and had ample opportunity to state his case and an alternative solution was also provided (a weekly COVID-19 negative report).
- 13.8 The Applicant was not suspended as a result of his refusal to be vaccinated. He was merely instructed to stay at home or to submit a weekly COVID-19 report, which action was not a genuine suspension. He was however suspended much later for issues that did not relate to the COVID-19 issue at all.
- 13.9 The Respondent was not willing to sign the Applicant's proposed indemnity as the form was clearly drafted by a lobby group. It contained certain clauses that were simply not factual and the COIDA legislation covered injuries in any event.
- 13.10 In the closing arguments reference was made to **Eskort Limited v Mogotsi and Others** ¹ where the Court castigated the employee for recklessly endangering lives of colleagues and customers and total disregard of company policies and the employer for not enforcing adherence to policies it has in the midst of pandemic. Mr Tatana reiterated their legal obligation in terms of legislation.

ANALYSIS OF EVIDENCE AND ARGUMENTS:

- 14 The Applicant referred his dispute as an alleged unfair labour practice. When the Applicant's evidence is considered in its totality, it is clear that his cause of action is that he was suspended and that the suspension is allegedly unfair within the ambit of the LRA. In terms of section 186(2)(b) of the LRA, employees enjoy protection against **unfair** suspensions. Although the LRA is silent on the duty of onus to prove an unfair labour practice, it is generally accepted and trite law that he or she who alleges an unfair labour practice must prove the allegation. Simply put, the onus is therefore on the Applicant to prove, on a balance of probabilities, that the Respondent subjected him to an unfair labour practice.
- 15 Although the Respondent did not pertinently object to jurisdiction, mention was made that their conduct might not be categorized as suspension. The first issue that therefore requires consideration from the evidence presented to me, relates to whether or not the decision taken by the Respondent falls within the ambit of an unfair labour practice i.e. can the conduct be classified as a form of suspension within the parameters of the LRA.
- 16 Mr Tatana argued that the Applicant was only suspended on 22 November 2021 and that the suspension was in fact for disciplinary reasons (not relating to the issue at hand). His argument is therefore that the Applicant is technically not on suspension pending the COVID-19 related issue. The Applicant's argument is simply that he is denied access to the workplace and therefore suspended. The current dispute was in any event referred long before any mention was made of disciplinary action.
- 17 In **City of Tshwane Metropolitan Municipality v SALGBC and Others**² the Labour Court held that there are numerous authorities that previously held that suspension could be precautionary or punitive. However, those cases were decided within the context of disciplinary action and it is not surprising that the definition accorded to "suspension" would be fitting to that context. There is however nothing in the LRA that states that the definition is limited to the extent that any suspension that takes place outside the realm of disciplinary action, is to fall outside the ambit of the LRA.
- 18 The Court endorsed a less restrictive interpretation of the definition of "suspension" to ensure that employees enjoy protection in terms of section 23 of the Constitution and section 185 of the LRA. The Court clearly found that the Bargaining Council was in fact vested with jurisdiction irrespective of the reason for the suspension. The employees were suspended because they refused to sign a new contract. The fact of the matter is that they were suspended and because of that, their dispute

¹ [2021] ZALCJHB 53

² Case JR 755-18 delivered on 15 October 2021

regarding the fairness of their suspension fell within the ambit of the LRA and thus the jurisdiction of the Bargaining Council. To hold that the Bargaining Council does not have jurisdiction because the employees were not suspended as a precautionary measure or as a sanction, would be to adopt an interpretation that is far too restrictive and superficial. The principle is obviously identical at the CCMA.

19 With aforementioned principle in mind, it is crucial to consider the evidence that relates to the decision taken by the Respondent. The evidence clearly demonstrates that the Applicant is denied access to his workplace as his access card is blocked. He was also informed that he should not enter the work premises until he is vaccinated or he should present a weekly negative test result. I have no doubt that the action of the Respondent described above falls within the ambit of a "suspension" and I am therefore satisfied that the Commission enjoys jurisdiction to determine the dispute.

20 Turning to whether or not the suspension is fair, there are various factors to be considered. The Applicant firstly relies on the Constitution of the RSA and claims that the decision to prohibit him from freely entering his place of work, constitutes a contravention of his human rights. The Applicant is specifically relying on section 12 of the Constitution (right to freedom and security of the person).

21 I am mindful of the fact that the dispute might possibly be better suited as a discrimination case, but I am also bound by the principles as laid down in **Ngobe v J.P Morgan Chase Bank and Others**³ and **Noko v Pharmicare Ltd**⁴ where the Labour Court pertinently held that:

*"There is a trend in the CCMA for commissioners to intervene and to halt arbitration proceedings and refer a dispute to this court when the commissioner forms the view that he or she has no jurisdiction on the basis that the real dispute between the parties concerns a reason for dismissal that is listed as automatically unfair. **This is an unfortunate trend.** A party referring a dispute to the CCMA must stand or fall on the merits of that dispute".*

22 The court went on to find that while there can be no harm in a Commissioner advising an applicant that an automatically unfair dismissal dispute is not determinable by the CCMA in instances where the parties make conscious decisions to run a case in an arbitration process in full appreciation of the jurisdictional consequences of their election, **it is not appropriate for Commissioners to intervene by abandoning the proceedings**, thereby dictating to the parties what he or she thinks their real dispute is and how it should be litigated.

23 I have therefore decided to consider the Applicant's case as one of an alleged unfair labour practice.

³ (2015) ZALCJHB 317

⁴ (2015) ZALCPE 30

- 24 In deciding whether or not the suspension constitutes an unfair labour practice, I have deemed it necessary to differentiate between the process that was followed and the reason that gave rise to the suspension.

PROCEDURES FOLLOWED BY THE RESPONDENT

- 25 The Respondent undertook three different Risk Assessments as described above. The process was duly handled from their national office and was in adherence with instructions from national government. The Risk Assessment was furthermore performed by using the template provided for by the Department and Employment and Labour. The Risk Assessments were submitted to the Department and there exist no reason not to believe that it complied with the Department's requirements.
- 26 As a result of the last Risk Assessment (October 2021) certain employees were identified as high risk and requested to be vaccinated. The Respondent was clearly also influenced by the decision of its main client, Sasol Ltd. There were negotiations with trade unions and some agreement reached in this regard. It is undisputed that there is an agreement that is currently being circulated for signature.
- 27 The Respondent also made certain adjustments to policies such as their leave policy. Individual employees were approached and requested to undergo vaccination. The Applicant was also approached and requested to comply and a meeting was also held between him and Mr Roothman in an attempt to persuade him to be vaccinated. There is various correspondence to this affect.
- 28 The Applicant's access card was blocked after extensive attempts to persuade him and he was also presented with an alternative solution to the problem namely to submit a weekly COVID-19 negative report. It is also clear that he actually made use of this option on three occasions, but is no longer willing to undergo weekly testing due to the cost thereof.
- 29 There are also other employees who prefer not to be vaccinated and they are accommodated alternatively. Two of them prefer to present weekly negative results, one works in an isolated office and two were placed at home on the "no work, no pay" principle.
- 30 It is abundantly clear that the decision of the Respondent was not taken on a whim and due process was followed. I will elaborate hereunder on certain steps as described in legislation.

REASON FOR SUSPENSION

- 31 The Respondent suspended the Applicant because he is not willing to be vaccinated and also no longer wishes to present a weekly negative COVID-19 result. In deciding whether or not this is a fair reason to suspend any employee, there are various factors and legal principles that require consideration.

THE CONSTITUTION OF THE RSA

- 32 The past few months have seen high level debates and discussions on whether or not COVID-19 vaccinations should be made mandatory in the workplace. At the centre of the debate is the conflicting constitutional rights coupled with moral and ethical opinions. There are wide ranging opinions and it appears that important institutions such as the South African Human Rights Commission did an about turn when they recently announced that compulsory vaccinations might be lawful under certain circumstances. It appears that NEDLAC holds the same view in this regard. The President of the Republic initially indicated that no one will be compelled to vaccinate but during a recent address to the nation (on 28 November 2021) the honourable President Ramaphosa announced that *"the implementation of any mandatory vaccination policy must be based on mutual respect, which is the respect of the rights of the people which achieve the balance between public health imperatives, the Constitutional rights of employees and the efficient operation of the employer's business. Now that is quite a delicate balance that needs to be struck."*
- 33 During the same speech reference was also made to occupational health and safety laws and a safe working environment. Moreover, it was announced that Cabinet is investigating the possibility of mandatory vaccination.
- 34 Human rights are protected in the **Constitution of SA, Act 108 of 1996** and specific reference can be made to sections 11 (right to life), 12 (freedom and security), 14 (privacy) and 15 (religion, belief and opinion). Section 12(2) provides that every person has the right to bodily and psychological integrity, which includes the right to make his or her own decisions regarding reproduction; to security in and control over their body; and not to be subjected to medical or scientific experiments without their informed consent. Section 12(2) also guarantees that every person has the right to make decisions about his or her own health and treatment, which should include the right to be vaccinated or not. The Applicant relies on this clause.

- 35 Constitutional rights may however be limited when there are justifiable grounds for doing so. Moreover, the **National Health Act 61 of 2003** also contains some provisions for emergency treatment (section 5), consent (sections 7 and 9), and participation in decisions of a medical nature (section 8).
- 36 Section 36 of the Constitution provides for the limitation of individual constitutional rights in so far as it is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, and having regard to: (i) the nature of the right; (ii) the importance of the purpose of the limitation; (iii) the nature and extent of the limitation; (iv) the relation between the limitation and its purpose; and (v) less restrictive means to achieve the purpose. No right is therefore absolute. See **Bernstein v Bester**⁵.
- 37 Our courts have not yet had the opportunity to decide on the issue at hand but dealt with section 12 of the Constitution in the past. In **Minister of Safety and Security and Another v Gaqa**⁶, the court relied on the public interest and applied a balancing act of rights to conclude that an individual was forced to undergo surgery, albeit that he never consented to surgery. Similarly, in the case of **Minister of Health of the Province of the Western Cape v Goliath and Others**⁷ the court compelled the surviving individuals to receive treatment for tuberculosis against their will. It is therefore abundantly clear that the public interest outweighs the right to bodily and psychological integrity of individuals in certain instances. The matter of **Prince v President of the Cape Law Society**⁸ also provides an excellent example of the limitation of the right of religion.
- 38 The CCMA can, in general, not determine constitutional issues, but the Applicant's reliance on the Constitution necessitates a consideration of these factors in deciding whether the suspension was for a fair reason. In doing so, I have firstly considered the nature of the right to be limited. The Applicant relies on a very important right and an infringement will have to be based on compelling reasons. The importance of the limitation is also important. The vaccination has shown a demonstrable success in limiting severe illness and transmission and the Applicant is unable to present any evidence to the contrary. In considering the nature of the limitation, it is clear that there is a very limited chance of adverse effects as a result of the vaccination. There is furthermore a clear and demonstrable relation between the limitation and its purpose. Less restrictive measures, such as face masks etc are already in place and it appears that the vaccination is almost a last resort in curbing the evil of 2019.

⁵ 1996(2) SA 751 (CC)

⁶ 2002 ZAWCHC 9

⁷ 2009 (2) SA 248 (C)

⁸ 2002(2) SA 794 (CC)

- 39 The Applicant must prove that the reason for the suspension was unfair. He argues that he relies on section 12 of the Constitution and that he is a Christian who believes that his natural immunity is sufficient. This was in fact, according to him, also the reason why he survived COVID-19. Although it is impossible to assess this statement, the issue at stake goes much further. The Respondent and/or Sasol Ltd does not require vaccination to protect only him or to cure any other worker from the dreadful disease. The aim of vaccination is to ensure a safe working environment for everyone and to protect lives and livelihood.
- 40 The Applicant failed to demonstrate that it is a requirement of the Christian belief that a person is not to be subjected to vaccination. I mention this as the Applicant relies on his religion, but his reliance is baseless and without any support, either theological or scientific.
- 41 The Respondent is a security company and is therefore also in the front line. Annexure B of the Regulations under the Disaster Management Act describes private security services as an essential service. For the economy to have any chance of survival it is crucial that essential services are delivered and that those enterprises operate with as little as possible interference and interruption.
- 42 The Applicant works in an open office which is shared with ten colleagues. It is also expected that he must visit all the sites and interact with all personnel. The Respondent also explained that the Applicant had COVID-19 at some stage and it was discovered by contact tracing that he might have passed the virus on to nine of his colleagues.
- 43 Before limiting his rights, the Respondent did consider alternatives as described above. It is however not possible that he works in an isolated office or from home and the Applicant chose not to make use of another option namely to present weekly negative test results.
- 44 In considering abovementioned factors, I am not convinced that he was or is a victim of any unfairness in as far as his claim to his constitutional rights are concerned.

CONSOLIDATED DIRECTIVE DATED 11 JUNE 2021

- 45 Due to the outbreak of the COVID-19 pandemic government was compelled to issue guidelines and on 29 April 2020 certain Regulations were promulgated under section 27 of the Disaster Management Act. The Minister of Employment and Labour subsequently issued a Directive on 4 June 2020 under the same act. The Directive required all employers to undertake a risk assessment to give effect to the

minimum measures required by the Directive. It was acknowledged that every workplace may differ and that risk assessments may therefore also differ. On 1 October 2020, a new Directive was issued and it was then required that all employers who employed more than 50 employees to submit a record of their risk assessment together with a written policy relating to the protection of employees' health and safety from COVID-19 in terms of s 7(1) of OHSA to its health and safety committee and to the Department of Employment and Labour within 21 days of the commencement of the direction. These Directives made very little mention of mandatory vaccinations and, perhaps more importantly the effect of a refusal to be vaccinated.

46 The Respondent complied with the abovementioned Directive albeit that they did not do so within the 21-day period. For this they presented a plausible reason and there is no prejudice to the Applicant.

47 On 11 June 2021 the Minister replaced the Directives with a new version (Government Gazette 44700 dated 11 June 2021) which is aimed at, amongst others, to provide some guidance to the issue at hand. At the time of the writing of this award, the Consolidated Directive of 11 June 2021 is the guiding Directive.

Section 3 of the Consolidated Directives read as follows:

Risk assessment and plans for protective measures

(1) *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 OHSA 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 OHSA, 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) *on the basis of 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*

(c) ***consult on the risk assessment and plan with-***

(i) *any representative trade union, as contemplated by section 14(1) of the Labour Relations Act, 66 of 1995; and*

(ii) any health and safety committee established in terms of section 19 of the OHSA or, in the absence of such a committee, a health and safety representative designated in terms of section 17(1) of the OHSA or employee representative; and (make that plan available for inspection by an inspector and a person contemplated in sub-direction (c).

(2) The plan referred to in sub-direction (1)(b)(i) must include-

(a) the date that the workplace will open and the hours of opening;

(b) a list of employees permitted to return to work and those who are required to work from home; (c) the plan and timetable for the phased-in return of employees to the workplace;

(d) identify the vulnerable employees for the purposes of direction 4(b);

(e) ways of minimising the number of workers at the workplace at anyone time as contemplated in direction 4(h);

(f) the workplace protective measures required to be taken in terms of these Directions and any sectoral guideline to get the workplace COVID-19 ready;

(g) the measures for the daily screening of employees and the screening of clients, contractors and visitors to the workplace; and

(h) the details of the COVID-19 compliance officer appointed in terms of direction 4(f); and (i) a procedure to resolve any issue that may arise from the exercise by an employee of the right to refuse to work in the circumstances contemplated in direction 14(1). 48 No. 44700 GOVERNMENT

GAZETTE, 11 June 2021

(3) The plan referred to in sub-direction (1)(b)(ii) must include- (a) the identification of those employees contemplated in sub-direction (1)(a)(ii); (b) the process by which the obligations in terms of this Direction are going to be complied with; and (c) subject to any collective agreement that determines otherwise whether the employer is planning to make it mandatory for employees identified in terms of paragraph (a) to be vaccinated as and when COVID-19 vaccines become available in respect of those employees.

(4) In developing and implementing a plan in terms of subsection (1)(b)(ii) an employer must take into account the rights of its employees to bodily integrity in section 12(2) and the right to freedom of religion, belief and opinion in section 13 of the Constitution.

Annexure C to the Consolidated Directives are of paramount importance and reads as follows:

1. *These guidelines are intended to guide employers, employer organisations, employees, trade unions, conciliators, arbitrators and the courts in determining the fairness of a mandatory vaccination policy and its implementation*
 2. *These guidelines deal with the key aspects of a policy requiring mandatory vaccination in the workplace. The guidelines are stated generally and departures from them may be justified in proper circumstances. For example, the size or the nature of the workplace may warrant a different approach.*
 3. *The LRA emphasises the primacy of collective agreements. These guidelines are not intended as a substitute for collective agreements or agreed procedures between employers, their employer organisations and trade unions.*
 4. *The key principle of these guidelines is that employers and employees should treat each other with mutual respect. A premium is placed on public health imperatives, the constitutional rights of employees and the efficient operation of the employer's business.*
 5. *Subject to any applicable collective agreement, a plan contemplated in direction 3 that requires all employees identified in terms of that direction to be vaccinated in accordance with the national COVID-19 vaccination roll out plan should provide the following:*
 - (a) *Every employee identified by the employer in terms of section 3(1)(a)(ii) should be notified of- (i) the obligation to be vaccinated as and when a vaccine becomes available for that employee, (ii) the right of an employee to refuse to be vaccinated on constitutional or medical grounds; (iii) the opportunity for the employee, at the employee's request, to consult a health and safety representative or a worker representative or trade union official;*
 - (b) *The employer should provide, in addition to the obligations contained in direction 4 in respect of COVID-19 vaccinations and, if reasonably practicable, transport to and from the vaccination site allocated in terms of the Electronic Vaccine Data System Registration Portal.*
 - (e) *Should an employee suffer side effects as a result of a COVID-19 vaccination, the employer should give the employee paid time off to recover if the employee is no longer entitled to paid sick leave in terms of the BCEA or any applicable collective agreement or lodge a claim for compensation in terms of the Compensation for Occupational Injuries and Diseases Act, 130 of 1993.*
- (2) **If an employee refuses to be vaccinated on any constitutional or medical ground, the employer should-**

(a) **counsel the employee** and, if requested, allow the employee to seek guidance from a health and safety representative, worker representative or trade union official;

(b) refer for further **medical evaluation** should there be a medical contra-indication for vaccination;

(c) if necessary, take steps to **reasonably accommodate** the employee in a position that does not require the employee to be vaccinated;

(3) For the purposes of these guidelines, reasonable accommodation means any modification or adjustment to a job or to the working environment that will allow an employee who fails or refuses to be vaccinated to remain in employment and incorporates the relevant portions of the Code of Good Practice: Employment of with Disabilities published in terms of the Employment Equity Act, 1999 (Act No.9 of 1999). This might include an adjustment that permits the employee to work offsite or at home or in isolation within the workplace such as an office or a warehouse or working outside of ordinary working hours. In instances of limited contact with others in the workplace, it might include a requirement that the employee wears an N95 mask."

48 The Consolidated Directive does not make the vaccine mandatory *per se*, but places the onus on the employer to take into account its general duties under the OHSA. Clause 3(4) confirms that the employer **must** take into account the Constitutional rights of their employees to bodily integrity and the right to privacy.

49 In instances where an employee refuses to be vaccinated on constitutional or medical grounds, an employer should counsel an employee and, if requested, allow the employee to seek guidance from a trade union official, worker representative or health and safety representative. The Applicant was in fact counselled by Mr Roothman who visited him from Gauteng. He was also invited to reconsider his position. An employer should also refer the employee for further medical evaluation should there be a medical contra-indication for vaccination. The Applicant did not rely on this aspect or present any evidence in this regard. Finally, an employer should, if necessary, take steps to reasonably accommodate the employee in a position that does not require the employee to be vaccinated. The Respondent clearly complied with this requirement as well.

50 I am therefore not convinced that the Respondent acted contrary to what is required from them in terms of the said Directive.

OCCUPATIONAL HEALTH AND SAFETY ACT, 85 OF 1991

51 To a large extent the common law principle of a safe working environment is encompassed in the **Occupational Health and Safety Act, 85 of 1993 (the OHSA)**. The aim of the OHSA is to specifically provide for the safety and health of employees with regards to the use of plants and machinery as well as an attempt by the government to prevent and avoid work-related injuries and illnesses. Section 8(1) of the OHSA is clear and unambiguous and imposes a statutory duty on all employers to take **reasonably practicable measures** to ensure a healthy and safe workplace. The section reads as follows:

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

52 Moreover section 8(2) states that the duty includes:

“taking such steps as may be reasonably practicable to eliminate or mitigate any hazard or potential hazard to the safety or health of employees, before resorting to personal protective equipment”.

53 Section 9(1) of the OHSA goes further and extends the employer's obligations to third parties who are directly affected by its activities. The section reads:

“Every employer shall conduct his undertaking in such a manner to ensure, as far as is reasonably practical, that persons other than those in his employment who may be directly affected by his activities are not thereby exposed to hazards to their health and safety”.

54 The OHSA goes even further and determines in section 14(b) and (c) that every employee at work must cooperate with an employer who has imposed measures and to obey health and safety rules and procedures laid down by the employer....in the interest of health and safety.

55 I have very little doubt that the requirement to vaccinate is nothing less than a “reasonable practical step” that every employer is required and compelled to take. It therefore follows that I can also not blame the Respondent in this regard.

56 It is also abundantly clear that there is a clear commercial rationale for the Respondent's decision. The previous closing of the office was almost disastrous and their largest client requires vaccination. They

are furthermore engaged in front-line services and the Applicant plays an important role in managing security on the Respondent's premises.

AWARD:

- 57 The Applicant was suspended by the Respondent.
- 58 The suspension of the Applicant is not unfair and the Respondent therefore did not commit an unfair labour practice within the parameters of section 186(2)(b) of the LRA.

Signature: _____



Commissioner: **Petrus Michael Venter**

Sector: **Safety/Security (private)**

APPROVED