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Our ref. DJ Eloff / MAT3334

Your ref:

17 June 2021

DEAR SOUTH AFRICA

Roodepoort, Gauteng

Registration no. 2021/371919/08

Dear Mr Hutchinson,

**RE: LEGAL OPINION REGARDING CONSTITUTIONALITY OF MANDATORY WORKPLACE
VACCINATIONS**

1. Hurter Spies Incorporated has been requested by Dear South Africa (hereafter 'the client') to provide a legal opinion on the question of the constitutionality of mandatory workplace vaccinations against the disease known as Covid-19, which disease is caused by the SARS-COV-2 virus. The client is a registered national not-for-profit company and civil rights organisation. The client acts in the interest of its supporters as well as in the interest of the public through active participation and advocacy.

2. In South Africa and abroad opinions are varied regarding the above-mentioned question. The most frequent conclusion appears to be that some form of balance has to be achieved when weighing up an employer's obligation to provide a safe and secure working environment by deciding whether to enforce a mandatory vaccination policy *viz-a-viz* an individual's rights as enshrined in the Constitution of the Republic of South Africa, 1996 (hereafter "the Constitution"). These affected rights include the right to freedom and security of the person, which includes the right to bodily integrity, as well as the right to freedom of religion, belief and opinion.
3. This legal opinion is structured as follows:
 - 3.1. Firstly, the relevant background and context of the legal question will be discussed.
 - 3.2. Secondly, the prevailing and applicable legal framework and legislation will be briefly discussed.
 - 3.3. Thirdly, the constitutional right to freedom and security of the person in terms of section 12 of the Constitution will be discussed in light of the legal question.
 - 3.4. Fourthly, the constitutional right to freedom of religion, belief and opinion in terms of section 15 of the Constitution will be discussed in light of the question posed.
 - 3.5. Fifthly, the importance of consent in medical treatment will be discussed.
 - 3.6. Lastly, the opinion will be concluded.
4. This memorandum attempts to be as brief and succinct as possible as per the client's instruction. The purpose of this memorandum is to highlight the constitutionality of mandatory vaccinations in the workplace. This memorandum should therefore not be viewed in isolation and legal advice should be sought in each particular situation that may arise.

BACKGROUND AND CONTEXT

5. The ongoing situation regarding the global Covid-19 pandemic does not need further introduction and is widely known and recognised. Suffice to mention that concerns regarding the safety, efficacy and both long-term and short-term side-effects and consequences of the various available Covid-19 vaccines, have been widely raised and debated, and cannot be known with certainty at this early stage.

6. The Department of Employment and Labour (hereafter 'the Department') on 11 June 2021 issued an updated occupational health and safety directive (hereafter 'the directive') which, among other things, expressly permits an employer to implement a mandatory workplace vaccination policy subject to specific guidelines.
7. Within 21 days of the directive coming into force an employer must amend their workplace plan to include the following:
 - 7.1. Whether they intend to make vaccinations mandatory;
 - 7.2. The category of employees that must be vaccinated;
 - 7.3. The manner in which it will adhere to the directive;
 - 7.4. The measures it will take to implement the vaccination of employees as and when vaccines become available;
 - 7.5. Provide employees with paid time off to be vaccinated, provided an employee shows proof of vaccination.
8. An employer must consult with the relevant trade union on the mandatory vaccination policy of the employer together with any health and safety committee established in terms of the Occupational Health and Safety Act. Factors to consider when determining mandatory vaccinations include age, comorbidities, risk of transmission due to the job role and any collective agreement in place on the subject. Not only do the directives require employee consultation and participation but the Occupational Health and Safety Act 95 of 1993 makes it abundantly clear that cooperation between employees and employers is required.
9. From the directive it is evident that vaccinations in the workplace are not compulsory through law but rather that it may be allowed subject to the conditions of the directive.

LEGAL FRAMEWORK AND APPLICABLE LEGISLATION

10. The following legislation is applicable on the subject of the above-mentioned legal questions:
 - 10.1. Constitution of the Republic of South Africa;

- 10.2. Basic Conditions of Employment Act 75 of 1997;
 - 10.3. Disaster Management Act 57 of 2002;
 - 10.4. Employment Equity Act 55 of 1998;
 - 10.5. Labour Relations Act 66 of 1995;
 - 10.6. National Health Act 61 of 2003;
 - 10.7. Occupational Health and Safety Act 95 of 1993.
11. Unlike medical testing in the workplace, which is regulated in terms of section 7 of the Employment Equity Act ("EEA"), at present, there is no employment and labour legislation regulating medical treatment in the workplace, which includes immunization in the workplace.

CONSTITUTIONAL RIGHTS

12. The right to bodily integrity is a constitutionally guaranteed right and undoubtedly forms part of the natural law. Section 12(2) of the Constitution provides that:

“Everyone has the right to bodily and psychological integrity, which includes the right—

- (a) to make decisions concerning reproduction;*
- (b) to security in and control over their body; and*
- (c) not to be subjected to medical or scientific experiments without their informed consent.”*

13. A plain reading of section 12(2) makes it evident that every person has the preponderant right to make decisions on health and medical interventions and treatment, which undoubtedly includes the acceptance or rejection of the vaccine.

14. The right to freedom of religion, belief and opinion also holds bearing on the constitutionality of the directive which allows employees to be subject to mandatory workplace vaccinations. Section 15(1) of the Constitution reads as follows:

“Everyone has the right to freedom of conscience, religion, thought, belief and opinion.”

15. Section 15(1) thus guarantees the right of every person to freely hold their own thoughts, beliefs or opinions. This includes the belief or opinion held by many people that administration of the vaccine, particularly mandatory administration, will be to their detriment. Whether an individual holds this belief as a conscientious objector, based on moral grounds, based on medical or scientific grounds or based on religious grounds, this is their protected right which cannot merely be disregarded.
16. Notwithstanding the importance of these fundamental rights, our courts have held that constitutional rights are not one dimensional and rights may be limited when there are justifiable grounds for doing so.
17. Section 36 of the Constitution provides for the limitation of 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.
 - (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.
18. However, it has been held that the five factors listed in section 36 do not form an exhaustive list.¹ They are included in the section as key factors that must be considered in an overall assessment as to whether or not the limitation is reasonable, but courts are encouraged to conduct a broader assessment in the particular case to arrive at a reasonable and proportional conclusion.
19. The right to bodily and psychological integrity provided for in section 12, as well as the right to freedom of belief and opinion provided for in section 15 may therefore be limited by legislation which passes a two-stage test of being both “reasonable” and “justifiable”.² First, it needs to be determined whether there has been a contravention of a guaranteed right in the Constitution

¹ S v Manamela and Another (Director-General of Justice Intervening) (CCT25/99) 2000 (3) SA 1 at paragraph 32.

² S v Zuma and Others (CCT5/94) 1995 (2) SA 642 at paragraph 21.

and secondly, whether the contravention is justified under section 36 (the limitation clause). The test of reasonableness involves the weighing up of competing rights and values based on proportionality.

20. Our courts have not yet had the opportunity to decide on the issue of compulsory vaccinations, but it has made several other judicial pronouncements on section 12. In *Minister of Safety and Security and Another v Gaqa*³, the court relied on the public interest and applied a balancing act of rights to conclude that the respondent 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*⁴, the court compelled surviving respondents to receive treatment for tuberculosis against their will. These decisions show that in some instances the public interest outweighs the right to bodily and psychological integrity of individuals.
21. Instances may arise where the rights of an individual to refuse vaccination is in conflict with not only the obligations of an employer, as imposed by the directives, but also in conflict with the rights of other co-employees. Vaccinated employees may raise that their constitutional right to life is being compromised by working with employees who object / refuse to being vaccinated. This constitutional legal question is therefore complex and uncertain without any guiding court precedence.

UNFAIR DISMISSAL BASED ON REFUSAL TO VACCINATE

22. Section 187(1)(f) of the Labour Relations Act, 1995 (hereafter “the LRA”) prohibits dismissals that discriminate against employees based, *inter alia*, on their religion, conscience, belief, political opinion or culture. The Employment Equity Act, 1998 (hereafter “the EEA”) offers similar protection against discriminatory conduct that falls short of a dismissal. The EEA also protects applicants for employment. Section 5(2)(c)(iv) of the LRA prohibits employers from prejudicing an employee (or person seeking employment) for refusing to do something that the employer is not lawfully entitled to require them to do.

³ Minister of Safety and Security v Gaqa 2002 (1) SACR 654 (C).

⁴ Minister of Health of the Province of the Western Cape v Goliath and Others 2009 (2) SA 248 (C).

23. As discussed above, Section 15 of the Constitution protects a person's right to religion and belief, including the right to practice one's religion. Certain religions may prohibit immunisation. Furthermore, certain vaccines may contain ingredients that are prohibited in certain religions. In this regard the Supreme Court of Appeals has held that religious and personal beliefs may be trumped by to an employer's legitimate operational requirements or its occupational health and safety obligations.⁵
24. It should be emphasised that where a workplace policy offends against a central tenet of a person's religion or beliefs, the employer is obliged to demonstrate that there was no means by which the employee could be reasonably accommodated or that the employer's requirement was a fair and inherent requirement of the job.
25. Employers have an obligation to protect their employees and maintain a healthy and safe working environment. When considering whether to implement a mandatory vaccination policy employers must have regard to their individual workplaces and assess whether such a policy is in fact necessary taking into account, inter alia, the following factors:
- 25.1. The viability of continued remote work;
 - 25.2. The number of vulnerable employees in the workplace;
 - 25.3. The effectiveness of additional PPE where necessary;
 - 25.4. Temporary alternative placements;
 - 25.5. The employees exposure to the public; and
 - 25.6. The number of employees with religious and/or medical grounds for objection.

CONSENT OF USER

26. The National Health Act provides that:

"Consent of user

(1) Subject to section 8, a health service may not be provided to a user without the user's informed consent, unless—

⁵ Department of Correctional Services v POPCRU & others (107/12) [2013] ZASCA 4 at paragraph 22 and 25.

- (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) *authorised 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 authorised 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 authorised in terms of any law or a court order;*
- (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 or her death or irreversible damage to his or her health and the user has not expressly, impliedly or by conduct refused that service.”*

27. Section 7(1)(c) and 7(1)(d) are of particular importance as they provide for the supersession of a person’s refusal to receive medical treatment based on the listed grounds and particular (very narrow) circumstances. Section 7’s departure point, however, remains that a person may not be compelled to undergo medical treatment without consent.

28. In terms of Annexure C to the new directives, it is essential that any employer planning to implement mandatory workplace vaccinations must notify affected employees of their right to refuse vaccination on constitutional or medical grounds. Where an employee refuses to be vaccinated on these grounds, an employer should:

- 28.1. Counsel the employee and allow them to consult with a trade union official, a worker representative or a health and safety representative.
- 28.2. Refer the employee for further medical evaluation where the objection is based on medical grounds. Naturally, this will also require the informed consent of the employee.
- 28.3. If necessary, take reasonable steps to accommodate the employee by amending their role or work environment to eliminate the need for vaccination. This can be done *inter alia* in the following ways: allow the employee to work from home or to self-isolate in the workplace; or require the employee to wear an N95 mask while at work.

ENSURING OCCUPATIONAL HEALTH AND SAFETY

29. Our courts have held that the ongoing Covid-19 pandemic is a matter of occupational health and safety that broadly overlaps with public health.⁶ The Occupational Health and Safety Act creates criminal liability for non-compliance with its provisions by imposing a legislative duty to ensure occupational health and safety. The Act is, however, a framework and not prescriptive regarding how this should be achieved.
30. Our courts have held that the Act and the regulations flowing from it require *reasonably practicable* measures in ensuring compliance.⁷ Moreover, when considering the constitutional obligation to consider *less restrictive means* when limiting a right, the responsibility to ensure other health and safety mechanisms are in place before mandating vaccination becomes increasingly important. Consequently, it is evident that any reasonable measures that aim to ensure workplace health and protection against Covid-19 would fulfil this criterion. Simply put, vaccinations are not the only solution to the problems that employers face.
31. Employers should thus consider all relevant facts and circumstances relating to their particular position when deciding whether to enact a mandatory workplace vaccination policy or not.

CONCLUSION

32. In summary the following is highlighted:
- 32.1. In terms of the new directives by the Department, employers may enact a policy of mandatory vaccinations, but that the process must be accompanied by a thorough consultation process and must respect the rights of the employee.
- 32.2. Employers should consider all less intrusive and restrictive means to ensure occupational health and safety.

⁶ Association of Mineworkers and Construction Union v Minister of Mineral Resources and Energy and Others (J427/2020) (2020) 41 ILJ 1705 (LC)

⁷ Pikitup (Soc) Limited v SAMWU and Others (JA82/13) [2013] (2014) 35 ILJ 983 (LAC) at paragraph 21 and 22.

- 32.3. An employee's right to bodily integrity may in limited instances be reasonably and proportionally limited.
- 32.4. An employee must consent to being vaccinated.
- 32.5. It is essential that any employer planning to implement mandatory workplace vaccinations must notify affected employees of their right to refuse vaccination on constitutional or medical grounds.
- 32.6. An employee may not summarily be dismissed for refusing to be vaccinated. Instead, reasonable steps must be taken by the employer to accommodate a refusing employee.
33. Currently, employers are faced with the predicament of attracting major legal challenges in both instances where they do or do not enact a mandatory vaccination policy. In the absence of legal precedent, mandatory vaccination policies should be approached with caution, complete transparency and willingness to engage.
34. While this memorandum and the current situation does not provide any clear-cut answers, it is safe to say that in the absence of enabling legislation that mandates vaccinations in the workplace, it would be extremely difficult to compel employees to vaccinate and moreover, extremely difficult to dismiss the employees based on their refusal.
35. Should the client have any further queries, it should not hesitate to contact us.

Yours faithfully,



HURTER SPIES INC

Daniël Eloff

Assisted by CK van Niekerk