





Mandatory Vaccinations at the Workplace during Covid-19 Times in South Africa: Lessons Learnt for Future Pandemics

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ABSTRACT

The purpose of the study was to analyse mandatory vaccinations at the workplace during COVID-19 times in South Africa. COVID-19 was first identified in March 2020 in South Africa. The National State of Disaster was ended by the President on 4 April 2022. However, while economic activities were gradually opening to revive the economy, some employers had issued mandatory vaccinations to all their employees at their workplaces. This was regarded in some quarters as a violation of the rights of workers. This paper however argues that there was a misunderstanding on whether any law authorised these mandatory vaccinations. The study found that forcing employees to vaccinate against their will, despite World Health Organisation (WHO) ethical considerations against mandatory vaccinations, was a violation of their constitutional right to security in and control over their bodies. Furthermore, it found that this violation was not justifiable under the limitation clause. The paper concluded that no law clearly authorised employers to apply mandatory vaccinations at the workplace. The authors hope that employers learnt some lessons from the implementation of COVID-19 mandatory vaccinations. The paper recommends that mandatory vaccinations should not be applied for future pandemics at the workplace without basis or authority of law. The study further recommends that government must develop clear laws and guidelines to regulate mandatory vaccinations for future pandemics in the workplace. The paper exposes the weaknesses of mandatory vaccinations which were applied by employers to employees at their workplaces during COVID-19 times in South Africa. The paper contributes to the growing constitutional and legal discontent of mandatory vaccines in South Africa and beyond to guide governmental intervention in future pandemics as individual rights interface with general health safety.

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INTRODUCTION

COVID-19 was originally discovered in December 2019.¹ Coronavirus (2019-nCoV) spread quickly worldwide from its inconclusive beginnings in Wuhan City China.² The first case was reported on 5

¹ Safura Abdool Karim and Petronell Kruger, "Which Rights? Whose Rights? Public Health and Human Rights through the Lens of South Africa's COVID-19 Jurisprudence," *Constitutional Court Review* 11, no. 1 (December 2021): 533–60, <https://doi.org/10.2989/CCR.2021.0019>.

² Tanu Singhal, "A Review of Coronavirus Disease-2019 (COVID-19)," *The Indian Journal of Pediatrics* 87, no. 4 (2020): 281–86.

March 2020, in South Africa.³ It severely affected society's functions worldwide.⁴ Various, states introduced strict impositions on their citizens which included isolations, trip limitations, countrywide lockdowns and mandatory vaccinations to prevent the escalation of the disease.⁵ The South African government was one of those countries that laid down containment measures in regulations and guidelines which were promulgated in the Disaster Management Act 57 of 2002.⁶ President Ramaphosa declared the state of disaster based on the Disaster Management Act 57 of 2002. The country was put under different alerts of the Disaster Management Act Lockdown between levels 1 to 5 following the status of the virus. The national lockdown was among these measures which were imposed in various stages according to a risk-adjusted strategy.⁷ To curb the increase of Coronavirus at workstations, some employers applied compulsory vaccinations. The paper, therefore, sought to investigate the basis and authority of these mandatory vaccinations at the workplace during the times of COVID-19. It further looked at lessons learnt to handle future pandemics better. In the following sections, therefore, the study attempts to unravel the constitutional validity of these mandatory vaccinations at the workplace in South Africa. The paper will begin by describing the methodology used for the study, followed by the discussion, recommendations, and conclusion.

METHODOLOGY

The study used qualitative research methods. A qualitative research method is a type of research that explores and provides deeper insights into real-world problems and helps generate hypotheses most suitable for further investigation. This kind of research aims to gain a better understanding through first-hand experience, thorough reporting, and dependable quotations of real investigation. The key methodological approaches of this investigation were literature surveys, the internet and various electronic sources related to COVID-19 mandatory vaccinations.

DISCUSSION

International Mandatory Vaccination; Ethical Considerations

The World Health Organisation (WHO), defines mandatory vaccination “as making vaccination a restriction of, for example, working in certain duties or settings such as health care, attending school or taking part in certain activities.”⁸ Mandatory vaccination policies, classically, allow a limited number of exceptions, such as medical risk factors that are recognised by authentic authorities.⁹ “Mandatory vaccination,” notwithstanding its name, is seldom obligatory, that is, people are not forced to be vaccinated.¹⁰ In other words, it is a different thing to say ‘You must be vaccinated’ and ‘You must be vaccinated in order to...’. However, vaccination orders are not rare. Even though, it should be noted that WHO did not support the way of mandates for COVID-19 vaccination, having argued that it was better to work on information campaigns and making vaccines available.¹¹ Legislation and legal explanations for mandatory vaccination differ from jurisdiction to jurisdiction. Nevertheless, what is ethical or ethically mandatory cannot and should not essentially be reduced to what the law entails because not all that is ethical is legal, and vice versa.¹² However, in South Africa, despite all WHO ethical policy considerations, some employers, as will be shown in the cases discussed below, adopted the attitude of forcing their employees to vaccinate with disregard for what the constitution or laws of general application portend.

³ Betty Claire Mubangizi and John Cantius Mubangizi, “COVID-19, Rural Livelihoods and Human Rights: A South African Perspective,” *Journal of Southwest Jiaotong University* 56, no. 3 (2021).

⁴ Karim and Kruger, “Which Rights? Whose Rights? Public Health and Human Rights through the Lens of South Africa’s COVID-19 Jurisprudence.”

⁵ Karim and Kruger, “Which Rights? Whose Rights? Public Health and Human Rights through the Lens of South Africa’s COVID-19 Jurisprudence,” 533-560.

⁶ Mubangizi and Mubangizi, “COVID-19, Rural Livelihoods and Human Rights: A South African Perspective.”

⁷ Mubangizi and Mubangizi, “COVID-19, Rural Livelihoods and Human Rights: A South African Perspective,” 216-228.

⁸ Ames Dhali, “To Vaccinate or Not to Vaccinate: Mandatory COVID-19 Vaccination in the Workplace,” *South African Journal of Bioethics and Law* (Health and Medical Publishing Group (HMPG), 2021).

⁹ WHO, *Policy Brief* 1.

¹⁰ WHO, *Policy Brief* 1.

¹¹ WHO, *Policy Brief* 1.

¹² WHO, *Policy Brief* 1.

The South African Constitution and Legislation on Mandatory Vaccinations

The South African Constitution requires that “Everyone has the right to bodily and psychological integrity, which include the right (a) to make decisions concerning reproduction; (b) to security in and control over their body; (c) not to be subjected to medical or scientific experiments without their informed consent.”¹³ The right to freedom and security of the person essentially is a right to be left alone.¹⁴ It creates a path of individual inviolability.¹⁵ Additionally, where a patient is able to make his or her decisions, his or her autonomy should be respected at all times.¹⁶ Autonomy plainly means self-rule.¹⁷ Before subjecting patients to any investigations or treatment, their consent should be obtained. This is equally an ethical and a legal obligation.¹⁸ Bodily integrity¹⁹ must be read with the right to be free from violence.²⁰ Clearly, bodily security is jeopardised by violence.²¹ However, not every action by the state or by other people that involves touching one’s body will be regarded as invasiveness enough to deserve constitutional consideration.²²

Invasions that are non-inconsequential on bodily integrity justifying constitutional consideration, happen regularly in the context of crime. For instance, a suspected drug carrier may be subjected to a bodily examination or an X-ray with or without his or her consent.²³ Further, an alleged drunk driver may be required to provide a blood test sample for investigation.²⁴ It could be argued that the right to freedom and security of the person can be limited by section 36 of the Constitution. However, in the absence of a law of general application authorising the constitutional violations of such rights,²⁵ the requirements of the limitation clause could not be met.²⁶ Unjustified bodily violations, besides criminal law, had been alleged in a few other settings. For instance, in the United States (US), there were challenges to compulsory vaccination,²⁷ and even fluoridation of water,²⁸ merited constitutional scrutiny.²⁹ Once, it has been determined that bodily integrity rights have been implicated, the courts will be required to find criteria for differentiating what is justifiable from what is unjustifiable.³⁰

This paper argues that forcing employees to vaccinate against their will was a violation of their constitutional right to security in and control over their bodies, and not to be exposed to medical or scientific tests without their permission. Furthermore, it argues that these violations were not justifiable under the limitation clause as there was no law of general application which authorised these mandatory vaccinations.

Mandatory vaccinations, in South Africa, appeared to acquire their authority from sections 8 and 9 of the Occupational Health and Safety Act (hereinafter the OHSA) and National Health Act (hereinafter the NHA).³¹ Section 8 of OHSA stipulates that every employer shall provide and maintain, as far as is reasonably practicable, a working environment that is safe and without risk to the health of their employees.³² Section 2 of NHA stipulated that the Act provides uniformity with respect to health services across the nation by protecting, respecting, promoting and fulfilling the rights of the people of South

¹³ Section 12(2) of the Constitution of the Republic of South Africa 1996 (hereinafter “The Constitution”).

¹⁴ Iain Currie and Johan De Waal, *The Bill of Rights Handbook* (Juta and Company Ltd, 2013), 287.

¹⁵ Currie and De Waal, *The Bill of Rights Handbook*, 287.

¹⁶ Keymanthri Moodley, *Medical Ethics, Law and Human Rights: A South African Perspective* (Van Schaik Publishers, 2017), 53.

¹⁷ Moodley, *Medical Ethics, Law and Human Rights: A South African Perspective*, 54.

¹⁸ Moodley, *Medical Ethics, Law and Human Rights: A South African Perspective*, 54.

¹⁹ Section 12(2)(b) of the Constitution.

²⁰ Section 12(1)(c) of the Constitution. See, Currie and De Waal, *The Bill of Rights Handbook*, 287.

²¹ Currie and De Waal, *The Bill of Rights Handbook*, 287.

²² Currie and De Waal, *The Bill of Rights Handbook*, 287.

²³ Currie and De Waal, *The Bill of Rights Handbook*, 287.

²⁴ Currie and De Waal, *The Bill of Rights Handbook*, 287., cited *Minister of Safety and Security v Xaba* 2004 (1) SACR 149 (D), where Southwood AJ decided that the Criminal Procedure Act did not allow a police officer to use violence to get the surgical removal of a bullet from the leg of a criminal suspect for purposes of evidence.

²⁵ In s 12(1)(c) and s 12(2)(b) of the Constitution.

²⁶ Currie and De Waal (n 14) 287.

²⁷ See, *Jacobsen v Massachusetts* 197 US 11 (1905).

²⁸ *Dowell v City Tulsa* 348 US 912 (1955).

²⁹ Currie and De Waal, *The Bill of Rights Handbook*, 287.

³⁰ Currie and De Waal, *The Bill of Rights Handbook*, 287.

³¹ Occupational Health and Safety Act 85 of 1993 (OHSA) and National Health Act 61 of 2003 (NHA).

³² Section 8(1) of OHSA. Section 9(1) mandates that every employer shall conduct his undertaking in such a manner as to ensure, as far as is reasonably practicable, 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 or safety.

Africa to an environment that is not detrimental to their health or well-being.³³ However, the paper argues that these provisions from both OHS Act and NHA were general provisions which did not specify that employers should apply mandatory vaccinations at the workplace, especially because both these Acts, preexisted Covid-19 pandemic. It appears, therefore, that the employers that applied these mandatory vaccinations followed the directive that was gazetted by the Minister of Employment and Labour, Thulas Nxesi, on 11 June 2021.³⁴ The directive stipulated that every employer must undertake a risk assessment, in accordance with sections 8 and 9 of the OHS Act, taking into account the operational requirements of the workplace, whether it intended 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 due to their age or comorbidities that must be vaccinated.³⁵ Dhali, however, correctly argued that, on the face of it, this meant that the directive did not make the vaccine mandatory.³⁶ However, it placed the onus on the employer to take into account its general duties under the OHS Act, which mandated the provision of a working environment that is safe and without risk to the health of employees and persons other than those employed who may be directly affected, e.g. patients and children at school.³⁷

Employees and other relevant individuals must not be exposed to hazards to their health or safety.³⁸ Furthermore, not every employee posed a risk, as some employees, for instance, worked from home or their work was such that they were not 'facing people' and hence not in close working contact with other workers or the public.³⁹ The study, therefore, submits that there appeared to be no law in South Africa that directly authorised mandatory vaccinations at the workplace. The discretion was left to the individual employers to apply these mandatory vaccinations in compliance with the directives and OHS Act. Indeed, some employers applied these mandatory vaccinations which ended up in court, whilst others did not. The following section, discusses, and analyses some of the cases that were decided by the courts on mandatory vaccinations.

Mandatory Vaccination Cases in South African Courts

In *Kok v Ndaka Security Services*,⁴⁰ Kok, the applicant, was employed as a security specialist in August 2019,⁴¹ by the respondent, Ndaka Security and Services.⁴² The applicant claimed that he was suspended from duty and that his suspension constituted an unjust employment practice.⁴³ He was ordered by the respondent to come back to his workplace after he had been inoculated against COVID-19. Alternatively, the applicant had to show a periodical COVID-19 negative assessment outcome. The respondent decided to suspend him, after their client, Sasol Ltd, required a 100% vaccination rate.⁴⁴ For several reasons, the applicant declined to be immunised against COVID-19. He believed that it was unfair to be denied access to his workplace as no legislation in place compelled any employee to be vaccinated.⁴⁵ To compel employees to vaccinate, would be against the Constitution,⁴⁶ the National Health Act,⁴⁷ and the Consolidated Directives given by the Minister of Employment and Labour.⁴⁸ Kok argued that Section 12 of the Constitution protected everyone's right to freedom and security. Furthermore, he was a committed Christian who had already recuperated from COVID-19. He trusted his body's natural immunity and his devotion.⁴⁹

³³ Section 2(c)(ii) of NHA.

³⁴ Government Gazette 44700 2021.

³⁵ Government Gazette 2021.

³⁶ Dhali, "To Vaccinate or Not to Vaccinate: Mandatory COVID-19 Vaccination in the Workplace,"⁴².

³⁷ Dhali, "To Vaccinate or Not to Vaccinate: Mandatory COVID-19 Vaccination in the Workplace,"⁴².

³⁸ Dhali, "To Vaccinate or Not to Vaccinate: Mandatory COVID-19 Vaccination in the Workplace,"⁴².

³⁹ Dhali, "To Vaccinate or Not to Vaccinate: Mandatory COVID-19 Vaccination in the Workplace,"⁴².

⁴⁰ *Kok v Ndaka Security Services* FSWK2448-21 (hereinafter "*Kok case*").

⁴¹ *Kok case* para 5.

⁴² *Kok case* para 5.

⁴³ *Kok case* para 4.2.

⁴⁴ *Kok case* para 7.

⁴⁵ *Kok case* para 12.1.

⁴⁶ Section 12(2) of the Constitution.

⁴⁷ National Health Act 61 of 2003.

⁴⁸ *Kok case* para 12.1.

⁴⁹ *Kok case* para 12.3.

The respondent contended that they acted according to the directives that were given by the Department.⁵⁰ The respondent was regarded as an essential service and their employees worked on the front line and had close contact with other employees and other members of the public.⁵¹ They argued that “the Consolidated Directive of 11 June 2021 granted discretion to employers when deciding on the issue of compulsory vaccination. It did not prohibit compulsory vaccination but prescribed a certain process. The respondent followed due process and submitted three Risk Assessments. The applicant was identified as an employee who was required to be vaccinated.⁵² 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 or at least in proximity to him. “The entire office had to isolate.⁵³ “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.” CCMA, having analysed all the evidence and arguments, found that the applicant was suspended, and the suspension was allegedly unfair within the ambit of the Labour Relations Act⁵⁴ (LRA).⁵⁵ However, CCMA held that the suspension of the applicant was not unfair and did not constitute a prejudicial labour practice.⁵⁶ This paper argues that this is an example of a case where, contrary to the WHO recommendations that people should not be forced to vaccinate, the employer forced the employee to vaccinate although, in South Africa, no law authorised mandatory vaccination.

In *Mulderij v Goldrush Group*,⁵⁷ Mulderij, the applicant, was employed as a business-related Training Officer.⁵⁸ The respondent, Goldrush Group, generated a Voluntary and Mandatory Vaccination regulation document, after observing in a Government Gazette about voluntary and obligatory alternatives of immunisation.⁵⁹ Respondent dismissed the applicant after the conclusion that she was perpetually incapacitated on the basis of her decision not to be vaccinated and by inference her rejection to take part in the creation of a secure and operational environment for all.⁶⁰ She challenged her prejudicial firing based on incapacity.⁶¹ Further, she challenged the substantive fairness of her dismissal, on the basis of section 12 of the Constitution.⁶² She sought reinstatement or maximum compensation, as a relief.⁶³ The Commissioner, after considering all the evidence and versions of the parties, concluded that Mulderij was perpetually debilitated based on her choice not to be immunised and inference rejecting to take part in the making of a secure operational environment.⁶⁴ The firing of the applicant was therefore found to be substantively fair. This was yet another decision where the employee was forced to vaccinate or be dismissed.

In *Bessick v Baroque Medical (Pty) Ltd*,⁶⁵ “The employer imposed a compulsory Covid-19 vaccination policy for its staff and the applicant refused to comply with that policy. As a result, she was retrenched, with three other colleagues who also elected not to abide by the compulsory vaccination policy.”⁶⁶ The applicant objected to the vaccination based on medical, personal, and religious reasons.⁶⁷ The commissioner concluded that the employer was justified in introducing a policy of mandatory

⁵⁰ *Kok* case para 13.2.

⁵¹ *Kok* case para 13.3.

⁵² *Kok* case para 13.4.

⁵³ *Kok* case para 13.4.

⁵⁴ Labour Relations Act 66 of 1995.

⁵⁵ *Kok* case para 14.

⁵⁶ *Kok* case para 58.

⁵⁷ *Mulderij v Goldrush Group* (GAJB 24054-21) [2022] ZACCMA 1 (hereinafter “*Mulderij* case”).

⁵⁸ *Mulderij* case para 3.

⁵⁹ *Mulderij* case para 11.

⁶⁰ *Mulderij* case paras 7 and 8.

⁶¹ *Mulderij* case para 4.

⁶² Section 12(2) which stipulates 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.”

⁶³ *Mulderij* case para 2.

⁶⁴ *Mulderij* case para 27.

⁶⁵ *Bessick v Baroque Medical (Pty) Ltd* WECT13083-21 (hereinafter “*Bessick* case”).

⁶⁶ *Bessick* case para 3.

⁶⁷ *Bessick* case para 67.

vaccination.⁶⁸ The applicant's dismissal was found to be substantively fair.⁶⁹ Furthermore, it was found that it would be completely unjustified to expect the employer to pay any termination pay package in the conditions, as the applicant had the election to vaccinate and retain her employment. Her refusal to vaccinate has no merit and was unreasonable.⁷⁰ The Commissioner held that "The termination of the applicant's services based on operational requirements was substantively and procedurally fair"⁷¹ and that the applicant's choice not to stick to the employer's mandatory vaccination policy was unreasonable and she was not entitled to any severance pay.⁷² It is submitted that in this case, the employee was forced to vaccinate or face the consequences of vaccine hesitation. The difference is that her dismissal was for operational requirements.

In *Solidarity Obo Members v SEEISA (Pty) Ltd*,⁷³ the applicant, Solidarity, approached the court on behalf of its members, for a final order to declare that the respondent's mandatory vaccination policy and policies flowing therefrom be declared unlawful and be set aside.⁷⁴ However, the court dismissed this case for lack of urgency.⁷⁵

The study submits, therefore, that in most of the mandatory vaccination cases, discussed above, the employees were, contrary to WHO recommendations, forced to vaccinate or be dismissed. This happened, even though, in South Africa, no law clearly mandated or authorised mandatory Covid-19 vaccinations. The laws or directives that were there only gave employers the discretion to apply or not to apply mandatory vaccinations.

RECOMMENDATIONS

The paper recommends that mandatory vaccinations at the workplace should only be applied for future pandemics on the basis or authority of law. If no law clearly states that mandatory vaccinations should be applied to employees at the workplace, then employers should avoid applying them.

CONCLUSION

This paper sought to analyse mandatory vaccinations at the workplace during Covid 19 times in South Africa, and lessons learnt for future pandemics. It undertook to investigate the basis and authority of these mandatory vaccinations at the workplace. The paper outlined the conditions and legal framework that existed when mandatory vaccinations were applied by employers to their employees at the workplace. The paper concludes that no law clearly authorised employers to apply mandatory vaccinations at the workplace. It argues, therefore, that employers should have heeded WHO recommendations not to force employees to vaccinate. The authors hope that employers have learnt some lessons from the implementation of mandatory vaccinations. The government should develop a clear legal framework or guidelines to regulate mandatory vaccinations at the workplace for future pandemics and this must be in line with the Constitution.

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⁶⁸ *Bessick* case para 74.

⁶⁹ *Bessick* case para 74.

⁷⁰ *Bessick* case para 77.

⁷¹ *Bessick* case para 78.

⁷² *Bessick* case para 79.

⁷³ *Solidarity Obo Members v SEEISA (Pty) Ltd* J 37/22 (hereinafter "*Solidarity Obo Members* case").

⁷⁴ *Solidarity Obo Members* case para 1.

⁷⁵ *Solidarity Obo Members* case para 36.

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