

**THE CONSTITUTIONALITY OF COVID-19 VACCINATION
POLICIES AND ITS IMPLICATIONS ON THE RIGHT TO
FREEDOM OF RELIGION IN THE WORKPLACE**

By

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DECLARATION

I, Janee Karuaihe, Student number **709177**, declare that this Research Report is my own unaided work. It is submitted in partial fulfilment of the requirements for the degree of Master of Laws (by Coursework and Research Report) at the University of the Witwatersrand, Johannesburg. It has not been submitted before for any degree or examination in this or any other university.

I have submitted my final Research Report through Turnitin and have attached the report to my submission.

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ABSTRACT

Covid-19 was declared by the World Health Organisation (WHO) as a disease affecting people over a large geographical area. It caused severe illness to millions of people around the world and the death of over four million people. This impact on people had a direct effect on employers, employees and the workplace. Religions and those practicing their religion weren't spared from the impact of Covid-19. To control the impact of Covid-19 on the workplace, employers were obligated to take steps to keep the workplace safe and to ensure that businesses can reopen in a manner that would ensure the safety of employees and the public. One of the measures taken by employers to ensure the safety of the workplace was the introduction of vaccination policies. These policies varied from workplace to workplace, but a consistent feature was that employees were required to be vaccinated to return to the workplace. If such workplace were to be implemented without exception, it would fail to recognise the fact that certain religious practices and certain people who practice various religions do not permit vaccines, and where they do, only certain vaccines are allowed. As there is no specific legislation governing the implementation of vaccination policies in the workplace, many employees across South Africa believed these policies unjustifiably limited rights protected by the Constitution, including the right to religion. The courts have accepted that vaccination policies may have the effect of limiting rights that are protected in terms of the Bill of Rights. Still, such limitations may be justified where the employer takes steps and introduces such a policy where necessary to ensure the safety of the workplace.

LIST OF ACRONYMS

Bill of Rights	(BOR)
Co-Operative Governance and Traditional Affairs	(COGTA)
Commission for Conciliation and Arbitration	(CCMA)
Disaster Management Act	(DMA)
Electrical Safety Authority	(ESA)
European Convention on Human Rights	(ECHR)
International Labour Organisation	(ILO)
International Labour Standards	(ILS)
Labour Appeal Court	(LAC)
Mandatory Vaccination Policies	(MVP)
Occupational Health and Safety Act	(OHSA)
Occupational Safety and Health Convention	(OSHC)
Polymerase Chain Reaction	(PCR)
Power Workers Union	(PWU)
World Health Organisation	(WHO)

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CHAPTER 1

1.1 INTRODUCTION

The novel coronavirus, known as Covid-19, is a highly infectious respiratory disease caused by the SARS-CoV-2 virus.¹ It was first identified in Wuhan, Hubei Province, China, in December 2019 and subsequently detected in South Africa on 5 March 2020.² Due to its significant infection, hospitalisation, and mortality rates, the World Health Organisation (WHO) declared Covid-19 a global pandemic on 11 March 2020.³ This declaration led to the implementation of worldwide measures aimed at minimising the spread of the virus.⁴

In South Africa, Covid-19 was declared a national disaster on 15 March 2020 under section 23(1)(b) of the Disaster Management Act, 2002 (DMA).⁵ This classification legally obligated the national executive to coordinate and manage the disaster response. On the same day, the President of the Republic of South Africa designated the Minister responsible for Cooperative Government and Traditional Affairs to coordinate and manage the disaster, as per section 3 of the DMA.⁶ The Minister then enforced various forms of lockdown measures to curb the spread of Covid-19 and regulate the State's response to the pandemic.⁷ These measures, included various alert lockdown levels that restricted people's rights, movement, and interactions to

¹ World Health Organisation 'Coronavirus disease (COVID-2019): Situation report-54' 2020 available at https://www.who.int/docs/default-source/coronaviruse/situation-reports/20200314-sitrep-54-covid-19.pdf?sfvrsn=dcd46351_2, accessed on 12 September 2023. Morgane, Camille, Philippe, Brouqui, Pierre, Didier, Philippe, Jean "Severe Acute Respiratory Syndrome Coronavirus (SARS-Cov-2) and Coronavirus Disease-2019 (COVID-19): The Epidemic and the Challenges" 2020 55 *International Journal of Antimicrobial Agents* 105924: 1–9.

² See Ndlovu & Tshoose "COVID-19 and Employment Law in South Africa: Comparative Perspectives on Selected Themes" 2021 33(1) *South African Mercantile Law Journal* 25–55.

³ National Institute for Communicable Diseases "First Case of COVID-19 Reported in SA" (no date) www.nicd.ac.za/first-case-of-covid-19-coronavirus-reported-in-sa/ (accessed 2021-11-08).

⁴ See Mudenda "Letter to Editor: Coronavirus Disease (COVID-19): A Global Health Problem" (2020) 4(1) *Journal of Pharmaceutical Research Science & Technology* 1–2. See also, Brueggemann, van Rensburg, Shaw, McCarthy, Jolley, Maiden & Zhou "Changes in the Incidence of Invasive Disease due to Streptococcus Pneumoniae, Haemophilus Influenzae, and Neisseria Meningitidis during the COVID-19 Pandemic in 26 Countries and Territories in the Invasive Respiratory Infection Surveillance Initiative: A Prospective Analysis of Surveillance Data" 2021 3(6) *The Lancet Digital Health* e360–e370.

⁵ Act 57 of 2002.

⁶ S 23(8) of the DMA.

⁷ This was declared in terms of s 27(1) of the DMA.

limit the virus's spread and impact.⁸ These measures were contentious and often required court intervention.⁹

In response to the ongoing pandemic, vaccines were developed to mitigate the risks associated with Covid-19. The World Health Organisation (WHO) continues to advocate for Covid-19 vaccines, describing them as the most effective tool to protect individuals from the virus's adverse effects.¹⁰ With the introduction of the vaccine, most employees were able to return to their workplaces, provided they adhered to the rules and regulations established by the government and employers to limit the risks associated with the virus.¹¹ These measures included wearing masks, sanitising regularly, and getting vaccinated. These precautions were crucial in ensuring a safe and healthy work environment during these challenging times.¹² However, some employees refused to be vaccinated and claimed amongst other things that if they were forced to take the vaccine, it would unjustifiably limit their right to freedom of religion.

1.2 PROBLEM STATEMENT

The Covid-19 pandemic has had an adverse impact on all sectors of society, including the workplace. Employers have been compelled to take measures to ensure a safe working environment, including introducing Mandatory Vaccination Policies(MVPs). The WHO describes MVPs as the act of coercing people to get vaccinated by posing threats directly or indirectly in case of non-compliance.¹³ However, despite their importance, the WHO has not endorsed MVPs, prioritising instead raising awareness about vaccines and making them

⁸ Citizen Reporter "Lockdown Level 5 Decision to be Made this Week" <https://www.citizen.co.za/news/2543740/lockdown-level-5-2021/> (accessed 2021-11-28). South Africa introduced five "alert levels", with alert level 5 being the strictest and level 1 the least strict. Alert level 5 applied during times of a high level of infections of COVID-19 with a low level of readiness of the health system.

⁹ The regulations were published in terms of s 27(2) of the DMA

¹⁰ Anywanu and Salami "The impact of COVID-19 on African economics: An introduction" (05 May 2021) <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC8207010/> (accessed 2022-09-06).

¹¹ Cirrincione, Plescia, Ledda, Rapisarda Rapisarda, Martorana, Moldovan, Theodoridou and Cannizzaro "COVID-19 pandemic: Prevention and Protection Measures to be Adopted at the Workplace" (29 April 2020) <https://www.mdpi.com/journal/sustainability> (accessed 2022-09-08). Measures to protect persons at the workplace were initially implemented per regulations brought into effect in terms of section 27(2) of the DMA by the Minister.

¹² See *Esau and Others v Minister of Co-Operative Governance and Traditional Affairs and Others* (611/2020) [2021] ZASCA 9.

¹³ World Health Organisation 'COVID-19 and mandatory vaccination: Ethical Considerations and caveats; Policy Brief' 2021, available at <https://www.paho.org/en/documents/covid-19-and-mandatory-vaccination-ethical-considerations-and-caveats-policy-brief-13> accessed 9 September 2023.

accessible to all. As a result, laws and policies relating to mandatory vaccines vary across countries, including South Africa. These policies have been met with vaccine hesitancy, a delay in acceptance or refusal of vaccination despite the availability of vaccination services.¹⁴ This situation has led to a dilemma for employers, as to whether they can unilaterally introduce MVPs at the workplace as necessitated in the Occupational Health and Safety Act (OHS) that mandates employers to ensure workplace safety, whilst it does not explicitly provide for the introduction of MVPs.¹⁵ The problematic aspect is that MVPs can potentially infringe on various rights, including the rights to freedom of religion¹⁶ and bodily integrity.¹⁷ This legislative gap has led to disputes. Therefore, this treatise aims to determine whether MVPs are constitutionally justifiable.

1.3 RESEARCH OBJECTIVES

The objective of this research is to evaluate the extent to which the South African legislative framework caters to MVPs. This treatise aims to determine whether the introduction of an MVP is permissible in terms of the Constitution, and, if the Constitution does permit the employer to impose MVPs, in what circumstances would such imposition be constitutionally permissible? The treatise will also examine the health and safety obligations of employers. It will further interrogate the manner in which the introduction of MVPs at the workplace implicates the right to freedom of religion.

1.4 RESEARCH QUESTIONS

This research aims to address the following question: In what circumstances may an employer introduce an MVP in the workplace? Additionally, the research will explore the ancillary question: Does the introduction of MVPs unjustifiably limit the right to freedom of religion?

1.5 RESEARCH METHODOLOGY

¹⁴ R Verna 'Critical Analysis of the Constitutionality of Mandatory Vaccination' (2021) 2 1 *Law Essentials Journal* 203.

¹⁵ See *Mulderij v Goldrush Group* (2022) 43 ILJ 671 (CCMA) para 11.

¹⁶ Section 15 of the Constitution.

¹⁷ Section 12 of the Constitution.

This treatise employs a qualitative research methodology, which involves the analysis of a diverse array of relevant sources. These include, but are not limited to, legal textbooks, case law, and scholarly publications. The primary sources encompass international treaties, legislation, common law, and case law. Secondary resources comprise legal textbooks, dissertations, and journals that various academics and legal specialists authored. Articles from a broad spectrum of national and international legal publications will serve as resource materials, and conference papers may also be utilised.

1.6 ASSUMPTIONS AND LIMITATIONS

The enforcement of MVPs by a multitude of private corporations and public institutions has led to the termination of employees who opted against vaccination. This situation escalated beyond mere job terminations, as a significant number of these dismissed employees contested their dismissals, alleging unfair treatment and violations of their constitutional rights. This study does not aim to explore the comprehensive dynamics between an employer's obligation to maintain a safe working environment and the full spectrum of an individual's constitutional rights. Instead, it will focus on the introduction of MVPs and the right of freedom of religion.

1.7 CHAPTER OUTLINE

This study will consist of five chapters as noted below.

Chapter one contains an introduction and general background of the study. It further sets out the problem statement, research objectives, assumptions and limitations, research hypothesis, research methodology, as well as a brief outline of the chapters to follow.

Chapter two will explore the scope of the right to freedom of religion.

Chapter three will look at how MVPs have been accepted internationally and in other countries.

Chapter four will canvas how MVPs are legislated for and have been interpreted by South African courts.

Chapter five concludes the study by providing recommendations that have emanated from the research.

CHAPTER 2: THE RIGHT TO FREEDOM OF RELIGION

2.1 INTRODUCTION

The right to freedom of religion is a fundamental constitutional guarantee enshrined in the Bill of Rights of the Constitution of the Republic of South Africa, 1996.¹⁸ This right is a binding provision on all branches of government, including the legislature, executive, judiciary, and state organs.¹⁹ It reflects its significant historical role in the evolution of human rights. The Constitution mandates a distinct separation between church and state, yet it robustly safeguards the ability of individuals and communities to exercise their religious beliefs within a framework of reasonable limitations.²⁰

This chapter will critically analyse the constitutional foundation of religious freedom, with particular emphasis on Section 15 of the Constitution, and its interaction with other fundamental rights such as the right to bodily integrity. It will explore the permissible scope of limitations on religious freedom, assessing how these limitations must reconcile individual liberties with broader societal imperatives.

The COVID-19 pandemic introduced a new dimension to the discourse on religious rights through the imposition of MVPs in workplaces. The pandemic's impact, with over 4 million infections and more than 100,000 deaths, along with significant economic disruptions, necessitated a re-evaluation of legal frameworks governing public health and individual rights.

Like many of the rights in the BOR, the right to freedom of religion is closely linked to the right to bodily integrity. Section 12(2) of the Constitution sets out the content of the right to bodily and psychological integrity.²¹ The nature of the right to freedom of religion as well as

¹⁸ Section 15(1) of the Constitution of the Republic of South Africa, 1996.

¹⁹ Section 8(1) of the Constitution of the Republic of South Africa, 1996.

²⁰ G Carpenter 'Beyond Belief- Religious Freedom under the South African and American Constitutions' (1995) 3 *THRHR* 884.

²¹ Section 12(2) of the Constitution of the Republic of South Africa, 1996.

the right to bodily integrity means that they are applied vertically by the state to its citizens as well as horizontally between citizens.²² This would mean that any legislation, policy, or conduct relating to MVPs, by the state would have to take cognisance of how such legislation, policies or conduct may affect the way and extent to which private citizens as well as organisations are allowed to practice their religion. The horizontal application of this right means that when enforcing a MVP private citizens would equally have to consider the scope of the right and its application to the workplace. This chapter will start by a briefly outlining the status of the BOR, followed by analyses of what the right to religion entails, before concluding with an analysis of the limitations that could be potentially imposed on this right.

2.2. The Constitution and the right to religion

Chapter one of the Constitution provides that it is the supreme law of South Africa.²³ The BOR which contains several fundamental rights, including the right to freedom of religion, bodily and psychological integrity and which seeks to give effect to the values that underpin the Constitution. It applies to all law in the land, the legislature, judiciary, and executive alike.²⁴ The Constitution imposes an obligation on the state to not only refrain from violating the rights in the BOR, but to use its power to promote and protect the rights contained therein.²⁵

The Constitution in section 15(1) stipulates that everyone has the right to freedom of conscience, religion, thought and opinion.²⁶ The wording in the section does not provide a large amount of detail to illuminate the content of the right. The protection afforded is wide and includes the protection of the rights to freedom of conscience, thought, belief and opinion in addition to the right to freedom of religion.²⁷ The term conscience envisages a moral judgement, whilst thought simply denotes the application of human reasoning.²⁸ Belief may be based on a deity, which is not always classified as religion.²⁹ What is clear is that section 15(1) of the Constitution protects a wide range of views. Contrary to section 15(1), section 15(2) and

²² *Taylor v Kurtstag NO* 2005 (1) SA.

²³ Section 2 of the Constitution of the Republic of South Africa, 1996.

²⁴ Section 8(1) of the Constitution of the Republic of South Africa, 1996.

²⁵ Ian Currie & Johan De Waal *The Bill of Rights Handbook* 6ed (2016) 9.

²⁶ The Constitution of the Republic of South Africa, 1996.

²⁷ Section 15(1) of the Constitution of the Republic of South Africa, 1996.

²⁸ M Shaw 'Freedom of Thought, Conscience and Religion' in R McDonald *et al* (eds) *The European System for the protection of Human Rights* (1993) 447.

²⁹ P Hogg *Constitutional Law of Canada* 3 ed (1992) 947.

31 of the Constitution are more limited in their application. Whilst section 15(2) is limited to religious observances, section 31 deals with communal aspects of religious beliefs.³⁰

The right to freedom of religion is multifaceted and made up of various ways in which the right can manifest. Firstly, one has a right to a belief, secondly the right to express such belief, and thirdly to have that belief manifested through one's conduct.³¹ The right to religion, further prohibits conduct whether in the form of coercion or compulsion that may compel people to act in manner that is contrary to their religious beliefs.³² Such coercion manifests itself where a person or a group of persons are compelled to do something that goes against their religious beliefs.³³

South African courts have also accepted the significance of the institutional context in which the right to freedom of religion is exercised, without diminishing the value in which the right to freedom of religion may be exercised at an individual level.³⁴ This is reflective of the right to be different and to as an individual practice your religion without having to conform to the cultural beliefs or religious standards of others.³⁵ This protection is achieved in two ways. Firstly, by positively enabling individuals to join with other individuals of their community and secondly, prohibiting the state from denying people the right to profess and practice their own religion.³⁶ This is not to say that a person can simply contribute any conduct as being part of their religion, as a practice will not be accepted where the alleged practice is not a religious practice or where a claimant does not profess a sincere belief.³⁷

2.3 Limitation of the Right to Freedom of Religion

Section 36 of the Constitution, which sets out the test to be applied when deciding whether a right in the BOR is being justifiably limited plays a significant role in the application of the right to freedom of religion. This is so in relation to this right, because it covers a wide range

³⁰ Section 15 and 31 of the Constitution of the Republic of South Africa, 1996.

³¹ *Prince v President of the Law Society of the Cape of Good Hope* 2002 (2) SA 794 (CC) para 38; *S v Lawrence* 1997 (4) SA 1176 (CC) para 92; *Christian Education v Minister of Education* 2000 (4) SA 757 (CC) para 19.

³² *S v Lawrence* para 92.

³³ *Ibid.*

³⁴ *Christian Education v Minister of Education* para 23-24.

³⁵ *Ibid.*

³⁶ *Ibid.*

³⁷ *MEC for Education, KwaZulu Natal v Pillay* 2008 para 52.

of convictions.³⁸ A violation of a right in the BOR can take place where either the purpose or the effect of legislation violates the right.³⁹ Conceptually, a piece of legislation may, at face value, be constitutionally compliant but falls short of the requirements set by section 36 of the Constitution in its application. This may take place, because it may not be the intention or foreseeable that the legislation unjustifiably limits a right, but in its implementation the legislation leads to unjustifiable consequences.⁴⁰

In certain instances, it is not necessary to inquire whether legislation is compliant with section 36 of the Constitution. The section 36 analysis can be avoided by inquiring whether the impugned conduct falls within the scope of the right.⁴¹ The courts have been more inclined to follow the latter approach and avoid having to conduct the section 36 analysis, where the conduct does fall within the scope of the right.⁴² To determine whether the impugned conduct falls within the scope of the right, the courts may require the claimant to show that the conduct places a substantial burden on the exercise of his/her right to freedom of religion or that the prohibited practice is a central tenet of his/her religion. An example of this is in *Christian Education v Minister of Education*,⁴³ where the applicants alleged that corporal punishment is a central tenet of its religious practices but did not believe it was necessary for girls in secondary schools.⁴⁴ Consequentially, the court found other methods of correction consistent with the applicant's beliefs, and therefore, the issue of corporal punishment was merely peripheral to the exercise of the applicant's religion.⁴⁵ The Constitutional Court showed deference to the applicant's beliefs in this regard by holding that, in the view of the affected parents, the impact of the prohibition on their religious and parental practices was far more trivial.⁴⁶

In *MEC for Education, KwaZulu Natal v Pillay*,⁴⁷ the court reconsidered the nature of the inquiry and the question relating to the weight that should be given to considering whether a practice is a central tenet of the religion. The court was untroubled about whether wearing a

³⁸ Ian Currie & Johan De Waal *The Bill of Rights Handbook* 320.

³⁹ *Ibid.*

⁴⁰ *Prince v President of the Law Society of the Cape of Good Hope* 2002 (2) SA 794 (CC) para 38.

⁴¹ Ian Currie & Johan De Waal *The Bill of Rights Handbook* 320.

⁴² *Christian Education v Minister of Education* 1999 (4) SA 1092 (SE).

⁴³ *Ibid.*

⁴⁴ *Ibid.*

⁴⁵ *Christian Education v Minister of Education* 1103F.

⁴⁶ *Christian Education v Minister of Education* 2000 (4) SA 757 (CC) para 37.

⁴⁷ *MEC for Education, KwaZulu Natal v Pillay* 2008 (1) SA 474 (CC).

nose stud was a central mandatory tenet of the Hindu faith or whether it was worn voluntarily.⁴⁸ The court found that this did not lessen the discrimination on the grounds of religion against the wearer and made several findings regarding religious observance.⁴⁹ Firstly, the court held that freedom is one of the underlying values of the BOR and that there is an obligation on courts to interpret all rights in a manner that promotes the underlying values of human dignity, equality and freedom.⁵⁰ The court went on to stress that these values are not mutually exclusive, but they also enhance and reinforce each other.⁵¹ Additionally, the court held that an essential element of an individual's right to freedom and dignity is the entitlement to the unique set of ends that the individual pursues.⁵² One of those is the voluntary ends that the individual pursues.⁵³ When an individual chooses to do something voluntarily rather than through obligation, it enhances the significance of the practice of autonomy.⁵⁴ This protection of voluntary as well as obligatory practices confirms the Constitution's commitment to affirming diversity.⁵⁵ It is also a commitment against what was a history of intolerance and exclusion.⁵⁶ The court went on to stress that diversity should not only be permitted when no other options are available.⁵⁷

Despite endorsing an individual's right to voluntarily take part in a religious practice, the court held that the centrality of the practice to the religion plays a significant role in determining the extent to which another party must go to accommodate that belief.⁵⁸ The essence of reasonable accommodation is an exercise of proportionality. Persons who merely appear to adhere to a religious and/or cultural practice, but who are willing to forgo it, if necessary, can hardly demand the same adjustment from others whose identity will be seriously undermined if they do not follow their belief.⁵⁹ Centrality must be judged with reference only to how important the belief or practice is to the claimant's religious or cultural identity.⁶⁰ Ultimately the courts

⁴⁸ Ibid at para 63-66.

⁴⁹ Ibid.

⁵⁰ *MEC for Education, KwaZulu Natal v Pillay* para 63-66.

⁵¹ Ibid.

⁵² Ibid.

⁵³ Ibid.

⁵⁴ Ibid.

⁵⁵ Ibid.

⁵⁶ Ibid.

⁵⁷ Ibid.

⁵⁸ *MEC for Education, KwaZulu Natal v Pillay* para 86 & 88.

⁵⁹ *MEC for Education, KwaZulu Natal v Pillay* para 63-66.

⁶⁰ Ibid.

have found that different degrees of protection should be afforded to different beliefs depending on their content.⁶¹

Secondly, practices that promote key constitutional values such as dignity, freedom, and equality must be afforded greater protection than those that seek to undermine them.⁶² Myerson is of the view that most important principle to consider whether a practice should be allowed is harm.⁶³ The final way in which to limit a person's right to religion is by law of general application, which is prescribed by section 36 of the Constitution. In South Africa, the threshold enquiry is whether the law of general application sanctions the limitation. If so, the purpose is considered with other factors, such as the effect of the legislation, in order to determine whether the limitation is reasonable and justifiable in an open and democratic society based on human dignity, freedom, and equality.⁶⁴ This position was affirmed by the Constitutional Court in *Minister of Safety and Security v Xaba*,⁶⁵ where the court ultimately held that where the legislation does not authorise the intrusion of a right, the requirements of the limitation clause could not be met.⁶⁶ In other jurisdictions such as Canada, the threshold enquiry is simply the purpose of the legislation, and if the purpose is invalid, its effects cannot be relied on to save the legislation.⁶⁷

A more in-depth enquiry was conducted in *Prince v President of the Law Society of the Cape of Good Hope*,⁶⁸ where the court found that the general statutory prohibition of the possession of dagga was a violation of the right to freedom of religion of Rastafarian.⁶⁹ The court found that the statutory prohibition on the possession of dagga limited the practical aspect of Rastafarians to practice their religion in that it prevented them from manifesting their religion through worship, practice, teaching and dissemination.⁷⁰ The Court further found that the proposed limitation, requiring the Rastafarian to have permits, could not be justified.⁷¹ In dismissing the proposed limitation, the court held that the proposed permit system for the

⁶¹ D Myerson *Rights Limited* (1997) 1.

⁶² D Myerson *Rights Limited* (1997) 1.

⁶³ Ibid.

⁶⁴ Ian Currie & Johan De Waal *The Bill of Rights Handbook* 323.

⁶⁵ 2004 (1) SACR 149 (D).

⁶⁶ *Security v Xaba* 2004 (1) SACR 149 (D).

⁶⁷ Ian Currie & Johan De Waal *The Bill of Rights Handbook* 323.

⁶⁸ 2002 (2) SA 794 (CC).

⁶⁹ *Prince v President of the Law Society of the Cape of Good Hope* 2002 (2) SA 794 (CC).

⁷⁰ Ibid at para 38.

⁷¹ Ibid.

Rastafarian would cause both an administrative problem associated with setting up and implementing any such system and would provide considerable difficulties in policing the system given the private nature of much of the religious consumption of the drug, in the absence of an established, formally organized structure for the religion.⁷²

In *Hay v B*,⁷³ there were several conflicting rights namely, the parents' right to freedom of religion, which had to be balanced against the child's right to life as well as the right to have the best interest of the child inform any decision concerning the child.⁷⁴ In *Hay v B*, the court made it clear that although the rights in the BOR are entrenched in the Constitution, they are not unfettered and may be limited by a law of general application, provided that such a limitation is reasonable and justifiable in taking into account taking into account all relevant factors, including the nature of the right, the importance of the purpose of the limitation, the nature and extent of the limitation, the relation between the limitation and its purpose, and less restrictive means to achieve the purpose.⁷⁵ The analogy to be drawn, is that where a vaccination policy is implemented in the workplace such policy will have to make provision and accommodate employees, who hold the right not to be inoculated so close to their religious practice that they would regard inoculation as a serious intrusion to their faith. Then again, such right of the employee will have to be balanced and weighed against the right of other employees and persons to a safe working environment as well as the duty on the employer to ensure that the workplace is safe.

2.4 Conclusion

The right to religion is complex because how religious practices are carried out differs from person to person. The complexity is exacerbated because the right to freedom of religion is generally enforced against other rights in BOR, which require the competing interests and rights to be weighed up against each other.

⁷² *Prince v President of the Law Society* para 34.

⁷³ *Hay v B* 2003 (3) SA 492 (W) at para 10.

⁷⁴ *Hay v B* para 10.

⁷⁵ *Hay v B* para 11.

CHAPTER 3: MVPs & INTERNATIONAL LAW

3.1 INTRODUCTION

The Covid19 virus has spread throughout the world, therefore, it comes as no surprise that many countries have had to deal with the enforcement of MVPs. The nature and extent of these policies have varied from country to country. Some countries have given their citizens the freedom to choose whether they wish to be vaccinated, while others have placed more pressure on their citizens by limiting the circumstances under which they will be exempted from being vaccinated.⁷⁶ Prior to 2018, a study was conducted in 193 countries to assess the various positions that countries have taken on vaccination policies and to ascertain the prevalence of MVPs across the world.⁷⁷ The study found that over 100 countries had MVPs. Around 62 of these countries penalised their citizens for non-compliance by imposing a hefty fine or refusing the enrolment of unvaccinated children at schools.⁷⁸ In certain instances, countries penalised parents who failed to vaccinate their children with a fine or imprisonment.⁷⁹ Undisputedly, this form of vaccine enforcement crosses the line from vaccination advocacy to forced vaccination, which is not consistent with what the WHO advocates for.⁸⁰

In certain countries such as Indonesia and Thailand, to ensure that their congregants do not violate religious doctrine, the religious Muslim authorities have held that the congregants could not be inoculated with certain vaccines due to the presence of material that emanates from pork, the consumption of which is forbidden by Muslim teaching.⁸¹ In a drastic departure from this

⁷⁶ E Walkinshaw 'Mandatory Vaccinations: the international landscape' (2011) 183 16 *Canadian Medical Association Journal* e1167.

⁷⁷ Katie Gravagna *et al* 'Global assessment of National mandatory vaccination policies and the consequences of non-compliance' (2020) 38 49 *Vaccine* 7865.

⁷⁸ Katie Gravagna *et al* *Vaccine* 7866.

⁷⁹ *Ibid.*

⁸⁰ *Ibid.*

⁸¹ Dakar Declaration on Vaccination 25 March 2014 available at <https://www.afro.who.int/sites/default/files/2017-09/Religious%20Leaders%20Declaration.pdf> accessed 12 October 2023.

position at the Dakar Declaration in 2017, Islamic leaders affirmed the importance of vaccinations for children and set out religious jurisprudence pertaining to the application of vaccinations.⁸² This demonstrates that different regions and countries worldwide have not always taken a similar stance on the issue of MVPs.

A significant factor that weighs on the reluctance of people to be inoculated with vaccines is the fact that almost 75% of the world practices one of the five most prominent religions, which are Christianity, Buddhism, Hinduism, Judaism, and Islam.⁸³ On the one hand, although Buddhism and Hinduism do prohibit vaccinations,⁸⁴ certain churches like the Church of Christ, and the Dutch Reformed Church explicitly dissuade their followers from getting vaccinated.⁸⁵ Below, the issue of how vaccination policies have been dealt with at an international level will be outlined through an assessment of the International Labour Organisation(ILO) and the Occupational Safety and Health Convention before turning to how different countries have incorporated MVPs into their laws.

3.2 International Labour Organisation and Covid19

The ILO places the overall responsibility to ensure that all protective measures are taken to minimize occupational risk, on employers.⁸⁶ This stems from the Occupational Safety and Health Convention (OSHC),⁸⁷ which places an obligation on employers to ensure, as far as reasonably practicable, that workplaces under their control are safe and without risk to health.⁸⁸

Although the overall responsibility is placed on employers, the OSHC places certain responsibilities on employees to ensure that they work together with the employer in order to ensure that they all enjoy the benefit of a safe workplace.⁸⁹ The OSHC requires workers to

⁸² Dakar Declaration.

⁸³ Stephen Juan 'What Are the Most Widely Practiced Religion of the World?' *The Register* 6 October 2006 available at https://www.theregister.com/2006/10/06/the_odd_body_religion/ accessed 12 October 2023.

⁸⁴ Vanderbilt University Medical Centre 'Immunization and Religion' undated available at <https://www.vumc.org/health-wellness/resource-articles/immunizations-and-religion> accessed 13 October 2023.

⁸⁵ Miriam Krule 'Why is There a Religious Exemption for Vaccinations?' *Slate Plus* 2015 available at <https://slate.com/technology/2015/02/religious-exemption-for-vaccines-christian-scientists-catholics-and-dutch-reform-church.html> accessed 13 October 2023.

⁸⁶ Article 16 of the C155 Occupation Safety and Health Convention, 1981(No. 155) (hereinafter the Occupation Safety and Health Convention, 1981).

⁸⁷ Article 16 of the Occupation Safety and Health Convention, 1981.

⁸⁸ Ibid.

⁸⁹ Article 19 of the Occupation Safety and Health Recommendation, 1981(No. 164) para 16.

cooperate with their employers in their endeavour to comply with prescribed safety measures.⁹⁰ This requires employees to take reasonable care for the safety of others, which includes the duty to avoid exposing others to health and safety risks. Notably, the OSHC measures prohibit expenditure for workers.⁹¹

In addition to the OSHC, the ILO maintains a system of International Labour Standards (ILS), which are aimed at promoting a decent working environment that has regard to the dignity and safety of all employees.⁹² The ILO has used its ILS and social dialogue to mitigate the social impact of Covid19.⁹³ This is so because its framework is based on four principles that present a set of interventions that can be tailored to be country specific.⁹⁴ First, the interventions aim to stimulate the economy; second, to support enterprise, jobs, and incomes; third, to protect workers in the workplace; and lastly, to rely on social dialogue to get solutions.⁹⁵

The ILO and its ILS do not directly address the issues relating to MVPs, thus leaving it up to individual countries to address the issue through their own national regulatory framework. However, as alluded to above the ILO takes the view in the OSHC, requiring issues relating to health and safety to be addressed through dialogue and cooperation between stakeholders. This does not mean that employers will have free reign to do as they please, as the ILO Convention No. 111 requires that where a decision is made by an employer relating to a MVP, it should be done in a non-discriminatory manner that has due regard to specific circumstances that may require exemptions and accommodations.⁹⁶

3.3 International History On MVPs

The first reported case where the courts had to deal with MVPs took place in America in 1890, where in *Abeel v Clark*,⁹⁷ court approved the enforcement of compulsory vaccination programs

⁹⁰ Article 19 of the Occupation Safety and Health Recommendation.

⁹¹ Ibid.

⁹² ILO ‘Rules of the game: An introduction to the standards-related work of the International Labour Organization (Centenary edition 2019) 2019 at 7 available at https://www.ilo.org/global/standards/information-resources-and-publications/publications/WCMS_672549/lang--en/index.htm accessed 13 October 2023.

⁹³ ILO Policy Brief: A policy framework for responding to the COVID-19 crisis ILO 18 May 2020.

⁹⁴ Ibid.

⁹⁵ Ibid.

⁹⁶ Article 1 of C.111 Discrimination (Employment and Occupation) Convention, 1958(No. 111).

⁹⁷ 1890 84 Cal.

by educational institutions and state agencies.⁹⁸ This position was strengthened in 1904 in *Jacobson v Massachusetts*,⁹⁹ wherein the court found that the state had a legitimate interest to take necessary steps to ensure the safety and health of its citizens, and granted constitutional authority to the state to make vaccination compulsory for all citizens.¹⁰⁰

Since the 1900s, human rights have developed significantly, allowing different countries to take varying positions on how vaccine policies are implemented. In *Solomakhin v Ukraine*,¹⁰¹ a complaint was brought to the European Court of Human Rights against Ukraine, after a patient complained that a vaccine had caused him harm.¹⁰² The patient complained that his right to privacy under Article 8 of the European Convention on Human Rights (ECHR), was violated. The court remarked that issues concerning MVPs are contentious by their nature, because a person's right to bodily integrity concerns the most intimate aspects of one's private life and that compulsory vaccination as an involuntary medical treatment amounts to an interference with the right to respect one's private life, which includes a person's physical and psychological integrity.¹⁰³

Although the court took cognisance of the importance of the right to bodily integrity, it dismissed the case and found that an individual's right to bodily integrity could be interfered with if it would stop the spread of a communicable diseases.¹⁰⁴ It further held that public health considerations and the fact that medical staff had checked the suitability of the vaccination prior to carrying out the vaccination on the patient, ensured that that the necessary precautions had been taken to ensure that the medical intervention would not be to the applicants detriment to the extent that it would upset the balance of interests between the applicant's personal integrity and the health and safety of the population at large.¹⁰⁵ Furthermore, the court remarked that if vaccinations were to be made compulsory this would interfere with an individual's right to privacy.¹⁰⁶ Notably courts position is in line with the ILO position, which advocates for voluntary vaccinations as opposed to forced vaccinations.

⁹⁸ *Abeel v Clark* 1890 84 Cal.

⁹⁹ *Jacobson v Massachusetts* 197 U.S. 11 1904.

¹⁰⁰ *Ibid.*

¹⁰¹ 2012 ECHR 24429/03.

¹⁰² *Solomakhin v Ukraine* 2012 ECHR 24429/03.

¹⁰³ *Ibid* at para 33.

¹⁰⁴ *Ibid* at para 35.

¹⁰⁵ *Ibid* at para 37.

¹⁰⁶ *Solomakhin v Ukraine* para 37.

3.4 Comparative Analysis Of Vaccination Policies In Countries Around The World

3.4.1 Australia

In Australia, although the government has not made vaccination mandatory, they took the stance to incentivise inoculation by having no jab, no pay policies and refusing tax relief for unvaccinated persons.¹⁰⁷ In 2021 various orders were made which differentiated between vaccinated and unvaccinated persons by imposing greater burdens on those who are not vaccinated against Covid19 in New South Wales, Australia.¹⁰⁸ The orders prevented workers from leaving certain affected areas of concern and prevented unvaccinated persons from working in certain industries.¹⁰⁹ Subsequent to these orders, two aggrieved applicants approached the court to determine the lawfulness of these orders. In dismissing the application, the court found that the minister did what was necessary to ensure the safety of the workplace and the public at large.¹¹⁰

MVPs and health directions were again challenged in Australia in *Simon Harding v Brett Sutton & others*.¹¹¹ Herein Simon Harding and 128 other plaintiffs sought to interdict the Minister from enforcing MVPs and directions. The Minister extensively used his powers to make directions that restricted the movement of the Victorians during the Covid-19 emergency, in order to restrict the transmission of the virus and protect public health.¹¹² In terms of these directions employers were restricted from allowing workers who were not vaccinated to work outside of their place of ordinary residence.¹¹³ The court dismissed the application, and found that there was nothing to suggest that the Minister acted unreasonably when he issued the directions, because he deemed them necessary to protect public health.¹¹⁴

¹⁰⁷ Melissa Davey 'Australia's 'no jab no pay rule' has little effect on anti-vaxxer parents- study' *The Guardian* 4 October 2020 available at <https://www.theguardian.com/australia-news/2020/oct/05/australias-no-jab-no-pay-rule-has-little-effect-on-anti-vaxxer-parents-study#:~:text=Australia%27s%20%20no%20jab%2C%20no%20pay,those%20who%20reject%20vaccination%20science.> accessed 13 October 2023.

¹⁰⁸ *Kassam v Hazzard; Henry v Hazzard* [2021] NSWSC 1320 para 1.

¹⁰⁹ *Ibid.*

¹¹⁰ *Ibid.*

¹¹¹ [2021] VSC 741.

¹¹² *Simon Harding v Brett Sutton & others* [2021] VSC 741 para 2.

¹¹³ *Ibid* at para 21.

¹¹⁴ *Simon Harding v Brett Sutton* para 21.

3.4.2 Canada

In Canada prior to its supreme court's adjudication of MVP, there had been several contradictory lower court and arbitration rulings. One of the first cases where the implementation of a MVPs was challenged was in an arbitration hearing wherein the Power Workers Union (PWU) asserted that the Electrical Safety Authority (ESA) unreasonably implemented a MVP, which they believe violates the employees' rights to privacy and bodily integrity.¹¹⁵

The learned arbitrator found that it was unreasonable for the ESA to place employees who refused to get vaccinated on administrative leave without pay.¹¹⁶ Significantly the arbitration did not concern the efficacy of the vaccination, but the interpretation of a collective agreement between PWU and the ESA. The issue in dispute was the managements right as found in the collective agreement between PWU and the ESA, to unilaterally introduce a rule or policy that all employees must disclose their vaccination status and any employee who does not disclose their status or who is not vaccinated places their employment in jeopardy.¹¹⁷

In coming to the decision, the arbitrator found that the ESA cannot discipline its employees for their failure to vaccinate, and mentioned that the Covid 19 vaccines that are being used are safe and effective at reducing the likelihood of becoming seriously ill or dying from the disease.¹¹⁸ Moreover the arbitrator found that vaccinations are a necessity to protect the healthcare system and bring an end to the pandemic, but there is no government mandate that all ESA employees must be vaccinated and that it is for the government to address general public health concerns, not employers.¹¹⁹

Subsequent to numerous arbitration hearings, the first time the Canadian Courts dealt with MVPs in the context of a civil claim was in *Parmar v Tribe Management Inc.*,¹²⁰ where the court had to determine whether the decision by the employer to place an employee who refused to be vaccinated on unpaid leave was reasonable and lawful. The employment contract

¹¹⁵ *Ontario Power Generation v The Power Workers Union* RE: OPG-P-185 12 November 2021.

¹¹⁶ *Ibid* at para 5.

¹¹⁷ *Ibid* at para 7.

¹¹⁸ *Ibid* at para 6 and 20.

¹¹⁹ *Ibid* at para 6 and 20.

¹²⁰ 2022 BCSC 1675.

expressly provided that the employee would comply with all of the employer's policies, as amended from time to time at the employer's discretion.¹²¹ This provision empowered the employer to implement and amend its workplace policies, and further obligated the employee to comply with the policies subject to the qualification that any such policy would be reasonable and lawful.¹²² The employee did not dispute the lawfulness of the MVP introduced by the employer, but argued that it was unreasonable, because it did not make an exception for employees who were able to work from home.¹²³

In coming to its decision, the court referred to the case *B.C. Hydro and Power Authority v International Brotherhood of Electrical Workers*,¹²⁴ wherein it was found that precautionary approach taken by the employer in implementing a MVP was justified, as the interest that led to the policy significantly outweighs the intrusion on the in interest of the employees.¹²⁵

3.5 Conclusion

For over a century, countries have had a receptive outlook toward the introduction and adoption of MVPs in the workplace, and this is a position that has not changed. The underlying reasoning behind the reception is the data that has evidenced that vaccinations assist in ensuring the safety of citizens. At an international level, the ILO does not directly deal with issues relating to MVPs, but its framework requires countries to deal with issues relating to the health and safety of its citizens through their own legislative framework, in a manner that incorporates both dialogue and cooperation between those that find themselves at the opposite spectrum of the table. With regard to the positive impact of vaccinations, it is unsurprising that commonwealth countries such as Australia and Canada have adopted a similar stance towards mandatory vaccinations. In Australia, the courts have ultimately held that the benefits of the Covid19 vaccination justify a differentiation between vaccinated and unvaccinated persons, whilst in Canada, the courts have found that the introduction of MVPs will be justified where it is reasonable and, therefore lawful provided it makes provision for certain exemptions, including but not limited to medical and religious exemptions.

¹²¹ *Parmar v Tribe Management Inc.* 2022 BCSC 1675 para 88.

¹²² *Ibid.*

¹²³ *Parmar v Tribe Management Inc.* para 89.

¹²⁴ *B.C. Hydro and Power Authority v International Brotherhood of Electrical Workers* 258, 2022 CanLII 25764 (BC LA).

¹²⁵ *Parmar v Tribe Management Inc.* para 119.

CHAPTER 4: MVPs AND THE RIGHT TO RELIGION IN SOUTH AFRICA

4.1 INTRODUCTION

Covid19 had a disastrous effect on South Africans. During the height of the pandemic in 2020 and 2021 South Africa had over 4million reported infections and over 100 000 deaths.¹²⁶ In addition to the effect on the lives of South Africans, the livelihoods of both wealthy and ordinary South Africans alike were not spared. Thousands of businesses closed down and there was a sharp increase in unemployment. To combat these severe effects employers sought to encourage their employees to get vaccinated as immunisation has historically been greatly successful in preventing the spread of diseases, saving millions of lives and giving people the chance to freely earn a living.¹²⁷ It is against this background that one must understand the introduction of MVPs in the workplace.

At the outbreak of Covid19, South Africa did not have a legislative framework that specifically governs and regulates MVPs at the workplace. Instead, there are various pieces of legislation that govern health, safety, the workplace, and other public spaces. In the absence of specific legislation in South Africa governing the implementation of vaccine policies, employers, employees, and the court have had to turn to other pieces of legislation to determine when and how vaccine policies may be enforced.

4.2 Occupational Health and Safety Act

The Occupational Health and Safety Act(OHS),¹²⁸ requires an employer to provide and maintain a working environment that is safe and without risk to the health of its employees.¹²⁹ The OHS was created to give effect to the common law duty of employers to take reasonable care for the health and safety of employees.¹³⁰ The legislative prescripts of the OHS compels the employer to take steps that are both reasonable and practicable to eliminate or mitigate

¹²⁶ Department of Health 'Covid 19 statistics' 2022-2023 available at <https://sacoronavirus.co.za/category/daily-cases/> accessed 22 July 2023.

¹²⁷ R Verna 'Critical Analysis of the Constitutionality of Mandatory Vaccination' (2021) 2 1 *Law Essentials Journal* 200.

¹²⁸ Act 85 of 1993.

¹²⁹ Section 8(1) of the Occupational Health and Safety Act 85 of 1993(hereinafter OHSA).

¹³⁰ Act 85 of 1993.

harm to ensure the safety or the health of the employees.¹³¹ Although the primary duty of the employer is the safety of the employees, this duty of care is extended to third parties by Section 9 of the OHS, which requires the employer to take necessary steps to ensure that the health and safety of persons who are not in its employment are not put at risk as a result of its activities.¹³² This places an obligation on employers to take the necessary steps and precautions to ensure that its suppliers, clients and any other visitors are not exposed to COVID-19.

Section 1 of the OHS provides that when determining whether a measure taken is reasonably practical one must have regard the severity and scope of the hazard or risk concerned, the state of knowledge reasonably available concerning that hazard or risk and of any means of removing or mitigating that hazard or risk, the availability and suitability of means to remove or mitigate that hazard or risk and the cost of removing or mitigating that hazard or risk in relation to the benefits deriving therefrom.¹³³ The OHS further defines a hazard as the source of the exposure to danger.¹³⁴

The Labour Appeal Court (LAC), has held that when determining whether a measure is reasonably practical, the factors listed above in Section 1 of the OHS, must be assessed objectively and weighed equally against one another.¹³⁵ Once each of these factors have been evaluated, a cumulative determination is made to determine whether a measure is reasonably practicable having conducted and assessed the risk.¹³⁶ An employer or employee will only have discharged its risk if it has done what is reasonably possible having had regard to the factors in Section 1, or where it can show that compliance was not reasonably practical.¹³⁷ There is no set standard as to what really what constitutes reasonably practicable, therefore each case will have to be determined on its own circumstances.¹³⁸

Section 8 and 9 of the OHS, therefore place a duty on the employer to act proactively to avoid any harm or injury to its employees and others. Both the employer and employee can therefore

¹³¹ Section 8 (2) (b) of the OHSA.

¹³² Section 9(1) of the OHSA.

¹³³ Section 1(iii) of the OHSA.

¹³⁴ Section 1 (xiii) of the OHSA.

¹³⁵ *Pikitup (Soc) Ltd v South Africa Municipal Workers' Union obo Members* para 52.

¹³⁶ *Ibid* at para 42.

¹³⁷ *Ibid*.

¹³⁸ *Ibid*.

not stand idly and must take the necessary steps to mitigate the risks. Ultimately what can be done must be done.¹³⁹

4.3 Vaccinations and the Courts

4.3.1 Duty Of The Employer To Provide And Maintain A Safe Working Environment

Employees are generally obligated to follow lawful instructions that they receive from their employers. Failure to adhere to lawful instructions may result in an employee being dismissed. In *National Union of Metalworkers of South Africa v National Flanges (Pty) Ltd*,¹⁴⁰ the court held that where an employee intentionally fails to abide by a lawful instruction from the employer in the interest of health and safety, it may be adduced that the employee has repudiated his employment contract and the employer may therefore be well within its rights to dismiss the employee.¹⁴¹

In *Solidarity obo Members and Another v Ernest Lowe, a division of Hudaco Trading (Pty)*,¹⁴² the court had to determine whether an admission policy which prevented an employee from tendering her services and performing her duties in terms of her contract of employment was unlawful. The dispute arose after the employer having conducted a risk assessment sought to introduce a policy that would require all employees who wanted to enter its premises to either produce proof that they were vaccinated or a negative Covid19 test result at their own expense.¹⁴³ Subsequent to the introduction of the new policy and various correspondences between the parties, the employer informed the employee that she will not be allowed to enter the premises without producing a vaccination certificate, alternatively a negative Polymerase Chain Reaction (PCR) test and that failure to produce one of the aforementioned documents would mean that the employee will be creating a health risk at the workplace and therefore disciplinary action may be taken against her.¹⁴⁴

The employee contended that by adopting an admission policy which prohibits any unvaccinated employee from entering the workplace and tendering/rendering their services;

¹³⁹ *Pikitup (Soc) Ltd v South Africa Municipal Workers' Union obo Members* para 52.

¹⁴⁰ 1991 (12) ILJ 1063 (IC), at 1065.

¹⁴¹ *National Union of Metalworkers of South Africa v National Flanges (Pty) Ltd* 1991 (12) ILJ 1063 (IC)1065.

¹⁴² J49/22 (14 March 2022).

¹⁴³ *Solidarity obo Members and Another v Ernest Lowe, a division of Hudaco Trading (Pty)* (2022) 43 ILJ 1125 (LC) para 8-9.

¹⁴⁴ *Ibid.*

and to withhold from employees their salaries, in circumstances where they cannot produce, on a weekly basis a negative PCR test amounted to a breach of her employment contract.¹⁴⁵ The court found that the dispute was centred on the lawfulness of the admission policy. The court found that there was no breach of the employment contract as the employee was unable to identify any term in the employment contract that was violated, nor could she identify any provision in the contract that was unilaterally changed by the introduction of an admission policy.¹⁴⁶ In relation to any contraventions of the OHSA, the court found that section 8 of OHSA, which required employers to provide and maintain as far as reasonably practicable, a working environment that is safe and without risk to the health of employees, was clear and unambiguous.¹⁴⁷ The court held that the OHSA existed prior to Covid19 and the duty prescribed by the OHSA remained unchanged during Covid19.¹⁴⁸

In *Kok v Ndaka Security*, the employee claimed that he had been unfairly suspended when the employer informed him that he should not return to work until such a time that he was vaccinated against Covid19, or alternatively he should provide the employer with a negative Covid19 test result on each day that he is at work.¹⁴⁹ The commissioner found that the circumstances justified the limitation of the employees right, as the Covid19 Vaccination has been considerably successful in limiting severe illness and transmission.¹⁵⁰ The Commissioner further found that the employees' suspension was fair, as the introduction of the MVP workplace is rationally linked to its purpose, which was to reduce infections and illness at the workplace, and the nature of the limitation of the right was justified as all other less restrictive options like utilisation of masks were already in place and were not an adequate alternative option.¹⁵¹

4.3.2 Vaccinations, the workplace and Incapacity

¹⁴⁵ *Solidarity obo Members and Another v Ernest Lowe, a division of Hudaco Trading (Pty)* para 24-26.

¹⁴⁶ *Ibid* at para 52.

¹⁴⁷ *Ibid* at para 55.

¹⁴⁸ *Ibid*.

¹⁴⁹ *Kok v Ndaka Security* [2022] 4 BALR 377 (CCMA) para 7.

¹⁵⁰ *Ibid* at para 38.

¹⁵¹ *Ibid* at paras 26, 56 and 58.

Items 10 and 11 of the Code of Good Practice: Dismissal (“the Code”), issued in terms of the Labour Relations Act (LRA),¹⁵² deals with incapacity and dismissal arising from ill health or injury. In terms of the Code, incapacity on the grounds of ill health may be temporary or permanent.¹⁵³ Where the employee is temporarily incapacitated the code requires the employer to investigate the extent of the incapacity or injury, and where the employee may be absent for an unreasonable time the employer must consider alternatives short of dismissal.¹⁵⁴ Where the incapacity is more of a permanent nature the employer, the employer the employer is obligated to investigate the possibility of securing the employer alternative employment or adapting the employees duties to accommodate his disability.¹⁵⁵ This process must allow the employee an opportunity to make representations.¹⁵⁶

In *Mulderji v Goldrush Group*,¹⁵⁷ the Commission for Conciliation Mediation and Arbitration (CCMA) was called by an employee to determine whether her dismissal for incapacity was substantively fair based on the her refusal to get vaccinated.¹⁵⁸ As a result of the outbreak of Covid19, the employer introduced and implemented a MVP.¹⁵⁹ Before the introduction of the policy the employer had the policy reviewed by its executive committee and its attorneys.¹⁶⁰ The process adopted by the employer was extensive and included a thorough analyses of the risks involved as well as consultative process which involved the creation of a vaccination committee and appeals committee.¹⁶¹

In challenging the fairness of her dismissal, the employee relied on section 12(2) of the Constitution, which she argued protected her from being vaccinated against her will.¹⁶² The employee contended that the MVP unjustifiably made her choose between her healthcare and her livelihood.¹⁶³ She based her assertion on the fact that should she be vaccinated, she would

¹⁵² Labour Relations Act 65 of 1995.

¹⁵³ Code of Good Practice: Dismissal.

¹⁵⁴ Code of Good Practice: Dismissal Item 10.

¹⁵⁵ Ibid.

¹⁵⁶ Ibid.

¹⁵⁷ (2022) 43 ILJ 671 (CCMA).

¹⁵⁸ *Mulderji v Goldrush Group* (2022) 43 ILJ 671 (CCMA) para 2.

¹⁵⁹ Ibid at para 11.

¹⁶⁰ Ibid at 11-16.

¹⁶¹ Ibid.

¹⁶² Ibid at para 23.1.

¹⁶³ Ibid at para 23.2.

have to indemnify the manufacturers of the vaccinations as well as the employer against any temporary or permanent harm that may result from the vaccination.¹⁶⁴

In coming to its decision, the CCMA noted that the LRA recognises incapacity as a legitimate ground for dismissal. The CCMA further held that regard must be had to the prognosis of the employees' condition, the extent of the employees' incapacity and the duration that the employee will be incapacitated for.¹⁶⁵ In finding that the employers decision to dismiss the employee for incapacity was substantively fair, the CCMA had regard to the employers evidence that employee was identified as a high risk individual due to her daily interaction with her colleagues, which would place her colleagues at risk of possible infection for as long as she refused to be vaccinated.¹⁶⁶

In *Mafokeng v Multichoice Support Services (Pty) Ltd*,¹⁶⁷ the CCMA had to determine the fairness of the dismissal of an employee, who was dismissed on the backdrop of an incapacity inquiry, which found that he was permanently incapacitated as consequence his failure to get vaccinated. In coming to its decision that the decision that the dismissal was unfair, the CCMA found that the employer failed to demonstrate how the employee was incapable of doing his work. The Commissioner ruled that where an employer claims that an employee is permanently incapacitated for refusing to get vaccinated, the employer must do more than argue that the employee refused to get vaccinated and such refusal was unreasonable, but must show that by refusing to get vaccinated the employee is a risk to other employees.¹⁶⁸

In *Drennan and another v Rhodes University*,¹⁶⁹ the CCMA again had to deal with a dismissal for incapacity where employees refused to take the Covid19 vaccination. The CCMA found that the dismissal of two university employees who refused to be vaccinated was substantially and procedurally unfair on several grounds. First, the CCMA found that the University failed to inform the employees of their right to refuse to be vaccinated based on the Constitutional right to bodily integrity and freedom of religion.¹⁷⁰ Second, the CCMA found that the University failed to comply with its own Covid19 vaccination policy, by failing to provide the

¹⁶⁴ *Mulderji v Goldrush Group* para 23.2.

¹⁶⁵ *Ibid* at para 26.

¹⁶⁶ *Ibid* at para 30.

¹⁶⁷ GAJB9612-22 2022.

¹⁶⁸ *Mafokeng v Multichoice Support Services (Pty) Ltd* para 58.

¹⁶⁹ *Drennan and another v Rhodes University* [2023] 2 BALR 141 (CCMA) para 106-108.

¹⁷⁰ *Ibid* at para 106-108.

two employees with counselling as well as failing to consider alternatives that would allow it could accommodate the two employees who wished not to be vaccinated.¹⁷¹

4.3.3 The Courts' Interpretation on Covid19 & Limitation of Rights

The limitation of fundamental rights in the context of the Covid19 pandemic was considered in *Esau v Minister of Co-Operative Governance and Traditional Affairs*.¹⁷² The court had to determine the lawfulness of regulations promulgated by the Minister. Notably the court referred to Lord Atkin's famous dissenting judgement in *Liversidge v Anderson*,¹⁷³ wherein he made the point that in times of national disaster laws are not silent, they speak the same language in war as in peace.¹⁷⁴ This highlighted the fundamental principle that all conduct must have its foundation rooted in law and ultimately be compliant with the Constitution. This is in line with the rule of law, which is a founding value of the Constitution and applies equally in crisis as it does in stable times.¹⁷⁵ This means that a right cannot simply be arbitrarily infringed, due to the outbreak of a pandemic.

The court further had to consider the proper approach to a limitation of fundamental rights inquiry. In coming to its decision, it referred to the approach adopted by our court in *S v Manamela*,¹⁷⁶ where the court held that 'the proper approach to a limitation inquiry is to determine the proportionality between the extent of the limitation of the right considering the nature and importance of the right infringed, on the one hand, and the purpose, importance and effect of the infringing provision, taking into account the availability of less restrictive means available to achieve the purpose'.¹⁷⁷ Although this was the minority judgement, the approach to the limitation enquiry was expressly approved by the majority.

Ultimately, the court found that in the circumstances the broad based limitation of everyone's fundamental right to freedom of movement, trade, occupation and profession was a rational response for the purpose articulated by the *Co-Operative Governance and Traditional Affairs*

¹⁷¹ *Drennan and another v Rhodes University* para 109-115.

¹⁷² 2021 (3) SA 593 (SCA).

¹⁷³ 1942 AC 206 (HL).

¹⁷⁴ *Liversidge v Anderson* 1942 AC 206 (HL) 244.

¹⁷⁵ *Esau v Minister of Co-Operative Governance and Traditional Affairs* 2021 (3) SA 593 (SCA) para 5.

¹⁷⁶ 2000 (3) SA 1 para 34.

¹⁷⁷ *S v Manamela and Another* 2000 (3) SA 1 (CC) para 34.

(COGTA) Minister when she provided for the initial lockdown.¹⁷⁸ The court further stressed that at its most basic, the purpose of the limitation was to protect the health and lives of the entire population.¹⁷⁹ The rights such as the right to religion, right to freely move, pursue a livelihood and dignity were limited to prevent the spread of Covid19 and the deaths of many people.¹⁸⁰

4.4 Conclusion

The OHS makes provision for an employer to take the necessary steps to ensure the safety of employees, the public and the workplace as whole. The introduction of a MVP, however, must be preceded by a risk assessment that identifies vaccinations as a solution to mitigate against the identified risk. Where an employer alleges that the employee is incapacitated as a result of the failure to be vaccinated, the employer must show how the failure of the employee to get vaccinated prevents the employee from doing his or her job. Where the introduction of a MVP introduced by an employer limits an employee's constitutionally protected right, such limitation may be justified where justified by the circumstances.

¹⁷⁸ *Esau v Minister of Co-Operative Governance and Traditional Affairs* para 141.

¹⁷⁹ *Ibid* at para 131.

¹⁸⁰ *Ibid*.

CHAPTER 5: CONCLUSIONS AND RECOMMENDATIONS

An evaluation of the decisions from the various adjudication authorities inclusive of the courts internationally and those in South Africa, demonstrates that although the South African legislative framework does not directly deal with the implementation of MVPs at the workplace, these vaccinations policies may be implanted in the workplace provided the implementation of such a policy is not done arbitrarily. The CCMA and the South African courts have been frequently required to scrutinise and employers conduct where a vaccination policy has been introduced in the workplace and have found the introduction of such policies to be necessary and justified, where the implementation of a MVP is preceded by a risk assessment and is done to respond to the risk that has been identified. This would mean that the right to practice ones religion may be limited provided that the employer conducted a risk assessment, which finds that a MVP is required. Such policy will have to accommodate religious practices where possible.

Although the ILO places the overall responsibility to ensure the safety of the workplace on the employer, it also places a duty on employees to avoid exposing other to health and safety risks. In terms of the health and safety standards of the ILO, regard should always be given to both the dignity of the employees on the one hand, and the safety of the workplace on the other. Globally, the position that countries have adopted in relation to MVPs in the workplace has varied. Whilst some has given employees the choice to be vaccinated, other countries have adopted a stricter stance, by limiting the circumstances when employees would be able to avoid being vaccinated. Over one-hundred countries have introduced MVPs during the outbreak of Covid19, whilst more than two thirds of these countries penalised citizens for their failure to get vaccinated by imposing hefty fines.¹⁸¹

ECHR has held that although issues relating MVP's are contentious because a person's right to bodily integrity concerns the most intimate aspects of one's private life and that compulsory vaccination as an involuntary medical treatment amounts to an interference with the right to

¹⁸¹ Katie Gravagna *et al* 'Vaccine 7865.

respect one's private life, an individual's right to privacy could be interfered with if it would stop the spread of a communicable diseases.¹⁸²

In Australia the Courts have stopped just short of implementing MVPs, by finding that the differentiation between vaccinated and unvaccinated persons was justified.¹⁸³ In Canada the Courts have taken a different view point by stating that the extra ordinary circumstances that have come about as a result of Covid19 mean that the implementation of a MVP was a reasonable and lawful policy choice for employers, provide the employer did a risk assessment and the policy provided for both medical and religious exemptions.¹⁸⁴

The Constitution of the Republic of South Africa gives wide protection to a person to practice his or her religion, which in the appropriate circumstances may include the right not to be inoculated should the circumstances of a particular case deem it appropriate that an employee does not have to be inoculated. Ultimately as in *Hay v B* the right of an employee to practice his religion and not be vaccinated will have to be balanced and weighed against the right of other employees and persons to a safe working environment as well as the duty on the employer to ensure that the workplace is safe.

The problem with the failure of the South African legislative framework to specifically articulate when, how and under what circumstances a vaccine policy may be implemented is that it has left the employer to determine how it should go about implementing a vaccination policy with the guiding principle being a risk assessment. To the detriment of an employee, there is no legislating framework guiding it on when such policy or a dismissal in terms of such policy would be unfair.

Without guidance on when the introduction of vaccination policy would be peremptory and the form of such a policy the legislative framework places a duty on employers to ensure that the workplace is safe. This means that an employer may implement a reasonable measure that is objectively necessary for the purposes of ensuring the safety of the workplace. The LAC has held that in determining whether a measure introduced by the employer is reasonable, the factors in section 1 of the OHS must be objectively viewed against each other, to determine

¹⁸² *Solomakhin v Ukraine* para 35.

¹⁸³ *Kassam v Hazzard* para 193 and 200.

¹⁸⁴ *Parmar v Tribe Management Inc.* para 133.

whether a measure is reasonable to avert the risk that has been identified.¹⁸⁵ The problem that arises is that there is no set standard but a wide guideline, which is open to abuse by employers, who can give more weight to certain factors in establishing that the need for vaccinations outweighs any right to religious practices that an employee may have. To combat this the introduction of a new legislation or an amendment to the OHS setting out more confined parameters for the introduction of a vaccination policy, may assist.

¹⁸⁵ *Pikitup (Soc) Ltd v South Africa Municipal Workers' Union obo Members* para 52.

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