

CCMA commissioner declares mandatory vaccination policies "unconstitutional"

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Hot off the heels of a number of awards by the CCMA which upheld mandatory vaccination policies in the workplace, the CCMA recently declared mandatory vaccination policies to be unconstitutional.



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The facts of this case are as follows:

1. The employee was employed as senior inventory controller. The employer supplies cardio, endocrine and neurological equipment to hospitals and other end users.
2. On 22 July 2021, the employer communicated its mandatory vaccination policy. In terms of clause 6 it was a requirement for all employees to vaccinate and clause 10 stated that "[e]mployees who refuse to be vaccinated will be in breach of the Company Policy and their services may then be terminated for operational reasons".
3. After the refusal of the employee to vaccinate due to an alleged adverse reaction to the influenza vaccine 10 years prior, the employer took the decision to retrench her.

4. The employee referred an dismissal dispute related to operational requirements to the Commission for Conciliation Mediation and Arbitration (the CCMA) related to the non-compliance with the employer's mandatory vaccination policy.
5. The CCMA was therefore called upon to determine whether the dismissal of the applicant was fair or not.

The CCMA held that the dismissal of the employee was substantively unfair and in the words of the senior commissioner "in fact unconstitutional".



Can employees refuse to enter a workspace with unvaccinated co-workers?

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The commissioner was of the view that mandatory vaccination policies are unconstitutional and that the rule in respect of mandatory vaccination was unreasonable.

Despite the nobility of the declaration by the CCMA, only the High Court can pronounce on the unconstitutionality of a policy and the said unconstitutionality has to be confirmed by the Constitutional Court. Constitutionality simply does not fall within the purview of the CCMA.

Furthermore on 22 June 2022 the Minister of Employment and Labour published the *Code of Practice: Managing Exposure to SARS-CoV 2 in the Workplace*, Government Notice No. 46596 (the Code) which remains applicable. In terms of this Code, employers may continue developing and enforcing mandatory vaccination policies. This is subject to employers firstly conducting a risk assessment and concluding a plan in terms of which employees identified in the risk assessment must be vaccinated. It is the outcome of the risk assessment that directs the employer's decision whether or not to have a mandatory vaccination policy in place, in order to ensure the safety of their workplace. The obligation to ensure safety in the workplace stems from the Occupational Health and Safety Act (OHSA) read together with Regulations to the OHSA and the Code itself.

Whilst the award raises interesting and important questions surrounding the constitutionality of mandatory vaccination policies, in the face of the Code, there is nothing in the law as it currently stands that prohibits employers from having and enforcing mandatory vaccination policies in respect of their individual workplaces.

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