

No vax, no test, no entry: Labour Court weighs in on Covid-19 admission policies

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The Labour Court (LC) recently considered the lawfulness of an employer's policy regulating how employees would be allowed to access the employer's premises in the context of the Covid-19 pandemic. On 14 March 2022, Makhura AJ handed down a judgment in the matter of *Solidarity obo Members and Another v Ernest Lowe, a division of Hudaco Trading Pty Limited*.



Image source: cottonbro from [Pexels](#)

Briefly, the facts were as follows:

- Hudaco implemented a policy that it would only admit employees to its premises who had been either fully vaccinated and provided proof of vaccination or, in the case of employees who chose not to vaccinate or disclose their vaccination status, if they could produce a negative Covid-19 test result on a weekly basis at their own cost (the Admission Policy);
- Van Rensburg, an employee of Hudaco, said she was unwilling to have the Covid-19 vaccination but would take a weekly test for Covid-19 if Hudaco paid for it. Hudaco would not do so;
- Van Rensburg was denied access to Hudaco's premises;

- Van Rensburg consulted a medical practitioner, who issued a "Covid-19 vaccination exemption form" recommending that she avoid the Covid-19 vaccine because of "cardiac arrhythmia". Hudaco stood by its Admission Policy, and required further information about this medical condition. An ECG report was provided to Hudaco but no cardiologists' report was forthcoming (as Hudaco had suggested would be necessary); and
- Solidarity brought an urgent application seeking an order, *inter alia*, declaring the Admission Policy unlawful and directing Hudaco to permit Van Rensburg to tender her services in terms of her contract of employment.

The LC was required only to determine lawfulness on the basis of the contract of employment and the Consolidated Direction (the Direction) issued in terms of the regulations to the Disaster Management Act, 2002 (the DMA) and/or the Occupational Health and Safety Act, 1993 (OHSA). The LC confirmed that it was not required to determine:

- whether the Admission Policy was fair or reasonable,
- whether the Admission Policy infringed upon van Rensburg's constitutional rights or rights under the Employment Equity Act, 1998;
- who should bear the costs of the Covid-19 testing, or whether Hudaco's failure to accept such costs was unreasonable; or
- whether weekly Covid-19 testing was un/reasonable.



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Hudaco's alleged breach

The breach, it was argued, arose out of provisions in Van Rensburg's contract of employment dealing with

- i. Hudaco's obligations to disclose policies that pertained to the performance of daily duties;
- ii. Hudaco's right to conduct medical testing;
- iii. Van Rensburg's obligation to obey all health and safety rules and regulations;
- iv. a provision rendering the contract subject to the laws of the Republic of South Africa; and
- v. a non-variation clause.

Relying on these clauses, Solidarity argued that Van Rensburg's contract of employment:

- does not require mandatory vaccination or the submission of weekly Covid-19 test results;
- must be read in conjunction with the provisions of the OHSA and all regulations and directives issued under that Act (including the Direction dealing with mandatory vaccination) that are implied or tacit terms of employment; and
- the Admission Policy does not comply with the OHSA (and the Direction) for various reasons, including an alleged failure to conduct a risk assessment and to consult on that assessment.

Hudaco dismissed the submission that the Admission Policy constituted a mandatory vaccination policy. It disputed that it had breached Van Rensburg's contract of employment but said that Van Rensburg was in breach of her contract of employment. The LC could not find that any breach of contract had occurred as a result of the implementation of the

Admission Policy and no provisions in the contract of employment needed to be restored, as Van Rensburg's contract had not been changed.

On this basis, the Court was required to determine only whether there was a breach of the Direction, which manifested into a breach of the contract of employment. In assessing this, the LC confirmed that:

- clause 8 of the OHS Act is unambiguous. It requires employers to provide and maintain, as far as reasonably practicable, a working environment that is safe and without risk to the health of its employees (this duty existed before Covid-19 and remains unchanged); and
- the Direction has the status of binding law in the form of subordinate legislation.



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Did the Admission Policy constitute a mandatory vaccination policy?

As Solidarity brought the application on the basis that the Admission Policy constituted a mandatory vaccination policy, the LC determined that it was necessary to assess whether the Admission Policy did in fact, constitute a mandatory vaccination policy. The LC said Solidarity and Van Rensburg had failed to plead any facts demonstrating that the Admission Policy constituted a mandatory vaccination policy.

The LC accepted that the Admission Policy provided employees with an option to vaccinate and provide proof of vaccination and, if they chose not to do so, to provide weekly Covid-19 test results (at their own cost).

On this basis, the LC was unable to find that the Admission Policy constituted a mandatory vaccination policy, so the various arguments on the alleged breach of the Direction relied upon by Solidarity fell away.

Hudaco alleged that it had complied with the Direction, which Solidarity did not dispute. The LC ultimately held that Hudaco was discharging its statutory duty to provide and maintain, as far as reasonably practicable, a working environment that is safe and without risk to its employees' health.

The application was dismissed.



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There are still questions to be answered

“ While this judgment represents important authority for employers targeting a vaccinated workforce, they must note that the judgment does not confirm the lawfulness (or fairness) of a mandatory vaccination policy and its implementation. The judgment is as important for the questions it does not answer as for those it does. It does not pronounce on the constitutionality of mandatory vaccination policies or the reasonableness of implementing them. It also does not answer some remaining 'burning' issues that arise from the practical implementation of mandatory vaccination policies, including those that the LC noted it did not have to determine. ”

These 'burning' questions include:

- whether requiring PCR testing as an alternative to mandatory vaccination is reasonable when asymptomatic Covid-19 positive persons are no longer required to isolate and, in effect, are permitted to enter a workplace;
- even if an employer decides Covid-19 testing is an alternative to vaccination, can that employer require the employee to bear the costs of testing in the face of safety legislation generally and the BCEA; and
- how employers justify disciplinary or related action against employees who are excluded from the workplace if they could be accommodated by, for example, work-from-home arrangements.

It remains to be seen whether such issues, and the others identified in the judgment, will be the subject of legal challenge, and what the outcome may be. It is increasingly accepted, however, that employers are entitled to implement a mandatory vaccination policy and/or regulate access to the workplace and that such policies, properly formulated and considered, will probably pass any Constitutional scrutiny.

Employers can and must adhere to their obligations under the Direction and, where appropriate, this should now include revisiting any risk assessment conducted initially to respond to the ongoing evolution of Covid-19 and its impact. Employers can and should accept that the risks in implementing mandatory vaccination policies are not likely to emanate from the validity of the policy itself (and, if anything, the LC judgment supports this) but from the manner and extent to which such policies remain necessary and are applied in the face of the particular nuances of the business and the ever-changing nature of the pandemic. A robust, proper and ongoing assessment of risk that informs the need for mandatory vaccination and a fair and consistent application of any consequent policy will mitigate and manage these risks.

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