

COVID-19 at the workplace: What lessons are to be gained from early case law?

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SUMMARY

The emergence of the COVID-19 pandemic and its consequences were overwhelming at South African workplaces. It had a significant impact on public and private life in South Africa and harsh rules were imposed that severely restricted social gatherings and other economic activities. Employers and employees grappled with issues like compulsory vaccinations, social distancing and the implementation of workplace policies at the workplace. The repercussions of the COVID-19 limitations are still being experienced after the lifting of the state of disaster. Among the issues are a troublesome economic downturn, significant job losses and a struggle to convince workers to return to workplaces. The Constitution, 1996 establishes a human rights-centred backdrop against which the picture of the pandemic is unfolding. Added to this, South Africa has a range of legislative instruments that regulate aspects like unfair dismissal and collective bargaining at workplaces. This placed South Africa in a position to regulate the COVID-19 pandemic in society at large, and workplaces in particular. A collection of the tribunal and court decisions regarding COVID-19 at the workplace have wound their way through the dispute resolution institutions. This contribution navigates relevant aspects of the Constitution as well as disaster management and labour legislation before reflecting on a selection of jurisprudence. The authors argue that there are important lessons to be gained from these early cases. Nonetheless, there are also unanswered questions of a constitutional nature that still need to be finalised. They also voice suggestions in the conclusion that may be of assistance to employers, employees, academics, and policymakers alike - that would also apply should future pandemics pester the South African society.

1 Introduction

The first positive case of the Coronavirus (COVID-19) was reported in South Africa on 2020-03-05.¹ Ten days later, on 2020-03-15, President Cyril Ramaphosa announced a “national state of disaster” to deal with

1 National Institute for Communicable Diseases “First case of COVID-19 reported in SA” www.nicd.ac.za/first-case-of-covid-19-coronavirus-reported-in-sa/ (last accessed 2021-11-08).

the pandemic and the country was placed under a strict “alert level 5” lockdown.² This lasted for 35 days. Since then, South Africa has experienced a significant upwards trend of positive cases coinciding with many deaths. At the time of the writing of this contribution, the National Institute for Communicable Diseases confirmed that South Africa’s COVID-19 death toll had reached more than 101 000.³

The South African government jumped into action as far as managing this situation. As will be discussed below, important directives and codes of good practice were issued that supplemented the overarching constitutional and disaster management legislation and the raft of labour legislation that was already in place before the pandemic. This contribution traverses relevant aspects of these legislative provisions before delving into the emerging case law pertaining to the COVID-19 pandemic in South Africa. The authors argue that even though the bulk of the restrictions have been lifted, important lessons of a legal nature can be learnt regarding the handling of this tragedy, and future medical disasters. Nonetheless, significant issues pertaining to especially constitutional aspects remain unanswered. The authors voice suggestions regarding the handling of future pandemics in the conclusion that may be of interest to employers, employees, academics, and policymakers alike.

2 The Constitution

The Constitution of the Republic of South Africa, 1996 contains a list of fundamental principles in Chapter II (the Bill of Rights) that could potentially apply to the COVID-19 pandemic. All other South African laws must be aligned to these rights.⁴ The most significant provisions of the Constitution regarding the COVID-19 pandemic are briefly discussed below.

Section 12(1)-(2) guarantees every worker the right to “freedom of security of person”, which includes “control over their body”. This is bolstered by the provision that no one may be subjected to medical or scientific experiments without their informed consent. Added to this, in terms of section 15, every person has the right to freedom of religion and “belief”. These principles hold the potential to play a significant role in determining whether the state could ultimately impose an obligation on

2 Citizen Reporter “Lockdown Level 5 Decision to be Made this Week” <https://www.citizen.co.za/news/2543740/lockdown-level-5-2021/> (last 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.

3 National Institute for Communicable Diseases “Latest confirmed cases of COVID-19 in South Africa” <https://www.nicd.ac.za/latest-confirmed-cases-of-covid-19-in-south-africa-7-july-2022/> (last accessed 2022-07-08).

4 S 8(1) Constitution, 1996. See also Van Niekerk and Smit *Law@work* (2019) 41.

certain groups of individuals, like employees, to be vaccinated against the COVID-19 virus. However, as pointed out in the discussion of the cases below, this question has not been fully answered by the South African courts as yet.

Concerning the workplace specifically, section 23(1) of the Constitution stipulates that “everyone has the right to fair labour practices”.⁵ This right could, for example, impact employers compelling their employees to report for duty despite the possibility of being infected at the workplace. In addition, section 23(2) accords every “worker”⁶ the right to form and join a trade union,⁷ to participate in the activities and programmes of a trade union⁸ and to strike.⁹ This raises questions as to how trade unions should go about engaging in collective bargaining if they do not have access to stable internet and if they are not permitted to enter workplaces based on precautionary measures to curb the spread of the virus.

As could be expected during the lock-down period in South Africa, several individual human rights had to be weighed up against what is in the best interest of society, and public health in general. In this regard, the Constitution provides in section 36(1) that, legislation may only limit constitutional rights to the extent that such limitation is reasonable and justifiable in an open and democratic society.¹⁰

5 In *NEHAWU v University of Cape Town* 2003 24 ILJ 95 (CC) the Constitutional Court confirmed that this right to fair labour practices extends to both employers and employees.

6 S 23(2) and (3) of the Constitution guarantees the rights to form trade unions and employers’ organisations for “workers” and “employees” alike. In *South African National Defence Union v Minister of Defence* 1999 6 BCLR 615 (CC) the Constitutional Court held that members of the defence force must be deemed to be “workers” for the purposes of s 23. This finding invalidated a law that prohibited soldiers from forming or joining a trade union.

7 S 23(2)(a) and s 23(3) Constitution, 1996.

8 S 23(2)(b) Constitution, 1996.

9 S 23(2)(c) Constitution, 1996.

10 S 36 of the Constitution provides for the limitation of the rights declared in Chapter 2. It states that these rights may be limited only in terms of a law of general application in an open and democratic society based on human dignity, equality, and freedom, considering all relevant factors including the nature of the right, the importance of the purpose of the right, the nature and extent of the limitation, the relation between the limitation and its purpose, and less restrictive means to achieve the purpose. In this regard, see *Larbi-Odam v Member of the Executive Council for Education* 1996 4 All SA 185 (B). What is reasonable and justifiable in an open and democratic society will depend on the circumstances. There is no absolute standard of what is reasonable. See also *S v Makwanyane* 1995 3 SA 391 (CC).

The Constitution also provides that everyone “has the right to have a dispute that can be resolved by the application of law decided in a fair public hearing, in court or where appropriate, another independent and impartial forum”.¹¹ However, in terms of section 37, several human rights, including the right to a hearing, may be suspended during a “state of emergency” for an initial period of 21 days. Nonetheless, such suspension is subject to judicial scrutiny in as far as a competent court may scrutinise the validity of a declaration of a state of emergency or the extension thereof. The Constitution does not refer to a “state of disaster”. However, at a special Cabinet meeting held on 15 March 2020, it was decided to declare a national state of disaster, rather than a state of emergency.¹²

3 Disaster management legislation

According to Van Niekerk, South Africa was one of the first African countries to legislate the risk management of disasters expansively.¹³ The author mentions that the South African Disaster Management Act (the DMA)¹⁴ and the National Disaster Management Policy Framework of 2005 (Policy Framework of 2005) “seek to integrate disaster risk reduction into all spheres of government through a decentralised approach”.

Shortly after the cabinet declared the state of disaster, the Minister for Cooperative Governance and Traditional Affairs, Dr Dlamini-Zuma, confirmed this in terms of section 27 of the DMA.¹⁵ The DMA directs that the executive should oversee the coordination of the government’s response to disasters. It points out that a disaster risk management policy should be implemented that centres on preventing or reducing the risk of disasters and it should include effective responses thereto.¹⁶ The Policy Framework of 2005 is the legal instrument specified by the DMA to serve as the foundation for the management of risks across multiple interest groups using “a coherent, transparent and inclusive policy on disaster management appropriate for the Republic as a whole”.¹⁷

11 S 34 Constitution, 1996. In *Road Accident Fund v Mdeyide* 2011 2 SA 26 (CC) the Constitutional Court held that “[t]he fundamental right of access to courts is essential for constitutional democracy under the rule of law”.

12 See GG No 4309 dated 15 March 2020.

13 Van Niekerk “A Critical Analysis of the South African Disaster Management Act and Policy Framework” 2014 *Disasters* 858.

14 57 of 2002.

15 See also *Government Gazette* No 43147 dated 25 March 2020.

16 S 27(2) of the DMA.

17 S 7(1) National Disaster Management Framework of 2005.

In terms of section 37 of the Constitution, a “state of emergency” can be declared, among others, when “the life of the nation is threatened by war, invasion, general insurrection, disorder, natural disaster or other public emergencies.”¹⁸ The finer details of any state of emergency are regulated in terms of the State of Emergency Act¹⁹ (the SEA).²⁰

It is submitted that the COVID-19 pandemic could easily have been categorised as a public emergency in terms of section 37 of the Constitution and the SEA. Yet surprisingly so, the cabinet’s declaration that authorised the lock-down did not refer to a state of emergency, but a state of disaster. In terms of section 1 of the DMA, a “disaster” is defined as a “progressive or sudden, widespread or localised, natural or human-caused occurrence which causes or threatens to cause death, injury, or disease”. It is submitted that, despite these different categorisations, the DMA is more appropriate to regulate natural disasters like fires, storms, or local draughts than widespread pandemics.

However, it is our view that reliance on either of the pieces of legislation would not have altered the course of events that followed the COVID-19 pandemic. The only significant difference between a state of disaster and a state of emergency is that the first-mentioned is relatively less restrictive than a state of emergency. Nonetheless, it is tailored to carry out a similar goal, which is to safeguard and reinstate the integrity of the country and its inhabitants where it is endangered by a natural disaster or other public crisis. While the proclamation of a state of emergency is completely in the hands of the President, the execution of the DMA rests on a cabinet member.²¹ The Ministry of Cooperative and Governance oversees this role.²² Be that as it may, it is significant to provide some background to the DMA as this Act and the directions

18 In addition, s 37 states that the declaration of the state of emergency must be needed to restore peace and order. It limits the duration to 21 days, which can be extended only by the National Assembly.

19 64 of 1997. See ss 1-4 of the SEA.

20 The reason for the declaration must be stated briefly by proclamation in the *Government Gazette*. The Act empowers the President to make regulations to deal effectively with any circumstances that threaten peace, security, and order in the Republic. Provision is also made for parliamentary supervision of the regulation, order or by-law, or any provision made in terms of the state of emergency. Furthermore, the National Assembly may make recommendations in this regard. Provision is also made in the Act for the lapsing of emergency regulations.

21 See s 37(2) Constitution.

22 See s 4(2) DMA. The DMA directs that the head of state should form an inter-governmental Committee on Disaster Management. This committee must ensure that the fundamentals of cooperative government with regards to Chapter 3 of the Constitution are put in place. In addition, the Act directs that the Minister of Cooperative Governance must preside over the committee. The committee members include other cabinet ministers associated with disaster management and provincial members of the Executive Council associated with disaster management.

published in terms thereof came under attack during the COVID-19 pandemic in South Africa.²³

4 Labour and social security legislation

Detailed labour and social security legislation give effect to, amongst others, everyone's constitutional right to fair labour practices. These instruments include the Labour Relations Act (LRA),²⁴ the Basic Conditions of Employment Act (BCEA),²⁵ the Occupational Health and Safety Act (OHSA),²⁶ the Unemployment Insurance Act (UIA)²⁷ and the Compensation for Occupational Injuries and Diseases Act (COIDA).²⁸ Each of these legislative measures applies to the COVID-19 pandemic to a differing degree.

The objectives of the LRA include the promotion of the institution of collective bargaining, the regulation of effective dispute resolution through specialised dispute resolution bodies and the regulation of job security.²⁹ The latter objective is achieved through the protection of employees against the perpetration of unfair labour practices and unfair dismissal based on misconduct, incapacity and the operational requirements of employers.³⁰ As discussed below, the LRA became of key importance in the workplace during the COVID-19 pandemic.

An employee may not be dismissed in the absence of a fair reason and every employer must follow a fair pre-dismissal procedure. If these requirements are not met, the dismissal will be unfair, and compensation or reinstatement could be ordered.³¹ In the words of Grogan,³² in essence, the LRA is an attempt to give statutory expression to innovations that had been developed by more enlightened employers and trade unions by private arrangement. It also seeks to codify some of the principles established by the industrial courts under the previous regime and to settle matters which have been left moot.

The purpose of the BCEA is to set minimum conditions of employment such as maximum hours of work and overtime, work on Sundays and public holidays; minimum annual paid leave, sick leave and maternity and paternity leave; minimum notice in terms of notice periods in case of termination of a contract of employment and how wages should be paid.³³

23 See the discussion in the parts that follow.

24 66 of 1995.

25 75 of 1997.

26 85 of 1993.

27 30 of 1996.

28 130 of 1993.

29 S 1 LRA.

30 Ss 185-188 LRA.

31 Ss 188, 193 and 194 of the LRA.

32 Grogan *Workplace Law* (2014) 7.

33 75 of 1997.

It is worth noting that in *Kievits Kroon Country Estate (Pty) Ltd v Mmoledi*,³⁴ the Supreme Court of Appeal (SCA) considered the situation of an employee who was absent from work without permission because she genuinely believed that she would fall ill if she did not attain training to become a traditional healer. It was concluded that the courts are entitled to grant relief to a dismissed employee who was absent from work without permission because she genuinely believed that she would fall ill if she did not attend training to become a traditional healer. It can be argued that this principle could also apply to the situation of the COVID-19 pandemic. Employees could refuse to return to work based on their actual fear of contracting the disease at the workplace.

Two significant legislative instruments became relevant during the COVID-19 pandemic in respect of health and safety at the workplace. Firstly, COIDA³⁵ ensures that employees or their dependents who have suffered injury, illness or death arising from the performance of work are compensated from a fund specifically created for that purpose. Compensation is payable only if the accident which caused the injury, illness or death occurred within the scope of the employee's employment and was not predictable. COIDA plays a significant role as far as it gives expression to the constitutional right to social security.³⁶

Secondly, the OHSA³⁷ imposes a general duty on employers to provide a safe and healthy working environment. It also covers aspects like the provision of protective equipment, information, and training to ensure health and safety at the workplace.³⁸ Employees are also obliged to obey health and safety rules that may have been implemented in respect of COVID-19 at the workplace.³⁹ So, for example, the cabinet issued the significant Consolidated Direction on Occupational Health and Safety Measures in Certain Workplaces (Consolidated Direction of June 2021) under the auspices of the OHSA.⁴⁰ Among others, the Consolidated Direction of June 2021 addressed the issue of compulsory vaccinations at the workplace. As discussed in the parts that follow, this has resulted in controversy and conflicting case law as debated below.⁴¹ It stated that when considering compulsory vaccination, each employer

34 2014 3 BLLR 207 (SCA).

35 130 of 1993.

36 S 27(1)(c) of the Constitution places an obligation on the state to take all reasonable measures within its available resources to provide social security to everyone. In *Mahlangu v Minister of Labour* 2021 42 ILJ 269 (CC) the Constitutional Court declared s 1(xix)(v) of the COIDA unconstitutional to the extent that it excluded domestic workers employed in private households from the definition of "employee" and effectively denies them compensation if they contract diseases like COVID-19 or suffer disablement, injuries, or death in the course of their employment.

37 85 of 1993.

38 S 8 (1)(d) OHSA.

39 S 8 (2) OHSA.

40 The Consolidated Direction was issued in terms of s 27(2) and reg 4(10) of the DMA in GG44700 dated 11 June 2021.

41 See the discussion in para 6 of the contribution below.

must undertake a risk assessment and the employer must declare if it will require compulsory vaccination at the workplace.⁴² If so, such employers must identify those that must be vaccinated due to the nature of their work or the risks involved to contract COVID-19 due to age or co-morbidities.⁴³ It should be noted though, that the employer must take into consideration the employee's right to bodily integrity, belief or religion as well as the guidelines contained in Annexure C of the OHS Act before implementing these restrictions at the workplace.

In an important development, the national state of disaster was lifted from midnight on 5 April 2022.⁴⁴ This raises the question where it leaves employers and employees regarding the regulation of COVID-19 at the workplace. The Consolidated Direction of June 2021 served as an employer's handbook on the measures that must be taken to mitigate the risks associated with COVID-19 in the workplace. With the end of the national state of disaster, these Directions ceased to have legal effect. To ensure that guidelines for managing contact to COVID-19 still exist for employers, the Minister of Employment and Labour on 15 March 2022 published the Code of Practice: Managing Exposure to SARS-CoV-2 in the Workplace, 2022 (the Code on SARS-CoV-2),⁴⁵ which took effect on the date that the national state of disaster lapsed.⁴⁶

Whilst not constituting binding law, the Code on SARS-CoV-2 "must" be considered when interpreting any employment law⁴⁷ and it largely mirrors the provisions contained in the Consolidated Direction of June 2021.⁴⁸ So, for example, when determining whether an employer has fulfilled its responsibility in terms of section 8 of the OHS Act to provide a safe work place, judges will contemplate whether the employer has conformed with the provisions contained in the Code on SARS-CoV-2.

In addition to the mentioned significant legislative instruments, and in an endeavour to improve the social security of employees, the UIA provided for payment of benefits to employees impacted by COVID-19. The Unemployment Fund supported employees through existing benefits in respect to illness in terms of a newly implemented COVID-19

42 Items 2-3 Consolidated Directions of 2021.

43 As above.

44 See Kahn "Ramaphosa Takes the Plunge and ends State of Disaster" <https://www.businesslive.co.za/bd/national/2022-04-04-ramaphosa-takes-the-plunge-and-ends-state-of-disaster/> (last accessed on 2022-07-08).

45 Issued in terms of GG46043 of 15 February 2022 available at https://www.gov.za/sites/default/files/gcis_document/202203/46043rg11405gon1876.pdf (last accessed on 2022-07-08).

46 The Code was published in terms of s 203(2A) LRA.

47 As above.

48 However, there are some minor differences. When compared with the wording of the Consolidated Directions of 2021, it is to be noted that there is no longer reference to specific categories of employees who may be required to be vaccinated. The Consolidated Directions of 2021 previously required employers to identify those employees who by virtue of the risk of transmission through their work or their risk of developing severe COVID-19 disease, must be vaccinated.

Temporary Employer-Employee Relief Scheme (COVID-19 TERS).⁴⁹ The above-mentioned legislative measures, directives and regulations gave rise to disputes regarding the infringement of employees' basic human rights that resulted in case law which sought to interpret the measures that were introduced to manage the COVID-19 pandemic.

5 The infringement of rights

After the declaration of the state of disaster, the government deployed soldiers to the streets to enforce lockdown regulations. This unleashed abhorrence from some opposition parties and critics who were opposed to such drastic measures.⁵⁰ Not long after the soldiers were deployed to the streets, they were accused of misusing their power and infringing the rights of citizens. Those who were suspected of infringing the lock-down regulations were compelled to roll on the ground and lie on their stomachs and do push-ups among other chastisements.⁵¹ In addition, producers of homemade liquor were detained for illegal production and selling of liquor and several interprovincial travellers with false travel permits were also arrested.⁵²

As could be expected, some members of society believed that their constitutional and labour rights were being restricted by the declaration of a state of disaster and the consequent lock-down measures. This resulted in several challenges in the courts against these restrictive measures.

6 COVID-19 related case law

The parts above sketched the legislative background to the COVID-19 judgements which made the headlines in South Africa. Members of society who felt aggrieved by the limitations being placed on society soon resorted to the courts to lift some of the restrictions. In *Mohamed v President of the Republic of South Africa*,⁵³ Muslim leaders and organisations approached the High Court to have certain parts of the lock-down regulations declared unconstitutional as it prohibited prayers in places of worship and freedom to move from their homes to the mosque. The applicants contended that these regulations infringed on

49 Issued in GG43161 of 26 March 2020.

50 See *BBC News* "Coronavirus: South Africa Deploys 70,000 Troops to Enforce Lockdown" <https://www.bbc.com/news/world-africa-52387962> (last accessed 2021-10-26).

51 See *Times Live* "Defence Minister Slams Soldiers for Punishing Civilians During Lockdown" <https://www.timeslive.co.za/politics/2020-03-30-defence-minister-slams-soldiers-for-punishing-civilians-during-lockdown/> (last accessed 2022-05-24).

52 *SABC News* "Over 80 People Arrested for Using Fake Permits in Eastern Cape" www.sabcnews.com/sabcnews/over-80-people-arrested-for-using-fake-permits-in-eastern-cape/ (last accessed 2021-10-28).

53 2020 5 SA 553 (GP).

their constitutional right to freedom of religion. Having considered the principles of *ubuntu*, the Court held that:

“[T]o the extent that the Government has put together its Task Team, has consulted exhaustively with them to ensure the safety of its citizens in order to ‘flatten the curve’ and prevent an already fragile health system from being overwhelmed, I cannot find that the restrictions imposed are either unreasonable or unjustifiable and thus the application must fail.”⁵⁴

In our view, the Court quite correctly dismissed the religious leaders’ application, finding that the restrictions of their rights were justified as the state sought to reduce the rate of spreading the virus. It is submitted that the court based its decision on a sound argument in as far as individual constitutional rights were restricted during a devastating pandemic in favour of the collective good for society.

Mohamed was followed by *Minister of Cooperative Governance and Traditional Affairs v De Beer*⁵⁵ where the SCA dealt with an appeal from a High Court judgment that declared the DMA’s restrictive measures to be unconstitutional. This arguably constituted the most significant challenge against the constitutionality of the level 3 and 4 lock-down regulations. The applicant argued that the regulations violated the Constitution’s Bill of Rights in that the measures exceeded the purpose and objectives of the DMA. The applicants also contended that the regulations were irrational and were based on incorrect advice.

The SCA noted that “COVID-19 denialism” was one of the underlying themes in the applicants’ founding affidavit. The Minister of Cooperative Governance and Traditional Affairs argued that her advice, unlike the opinions of the applicants’, was taken from medical and scientific experts when making the regulations. It was further placed on record that the declaration of a national state of disaster and the regulations were entirely rational and in line with what other countries, including Spain, France and Italy, had implemented. The Minister quite correctly contended that the limitations imposed on fundamental freedoms by the regulations were justifiable when viewed against the provisions of section 36 of the Constitution. The SCA dismissed the High Court judgment and held that the applicant’s case was based upon sweeping generalisations and broad conclusions.

Several cases related to the employer-employee relationship were also lodged under the ambit of the LRA. The discussion that follows covers disputes regarding termination of employment based on misconduct, incapacity and operational requirements. The cases also covered the significant aspects of collective bargaining and unilateral amendments to contracts of employment.

54 *Mohamed v President of the Republic of South Africa* para 77.

55 2021 3 All SA 723 (SCA).

In relation to dismissal based on misconduct, in *Eskort Limited v Mogotsi*,⁵⁶ an assistant butcher of the meat processing company Eskort, tested positive for COVID-19, but continued reporting for work. After investigations by his employer, it was discovered that a day after the employee had received his COVID-19 positive test result, he was observed on video footage at the workplace hugging a fellow-employee who happened to have a heart condition. The material further recorded the employee entering the employer's premises without a mask. The assistant butcher's conduct resulted in several employees with whom he had been in contact being sent home to self-isolate. The employer dismissed the employee on grounds of misconduct.

The employee challenged his unfair dismissal in terms of the LRA. The employee claimed that he was not given clear directives pertaining to the COVID-19 pandemic by the employer. The Commission for Conciliation, Mediation and Arbitration (CCMA) reinstated the employee, finding that he should rather have received a written warning in line with the employer's disciplinary code.⁵⁷

On review, the Labour held that disciplinary codes constitute guidelines and not binding contractual provisions.⁵⁸ The Labour Court found that the discharged employee put the lives of his colleagues at risk by ignoring various health and safety protocols and procedures. The employee was also a member of the company's in-house coronavirus site committee, and he should have been aware of the dangers inherent to the spreading of the disease.

It is submitted that the Labour Court was accurate in its findings. Even though everyone has the right to fair labour practices in terms of the Constitution and employees have the right not to be unfairly dismissed in terms of the LRA, public health concerns trumped the fact that the employer's disciplinary code did not specifically make provision for the dismissal of employees based on the breach of COVID-19 protocols. Nonetheless, neither the CCMA, nor the Labour Court, analysed constitutional principles that could shed light on the question whether a breach of COVID-19 related misconduct rules could justify dismissal.

56 2021 42 ILJ 1201 (LC). See also Tshoose "Dismissal Arising from Flouting COVID-19 Health and Safety Protocols: *Eskort Limited v Stuurman Mogotsi* [2021] ZALCJHB 53" 2021 *Obiter* 702 where the author states that "[f]ollowing the Labour Court judgment in *Eskort Limited*, it is now clear that should an employer issue a lawful and reasonable instruction to its employees, even in the midst of a pandemic, the employee is obliged to adhere to it and could face dismissal for failure to comply". See also the decision of the *Botha v TVR Distribution* 2020 12 BALR 1282 (CCMA) where a similar approach was adopted.

57 *Eskort Limited v Mogotsi* para 16.

58 *Eskort Limited v Mogotsi* para 7.5.

In relation to dismissal based on incapacity, the CCMA in *Theresa Mulderij v The Goldrush Group*⁵⁹ ruled that the dismissal of an employee for refusing to get vaccinated against COVID-19, was substantially fair. In this instance the employer had from its drafting of the policy up to its implementation, followed all the crucial steps prescribed by the regulations that govern the adoption of vaccine mandates by employers. Before applying the policy, the employer consulted with various unions and all employees for several months. These stakeholders confirmed that the policy was explained to them, and that they had read it.

Despite these efforts, the employee declined to be vaccinated against COVID-19 and she flouted the company's vaccine policy. She applied for an exemption as provided for in the company's workplace rules, based on a claim to the right to "bodily integrity" guaranteed in section 12(2) of the Constitution. The company's exemption committee declined the employee's application. It did so because the company had acknowledged her as a high-risk individual who interacted with fellow-employees daily whilst on duty in confined work spaces.

The employee was called to a hearing, which concluded that the employee was "incapacitated" and that this incapacity was permanent as she had indicated that she had no intention of being vaccinated. The employee challenged and lost her unfair dismissal case at the at CCMA. The arbitrator rejected the employee's request to be either reinstated or fully compensated.⁶⁰

This decision is important as the LRA recognises incapacity as a legitimate ground for dismissal.⁶¹ In this case, the arbitrator held that incapacity arose because of the employee's refusal to get vaccinated because it made it impossible for her to do the job for which she was employed.⁶²

59 CCMA case number GAJB 24054-21, dated 2022-01-24. See also De Vos "The Unvaxxed, be Warned: You Owe it to your Colleagues to get Jabbed – and you Could be Fired if you Don't" <https://www.dailymaverick.co.za/article/2022-01-26-the-unvaxxed-be-warned-you-owe-it-to-your-colleagues-to-get-jabbed-and-you-could-be-fired-if-you-dont/> (last accessed 2022-01-31).

60 See also the Australian decision of *Kimber v Sapphire Coast Community Aged Care Ltd* 2021 *Australian Industrial Law Review* 102-106 where the Fair Work Commission had to consider the fairness of the dismissal of an employee based on her reluctance to be vaccinated after the government had introduced steps to curb the COVID-19 pandemic. The Commission concluded that the dismissal was fair and reasonable on the grounds that the employee could not perform her inherent job requirements because she was not permitted to be on an old care premises under the public health regulations in place at the time.

61 S 188 LRA.

62 See also the discussion by Botha "Mandatory Vaccinations in the Workplace: Lessons from COVID-19" 2021 42 *ILJ* 2065 where the author confirms that employers could potentially dismiss employees on grounds of misconduct and incapacity due to their reluctance to receive a COVID-19 vaccination.

In analysing the award, it is significant to note that employees owe a duty of care to safeguard their colleagues. The commissioner noted the instance when Sutherland J also referred to this duty in a memorandum to his colleagues on issue of vaccinations in the workplace. He wrote:

There has been, as yet, only mild protest that this adopting a no-vaccination-no-entry policy violates freedom of choice ... [I]n my view this is the wrong question. The proper question is whether or not an individual is sufficiently civic minded to appreciate that a duty of care is owed to colleagues and others with whom contact is made to safeguard them from harm. If one wishes to be an active member of a community then the incontrovertible legitimate interest of the community must trump the preferences of the individual.⁶³

Although it may seem controversial to allow employers to dismiss employees based on incapacity rather than insubordination or misconduct for the breaching of workplace policies, this ruling serves as a warning to unvaccinated employees that repercussions may follow such inaction.

One should also consider that although this case is arguably an important decision, the CCMA did not conduct an in-depth analysis of the potential breach of the fundamental principles safeguarding individual rights contained in the Constitution, 1996. It is submitted that this issue will finally have to be determined by the Constitutional Court.

In relation to dismissal based on operational requirements, the Labour Court in *Food and Allied Workers Union v South African Breweries (Pty) Ltd*,⁶⁴ considered a set of facts where the employer retrenched several employees based on economic reasons caused by COVID-19. Amongst other procedural requirements, the LRA prescribes that consultations should be conducted with trade unions before retrenchment.⁶⁵ The trade union complained about the efficacy and reliability of the zoom application (a video conferencing app) as a proposed medium to complete the already commenced consultation process. The Labour Court only considered procedural fairness and the question arose whether conducting the section 189 LRA consultation process as part of the retrenchment through the zoom application, was acceptable or not.

The Labour Court adopted a pragmatic approach and held that the LRA does not prescribe the form in which consultation in terms of section 189A must take place and that video-conferencing was an acceptable method of consultation under the present circumstances.⁶⁶ The Labour Court acknowledged the problems associated with conducting consultation processes using technology, but held that such problems were not to be elevated to instances of procedural unfairness, especially

63 *Theresa Mulderij v The Goldrush Group* para 26.

64 2020 41 ILJ 2652 (LC).

65 S 189(1)-(2) LRA.

66 *Food and Allied Workers Union v South African Breweries (Pty) Ltd* para 26.

when the union party had voluntarily abandoned the consultation process. The application was dismissed.

It is opined that the Labour Court was also correct in this instance when interpreting the provisions of the LRA in as far as any of the parties to the collective bargaining process should be dissuaded from adopting delaying tactics based on the realities of COVID-19 to launch their attacks in court proceedings.

In another significant matter, *Kgomotso Tshatshu v Baroque Medical (Pty) Ltd*,⁶⁷ the CCMA dealt with the substantive fairness of an operational requirement dismissal where the employer implemented a mandatory vaccination policy. The policy confirmed that the vaccination of its employees was an operational requirement and this was communicated with its employees. The employer contended that the policy was required to ensure a safe working environment for its employees and clients. The employee refused to vaccinate as she previously had a negative response to a flu vaccination 10 years earlier, but the employer rejected this excuse and retrenched the employee.

The commissioner concluded that when considering the limitation of rights provided for in the Constitution as well as item 7 of the LRA's Code of Good Practice: Dismissal,⁶⁸ that this workplace policy was unreasonable. The commissioner also held that an employer has no right to formulate any COVID-19 vaccination mandate as this responsibility rests on government. The commissioner therefore found the dismissal to be substantively unfair, and unconstitutional.⁶⁹

It is submitted that although this decision concerned important legal issues, that it is flawed in a number of respects. The authors argue that the commissioner conflated the issue of the transgression of workplace rules which constitute misconduct, with the requirements for operational requirements.⁷⁰ Added to this, commissioners do not have the authority to declare employer's workplace rules unconstitutional and the Commissioner did not consider the Code on SARS-COV-2. This Code permits employees to implement a mandatory vaccination programme

67 GABJ 20811-21 dated 2022-06-22.

68 Schedule 8 of the LRA, amended by s 57 of Act No. 42 of 1996 and by s 56 of Act No. 12 of 2002.

69 In *Kgomotso Tshatshu v Baroque Medical (Pty) Ltd* para 58 the commissioner held that when "one considers the Equality Clause (section 9 of the Constitution), Freedom of security of the person (section 12 of the Constitution), limitation of rights (section 36 of the Constitution), the lack of reasonableness of the rule, Government's response to and the Regulations it issued, it becomes unmistakably clear that the right to issue any law of general application in respect of COVID-19 vaccinations rest with Government. An employer has no right to formulate any COVID-19 Vaccination Mandate".

70 Item 7 of the Code of Good Conduct Dismissal lists the following factors for a person who is determining whether a dismissal for misconduct is unfair:

(a) whether or not the employee contravened a rule or standard regulating conduct in, or of relevance to, the work-place; and

and obliges workers to comply with the employer's plan. Therefore, this does not appear to be left to the prerogative of government.

It is the view of the authors that these issues ventilated in the CCMA, is yet to be determined by higher authority and the hope is expressed that these uncertainties will be clarified by the Constitutional Court in the not too distant future.

The Labour Court has also considered legal questions pertaining to the unilateral amendment of contracts of employment in the context of strike action. In *Macsteel Service Centres SA (Pty) Ltd v National Union of Metalworkers of SA*,⁷¹ the Labour Court had to consider a dispute concerning wage reductions imposed by employers due to COVID-19 lock-down measures. The national lockdown forced Macsteel to shut down its entire operations for two months. Macsteel was eventually allowed to resume its operations, albeit at only 50 % capacity, when the application of the level 3 regulations commenced on 1 June 2020.

Despite the closure of the plant, the employees were paid their full salaries in April and May 2020. When the employer reopened its operations, it decided to cut its employees' salaries by 20 % to avoid retrenchments. NUMSA and the employees objected to the proposed salary reduction and referred a dispute to the CCMA, alleging a unilateral change to terms and conditions of employment. When the dispute could not be resolved during conciliation, the employees embarked on a strike. The employer responded by launching an urgent application to interdict the strike. The Labour Court acknowledged that the employer had good intentions in trying to ensure that everyone is treated equally and to ensure that everyone received salaries. However, the Labour Court found that, on the facts, the 20 % reduction in salary amounted to a unilateral change to terms and conditions of employment of the LRA,⁷² which is *per se* unlawful.

Although the Labour Court may have been technically correct in its interpretation of the LRA, it is a misfortune that the reality of the situation, namely the possibility of retrenchment of employees, did not weigh enough to save the jobs of employees who may be faced with retrenchment.

The Labour Court also considered disputes flowing from the provisions of the OHSA. In *National Education Health and Allied Workers Union (NEHAWU) obo Members Providing Essential Services v Minister of*

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- (b) if a rule or standard was contravened, whether or not –
 - (i) the rule was a valid or reasonable rule or standard;
 - (ii) the employee was aware, or could reasonably be expected to have been aware, of the rule or standard;
 - (iii) the rule or standard has been consistently applied by the employer; and
 - (iv) dismissal with an appropriate sanction for the contravention of the rule or standard.” It is submitted that these principles do not apply in respect of operational requirement dismissals.

71 2020 8 BLLR 772 (LC).

72 As contemplated in ss 64(1), (4) and (5) LRA.

Health.⁷³ the trade union lodged an urgent application seeking an order declaring that the Minister of Health had breached his obligation to provide personal protective equipment (PPE) to health workers involved in the fight against the COVID-19 pandemic. They also sought an order declaring that the Minister had failed to issue guidelines for the use of such PPE and that the Minister of Health had failed to meaningfully engage with the trade union on these issues. The union also sought an order directing the Minister of Labour to exercise his powers in terms of section 21 of the OHSA to prohibit the performance of those duties that endanger the health and safety of these employees.

NEHAWU also sought to interdict and declare unlawful any disciplinary action to be taken against its members about refusing to work in the absence of PPE. The Labour Court acknowledged the heroism of front-line healthcare workers and agreed that they were entitled to PPE so that the risk of exposure to infection was reduced. Nonetheless, the Labour Court fittingly found that NEHAWU had not succeeded in establishing that the Minister of Health had failed to provide such PPE and the guidelines regarding its use. The trade union lost the case.

In a second case lodged under the auspices of the OHSA, *Association of Mineworkers and Construction Union (AMCU) v Minister of Mineral Resources and Energy*,⁷⁴ the Labour Court had to grapple with the issue of occupational health and safety during level 5 restrictions. During this period essential services providers and some mines were permitted to operate subject to compliance with a number of strict precautions and requirements imposed by the Department of Labour through the directions and regulations issued under the DMA. These regulations were amended on 16 April 2020, with the effect that all mines were exempted from the applicability of the lock-down regulations, subject to certain conditions relating to occupational health and safety.

AMCU requested the Minister of Mineral Resources to issue guidelines in terms of sections 9(2), 9(3) and 49(6) of the Mine Health and Safety Act⁷⁵ (MHSA) setting health and safety standards for mine workers. The Labour Court held, albeit by consent in terms of a joint draft court order submitted by the parties, that the Chief Inspector's decision not to act under section 9 of the MHSA was not reviewable in terms of the Promotion of Administrative Justice Act.⁷⁶

73 2020 6 BCLR 767 (LC).

74 2020 41 *ILJ* 1705 (LC).

75 29 of 1996.

76 3 of 2000.

7 Lessons and conclusions

What lessons can be gained by South African employers, employees and policymakers regarding the current legislative framework and emerging case law during the era of the COVID-19 pandemic that would probably also be of relevance to future pandemics?

Firstly, South Africa has a multi-faceted legislative framework that applies to workplaces which seek to regulate disaster management; protect workers' fundamental rights; balance employees' rights not to be unfairly dismissed and employers' right to implement discipline at the workplace. It is imperative, that employers must acquaint themselves with all these loosely associated legislative instruments which are all to a greater or lesser extent relevant during the time of the COVID-19 pandemic. Employers ought to familiarise themselves with the details of relevant instruments and it is advised that they should implement COVID-19 policies and protocols that are adhered to by all employees in the workplace.

Secondly, there are clear indications that persons who wish to rely on their human rights to overturn the restrictive norms which have been established by disaster management instruments will most likely fail should they challenge the validity of the measures. Even though the Constitution protects several individual rights, these liberties are most likely destined to be weighed up against the public interest. An erosion of individual rights will most likely be permitted to curb the spread of diseases and to lessen the burden on stretched public health systems.

Thirdly, despite the protective measures of the LRA, there is a clear warning to all employees that a breach of COVID-19 policies and protocols could lead to their dismissal. They could potentially be brought to book by the employer based either on grounds of misconduct or incapacity.

Fourthly, it is advisable that employers should implement COVID-19 specific workplace policies that are aligned to the current legislative model and employees should read those policies. Trade unions and employees should be consulted over a period of time regarding such policies. Even though the courts have recognised that disciplinary codes constitute mere guidelines and not binding conditions of service, it would be best for employers to ensure fairness by employing clear principles that seek to ensure even-handedness at the workplace. However, once implemented, employers are entitled to hold their employees responsible if they do not comply with COVID-19 protocols that may include prescripts about vaccination, the wearing of PPE, sanitising and social distancing.

Fifthly, employers should be careful not to amend conditions of employment without reaching consensus with trade unions and their members. Such changes could lead to industrial action and the courts will

not hesitate to permit strike action that results from such unilateral changes.

Sixthly, trade unions and employers should embrace, rather than resist, technological platforms when it comes to consultation and collective bargaining during national disasters like the COVID-19 pandemic. The courts will not accept the excuse of technological inequalities as an excuse to withdraw from collective processes envisioned by the LRA.

Finally, there are still outstanding issues in respect of COVID-19 at the workplace which have not yet been properly considered and resolved by the courts. As alluded to, employers are permitted to introduce measures to compel employees to vaccinate at certain workplaces and under strict conditions. However, the Labour Court and the Constitutional Court have not provided finality on the controversial point of view of the CCMA in *Kgomotso Tshatshu v Baroque Medical (Pty) Ltd* where it was concluded that mandatory vaccination policies infringe upon every employee's right to bodily integrity and the right to freedom of religion. This is an important outstanding issue and guidance from the courts in this regard will greatly assist stakeholders during future pandemics. Nonetheless, it is submitted that the decisions of these early cases do provide some preliminary guidelines should the South African population be devastated by similar medical disasters in the future.