DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: YES/NO.
(2) OF INTEREST TO OTHER JUDGES: YES/NO.
(3) REVISED.

14/03/2022
DATE

SIGNATURE

THE JUDICIARY · REPUBLIC OF SOUTH AFRICA ·

IN THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Reportable

Case No: J49/22

In the matter between:

SOLIDARITY obo MEMBERS **First Applicant**

JOHETTA VAN RENSBURG **Second Applicant**

and

ERNEST LOWE, A DIVISION OF HUDAGO TRADING (PTY) LTD **Respondent**

Heard: **9 February 2022**

Delivered: **This judgment was handed down electronically by circulation to the parties' legal representatives by email. The date and time for hand-down are deemed to be 14 March 2022**

JUDGMENT

MAKHURA, AJ

Introduction

[1] In terms of their amended notice of motion, the applicants approached this Court seeking an order in the following terms:

> "2 Declaring the Respondent's admission policy, introduced by the Respondent on 13 December 2021, to be unlawful;
>
> 3 Declaring the refusal by the respondent to permit and allow the Second Applicant to tender her services and to perform her duties in terms of her contract of employment, to be in unlawful breach of the Second Applicant's contract of employment;
>
> 4 Directing the Respondent to comply with the terms of the Second Applicant's contract of employment; by permitting and allowing the Second Applicant to tender and render her services; at and to the Respondent; in accordance with the terms of the Second Applicant's contract of employment;
>
> 5 Directing the Respondent to pay the Second Applicant remuneration for the period 1 January 2022 until date of this order, and thereafter to pay her remuneration in the ordinary course as provided for in her contract of employment;
>
> 6 That the Respondent's obligation, provided for in prayer 5 above, to continue paying the Second Applicant's remuneration in the ordinary course; in terms of her contract of employment, is subject to the Second applicant rendering services in terms of such contract, if called upon to do so by the Respondent..."

[2] Having considered the prayers, the applicants seek an order declaring that the respondent's admission policy is unlawful and in breach of the second applicant's contract of employment. The respondent opposes the application and raises two preliminary points of exception and a special plea. In addition, the respondent argues that the matter is not urgent and that the applicants failed to make out a case on the merits.

[3] Based on the relief sought, if the Court grants the first prayer, it should follow that the other prayers should be granted. The same logic applies if the first prayer is dismissed.

Material facts

[4] The second applicant (employee) was employed with effect from 1 February 2021 in the internal sales division. She signed a contract of employment on 13 May 2021. I will come back to the terms of the contract later in this judgment.

[5] On 6 December 2021, the respondent issued a letter to the employees within its group of companies. The material part of the contents of the letter are:

> "South Africa cannot afford another lockdown and Hudaco cannot afford another lockdown. The only scientifically proven way to prevent lockdowns is to be vaccinated. Scientists advise that new variants emerge where there are high levels of unvaccinated people, so vaccination protects not only the individual but the entire community and the economy at large.
>
> It has been shown that it is overwhelmingly unvaccinated people who need to be hospitalized for Covid-19 and who put healthcare systems under strain around the world. The success of vaccines in containing both the spread and severity of the disease has been well documented. For example, data shared by Discovery Medical Scheme shows that an unvaccinated person who gets Covid is 20 times more likely to die from it than a vaccinated person who gets Covid. To date, Hudaco has implored all its people to get vaccinated and has done what it reasonably could to assist, including in some cases bringing nurses on site, providing transport to vaccination sites and allowing paid time off to go for vaccination. While most staff members have taken advantage of the opportunities presented, there are still some who have not.
>
> South Africa has an adequate supply of vaccines at no cost to the individual but many people are not taking the trouble to be vaccinated or have objections that are not well founded in science. Unvaccinated people are putting their families,

> friends, co-workers, jobs and the economy at risk. If everyone is vaccinated we will be able to get back to normal, create jobs and get the economy going again.
>
> In this context, Hudaco has performed an overall risk analysis and is formalizing a policy that will be adopted effective from 10 January 2022, aimed at saving lives and protecting employment. We want to provide a working environment in which all employees can be as safe from Covid-19 as possible, we want to get back to normal, we want to get the economy going and create jobs and the only way you can help us is by being vaccinated. Several countries around the world are making it mandatory and our government has recently indicated that South Africa will follow imminently. Various business bodies and labour unions are supportive and are seeking guidance from the courts in this regard."

[6] The employee subsequently informed the respondent that she was unwilling to receive the Covid-19 vaccination. She said that she was willing to undergo the weekly Covid-19 test at the respondent's expense. In response, the respondent informed the employee it would not pay for the Covid-19 test and that she would therefore not be allowed to enter its premises. The employee was informed that the 'no-work-no-pay' principle would apply and that disciplinary steps may be taken against her.

[7] On 9 December 2021, the first applicant (union) addressed a letter to the respondent wherein it recorded the respondent's intention to implement a policy that would require employees to produce proof of vaccination or Covid-19 test results on a weekly basis at the employees' cost. The union wrote further that:

> "Our member has further informed us that the process mentioned ... hereof was not included in her original terms and conditions of employment. You further failed to properly consult or achieve consensus with our member(s), or ourselves, regarding the requirement of a mandatory Covid-19 vaccination in order to continue her services, or the alternative process ... It follows that you as the employer in essence are adding a provision to the terms and conditions of employment, which would need to be agreed to in order to be lawful."

[8] The union further referred to the Consolidated Direction on Occupational Health and Safety Measures in Certain Workplaces dated 11 June 2021[1] (Direction) and argued that the respondent's decision or process, which was subsequently called "site entry policy" (herein called the admission policy), was in contravention of the Direction. The union then argued that the respondent failed to consider or properly consult on reasonable alternatives after the employee informed it of her intention not to receive the Covid-19 vaccination. In conclusion, the union demanded a written undertaking that the respondent would refrain from implementing the site entry policy and to arrange a meeting with them within five days, failing which they might resort to appropriate legal recourse.

[9] On 13 December 2021, the respondent issued a communication by email to all employees. The employees were notified that the respondent had decided that in the new year, admission to its premises would only be granted to employees who have been fully vaccinated or to those who produce a negative Covid-19 test result within the prior seven days. Therefore, access to its premises would be on the production of proof of vaccination or a negative Covid-19 test result. The respondent also stated that it would not contribute to the cost of the Covid-19 test, nor would it allow employees to take off paid working hours for the purpose of testing. The employees were informed that they were not forced to be vaccinated nor would they be forced to disclose their vaccination status. However, anyone who elects not to disclose his or her vaccination status would be required to provide proof of a negative Covid-19 test on a weekly basis.

[10] The above email was followed by another shortly thereafter. This email was apparently in support and clarification of the above. It stated the following:

> "Please understand that you will only be allowed onto Hudaco premises, ie. all Hudaco place [sic] of work, from 10 January 2022 onwards if:

[1] GNR.499 of 11 June 2021.

> you can produce your vaccination certificate, or proof that you have had your first Pfizer vaccination jab
>
> you can produce a negative Covid-19 test not older than 7 days, the cost of which would be for your personal account...
>
> A negative test result needs to be produced every 7 days going forward, or until you can produce proof of vaccination."

[11] On 15 December 2021, the respondent, through its attorneys, responded to the union's letter dated 9 December 2021. The respondent referred to sections 8 and 9 of the Occupational Health and Safety Act (OHSA)[2] which set out the employer's duty to provide and maintain, as far as is reasonably practicable, a working environment that is safe and without risk to its employees' health, as well as an undertaking that persons who are not its employees but may be directly affected by its activities are, as far as is reasonably practicable, not exposed to hazards to their health or safety. The respondent disputed that its admission policy constituted any breach of contract or constituted a unilateral change to the terms and conditions of employment. The letter went on to explain that many of the respondent's customers demand full vaccination compliance from their suppliers and that having employees who refuse vaccination exposed the respondent to loss of business which could result in mass retrenchments. In conclusion, the letter stated:

> "We are instructed that, should your member choose not to be vaccinated and also refuse to produce the required negative COVID-19 PCR tests, she will not be permitted to enter our Client's premises. Considering further that she will be seen as seeking to create a health and safety risk to our Client, she should expect the appropriate disciplinary action to be taken against her.

[2] Act No. 85 of 1993.

> Our Client takes its Health and Safety obligations very seriously and should your member refuse to comply with our Client's reasonable instructions, she should expect to find herself no longer employed by our Client."

[12] On 4 January 2022, the employee arrived at the respondent's premises to report for duty. She was informed to immediately leave the respondent's premises because she was unvaccinated and failed to produce a negative PCR Covid-19 test result. The union addressed a letter to the respondent on the same day which essentially repeated the contents of its letter of 9 December 2021 and its argument that the admission policy is in breach of the employee's contract of employment and sought an undertaking not to implement the admission policy failing which they would resort to the appropriate legal recourse. In its response on 5 January 2022, the respondent informed the union that its position remains unchanged.

[13] On the same day, 4 January 2022, the employee consulted a medical practitioner, Dr le Roux, and was issued with a Covid-19 vaccination exemption form. This is a standard form seemingly completed by a medical practitioner in which the employee's details were filled in and the medical practitioner indicated as follows:

> "Following consultation with the named individual, I have recommended that Covid-19 Vaccination be avoided for the following reason or reasons:
>
> This person has a medical condition or health concern for which in my professional opinion, COVID-19 vaccination is contraindicated."

At the end of the above, the medical practitioner wrote "*cardiac arrhythmia*".

[14] On 6 January 2022, the applicants' attorneys addressed a letter to the respondent. In addition to rehearsing the contents of the union's letters of 9 December 2021 and 4 January 2022, the applicants' attorneys wrote that the respondent:

> "unilaterally and in stark contrast to the provisions of the directive supra implemented a mandatory Covid-19 vaccination policy, and upon our client's member's reluctance to adhere to the said unilateral amendment, ordered her to vacate the workplace premised [sic]".

[15] The letter sought an undertaking by 11 January 2022 that the employee would be allowed to return to work and that the unilateral change in her employment conditions be stayed, pending the respondent's compliance with the provisions of the Direction.

[16] In response, the respondent's attorneys reiterated that the respondent stood by the admission policy. The letter then dealt with the vaccination exemption certificate and requested the employee to produce a specialist cardiac function report by 12 January 2022. The respondent stated that they would require the employee to attend an independent medical assessment at a medical practitioner of its office. The letter concluded that the specialist report, independent medical assessment and the employee's conduct would determine what action would be taken against the employee and whether she would remain in the respondent's employment.

[17] Subsequently, the respondent was provided with an Electrocardiogram (ECG) report. No cardiologist report was produced.

[18] On 12 January 2022, the applicant submitted a 'referral letter' which was issued by Dr le Roux. The referral stated that the employee was seen by Dr le Roux 'for the first time' on 4 January 2022, "*with a standing history of cardiac rhythm abnormalities*" and the medical examination confirmed the presence of arrhythmias.

[19] On 13 January 2022, the respondent's attorneys addressed an email to the applicants' attorneys reiterating the respondent's stance that the admission policy would remain in place and that the employee would not be granted any exemption.

[20] This urgent application was issued and filed on 21 January 2022, seeking a final order *inter alia* declaring the admission policy to be unlawful.

Applicants' case

[21] Although the applicants approached the Court alleging breach of the second applicant's contract of employment, the founding affidavit is riddled with repetitive arguments about alleged breaches of particular sections of the Constitution of the Republic of South Africa, 1996 (sections 9, 10, 12, 14 and 23) and section 7(1) of the Employment Equity Act[3] (EEA). The applicants have also suggested that the employee's "*right not to be subjected to a lockout which arises from an unlawful instruction*" requires protection.

[22] The applicants' counsel has, however, indicated to the Court that their case is not based on the Constitution. He said that their claim is one of breach of contract, as per the notice of motion as amended. Therefore, all allegations about breach of the Constitution and the EEA are of no relevance to these proceedings.

[23] Throughout the founding affidavit, the applicants have argued their case on the assumption that the admission policy constitutes a mandatory vaccination policy. The argument goes further that the admission policy falls foul of statutory and other prescripts.

[24] The upshot of the applicants' case is that they want the employee's contractual rights restored. This is what they say their application is about:

> "...this dispute concerns the respondent's decision to adopt an admission 'policy' which prohibits any unvaccinated employee entry into the workplace; and the respondent's decision to deny these employees the right to tender/render their services; and to withhold from these employees their salaries, in circumstances where they cannot produce, on a weekly basis, a negative Covid-19 test result, which is to be paid for by themselves; and which it [wants] to be conducted outside normal hours of work."

[25] The applicants then continued to explain what the application is not about. They say that the application is not concerned with whether an employer is entitled to

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[3] Act No. 55 of 1998.

implement a mandatory vaccination policy. They then reiterated that the application is limited to:

25.1 Whether the respondent has followed the prescribed procedure and considered all alternatives prior to implementing the policy denying the employee entry into the workplace and withholding her salary;

25.2 Whether the policy is reasonably practicable; and

25.3 Whether the respondent acted unlawfully in denying the employee entry to the workplace, withholding her salary and requiring her to produce a weekly negative Covid-19 test result in the circumstances where:

25.3.1 there is a valid and enforceable contract of employment;

25.3.2 the employee tendered her services;

25.3.3 the respondent failed to evaluate the risk of breach of the OHSA;

25.3.4 the respondent can reasonably accommodate the employee; and

25.3.5 the employee has a valid and "*reasonable medical reason for not complying with the mandatory vaccination policy*".

[26] The applicants referred to the provisions that have been allegedly breached. There are five provisions upon which the applicants rely. They are:

26.1 Clauses 15(b) and (c), which require employees to request from management policies that affect the performance of their daily duties, and further require employees to understand that not all policies need to be reduced to writing;

26.2 Clause 17, which deals with the right to search employees and conduct medical testing. This clause provides that the employee's employment is conditional on her continued health and fitness to perform her functions and that, should any of the respondent's clients or sites

require medical testing or fitness, she may be required to undergo the applicable test;

26.3 Clause 27, dealing with health and safety, provides that the employee "*will strictly adhere to all health and safety rules and regulations*" that are promulgated by the respondent;

26.4 Clause 32(b) which provides that the agreement and the legal relations between the parties shall be determined in accordance with the laws of the Republic of South Africa; and

26.5 Clause 36(c), which provides that no alteration, variation or cancellation by agreement of, addition or amendment to or deletion from the agreement shall be of any force or effect unless reduced to writing and signed by both parties.

[27] The applicants, having referred to the above provisions, then argue that the contract does not contain any provision to the effect that the employee's continued employment is subject to producing a negative PCR test at her own expense. In addition, the applicants argue that the contract does not contain any requirement or condition of "*mandatory vaccination*" and that if she is not fully vaccinated, she would be required to pay for the test.

[28] The applicants argue that in addition to the express terms of the contract, the provisions of OHSA together with all regulations, schedules and directives constitute implied, alternatively tacit terms of the employee's contract of employment. Further, they allege that the Direction must be read as constituting implied, alternatively, tacit terms and conditions of her contract of employment.

[29] The applicants submit that the respondent seems to hold a view that:

> "it is entitled to implement a mandatory vaccination policy; without following any due process; and without having regard to ant threat and/or breach of the

applicant's contract of employment; consequent to the respondent's disregard of the applicant's Constitutional or statutory rights."

[30] The argument is developed further that the "*mandatory vaccination and admission policy*" does not comply with the Direction and OHSA. Referring to the Direction, the applicants argue that the "*mandatory vaccination and admission policy*" is non-compliant for the following reasons:

30.1 The respondent failed to conduct a risk assessment;

30.2 The respondent failed to consult on the risk assessment and plan which it intended to implement. Put simply, the respondent failed to consult the union or the employees before implementing the admission policy;

30.3 The respondent failed to identify vulnerable employees;[4]

30.4 The respondent failed to provide reasonable accommodation to the vulnerable employees;

30.5 The respondent failed to determine which part of the workplace or positions are most vulnerable to transmission and contamination and why;

30.6 The respondent failed to determine the severity of the threat posed by Covid-19 at the specific workplace and in the defined areas of the workplace; and

30.7 The respondent failed to consider the employees' Constitutional rights and the right to (or not to) be vaccinated.

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[4] In terms of clause 1 of the Direction, "vulnerable employee" is:

"(a) any employee with known or disclosed health issues or comorbidities or any other condition that may place the employee at a higher risk of complications or death than other employees if infected with SARS-CoV-2 virus; or

(b) above the age of 60 years who is at a higher risk of severe COVID-19 disease or death if infected."

[31] The applicants acknowledged that the Direction has opened the door to a mandatory vaccination policy subject to several procedural prescripts. Those prescripts appear in the preceding paragraph. The applicants argue that the undertaking of a risk assessment prior to adopting and implementing a "*mandatory vaccination policy*" is a requirement.

[32] Referring to sections 8, 17 and 19 of the OHSA, they argued that the respondent breached these provisions due to its failure to conduct a proper risk assessment, to consult with the employees and to reasonably accommodate the employee, considering that the employee was exempted from being vaccinated. In conclusion, the applicants argue that the weekly PCR test that the employee would be required to produce will cause an unjustified hardship.

Respondent's case

[33] The respondent takes a swipe at the applicants' assumption that the admission policy constitutes a mandatory vaccination policy. It disputes that the admission policy is a mandatory vaccination policy and argues that the applicants have failed to show the basis upon which the admission policy is a mandatory vaccination policy.

[34] Having disputed that it has implemented a mandatory vaccination policy, the respondent further disputes that it breached the employee's contract of employment. It relies on various provisions of the contract, inter *alia*:

34.1 Clause 8(a)(i), which sets out the employee's duties and responsibilities. It provides that the employee will "*comply with all directives given to him/her by the Company and with all rules, regulations and policies laid down from time to time by the Company…*";[5]

[5] See also clause 8(a)(xix) of the contract of employment.

34.2 Clause 8(a)(x), that she accepts that the absence of a written rule or policy will not affect the enforcement of such rule or policy or the validity or fairness of disciplinary action against the employee based on such rule or policy;

34.3 Clause 15(a), which provides that all employees are subject to the policies, procedures and code of conduct of the respondent and that these may be amended at any time at the respondent's sole discretion;

34.4 Clause 27(a), which requires the employee to "*strictly adhere to all health and safety rules and regulations*" that are promulgated by the respondent; and

34.5 Clause 34(a), which provides as follows:

> "It is recorded that any right of access the employee has to any premises of the Company is dependent upon the employee actually rendering performance and actually fulfilling his/her duties to the Company in terms of their employment contract. Should any employee, for any reason whatsoever, not render actual performance or fulfil actual duties as aforesaid, the Company will be entitled to require the employee(s) concerned to immediately vacate the Company premises. Unless otherwise agreed, the employee agrees that they will not be entitled to any remuneration for any period that they are denied access to the Company's premises."

[35] After referring to the above provisions, the respondent argues that, contrary to the applicants' contention that the respondent breached the employee's contract, it is the employee who in fact breached the contract of employment.

[36] The respondent argues that the admission policy was introduced in compliance with sections 8 and 9 of the OHSA, that it is not mandatory as the employees have the option to produce a negative Covid-19 test result, that there was a risk

assessment conducted and that there was extended consultation with employees when the risk assessment was conducted between July 2021 and December 2021.

[37] On the above basis, the respondent denies any breach of the contract of employment, denies that it has unilaterally changed the terms and conditions of the employee's contract of employment, and therefore asserts that there is nothing to restore. The respondent also disputes that the employee has a contractual right to tender performance and be compensated. In respect of the Direction, the respondent submits that the applicants seek to apply the mandatory vaccination guidelines to a non-mandatory admission policy. Based on the above, the respondent submits that the application must fail with costs.

Urgency

[38] I must first decide whether the matter is urgent. The basis for urgency pleaded for by the applicants is that they seek to enforce the employee's contractual rights. It is pleaded that the employee has a right not to be subjected to a 'lockout' arising from an unlawful instruction, the right to bodily integrity and human dignity, a contractual right to tender performance and a statutory right against forced medical testing. The respondent disputed urgency and essentially argued that the applicants should have at the very least brought the application in December 2021 and that this Court should dismiss the application on urgency.

[39] Although the grounds of urgency are somewhat flimsy, I am mindful of the fact that this is an application to enforce the right contained in a contract of employment and that the employee continues not to report for duty. The respondent has contributed to the timing of this application in that it has entertained and engaged the applicants on the issue of whether the employee could be exempted from the application and implementation of the admission policy. The decision that the employee would not be exempted from the admission policy was communicated on 13 January 2022, after the exchange of medical reports.

[40] From 13 January 2022, it took the applicants 7 days to bring this application. It was argued on behalf of the applicants that the matter is important and that, inherently, this Court entertains matters relating to alleged breaches of contracts of employment on an urgent basis.[6] For the above reasons, it is my view that the issues raised in this matter should be entertained by this Court. Accordingly, I find that the application is urgent.

Exception and special plea

[41] The respondent has raised two preliminary points in the form of an exception and a special plea. The exception raised is that the application lacks the averments to sustain a cause of action. The special plea raised is that the employee has indemnified the respondent against the claim or relief sought in these proceedings.

[42] Regarding the exception, there are no provisions in the Rules of the Labour Court dealing with exceptions to pleadings. Rule 23 of the Uniform Rules of Court[7] would therefore apply. Rule 23(1) of the Uniform Rules of Court requires the respondent to notify the applicant to remove the cause of complaint. Considering that this is an urgent application, the respondent could have also asked for this cause of complaint to be removed within a shorter period. The applicant was not afforded such an opportunity.

[43] Rule 23(3)[8] makes it clear that wherever an exception is taken to any pleading, no plea or replication or other pleading over shall be necessary. Notwithstanding this, and demonstrating the challenge of raising exceptions in urgent proceedings, the respondent proceeded to respond to the allegations in the founding affidavit after arguing that the pleadings lack the averments to sustain a cause of action.

[44] For the reasons set out above, I find that the respondent failed comply with the rules and did not ask for the non-compliance to be condoned when raising its

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[6] See: *Ngubeni v NYDA* (2014) 35 ILJ 1356 (LC) and *Solidarity obo members v SABC SOC Ltd* (2016) 37 ILJ 2888 (LC)

[7] Rules regulating the conduct of the proceedings of the several provincial and local divisions of the High Court of South Africa (Uniform Rules of Court).

[8] Uniform Rules of Court.

exception. The respondent is not prejudiced as it has answered to the allegations raised in the founding affidavit. For this reason, the respondent's exception must be dismissed. It has in any event no merit.

[45] Regarding the special plea, the respondent argues that the employee has indemnified it against "all" claims and that she is therefore precluded from seeking the relief sought in these proceedings. The relevant provision reads that the employee "*indemnifies the Company against all claims brought against the Company as a direct result of the employee's employment with the Company*".

[46] The application before me is for an alleged breach of the same contract and enforcement of the rights contained in the same contract. It is, respectfully in my view, incomprehensible how any party to a contract can be kicked out of this Court when she is trying to enforce the rights contained in the very same contract and when she is also claiming that the respondent has breached the terms of that contract. In any event, the employee has not waived her right to bring a claim against the respondent.

[47] I am therefore unable to agree with the respondent's submission that the employee is precluded from bringing this application. Accordingly, the special plea is meritless and is hereby dismissed.

Analysis: the breach of contract

[48] The case brought before this Court is based on lawfulness. Whether the admission policy is fair or reasonable is not an issue before me. The application is also not about whether the admission policy infringes the employee's rights contained in the Constitution nor is it about non-compliance with the EEA. The applicants made it clear that the application is not about whether the respondent is entitled to implement a 'mandatory vaccination policy'. The applicants' case is that the respondent is in breach of the employee's contract of employment.

[49] The lawfulness attack on the admission policy is twofold. The first is based purely on the contract of employment, and the second is based on the Direction and/or OHSA. I deal with these below.

Was there a breach or unilateral change to the terms of the contract of employment?

[50] The starting point is to consider the relief sought in these proceedings. The applicants seek an order declaring the admission policy to be unlawful. The argument is that the admission policy is unlawful because it breaches the employee's contract of employment. This is the reason the applicants approached the Court on an urgent basis - to restore the employee's contractual rights. In such cases, the applicant must prove the existence of the contract, plead what was done or not done and demonstrate that because of the action or inaction on the part of the respondent, there has been a breach of her contract of employment.

[51] The existence of the contract of employment is not in dispute. The applicant referred to various provisions of the contract. Thereafter, they argued that the contract does "*not contain any provision, to the effect that the second applicant's continued employment is subject to producing a negative PCR test weekly*", and certainly not at her own expense.

[52] Essentially, the applicants were unable to point to any specific term of the contract that was breached because of or by the adoption of the admission policy. Further, there was no provision of the contract of employment that the applicants alleged was unilaterally changed by the introduction of the admission policy.

[53] In the absence of any specific reliance on a particular term and/or condition of the contract of employment that has been breached or unilaterally changed, I am unable to find that there was any breach of contract that occurred because of the introduction and implementation of the admission policy. Equally, there are no provisions of the contract of employment that need to be restored as the employee's contract has not been changed.

Breach of the Direction and/or OHSA, which manifested into a breach of the employee's contract of employment

[54] The applicants' argument is that the admission policy was implemented without consulting the employees on the risk assessment and plan, as required by the Direction. They argue further that the admission policy was therefore unilaterally introduced and enforced. They refer to sections 8 and 13 of the OHSA and argue that the right of the employee to receive information on the hazards to which she is exposed in the workplace, and the measures taken to address such risks, have been violated. The applicants also referred to sections 17 and 19 of the OHSA as other provisions that were breached because of the respondent's failure to consult with the employees.

[55] Clause 8 of the OHSA[9] is unambiguous. It requires employers to provide and maintain, "as far as is reasonably practicable", a working environment that is safe

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[9] Section 8 of OHSA provides:

> **"8. General duties of employers to their employees**
>
> (1) Every employer shall provide and maintain, as far as is reasonably practicable, a working environment that is safe and without risk to the health of his employees.
>
> (2) Without derogating from the generality of an employer's duties under subsection (1), the matters to which those duties refer include in particular -
>
> (a) the provision and maintenance of systems of work, plant and machinery that, as far as is reasonably practicable, are safe and without risks to health;
> (b) taking such steps as may be reasonably practicable to eliminate or mitigate any hazard or potential hazard to the safety or health of employees, before resorting to personal protective equipment;
> (c) making arrangements for ensuring, as far as is reasonably practicable, the safety and absence of risks to health in connection with the production, processing, use, handling, storage or transport of articles or substances;
> (d) establishing, as far as is reasonably practicable, what hazards to the health or safety of persons are attached to any work which is performed, any article or substance which is produced, processed, used, handled, stored or transported and any plant or machinery which is used in his business, and he shall, as far as is reasonably practicable, further establish what precautionary measures should be taken with respect to such work, article, substance, plant or machinery in order to protect the health and safety of persons, and he shall provide the necessary means to apply such precautionary measures;
> (e) providing such information, instructions, training and supervision as may be necessary to ensure, as far as is reasonably practicable, the health and safety at work of his employees;
> (f) as far as is reasonably practicable, not permitting any employee to do any work or to produce, process, use, handle, store or transport any article or substance or to operate any

and without risk to the health of its employees. This is a duty that employers owed to employees prior to Covid-19, and the duty remains unchanged. Employers are enjoined, in terms of section 8(2)(b) of the OHSA, before resorting to personal protective equipment, to ensure that they take such steps, as may be reasonably practicable, to eliminate or mitigate any hazard or potential hazard to the safety or health of employees. Section 8(2)(f) specifically enjoins employers, as far as is reasonably possible, not to allow employees to do any work unless certain precautionary measures, such as section 8(2)(b), have been taken. Section 9(1) extends the employer's duties in section 8 to non-employees.

[56] The Direction came into effect on 11 June 2021. One of the arguments raised by the applicants is that the Direction takes the form of binding law. In *Dawnlaan Beleggings (Edms) Bpk v Johannesburg Stock Exchange and others*[10], the Court found that if a provision of an Act contemplates or anticipates consequent subordinate legislation, and rules are consequently validly promulgated in terms of that enabling Act, the promulgated rules constitute binding law in the form of subordinate legislation. In this instance, the Direction was issued in terms of regulation 4(10) of the Regulations made under section 27(2) of the Disaster Management Act[11]. Regulation 4(10)[12] provides that:

> "Any Cabinet member may issue and vary directions. as required, within his or her mandate, to address, prevent and combat the spread of COVID -19, and its impact

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plant or machinery, unless the precautionary measures contemplated in paragraphs (b) and (d), or any other precautionary measures which may be prescribed, have been taken;
(g) taking all necessary measures to ensure that the requirements of this Act are complied with by every person in his employment or on premises under his control where plant or machinery is used;
(h) enforcing such measures as may be necessary in the interest of health and safety;
(i) ensuring that work is performed and that plant or machinery is used under the general supervision of a person trained to understand the hazards associated with it and who have the authority to ensure that precautionary measures taken by the employer are implemented; and
(j) causing all employees to be informed regarding the scope of their authority as contemplated in section 37(1)(b).

[10] 1983 (3) SA 344 (W) at 365C – G.
[11] Act No. 57 of 2002, as amended.
[12] Government Gazette No 43258, 29 April 2020

on matters relevant to their portfolio, from time to time, as may be required, including –

(a) disseminating information required for dealing with the national state of disaster;

(b) implementing emergency procurement procedures;

(c) taking any other steps that may be necessary to prevent an escalation of the national state of disaster, or to alleviate, contain and minimise the effects of the national state of disaster; or

(d) taking steps to facilitate international assistance."

[57] It is evident that the Direction falls under the scope of that contemplated by regulation 4(10), especially regulation 4(10)(c). As such, the Direction is of the status of binding law in the form of subordinate legislation. The question now is whether the Direction is applicable to this matter.

[58] The applicants have relied predominately on clause 3 and annexure C to the Direction. Clause 3 requires employers to undertake a risk assessment to give effect to the minimum measures required by the Direction, in accordance with section 8 and 9 of the OHSA, taking into account whether the employer "*intends to make vaccination mandatory and if so, to identify those employees who by virtue of the risk of transmission through their work or their risk for severe COVID-19 disease or death due to their age or comorbidities that must be vaccinated*". Clause 4(2) provides that if the employer "*decides that vaccination is mandatory in respect of the employees identified in terms of section 3(1)(a)(ii), the vaccination plan must comply with any applicable collective agreement and take into account the guidelines set out in Annexure C to this Direction.*"(Own emphasis)

[59] Annexure C sets out the guidelines to be followed if an employer decides to make vaccination mandatory. Clause 2 of annexure C provides that the guidelines are stated generally and departures from them may be justified in proper circumstances.

[60] Save for the above provisions of the Direction (certain provisions of clause 3, clause 4(2) and annexure C), the remainder of the Direction comprises of general provisions regarding general protective measures and safety precautions in response to Covid-19. That these provisions do not apply specifically to mandatory vaccination is borne out by the fact that substantively similar provisions were previously issued in earlier Consolidated OHS Directions prior to the introduction of Covid-19 vaccinations. Furthermore, that the Direction specifically contemplates mandatory vaccination, the maxim of *expressio unius exclusio alterius* applies, and implies that the other provisions in the Direction do not apply to mandatory vaccination.

[61] As already stated elsewhere above, the applicants have brought this application on the assumption that the admission policy constitutes a mandatory vaccination policy. To invoke the provisions of the Direction upon which the applicants rely, it must first be established whether the employer had introduced a mandatory vaccination policy.

Did the respondent adopt a mandatory vaccination policy?

[62] The applicants knew as early as 15 December 2021 that the respondent's position is that its admission policy does not constitute a mandatory vaccination policy. They have however elected not to plead and demonstrate how the admission policy amounts to a mandatory vaccination policy. They proceeded on the assumption that the employees were mandated to vaccinate.

[63] The admission policy is in the form of the two emails sent to the employees on 13 December 2021. To do justice to the policy, the two emails are reproduced below. The first email from Ramona Mackenzie to employees sent at 10h37 reads:

> "Good Morning Colleague [sic],
>
> Trust you are all doing well, please be advise (sic) that Hudaco have [sic] decided that in the new year, admission to all Hudaco premises will only be granted to employees who have been fully vaccinated or who have had a negative Covid test

within the prior seven days. Proof of vaccination status or recent Covid test will be required.

- The company will not contribute to the cost of Covid tests as vaccines are free.
- Employees will also not be allowed to use paid working hours to get tested.
- Employees will not be forced to be vaccinated, nor will they be compelled to divulge their vaccination status, which it is their right to keep confidential.
- Anyone who wishes not to divulge it will have the alternative of producing evidence of a negative Covid test each week instead.

All staff already vaccinated should please forward their respective certificates to the Human Resources Department before the 3rd January 2022, and those who has (sic) chosen not to be vaccinated, should then submit their negative results before 7:30 on Monday morning to their respective managers.

I urge all of you to embrace this initiative and to work with us in your own best interests, in the best interests of everyone close to you and the (sic) in the best interests of the country as a whole." (Own emphasis)

[64] The second email, which was sent shortly after Mackenzie's email above, reads as follows:

"Dear All,

In support of Ramona's communication, I want to be clear on the following:

Please understand that you will only be allowed onto Hudaco premises, ie. all Hudaco places of work, from 10 January 2022 onwards, if:

- you can produce your vaccination certificate, or proof that you have had your first Pfizer vaccination jab

- you can produce a negative Covid-19 test not older than 7 days, the cost of which would be for your personal account as Ramona mentioned.

A negative test result needs to be procured every 7 days going forward, or until you can produce proof of vaccination.

Should you be unable to work due to the above reasons, ie. not producing any of the two types of the documents, unfortunately the no-work-no-pay principle will be applied as you would not be able to work.

This will remain in place until proof of either document type can be supplied."

[65] It is common cause that the employee indicated that she elected not to be vaccinated. For employees who are not vaccinated, their alternative is to provide the Covid-19 test result every seven days. The applicants do not challenge Covid-19 testing as a necessary or reasonably practicable measure taken by the respondent to mitigate against the risk of Covid-19. The closest they have come to complaining about the testing in these proceedings is in relation to the expense of the weekly PCR test, which they say, *"can be regarded as an unjustified hardship"*. The respondent has indicated in these proceedings that the Rapid Antigen Testing would be acceptable. In any event, this case is not about who should bear the costs of the test and it is not for this Court to decide the reasonableness or otherwise of the respondent's decision to not carry the costs of the test

[66] What is clear from the admission policy is that for employees to access the premises, they have two options. Firstly, employees may decide to vaccinate and produce proof thereof. However, for those who choose not to vaccinate, they are not left without any option. They must provide the Covid-19 test results every seven days. It is not the applicants' case that the weekly Covid-19 PCR test is unreasonable. In any event, this case does not deal with the reasonableness or otherwise of the respondent's conduct or the admission policy. There is no suggestion that the PCR test is unlawful. The argument is that requiring the PCR

test result on a weekly basis is in breach of the contract of employment. I have already decided that I found no breach of any provisions of the contract nor any unilateral change of the terms of the contract.

[67] The employee understood that she does not have to be vaccinated for her to access the premises. She went to obtain a medical certificate purporting to exempt her from vaccination. Whilst the respondent raised many questions relating to this exemption certificate, that is not an issue before me. The point is that the respondent engaged the employee with regard to this exemption certificate and even offered that she should consult a specialist of their choice. Although not set out as part of its admission policy, this is another factor that shows that unvaccinated employees may still access the respondent's premises. Significantly, the admission policy does not say that unvaccinated employees would not be allowed entry into its premises.

[68] The applicants argue that the letter dated 6 December 2021 issued to the employees demonstrates that the respondent wanted its employees to be vaccinated and that its purpose was to 'enforce vaccinations'. Whilst employees may have been encouraged about the science relating to vaccination, I am unable to agree that the respondent wanted to make vaccination mandatory. Even if that may have been the respondent's preference, the fact is that the admission policy did not require employees to disclose their vaccination status nor has it determined that only vaccinated employees would be allowed to access its premises and continue working.

[69] Based on the above, I am unable to find that the admission policy constitutes a mandatory vaccination policy. The provisions relied upon by the applicants are therefore not applicable and are of no relevance to the matter because the respondent's admission policy is not a mandatory vaccination policy. The applicants' argument that the respondent was required to consult the employees or the union on the risk assessment and vaccination plan falls away. The respondent has argued that it conducted a risk assessment and attached same to

its answering affidavit. This allegation was not disputed by the applicants in their replying affidavit. It follows that the admission policy cannot be and is not in breach of the Direction and the OHSA. In fact, the respondent acted in accordance with the OHSA and the provisions of the Direction in its duty to provide and maintain, as far as is reasonably practicable, a working environment that is safe and without risk to its employees' health.

[70] The applicants have failed to make out a case that the admission policy is unlawful. It follows that the other prayers in the notice of motion must equally fail. The application is therefore bound to fail.

[71] In the premises, the following order is made:

Order:

1. The respondent's exception and special plea are dismissed.

2. The application is dismissed.

3. There is no order as to costs.

M. Makhura

Acting Judge of the Labour Court of South Africa

Appearances

For the Applicants:	Adv. C Goosen with Adv. D Groenewald
Instructed by:	Serfontein, Viljoen & Smart Attorneys
For the Respondent:	Mr Q. Donaldson of Donaldson Attorneys