

Arbitration Award

Case Number: WECT13114-21

Commissioner: Winnie Everett and Laurie Warwick

Date of Award: 7-Mar-2022

In the **ARBITRATION** between

Dale Dreyden

(Union/Applicant)

and

Duncan Korabie Attorneys

(Respondent)

APPROVED

Union/Applicant's representative: Mr. D Dreyden _____

Respondent's representative: Mr. D Korabie _____

DETAILS OF HEARING AND REPRESENTATION

1. The arbitration hearing took place on 15 February 2022 as a hybrid sitting at the offices of the CCMA in Cape Town, with the lead arbitrator connecting through a digital link. Due to the novel nature of disputes arising from mandatory vaccination in the workplace, the CCMA elected to appoint the CCMA Director, Mr. Cameron Sello Morajane as lead arbitrator, along with two Senior Commissioners, namely Ms. Winnie Everett and Ms. Laurie Warwick, to hear the matter. Due to connectivity problems, Commissioner Morajane stepped down as lead arbitrator before hearing of the merits of the matter commenced. Senior Commissioners Everett (as lead arbitrator) and Warwick proceeded to hear the matter.
2. Both the Applicant, Mr. Dale Dreyden, and the Respondent, Duncan Korabie Attorneys per Mr Duncan Korabie, were present and represented themselves.

ISSUE TO BE DETERMINED

3. We must decide whether the Applicant's dismissal by the Respondent was substantively and procedurally fair; and in the event that the dismissal was either procedurally or substantively unfair, or both, the appropriate relief to be ordered in terms of section 193 of the Labour Relations Act 66 of 1995 ("the LRA").

BACKGROUND INFORMATION

4. Respondent is a law firm that is owned and operated by Duncan Ernest Korabie and situated in Wellington, Western Cape. The Applicant was appointed by the Respondent as a trainee in terms of a Contract of Articles from 28 August 2018. The letter of appointment, dated 5 September 2018, states that the tenure of the appointment was subject to the availability of the Contract of Articles. Applicant was initially paid a stipend of R2000.00 per month, which was later increased to R2500.00.
5. On 30 August 2021, for reasons set out in this arbitration award, Applicant was notified that his services were terminated without notice. His last day of work was 31 August 2021.
6. The Applicant referred the dispute to the CCMA on 20 September 2021 in terms of section 186 of the LRA. The Applicant cited "Refusal to vaccinate for Covid-19" as the ground for dismissal.
7. The matter was scheduled for a con-arb process on 11 November 2021, but, following an objection to con-arb filed by the Respondent on 22 October 2021 and in compliance with CCMA Rule 17(2) read with section 191(5A)(c) of the LRA, the arbitration did not commence immediately after the certificate of outcome was issued certifying that the dispute remained unresolved.
8. On 29 November 2021, the Applicant submitted the completed form LRA 7.13 Request for arbitration in terms of section 136 of the LRA. In this request, and as elaborated in his "Heads of Argument" that

accompanied the referral, he submitted that the dismissal was automatically unfair as the reason for dismissal was his refusal to vaccinate against Covid-19. The Heads of Argument further cited a breach of contract and a claim for damages related to this alleged breach.

JURISDICTION TO ARBITRATE

9. These claims were the source of the presiding Commissioners' inquiry into whether the CCMA had jurisdiction to arbitrate the dispute. Initially the Applicant indicated the intention to pursue the route of automatically unfair dismissal as well as his claim for damages for breach of contract, meaning that the matter would need to be adjudicated by the Labour Court.
10. Section 141(1) of the LRA allows both parties to give written consent for a dispute that a party would otherwise be entitled to refer to the Labour Court for adjudication, to be arbitrated under the auspices of the CCMA. The employer initially consented to arbitration but soon thereafter, withdrew consent after taking legal advice. In the absence of a written agreement, the commissioners allowed withdrawal of the verbal consent meaning, once again, that the matter would need to be adjudicated by the Labour Court.
11. The commissioners were mindful of the Labour Court judgment in *Ngobe v JP Morgan Chase Bank* (2015) (JR1893/2012, JR1882/2012) [2015] ZALCJHB 317; (2015) 36 ILJ 3137 (LC) in which the Labour Court expressed concern that there was a trend of commissioners too easily finding they lacked jurisdiction to arbitrate because of some allegation that the dismissal was automatically unfair.
12. After further explanation of the types of dismissal disputes that may be arbitrated by the CCMA and those that must be adjudicated by the Labour Court, the Applicant then elected not to proceed on the basis of an automatically unfair dismissal, but rather for the CCMA to arbitrate the dispute on the basis of a ground as contemplated in section 188(1)(a)(i) – dismissal on the basis of either conduct or capacity. This “reframing” of the dispute at the commencement of arbitration was accepted as it was in line with the applicant's original referral.
13. The commissioners proceeded on the basis that they were satisfied that the CCMA had jurisdiction to arbitrate the dispute.

SURVEY OF EVIDENCE AND ARGUMENT

Employer's Evidence

14. Mr Duncan Ernest Korabie (“Korabie”) testified that he had been in practice for 14 years for his own account. Duncan Korabie Attorneys is based in the Western Cape town of Wellington and employs three people (he employed seven people at the time that Applicant's services were terminated).

15. One of the areas of focus of the practice was that of work related to the Zondo Commission of Inquiry into State Capture ("Zondo Commission"). In 2019, the Practice experienced a cyber-attack, followed by three further such attacks. In 2020 the Practice was subjected to a physical break-in and specific information was stolen. Due to the latter, the Practice had to take measures to increase its security, in particular the protection of digital information on the server.
16. The added vulnerability to security breaches meant that staff, including the Applicant, could not work from home during the Covid-19 period.
17. Following an engagement with the Applicant's mother in 2018, Korabie agreed to appoint the Applicant as a candidate attorney while the Applicant studied law. The 'terms of reference' was that Applicant would work for free during that period, but the Respondent decided to pay a nominal amount of R2000-00 (this was increased to R2500-00 and remained so until Applicant's services were terminated). The applicant was able to study alongside his work and he could take a month study leave during exam time. Applicant was allowed to use the resources of the office to do research and to use the textbooks related to his studies.
18. Respondent explained that Articles of Clerkship can be for a period of five years when the person concerned is studying towards an LLB. That would have taken Applicant's Clerkship until August 2023. However, at the time of his appointment, Applicant was already studying and he completed his Bachelor of Laws (LLB) degree in August 2021 (although the Applicant did not advise the employer of this fact at the time). Applicant would then be required to apply to the Legal Practice Council for a reduction of the period of practical vocational training from five years to two years in terms of section 13(3) of the Attorney's Act 53 of 1979. Applicant had not made such an application as at the time of the arbitration hearing. On this basis, Korabie submitted that his duty only extended for the period of Articles of Clerkship. Furthermore, Korabie submitted that he had not created any impression that Applicant would be employed beyond his period of articles.
19. Korabie provided testimony on why he required members of staff to be vaccinated against Covid-19.
20. In 2019, Korabie became gravely ill and was diagnosed with Addison's Disease, a disease that prevents one's body from producing cortisone, a hormone that is required to deal with stress.
21. This disease can be life threatening when the body is under stress and fighting an infection. On 29 August 2019, Korabie collapsed at home with multiple organ failure. He was also very ill in September 2019 when doctors discovered that a gland in his brain was aggravating the medical matter. Staff were advised of his diagnosis and the implications thereof. During this time, Korabie relied on Applicant to attend to matters in the office, including drafting applications for postponement. Korabie would delegate and oversee work during the period of his confinement.
22. Korabie, whose house and practice are on the same property, fully returned to work in March 2020. It was also during this period that South Africa experienced its first reported Covid-19 case and there were

speculations in the media regarding the health impact of Covid-19. Doctors advised Korabie to minimise his exposure to the virus as far as possible.

23. On 24 March 2020, and following President Ramaphosa's announcement of the national Covid-19 shutdown that was to commence on 27 March 2020, Korabie convened a meeting with the staff, including Applicant. At arbitration, Korabie submitted the original copy of the handwritten notes that he wrote shortly after that meeting. Korabie stated that at that stage, doctors had advised of the potential for a vaccine and that he had told staff that they would be required to take the vaccine as and when it became available. He had also asked staff to exercise caution so as to avoid being infected with Covid-19. Korabie had go so far as to tell Applicant and his colleagues words to the effect that "if I find you on the street during lockdown or at parties, you are gone." He explained how one staff member had attended a party before the lockdown and became infected with the virus and then subsequently infected another staff member (both names were provided at arbitration) who became very ill and who is still ill.
24. During cross-examination, Applicant contested the significance of the handwritten notes on the basis that these did not constitute formal minutes of a meeting and that they were not signed by members of staff. Applicant stated that they could have been written at any stage and did not constitute evidence of what transpired at the meeting. Korabie denied this and stated the fountain pen he used to write the notes formed part of the items that were stolen from the practice in 2020. He indicated that there was no requirement for members of staff to sign his handwritten notes of what was said at the meeting.
25. Korabie explained that his survival was linked to the preservation of the law firm and the employment and livelihoods of his employees and in turn, their dependents. He could not allow members of staff to put him in a position that they endangered his health or that of others. In addition, Korabie was the sole breadwinner for his two small children, and he needed to survive in order to secure their future.
26. Korabie's fear of the consequences should he fall ill were enhanced when in August 2020 he contracted pneumonia and was severely ill. Although this incident was not directly linked to Covid-19, it demonstrated the extent of his medical vulnerability.
27. For security reasons Korabie could not allow staff to work remotely with work files and computers during lockdown. In the Applicant's case, Korabie could also not allow him to work remotely due to the added issue of his Contract of Articles which required Applicant to work under Korabie's supervision.
28. According to Korabie, the practice adopted the risk assessment framework as issued by the Department of Justice and Constitutional Development and adjusted same in line with adjustments made by said Department. A copy of the latter's "Covid-19 risk-adjusted plan in respect permitted services under alert level 4" (sic) dated 18 May 2020 together with a letter titled "Covid-19 Risk Plan Policy" electronically signed per Duncan Korabie and dated 30 May 2020, was submitted in evidence. In addition, Korabie held staff meetings on a weekly basis. At these meetings, Covid-19 and the need to vaccinate were discussed. It was thus not a last-minute decision to require staff to be vaccinated. Korabie told staff that there are

some employers who would not require vaccination, but that he could not afford that due to his own comorbidities.

29. Korabie listed the names of two staff members, other than himself, who had one or more comorbidities, and the names of other staff members who lived with people who had comorbidities (two of whom subsequently passed away). The Applicant was young and had no reported comorbidities, but lived in his parents' house at the time.
30. Korabie explained that the office had an open plan layout and there was no scope for isolated work areas.
31. Korabie explained his extended occupational health and safety obligations that required him to take measures to ensure that members of the public that visit the office are not placed at risk.
32. Korabie followed the progression of the development of a Covid-19 vaccination in the media. In October 2020 it became apparent that pharmaceutical companies such as Pfizer, Moderna and Johnson & Johnson, had succeeded in developing a vaccination.
33. On 15 January 2021, the Respondent drafted a Covid-19 Vaccination Policy – "Policy 1/2021", submitted as evidence. This policy served to set out Respondent's expectations regarding staff's need to vaccinate as and when a vaccine was available. It also set out consequences for non-compliance which included disciplinary action "up to and including termination of employment." According to Korabie, a copy of the policy was placed on the internal server to which the Applicant had access. Korabie reiterated that there had been ongoing engagements between him and staff concerning the need to vaccinate and that it was thus not just a once-off announcement. During cross-examination, Applicant contended that this vaccination policy had been drafted after his dismissal as he (Applicant) was involved in the drafting of policies and had not been aware of this policy. Korabie denied this and stated that he (Korabie) had drafted the policy and had made it available to staff on the server. Applicant further challenged the validity of the policy on the basis that it had not been signed by members of staff. Korabie responded that it was not a requirement for staff to sign policies issued by the practice. The 'validity' of a policy is thus not dependent on staff approval by way of signature.
34. In August 2021, Korabie had received his second Pfizer vaccination. At that stage, all members of staff, other than Applicant and one other, had received their vaccination. By 20 August 2021, the vaccination was available for the 18 – 35-year-old group. Applicant and the other non-vaccinated colleague (name provided) fell within that age group.
35. On 27 August 2021, Korabie met with the staff. He explained that he was not wavering from the requirement for staff to be vaccinated. He reiterated that there was no other place for them to isolate in the open plan office and that, for security reasons as explained earlier, he could not allow them to work from home.
36. Applicant and the other young employee referred to above indicated that they did not wish to be vaccinated. Applicant apparently believed that it was not necessary for him to vaccinate given that Korabie

- was vaccinated. Applicant also referred to alternative and anti-vaccination footage he had viewed on social media, plus that his father had used prescription medication, Ivermectin, to 'cure' people with Covid.
37. Korabie told Applicant and the other employee that he did not wish to hear of medical doctors who had given their scientifically unsubstantiated (not peer-reviewed) opinion on the vaccination. Furthermore, Korabie explained to them that while the vaccine producers were not saying that being vaccinated means you won't contract the virus, they were saying that it will give you more protection and that was the security measure that he needed for the office.
38. Korabie explained that the WhatsApp message of 20 August - "Everybody has 5 days to confirm that they are registered for the vaccine and have taken the vaccine writhing (sic) 10 days thereafter. Failure to do so results in the termination of your employments (sic)" - a copy of which was tendered as evidence by the Applicant and elaborated upon in his evidence, was thus not as a result of a process that started in August 2021, but rather had started with the aforementioned engagements with staff that started in March 2020.
39. When on 30 August 2021, Applicant responded to the said WhatsApp message and confirmed his decision not to be vaccinated, he did not provide reasons to substantiate the basis for such a decision. Korabie went further to say that up until the day of the arbitration hearing, the Applicant had yet to articulate his reasons for not taking the vaccine.
40. Korabie's approach to this was essentially that if Applicant wished to continue to work for the practice, he had to accept Korabie's right to require him to be vaccinated. Applicant's services were thus terminated. The same applied to the other employee who had confirmed that he would not be vaccinated, although he had subsequently taken the vaccination and returned to work.
41. During cross-examination, Applicant claimed that Korabie's motive for re-employing that employee was to prevent him from siding with Applicant in the unfair dismissal claim. Korabie responded by saying that the other employee was re-employed following his decision to get vaccinated.

Applicant's Evidence

42. The Applicant, Mr. Dale Dreyden, submits that his dismissal was procedurally and substantively unfair and that he is also owed 4 weeks' notice pay in that he had more than 12 months' service with the employer.
43. Applicant submitted evidence (also referred to in the Respondent's evidence) that on 20 August 2021, Korabie sent the group chat WhatsApp message as referred to in paragraph 38 above. At 14h27pm on 30 August 2021, Applicant sent a WhatsApp message in response to the latter stating as follows: "Dear Duncan, your notification dated 20 August 2021, refers. I confirm my intention of NOT receiving the vaccination for a number of reasons." To this, Korabie responded at 16h35 on the same day: "Thank you for your notice." On the same day at 07h29, but submitting a WhatsApp directly to Korabie (i.e. not using the group chat), Applicant directed the following WhatsApp message to Korabie: "Morning DK. I woke up with a massive migraine, I'm not coming in today boss. If there is anything you need, just call." Korabie first

responded at 09h13 by saying: "That's nice hey", followed by a message at 16h40 stating: "Tomorrow will be your last day as well. You don't have to come (sic) in tomorrow. I will pay you until the (sic) tomorrow."

44. Applicant submits that there was no fair procedure followed in effecting his dismissal (this is expanded upon below).
45. The Applicant testified that the policy (of 15 January 2021) that was submitted by Respondent was not valid and that, in his view, it was drafted after Applicant's dismissal. According to Applicant, the employees would have needed to agree to vaccination and should have been provided with a mechanism to challenge the policy. Likewise, Applicant believed firmly that for a policy to be valid, it had to be signed by members of staff. During cross-examination, he agreed that when he started to work for Respondent, he followed existing policies because he had no objection to them. Applicant submitted further that there were policies on the office server that were signed by employees. However, during cross-examination, he was not sure who had signed the policies in question.
46. Applicant, while agreeing that prior to August 2021, there were informal discussions between Korabie and staff in the office regarding Covid-19 and the vaccination, stated that these were not 'formal' and that there was never any opportunity to respond to the vaccination requirement. Applicant stated that Korabie would sometimes address the matter with him while he (Applicant) was working with the files, but that there had been no time to engage further on the request that staff vaccinate.
47. Under cross-examination, Applicant, acknowledged that Korabie did have various meetings with all staff members in the boardroom where the issue of Covid-19 vaccination was discussed and that the members of staff were asked to vaccinate, albeit not in a formal policy. He also acknowledged that Korabie did provide the opportunity for staff to have a say at these meetings. However, Applicant stated that he could not give his reasons [not to vaccinate] in a room full of people and it should have been done one on one. He claimed further that these were not formal meetings as no record was kept of the content of the meetings.
48. Under cross-examination, Applicant acknowledged that he was never barred from entering Korabie's office (except when Korabie was busy with work) to discuss matters. He acknowledged further that he had also visited Korabie at his home to raise issues from time to time and that he had a work e-mail address that he could have used to write to Korabie to discuss the issue of mandatory vaccination. However, Applicant countered this by saying that there was no policy to provide staff with guidance on what should be done in the event of an internal dispute. He admitted that he had previously written to Korabie to complain about other staff members and that file notes can be made on specific incidents.
49. For Applicant, his dismissal was not preceded by a fair process. He was not 'charged' on disciplinary grounds or provided with a formal opportunity to deal with his reasons for not vaccinating.
50. Applicant contended further that there is no law requiring mandatory vaccination. He noted that a "Bill" (of law) does not provide the necessary authority for mandatory vaccination and that there is no Act of

Parliament that allows an employer to institute mandatory vaccination or to dismiss an employee for failing to vaccinate. Instead, Applicant contended there were only Regulations and Directions issued in regard to mandatory vaccination in the workplace.

51. Furthermore, Applicant submitted that had there been a workplace policy on this and he had signed such policy, it would be obligatory to follow that policy. During cross-examination, Applicant acknowledged that he was aware of the Government Regulations that were put in place during May 2020 that set out conditions for employers to follow for the safe return of employees to return to work and that Respondent had complied with various health and safety requirements. Applicant recalled that steps were taken, including the usage of the 'fogger', to sanitise the office and that he complied with the regulations in respect of wearing a face mask, hand sanitization, etc.
52. During cross-examination, he said that he was aware of the Occupational Health and Safety Act (Act 85 of 1993) and the onus it places on an employer to provide a safe working environment. He was aware of Korabie's medical condition and noted that he had always been there to assist Korabie in this regard. Furthermore, he was aware of the fact that Covid-19 has a negative impact on people with comorbidities. However, he stated that he could not see how his failure to vaccinate would make it unsafe for Korabie. In addition, Applicant stated that to date, he had not contracted Covid-19, even when he was in contact with others who had Covid-19. He submitted that he thus could not assume that by vaccinating, he would not contract Covid-19.
53. During cross-examination, Korabie asked Applicant why, over a period of 1.5 years when the issue of a Covid-19 vaccination was discussed in the office, he would not give formal reasons why he did not want to take the vaccination. Applicant submitted that he had given informal reasons. He explained that the Covid-19 vaccine is not a "formal" vaccine and that he had reservations about the safety thereof. He claimed that personal information at his disposal, the source of which he would not reveal, showed that the majority of those who took the vaccination became ill. Applicant agreed that some of the information that he shared was 'conspiracy-related', noting that he had a "creative mind". He also admitted that Korabie had asked him to share the information that he was relying on, but that this was 'informal'. Applicant did not give Korabie this information as he thought that Korabie would not take it seriously. Instead, Applicant believes that Respondent should have undertaken a risk assessment and drafted a policy [on mandatory vaccination].
54. Applicant stated that he had provided his grounds for refusing to vaccinate to the CCMA. These are included in his Affidavit and the "Heads of Argument" that were submitted prior to the arbitration hearing. While he did not wish to provide more details pertaining to these [at the arbitration], he did refer to his right to bodily integrity. The grounds listed by Applicant [at sub-paragraphs 17.1 – 17.6 of his Affidavit] are as follows: "Unfairly discriminated against me on an arbitrary ground (Vaccination)"; "Religious belief"; "Conscience"; "Belief"; "Political opinion"; "Exercising a right conferred by the Labour Relations Act".

55. Applicant submitted that he could have been accommodated in another space in the office. For example, that he could have sat at the receptionist desk. Under cross-examination, Applicant acknowledged that he would still have had access to other staff members and the public who visit the office as well as people at the Courts.
56. Applicant claimed that the other colleague whose job was terminated for his failure to vaccinate was not vaccinated when he was re-employed. Korabie denied this.

CLOSING ARGUMENT

Respondent

57. Korabie argued that a policy had been in place for more than 1.5 years. All staff complied except for the Applicant. He refused to vaccinate based on unsupported reports and unsubstantiated claims.
58. The Applicant was persistent that he did not have to vaccinate, that there was no legal requirement to do so, and that he could not be forced to do so. Korabie had a duty to protect his staff.
59. The efficacy of the vaccine is the subject of publications by the Government and others. Those negatively affected by the vaccine are in the minority.
60. Applicant refused to follow the Respondent's policy or to provide a substantial reason for this. Applicant did not provide documentary evidence to show that he engaged on the issue with the Respondent. Applicant was given 1.5 years to vaccinate [as and when the vaccination became available]. Applicant first said there were no discussions at the workplace on vaccination and then said this was discussed, but on an informal basis.

Applicant

61. Applicant argued that the Respondent's Covid-19 Vaccination Policy is not signed and is thus not valid.
62. Respondent did not provide evidence to show that the dismissal was substantively and procedurally fair.
63. Applicant claims maximum compensation for his dismissal and does not wish to be reinstated.

ANALYSIS OF EVIDENCE AND ARGUMENT

64. The Applicant is contesting the fairness of his dismissal on substantive and procedural grounds. Linked to the substantive grounds, he has also expressed a view that there is no legislative basis for mandatory vaccination in the workplace. This issue will be dealt with first.
65. Applicant submits that there is no Act of Parliament that either empowers employers to dismiss employees who fail to take the vaccination or that requires that vaccinations be mandatory. Applicant submits that there are only directives and regulations regarding mandatory vaccination, but none that place a legal obligation on him to be vaccinated.

66. In respect of the first part of Applicant's submission, it is correct to say that there is no Act of Parliament that specifically empowers an employer to dismiss an employee for failure to be vaccinated. While section 186(1) of the Labour Relations Act 66 of 1995 (LRA) sets out the meaning of an unfair dismissal (and unfair labour practice), section 188 of the LRA provides that a dismissal that is not automatically unfair will be unfair if the employer fails to prove (on the balance of probabilities) that the reason for the dismissal is a fair reason related to the employee's conduct or capacity or operational requirements, and that it was effected in terms of a fair procedure. Within each of these broad categories, there may be many examples of reasons for dismissal that are not specifically listed in the legislation. For example, nowhere in the LRA will you find a specific reference made to absconding from work or the commission of fraud, but these may form the basis of a dismissal on a ground of 'conduct'. Thus, the absence of a specific reference to 'failure to vaccinate' in the enabling legislation does not prohibit subsequent dismissal for this reason, provided that the requirements of procedural and substantive fairness apply. Likewise, the existence of a mandatory vaccination policy in a workplace does not automatically imply that where an employee refuses to be vaccinated and is subsequently dismissed, that the dismissal will always be fair. Each case must be determined on its merits.
67. While on the subject of Acts of Parliament, sections 8 and 9 of the Occupational Health and Safety Act 85 of 1996 (OHSA) places an obligation on an employer to ensure, as far as reasonably practicable, a safe and health working environment. The employer referred specifically to this obligation and relied on this Act in formulating a mandatory vaccination policy. It is worth noting that section 14 of the same Act places duties on employees, amongst other, to "take reasonable care for the health and safety of himself and of other persons who may be affected by his acts or omissions";¹ to co-operate with the employer's efforts to implement health and safety obligations;² and to carry out lawful orders and obey health and safety rules and procedures laid down by the employer in the interest of health and safety [in the workplace].³
68. In respect of the second part of Applicant's submission, it is necessary to set out the legal framework as it applies to the issuing by the Minister of Employment and Labour of the Consolidated Direction on Occupational Health and Safety Measures in Certain Workplaces in June 2021 (Consolidated Direction of June 2021). Firstly, the Consolidated Direction of June 2021 is subordinate legislation. Section 239(a) of the Constitution, 1996, states that "national legislation" includes subordinate legislation made in terms of an Act of Parliament. The Consolidated Direction of June 2021 was issued in terms of Regulation 4(10) of the Regulations made under section 27(2) of the Disaster Management Act 57 of 2002. Subordinate legislation needs to link to the purpose of the enabling Act of Parliament. In this regard, the Consolidated Direction of June 2021 set out, amongst other, to prevent the escalation of Covid-19 in the workplace, and to alleviate, contain and mitigate the severity of the virus in certain workplaces.

¹ At section 14(1)(a) of the OHSA of 1993.

² At section 14(1)(b) of the OHSA of 1993.

69. In a nutshell, on application of section 239(a) of the Constitution, 1996, the Consolidated Direction of June 2021 constitutes "national legislation" as it was made in terms of an Act of Parliament, namely the Disaster Management Act of 2002. Needless to say, if the state of disaster as declared by the President of South Africa in terms of that Act were to come to an end, the regulations issued in terms thereof would have no force and effect and the provision for mandatory vaccination in workplaces would cease to exist unless provided for in some other legislation.
70. The Applicant is correct in his submission that there is presently no legislation (including Regulations and Directions) that places a legal obligation on him to get vaccinated. However, the Consolidated Direction of June 2021, which applied at the time of Applicant's dismissal in August 2021, and still applies, does provide for circumstances in which an employer may make vaccination mandatory and thus a requirement for continued employment with that employer.
71. When interpreting and applying the Consolidated Direction of June 2021, one needs to also consider the size of the employer. The significance of this is located in sub-direction (3) of Direction 2, which states: "Subject to the employer's obligations under the OHS Act to conduct a risk assessment, employers with less than 10 employees need only apply the measures set out in direction 12 of these Directions." Direction 12 sets out measures that employers with 10 employees or less must take to ensure the health and safety of employees who return to work when an employer's operations recommence. Direction 12(i) directs small employers to put in place any other measures indicated by a risk assessment of the workplace, including measures that are appropriate in direction 9(2), if the public has access to the workplace.
72. The main body of the Consolidated Direction of June 2021 thus does not make it a requirement for an employer with 10 or less employees to comply with Direction 3 ["Risk assessment and plans for protective measures] and Direction 4. Direction 3 sets out pre-emptory requirements for employers. Direction 3(1)(a)(ii) provides that: "Within 21 days of the coming into force of the amendment to this Direction, in accordance with sections 8 and 9 of the OHS Act, taking into account operational requirements of the workplace, whether it 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".
73. By virtue of the provisions of Direction 2(3) read with Direction 12, there is thus no pre-emptory provision in the Consolidated Direction of June 2021 for an employer with 10 or less employees to produce a written vaccination policy. It is only Annexure C to the Consolidated Direction of June 2021 – "Guidelines if an employer makes vaccination mandatory" – and which applies to all employers, where employers with 10 or less employees are arguably included in a reference made to a mandatory vaccination policy. However, items 1 and 2 of the Guidelines provide the purpose of the guidelines and make no mention of these being mandatory. Instead, item 2 specifically states that: "The guidelines are stated generally and departures

³ At section 14(1)(c) of the OHS Act of 1993.

from them may be justified in proper circumstances. For example, the size or the nature of the workplace may warrant a different approach.”

74. Irrespective of when Korabie made a copy of the written policy on mandatory vaccination available to the Applicant (the applicant maintained he saw the policy for the first time at arbitration and he claimed it was drafted after his dismissal) the emphasis should not be on whether it was written or not, but rather on whether the Respondent’s requirement to make vaccination against Covid-19 mandatory for the staff was based on the operational needs of the Respondent as determined by a risk assessment, whether conducted formally or not. Furthermore, emphasis is to be placed on whether Applicant was aware of this requirement; whether the Respondent considered reasonable accommodation of the Applicant or others who wished not to be vaccinated; whether the Applicant was provided with a fair opportunity to respond to the requirement; and ultimately, whether the sanction of dismissal was appropriate in the circumstances.
75. If one extracts the key requirements from the Direction, read with the Guidelines, an employer considering implementing mandatory vaccination in the workplace would need to do the following, as a minimum:
- 75.1 Conduct a risk assessment of the workplace (in the case of small businesses employing 10 or fewer employees, this need not be a formal process);
 - 75.2 Develop (or amend) a plan taking into account employees’ constitutional rights to bodily integrity (section 12(2) of the Constitution) and freedom of religion, belief and opinion (section 13 of the Constitution);
 - 75.3 Implement protective measures in the workplace;
 - 75.4 Identify measures regarding vaccination of employees (whether merely encouraging vaccination or requiring mandatory vaccination);
 - 75.5 Consult with the union / health and safety committee / employees on the plan;
 - 75.6 Notify all employees of the plan and the manner in which it intends to implement it;
 - 75.7 Educate employees on the dangers of covid-19 and measures to prevent spread, as well as vaccinations available, their benefits and possible side effects;
 - 75.8 Give employees paid time off to be vaccinated;
 - 75.9 Inform employees who, identified through the risk assessment, are required to vaccinate of the obligation to do so;
 - 75.10 Inform employees that they have the right to refuse on medical and constitutional grounds;
 - 75.11 If an employee refuses, ask for the reasons and counsel the employee;
 - 75.12 Refer the employee for medical evaluation should there be a medical contra-indication for vaccination.
 - 75.13 If necessary, take steps to accommodate the employee as far as is reasonably practical.
76. The Guideline stops short of stating that employees may be dismissed if they refuse to vaccinate where there is a policy of mandatory vaccination. However, this is implied by the requirement for reasonable

accommodation. If that fails, dismissal is inevitable. The procedure outlined in the Direction, read with the Guideline most closely resembles the procedure required in Incapacity: ill Health dismissals which also provides for consultation, referral to medical practitioners and reasonable accommodation.

77. As can be seen from the above, there are several procedural and substantive requirements before dismissal for refusing to vaccinate where vaccination is mandatory. Because of the nature of the issue, it is possible that a failure to follow the procedural steps may result in substantive unfairness, since it is through the procedural steps that the employer and employee engage on the substantive issues. However, in this case, the distinction between substantive and procedural fairness was clear, as discussed below.

78. It is an oft-repeated phrase in the field of labour dispute resolution that "each case must be decided on its own merits". This is perhaps the single most important principle when deciding on the fairness of a dismissal due to an employee's refusal to be vaccinated. The factors that may be relevant include:

- 78.1 The size of the workplace;
- 78.2 The nature of the workplace;
- 78.3 The nature of the job;
- 78.4 Whether the job is performed outdoors, indoors or in close confines;
- 78.5 Ventilation in the workplace;
- 78.6 The degree of exposure to other employees, managers and owners;
- 78.7 The degree of exposure to members of the public;
- 78.8 The illnesses or co-morbidities of other employees, managers and owners;
- 78.9 The age of other employees, managers and owners;
- 78.10 The reasons for an employee's refusal to vaccinate;
- 78.11 The particular variant of covid-19;
- 78.12 The state of disaster level in the country, if any at the time
- 78.13 Any "waves" in the pandemic that the country is experiencing;
- 78.14 Whether work may be done from home;
- 78.15 Whether an employee who refuses to vaccinate can be accommodated.

79. We turn now, at last, to consider the fairness of the applicant's dismissal having regard to these factors. Korabie's evidence about his medical condition and the danger covid-19 posed to his health, indeed his life, was convincing. He was certain, within the context of his medical condition, that he would die or be severely incapacitated if he contracted Covid-19 which would also be the end of the law firm and the employment of those working there. Many of these employees or their dependents also had comorbidities that he took into consideration. Even if Korabie placed the vaccination policy in writing after the fact, it was clear that he assessed his risk and that of the employees and those close to them should they be exposed to Covid-19. This informed his strictly held view that a Covid-19 vaccination, as and when it became

available, would be a requirement for continued service at his legal practice. A law practice involves exposure to members of the public at the courts and in the workplace and he took all necessary steps to avoid or limit the spread of the virus.

80. The Applicant's only counter to the latter was the emphasis that he placed on discussions held between Korabie and members of staff not being 'formal' for want of a written record of same and for want of a policy document dependent on the signature of the employees. However, the evidence suggests that Applicant was well aware of Korabie's position on the need for staff to be vaccinated against Covid-19 and, in particular, of the fact that Korabie had both demonstrated (through previous illness) and stressed that Addison's disease placed him in a high level of medical vulnerability should he be infected with Covid-19.
81. It should be stated that at the time of the applicant's dismissal (August 2021), South Africa had experienced the Alpha variant of the disease and was experiencing the Delta variant. The prevalent scientific findings at the time were that "vaccination reduced transmission of SARS-CoV-2 from vaccinated persons who became infected, potentially by reducing viral loads."⁴ There are views that may have changed with the Omicron variant, but it was entirely reasonable for Korabie – at that time – to believe that vaccination of his staff members would reduce the risk of them spreading the virus to other employees and to him. As there are more variants and the science and research on the effectiveness of vaccines develop, we may come to a different conclusion, but at the time, Korabie's requirement that staff vaccinate was reasonable.
82. The Applicant did not provide clear reasons for his refusal to vaccinate. He referred to his bodily integrity, and the right not to be experimented upon, as well as his rights to belief and opinion. Korabie referred to the applicant's reliance on YouTube material where various doctors' opinions on the vaccine were circulating. Given the absence of substantiation, the most compelling of these is the right to bodily integrity contained in section 12 of the Constitution (1996). Korabie asserted that none of the Applicant's rights could in the circumstances compete with his (Korabie's) right to life. In the particular circumstances of Korabie's medical condition and the potential threat to his survival were he infected, a policy of mandatory vaccination was reasonable and trumped the grounds that Applicant relied on to remain in Respondent's employ despite not vaccinating against Covid-19.
83. Korabie went into considerable detail in his evidence on why he was unable to reasonably accommodate the Applicant through the alternatives of working remotely both within the office or from an external venue. In regard to the former, it was not disputed that the workplace has an open plan design and did not allow for a cordoned off area in which the Applicant could work; and in any event, the nature of the job required interaction with Korabie himself, other staff members and members of the public. In terms of remote work,

⁴ David W Eyre et al, *Effect of Covid-19 Vaccination on Transmission of Alpha and Delta Variants*, published in *The New England Journal of Medicine*, 5 January 2020, available at [NEJM.org](https://www.nejm.org), accessed on 3 March 2022.

the Applicant was required under his Contract of Articles agreement to work directly under Korabie's supervision and, in addition, could not work from home due to threats to data security. We are satisfied that Korabie applied his mind to reasonable accommodation of the Applicant's wish to continue working for Respondent despite remaining unvaccinated, but that the options were not operationally viable in the circumstances.

84. Ultimately, given the Applicant's continued refusal to vaccinate against Covid-19 – even at the time of the arbitration hearing and despite admitting to knowing how medically vulnerable Korabie is and was at the time of Applicant's dismissal - the Applicant was incapable of performing his duties as required by the Respondent. As there was no alternative way to accommodate the Applicant, dismissal inevitably followed.
85. For the above reasons we find the Applicant's dismissal was substantively fair.
86. Turning to procedural fairness and with reference to the steps summarised in paragraph 75 above, and the Code of Good Practice: Dismissal, we find as follows: 1) The employer had assessed the risks associated with the potential spread of Covid-19 in that workplace, had adopted a plan regarding measures to prevent the spread of Covid-19 in the workplace, which plan included mandatory vaccination. 2) Korabie engaged with the employees, including Applicant, on the overall plan and the requirement to be vaccinated, as well as the manner in which the plan would be implemented. 3) The Respondent educated employees on the dangers of Covid-19, particularly to himself and other employees and their families in the workplace, and of available measures to prevent the spread of the virus, including available vaccination. The Applicant was informed that, for purposes of working in that workplace, he was required to vaccinate and was made aware of the consequences of failing to do so.
87. Given the sensitivity and novelty regarding Covid-19 and the vaccination process, in particular at the time of Applicant's dismissal (August 2021), we find that while Korabie had taken time to keep abreast of scientific research and guidance regarding the efficacy of the development and medical impact of the Covid-19 vaccination, possibly due to his own impending medical vulnerability should he be infected with Covid-19, same could not be assumed for someone like Applicant, who had already expressed willingness to follow so-called conspiracy theories about the vaccine and the alleged fate of those who had previously spoken out against vaccination as shared on public social media platforms such as YouTube.
88. On 20 August 2021, the date that the Covid-19 vaccination became available for those like Applicant aged between 18 and 35, instead of Korabie engaging Applicant (and the colleague as mentioned above) personally on the Respondent's requirement to vaccinate, Korabie used a workplace group WhatsApp platform to send the 'do or leave' message.
89. Our finding is that despite earlier discussions with Applicant as a member of staff on the need to vaccinate, at this crux time, the employer fell short of the standard for procedural fairness as follows: 1) The employer did not inform the applicant that he had the right to refuse vaccination on constitutional grounds. 2) The employer did not ask the applicant for his reasons for failing to vaccinate, or counsel him. 3) While Korabie

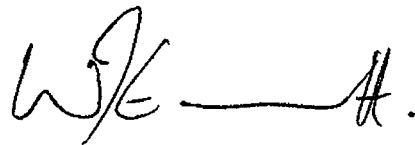
did consider and subsequently exclude the possibility of reasonable accommodation as an alternative to dismissal, these were not explored with the Applicant. 4) Finally, the applicant was merely advised in a WhatsApp message that his services were terminated. In essence, the level of consultation was not sufficient.

90. In the circumstances, the Applicant's dismissal was procedurally unfair.
91. In deciding on the appropriate remedy for a dismissal which was substantively fair, but procedurally unfair, we have taken into account that, but for the fact that Dreyden had not applied to the Legal Practice Council for a reduction of the period of practical vocational training from five years to two years in terms of section 13(3) of the Attorney's Act 53 of 1979, his Articles of Clerkship had in effect concluded when he obtained his LLB degree, and the Respondent had at no stage promised to appoint him as an associate. We have also taken into account that it would have taken a relatively short period of time for Korabie to have followed the necessary procedural steps, in particular, to consult with the applicant. In the circumstances one month's compensation at the stipend he earned of R2500.00 per month is just and equitable.

AWARD

92. The dismissal of the Applicant, Mr Dale Dreyden, was substantively fair, but procedurally unfair.
93. The Respondent, Duncan Korabie Attorneys, is ordered to pay Mr Dale Dreyden compensation amounting to R2500.00 (two thousand five hundred rand).
94. The Respondent, Duncan Korabie Attorneys, is ordered to pay Mr Dale Dreyden four weeks' notice pay of R2309.46 ($R2500.00 / 4.33 \times 4$) (two thousand three hundred and nine rands, and forty-six cents).
95. The **total amount of R4809.46** ($R2500.00 + R2309.46$) (four thousand eight hundred and nine rands, and forty-six cents) must be paid on 25 March 2022.

APPROVED



Signature: _____

Commissioner: **Winnie Everett**

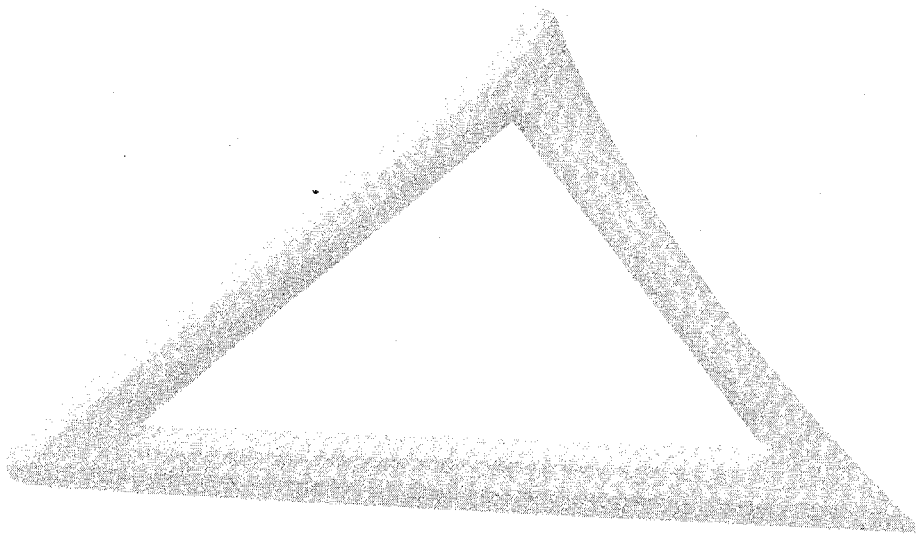
Sector: **Business/Professional services**



Signature: _____

Commissioner: **Laurie Warwick**

Sector: **Business/Professional services**



APPROVED