

Arbitration Award

Case Number: GAJB20811-21
Commissioner: Richard Byrne
Date of Award: 22-Jun-2022

In the **ARBITRATION** between

Kgomotso Tshatshu

(Union/Applicant)

and

Baroque Medical (Pty)Ltd

(Respondent)

APPROVED
Applicant's representative: MR. MASANGO (ADVOCATE)

Employee's address: _____

Telephone: _____

Telefax: _____

E-mail: _____

Respondent's representative: MR. CRAWFORD (ATTORNEY)

Respondent's address: _____

Telephone: _____

Telefax: _____

E-mail: _____

DETAILS OF HEARING AND REPRESENTATION

- [1] This matter was heard on 6 and 8 June 2022. Mr. Masango, an Advocate, represented the Applicant. Mr. Crawford, an Attorney, represented the Respondent. Neither party raised any issue relating to my jurisdiction to arbitrate this matter.
- [2] The parties agreed to submit closing arguments by 15 June 2022. I received both parties' arguments. The Respondent's arguments however, were a copy of its arguments in Case Number GATW 12218-21, and concerning the Applicant Belinda Ruysenaers.

BACKGROUND TO THE DISPUTE

- [3] This is a dismissal dispute related to operational requirements. The basis of the dismissal related to non-compliance with the employer's Vaccine Mandate Policy. The Head office of the CCMA decided that these matters were "red line" and chose specific Commissioners to deal with them. This award is not the first to deal with the issue, and also not the first concerning the same employer.
- [4] Before writing this award, I have read the awards of my fellow Commissioners under Case Numbers WECT 387-22, FSWK 2448-21, WECT 13114-21, WECT 17050-21, WECT 17091-21, WEGE 194-22, WECT 1150-22, WECT 13083-21 and GAJB 3250-22.
- [5] The relevant phrases from the Baroque Mandatory Covid-19 Vaccination Policy, as communicated to staff on 22 July 2021, reads as follows:

Clause 6: "it is a requirement that all Employees be vaccinated."

Clause 8: "Accordingly, Employees are to make the necessary arrangements to get vaccinated and provide proof of their vaccination status (whether it be the single dose vaccine or the first dose of the two-dose vaccine) as soon as they become eligible therefore."

Clause 9: "Baroque Medical acknowledges and respects that Employees are entitled to their own opinion and belief, however, it cannot be unsubstantiated, at the expense of the greater good and operational necessity of the business."

Clause 10: "Employees who refuse to be vaccinated will be in breach of Company Policy and their services may then be terminated for operational reasons."

"There are no alternative positions or roles that do not require vaccination."

- [6] The Respondent's representative confirmed in his opening statement that this was a strict and inflexible Policy when he stated that the reason for an employee's refusal to be vaccinated is ultimately irrelevant. Four employees refused to be vaccinated and the Respondent rejected all their submissions. All were dismissed.
- [7] The Respondent then allegedly conducted a Risk Assessment and thereafter consulted with the staff. Insofar as this Applicant is concerned, she stated that her refusal at the time was due to her fear of the vaccination, as she had had a negative response to a flu vaccine 10 years earlier. The Respondent asked her to provide proof of this. She provided a Doctor's note, which Doctor was the same one who treated her 10 years earlier. The Respondent did not accept this Doctor's note as sufficient, and sent her to a MediClinic. She did so, and came back with another Doctor's note. Again, the Respondent did not accept this Doctor's note. The Applicant then, at her own expense, went to another Doctor, who allegedly was more of a specialist on Covid-19 matters, but he refused to write a detailed report for the Applicant. As such, this last Doctor's visit had no effect on the Applicant's cause.
- [8] In the circumstances, the Respondent decided to retrench the Applicant, and with no severance pay.
- [9] Both parties raised their competing views on the issue of severance pay in their opening statements. I ruled that since severance pay was not a specific issue that appears in the referral, they could argue the matter and I would make a ruling on whether there is an entitlement to it, but that I will not make an order concerning any possible payment of such in this award. The parties accepted this and we proceeded on the basis of the main dispute, which was the dismissal itself.
- [10] I must decide whether or not the dismissal of the Applicant was fair. If I find that the dismissal was unfair, I must decide on an appropriate remedy.
- [11] As indicated above, I will also deal with the issue of severance pay.

APPROVED
ISSUE TO BE DECIDED

SURVEY OF EVIDENCE AND ARGUMENT

THE RESPONDENT'S CASE

- [12] The Respondent handed in a bundle of documents and led the evidence of Ms. Alison du Toit, the Legal Advisor of the Respondent.

- [13] Ms. Du Toit stated that she is the Legal Advisor at Baroque. She was part of the Covid-19 Committee, which comprised of five individuals from Management. (This changed to four during cross-examination.) Consultations with staff started on 14 July 2021, and the Mandatory Vaccination Policy was introduced on 22 July 2022.
- [14] The aim of the Policy was aimed at minimising the transmission of Covid-19 and improving the health of the employees. It was also touted as an operational requirement in the sense that it would reduce the time that employees spend away from work due to illness, which affects the productivity of the business. Further, that it was operational in that they would be ensuring a safe working environment for employees.
- [15] They had considered that the current Regulations in place such as face masks, social distancing and working from home were not viable. They had also decided that there were no other alternatives available for those who did not vaccinate. They obtained the view that they were in line with section 36 of the Constitution in that they were applying a law of general application, which applied within the four walls of their Company, and that the interests of the majority outweighed the interests of a few individuals. They were not going to have a separate Policy for the few who decided not to vaccinate.
- [16] They respected any person's Constitutional right not to be vaccinated, and were therefore not forcing any employee to be vaccinated. But, if the employee after consultation still refused to be vaccinated, a section 189 retrenchment process would follow.
- [17] The Applicant, Ms. Tshatshu, objected to the Mandatory Vaccination Policy on both medical and Constitutional grounds. She stated that she had a negative reaction to a flu vaccine 10 years earlier, and considering that they were similar viruses, she was at the time unwilling to take the vaccine. On Constitutional grounds, she argued that she had a right to bodily integrity and that the Covid vaccine was experimental.
- [18] The Company's response to the Applicant's objections were firstly not to accept the Constitutional grounds. On the medical issues raised, they advised her to produce Doctor's notes to substantiate why she could not be vaccinated. After not accepting her first Doctor's notes as being vague, unsubstantial and hearsay, they asked her to go to MediClinic to get specialist advice. This the Applicant did, except that the Doctor she saw was not a specialist, and his Note received a similar reaction from the

Company. They then asked her to go see a Specialist, which she did, but that Doctor refused to draft a detailed report.

- [19] If the Doctor's note was reasonable/substantiated, this would have affected the Respondent's attitude regarding severance pay, i.e. the Applicant would then have been paid severance pay.
- [20] In terms of complying with section 189 in respect of offering alternatives, they did offer an alternative to the Applicant. The alternative was that they offered her her same job back on condition she got vaccinated. The Respondent argued that an alternative job did not have to be a different position, but that it could be the same position but with different conditions. The condition was to have the vaccination.
- [21] A client that they deal a lot with, MediClinic, had sent them a letter stating that they have a Mandatory Vaccine Policy, and that they require employees of the Respondent to also be vaccinated.
- [22] In cross-examination, Ms. Du Toit stated that there was no obligation to select any employee lower than senior management onto the Covid Committee. The research they did was to consider the LRA, OHSA, FDA and SA Health Authorities, considered the well-being of employees in the organisation, if vaccinations were safe and implementing laws of general application.
- [23] Ms. Du Toit did not present the Risk Assessment, and nor was it in the Respondent's bundle of documents.
- [24] I put to the witness a proposition that if 1% of Companies in the Country had these Mandatory Vaccination policies and/or 1% of employees worked in an environment where this Policy applied, what would be the value of the rule? The response was that they could mitigate it in their four walls. I asked if they had looked at international attitudes to vaccine mandates. The response was that they had just looked at what was in the news. I put to the witness that they were above herd immunity in the workplace, approximately 97% vaccinated. The response was that the Policy still stands, and that they don't know how long the vaccine lasts.

THE APPLICANT'S CASE

- [25] The Applicant handed in a bundle of documents and led the evidence of Ms. Tshatshu.

- [26] She worked as a Senior Inventory Controller. Her salary was R23 300-00 per month. The Company mainly deals with the supply of Cardio, Endocrine and Neurological equipment to hospitals and other end-users. She did not work in a medically-controlled environment, but was in an open-plan office. The stock room is medically-controlled. The Sales Reps and Drivers are not allowed in the building, and she communicated with them by phone or email. The Drivers of the Suppliers are also not allowed in the building.
- [27] The Clinical Specialists and Sales Managers had to go into the hospitals to do the deliveries. It was indicated to her that it was the hospitals where most of the infections occur, and so the hospitals did not want the Respondent's staff to contract Covid and bring it to them. She did not go to any hospitals.
- [28] She was asked to produce Medical notes to substantiate her refusal to vaccinate. She did so, but the Respondent did not accept her Doctor's note. They asked her to go to MediCross, which she did. They did not accept that Doctor's note either. They asked her to go to a Specialist. She went to one on her own accord, but he refused to write a report because she was not ill at the time.
- [29] She has never seen the Risk Assessment or been part of the formulation thereof.
- [30] At one stage meetings were mostly done remotely. She would be given a laptop and allocated to work alone in a boardroom. There was social distancing and all the other protocols at the time. As such, she did not see the need for a vaccine mandate at the time.
- [31] No alternatives were offered her, as she did not vaccinate.
- [32] In cross-examination, the Applicant confirmed that consultation had occurred on 7 and 16 July 2021. It was put to the Applicant that the approach of "herd immunity" implies a leap of faith. The Applicant agreed to this. The Applicant confirmed that even today she would refuse the vaccination. Reinstatement was also accepted as impossible due to the continued existence of the vaccine policy.
- [33] The Applicant party argued that the Mandatory vaccine Policy constituted an unreasonable rule. The procedure was unfair as the employees were not involved in the formulation of a Risk Assessment. Severance pay was due as no alternatives were offered the Applicant.

ANALYSIS OF THE EVIDENCE AND ARGUMENT

- [34] I will first deal with whether or not the vaccine mandate is a reasonable rule. Thereafter I will deal whether or not any vaccine mandate, to the extent that it is reasonable, can constitute a basis for a dismissal for operational requirements. I will then deal with severance pay. Finally, I will deal with the issue of whether or not the dismissal of the Applicant was fair.
- [35] The legislative framework
- [36] Since the issues surrounding mandatory Covid policies point towards a Constitutional declaration, are referred to in the Consolidated Code, are in the public interest and are accepted as potentially valid objections that employees may have, it is clearly a starting point in the current matter.
- [37] Section 7(2) of our Constitution states: "The state must respect, protect, promote and fulfill the rights in the Bill of Rights." The point I want to emphasise here is that it is the State's duty.
- [38] Section 8(1) states: "The Bill of Rights applies to all law, and binds the legislature, the executive, the judiciary and all organs of state." What needs to be extracted here is that all three branches of government, and in this context it is the State, that is bound by the Bill of Rights. The Bill of Rights speaks to "law", which comprises mostly national and subordinate legislation, case law and common law. It does not include internal Company rules.
- [39] The Equality clause, section 9 states: (1) Everyone is equal before the law and has the right to equal protection and benefit of the law. (3) The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds ... (4) No person may unfairly discriminate directly or indirectly against anyone on one or more grounds in terms of subsection(3). National legislation must be enacted to prevent or prohibit unfair discrimination. (5) Discrimination on one or more of the grounds listed in subsection (3) is unfair unless it is established that the discrimination is fair.
- [40] A number of issues should be extracted from the Equality Clause. Everyone, and not just employees of a particular Company, are equal before that law. The State has not unfairly discriminated against anyone in terms of vaccine policies. No legislation has been passed requiring that all employees or citizens be vaccinated. Our Judiciary, right from the Constitutional Court down to the Labour Court, and also including the CCMA and Bargaining Councils, have not instituted any rules amongst themselves requiring compulsory vaccinations. No State Department, or organ of State has, to my knowledge, implemented anything of the sort. Why? Because that would amount to unfair discrimination and be unreasonable. In terms of subsection (5), it is the State or any "person", which would include an

employer, that must establish that the discrimination is fair. It is not the onus of the employee to prove that the discrimination is unfair.

[41] Section 12 of the Constitution states in part:

- (1) Everyone has the right to freedom and security of the person, which includes the right-
 - (a) Not to be deprived of freedom arbitrarily or without just cause;
- (2) Everyone has the right to bodily and psychological integrity, which includes the right-
 - (a) To take decisions concerning reproduction;
 - (b) To security in and control of their body; and
 - (c) Not to be subjected to medical or scientific experiments without their informed consent.

[42] The points I want to emphasise here is that it is the employer, or "person" who has to establish just cause. It is not the employee who bears this onus. Subsection (2) uses the word "includes", which means it is not limited to (a) to (c). There is no requirement for the employee to provide reason. They can simply exercise their right.

[43] I will develop the argument further hereunder that Mandatory Vaccine Policies are not only unreasonable, but that they have no place in our labour market.

[44] Section 36 of the Constitution is, not without merit, one of the most important sections in the Bill of Rights. It reads as follows:

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- (1) The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including –
 - (a) The nature of the right;
 - (b) The importance of the purpose of the limitation;
 - (c) The nature and extent of the limitation;
 - (d) The relation between the limitation and its purpose; and
 - (e) Less restrictive means to achieve the purpose.
 - (2) Except as provided in subsection (1) or in any other provision of the Constitution, no law may limit any right entrenched in the Bill of Rights.

- [45] It is true that when applying the principles of administrative law, that the principles and processes that appear in National legislation or the Constitution can be cascaded down to the level of the rules that apply in a Company. Hence the employer's reference to a law of general application, meaning in their context that the vaccine mandate is a general rule of application to all employees in that Company. However, one should always bear in mind that in many cases the Constitution is regulating the relationship between the State and the citizens and not employers and employees. So, whilst the administrative principle of "law of general application" is a valid one that can be used in internal HR and disciplinary processes, one should also bear in mind the differences inherent in section 36 and those powers that an employer wields. One clear difference is in the legitimacy of the law. Laws are passed through a parliamentary and Constitutionally entrenched process. An employer enjoys no such inherent legitimacy, and is open to challenges as to reasonableness and fairness in addition to the limitations imposed by section 36.
- [46] At the time of this dispute, there was a Consolidated Directive of 11 June 2021, issued in terms of Regulation 4(10) of the Regulations under section 27(2) of the Disaster Management Act 57 of 2002. What is important to note is that the Risk Assessment could, in terms of requiring certain employees to be vaccinated, apply only to those individuals who were identified in terms of specific criteria. Nowhere does this Directive provide for, or permit, a blanket Mandatory Vaccine Policy.
- [47] The Regulations passed in terms of travel, gatherings, social distancing, wearing of masks, sanitisation, as well as the requests by Government to get vaccinated, is also part of the legislative framework. I will not deal with these particular Regulations, as they are known generally by the Public.
- [48] Reasonableness of the rule
- [49] The incidence of Covid-19 is a worldwide issue. In other words, it is a national and inter-national issue. Governments around the world have responded by issuing various laws and regulations that apply to their citizens in order to curb the spread and transmission of the virus. A number of vaccines have come to the fore, produced by reputable medical Companies. Governments have recommended the vaccines. These same vaccines have been administered to citizens internationally. Not one Country, as far as I am aware, has proclaimed a compulsory vaccination law for their citizens.
- [50] In terms of the Constitutional framework referred to above, but what is also a fair requirement in the LRA, is that the requirement to prove the reasonableness of the rule rests on the employer. The employer has not produced their Risk Assessment or led any evidence on it. I can only conclude that it

either does not exist or they do not wish to present it. They have not produced any evidence concerning the effectiveness of this rule in any Organisation that has implemented such rule. They have not demonstrated the relationship between the rule and its objective. All they have is a nicely-worded Policy document, but which does not talk to the reasonableness of the rule itself.

- [51] Bearing in mind that the incidence of Covid-19 and vaccinations are in the minds of most citizens, but that Mandatory Vaccine Policies are a rule that has been implemented in by far the minority of Companies, which I would hazard a guess at being less than 1%, these Policies have to be adjudged against what the rest of society thinks of these Policies (see section 36 of the Constitution). Certainly there are no such Mandates in the Public Sector, very few in the Commercial, Industrial, Financial and Private Sectors, and likely non-existent in the Informal Sector. As such, what is the value or objective of such Policies if an extremely small number of people attempt to adhere to it?
- [52] The employees at the Respondent do not live in a cocoon. Before and after their shifts they interact with their families and friends. Their wives and husbands go to work at employers who do not have mandatory vaccine policies. Their children go to schools where there are no mandatory vaccine policies. They go to supermarkets, restaurants and other organisations that do not have mandatory vaccine policies. Any of them can pick up Covid-19 anywhere. It has been commonly shared in the news, social media and interactions between private citizens that the vaccine does not prevent a person from getting Covid-19, nor does it prevent the vaccinated person from transmitting the virus to other persons. Again, how is it reasonable to implement such a Policy amongst so few of the population?
- [53] The Respondent did not motivate as to why their situation was any different to any other employer in South Africa. All employers experience sick employees, some from other illnesses and some from Covid-19. If their argument in this regard were valid, then it would be valid for every employer, thus further confirming that this was a National issue
- [54] The employer has experienced several difficulties in dealing with this Mandatory Vaccination Policy. Since they chose the route of retrenchment (operational requirements), they had to show that they went through a consultation process. However, since they had decided beforehand that they would dismiss every employee who did not vaccinate, these consultations were largely lip-service. In terms of the Consolidated Regulations at the time, they were to consider any objections on medical, constitutional and religious grounds. Their requests to the Applicant to get medical reports were also lip-service, as they had no intention to amend their Policy to make exception for any employee. Each medical report was "rubbished". In fact, as testified by the Respondent's witness three times, any credible medical report would only have resulted in the employee being paid severance pay as opposed to getting no

severance pay. The dismissal would still have occurred. Requesting the Applicant to go and seek medical opinions stood out to me as a contradiction in the Respondent's case. Since no medical report was going to make any difference, as confirmed by the Respondent in its opening statement, why even send the Applicant to Doctors for such reports? They simply sent the Applicant on a run-around, for no fair or reasonable purpose. Their vaccine policy made it impossible to properly follow section 189 of the LRA.

[55] The most bizarre part of the Respondent's evidence is their explanation of why they decided not to pay the Applicant any severance pay. Their case was that since they did not accept the medical reasons for the Applicant's refusal to be vaccinated, that this was different to the event that the Applicant provided a well-reasoned and credible reason not to be vaccinated. The outcome of this was that in any event the Applicant would be retrenched, but that if she had a good reason to object to vaccination she would receive severance pay. Clearly, since the outcome was the same, severance pay would have been due. The lack of logic is astounding.

[56] I might add that if this sort of rule were to be accepted in our jurisprudence, then it would allow for a floodgate of rules relating to medical issues, and possibly other issues, and most definitely discriminatory issues that an employer could use to retrench staff.

[57] **Conclusions**

[58] When one considers the Equality Clause (section 9 of the Constitution), Freedom and security of the person (section 12 of the Constitution), limitation of rights (section 36 of the Constitution), the lack of reasonableness of the rule, Government's response to and the Regulations it issued, it becomes unmistakably clear that the right to issue any law of general application in respect of Covid-19 vaccinations rests with Government. An employer has no right to formulate any Covid-19 Vaccination Mandate. It is the prerogative of Government.

[59] The rule regarding vaccinations was therefore unreasonable. It follows that the dismissal of the Applicant was substantively unfair.

[60] I will not deal with procedural fairness, as the employer was not able to follow a fair procedure.

[61] The Applicant has confirmed that she does not wish to be reinstated. I take into account that the dismissal was substantively unfair, in fact unconstitutional. The dismissal should not have occurred, and

the Applicant has lost employment she has had for years due to, in effect, the employer's breach. In my view 12 months' compensation is warranted. Compensation amounts to R23 300-00 x 12 months = R279 600-00.

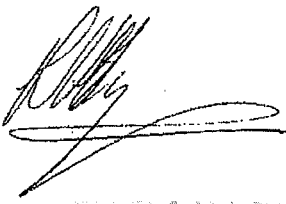
[62] With respect to severance pay, if a retrenchment was considered to be an appropriate response by the employer, severance pay would have been due and payable. However, in the light of my findings in the main matter, this issue becomes academic.

ORDER

[63] The dismissal of the Applicant was substantively unfair.

[64] The Respondent is to compensate the Applicant the equivalent of 12 months' salary amounting to R279 600-00. This is to be paid by 25 July 2022.

[65] There is no order as to costs.



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**RICHARD BYRNE
SENIOR COMMISSIONER**