

**IN THE HIGH COURT OF SOUTH AFRICA  
(WESTERN CAPE DIVISION, CAPE TOWN)**

Case No.....

In the matter between:

**MAPETEKE TSHEGOFATJO MOGASHOA** First Applicant

**MAX JOHN TEDDER** Second Applicant

**KAIDEN WESSELS** Third Applicant

**GIA HENSBURG** Fourth Applicant

**POSTGRAD: DETAILS TO BE FURNISHED** Fifth Applicant

and

**THE UNIVERSITY OF CAPE TOWN** Respondent

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**FOUNDING AFFIDAVIT**

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I, the undersigned,

**MAPETEKE TSHEGOFATJO MOGASHOA**

do hereby make oath and say that:

1. I am an adult female and I am a 3<sup>rd</sup> year student at UCT completing a BA in Theatre and Performance, majoring in Dance Performance. I am resident at **Forest Hill Residence, Mowbray, Cape Town.**
2. I also depose to this affidavit on behalf of the second to **[fifth]** applicants whose confirmatory affidavits are filed herewith.
3. The facts contained herein are within my personal knowledge, unless the contrary appears from the text, and are both true and correct.
4. Where I rely on facts conveyed to me by third parties, I verily believe the correctness of such facts and, where appropriate, I attach confirmatory affidavits.
5. Where I make legal submissions I do so based on the advice of my legal representatives whose advice I believe to be true and correct.
6. The purpose of this application is:
  - 6.1. First, to interdict the operation of the vaccination mandate issued by UCT on **[insert date]**, pending a review of the decision; and

- 6.2. Second, to review and set aside the decision to implement the vaccine mandate.
7. This affidavit is structured as follows:
  - 7.1. **First**, we make some introductory remarks;
  - 7.2. **Second**, we set out the parties to this application;
  - 7.3. **Third**, we set out the background to the present application;
  - 7.4. **Fourth**, we address the requirements for an interim interdict;
  - 7.5. **Fifth**, we address the requirement of urgency;
  - 7.6. **Sixth**, we address the relief sought in respect of the interim interdict;
  - 7.7. **Seventh**, we address Part B of the present application

## **INTRODCUTORY REMARKS**

8. At the outset it is necessary to make some preliminary remarks, concerning the present challenge.
9. This application does not seek to advance conspiracy. We accept that COVID-19 constitutes a major public health risk. We also accept, for purposes of this application, that those who elect to have vaccines administered are protected from serious illness or death in the event that they contract COVID-19.
10. The applicants, however, are persons who do not wish to be vaccinated and who remain desirous of continuing their education at UCT. The issue which

arises, however, is that as a result of the vaccine mandate in its current form the applicants are being precluded from continuing their education at UCT.

11. The applicants, in principle, also take no issue with a vaccination mandate subject to it containing reasonable exemptions, which the current vaccination mandate does not.
12. If the vaccination mandate allowed for access to campus for those who were unvaccinated subject to the presentation of negative PCR tests at reasonable intervals, alternatively, allowed for such students to continue with online learning as has been the case since the declaration of the national state of disaster on 15 March 2020, we would not be seeking to challenge the present vaccination mandate.

#### **THE PARTIES TO THIS APPLICATION**

13. I am the first applicant and have described myself above. For purposes of this section of the affidavit, I confirm that there is a practical component to my degree which requires my being on campus. It bears mentioning at this juncture that I have received NSFAS funding. If I am unable to complete my degree I will be required to repay the funding which I have received from NSFAS in full. I attach hereto marked "**FAXX**" the funding agreement I entered into with NSFAS. **[First Applicant to furnish a copy of funding agreement]**
14. Second applicant is **MAX JOHN TEDDER** an adult male and 2<sup>nd</sup> year student at UCT, completing a Bachelor of Business Science: Actuarial Sciences

degree, resident at 11 Ottawa Road, Bakoven. Second applicant is not required to be on campus for purposes of completing his degree.

15. Third Applicant is **KAIDEN WESSELS [insert]**
16. Fourth Applicant is **GIA HENSBURG** an adult female and is a 3<sup>rd</sup> year student at UCT, completing a BA in Theatre and Performance, majoring in Dance Performance, resident at 66 Princes Road, Claremont. Fourth applicant is required to be on campus for purposes of completing the practical component of her degree.
17. Fifth Applicant is **[unknown postgraduate]**
18. The Respondent is **UCT**, a higher education institution established in terms of the Higher Education Act 101 of 1997 ("**the Higher Education Act**") with its principal place of administration at Bremner Building, Lower Campus, Rondebosch.

## **BACKGROUND TO THIS APPLICATION**

19. On 10 September 2021 the Senate of the University of the Cape Town ("**the Senate**") endorsed a proposal which would require students to present proof of having been vaccinated as a condition of registration for the 2022 academic year.
20. On 13 September 2021, the student body received a letter from the Student Representative Council ("**the SRC**"), seeking submissions on the vaccination mandate from the student body.

21. On 17 September the Senate passed a motion, attached hereto marked “FA1”, containing what would later be called an “in-principle” mandate (“**the Senate motion**”). We address, further below, the procedural fairness issues which arise out of the public participation process which UCT elected to follow
  
22. The Senate motion, *inter alia*:
  - 22.1. Recommends to the UCT Council that it institute a mandate from 1 January 2022 requiring all staff (as a condition of being able to perform their duties) and students (as a condition of registration) to provide acceptable proof of having been vaccinated against SARS-CoV-2;
  
  - 22.2. Recommends to Council that Council mandates the executive officers of the University and the Senate, by no later than 1 November 2021, to constitute a panel comprising of eminent domain-specialists and members of the general staff and student bodies to:
    - 22.2.1. establish the logistical and operational features required to implement this mandate, including access to vaccination facilities as well as communications to staff, students and the wider University community;
  
    - 22.2.2. establish systematic principles, rules, and guidance relating to the permissible grounds for exemption from, or specification of alternatives to, the COVID-19 vaccination mandate;
  
  - 22.3. And thereafter to:

- 22.3.1. act as the body that receives and adjudicates with compassion applications for exemption from the COVID-19 vaccination mandate;
  - 22.3.2. monitor the effectiveness of compliance with and outcomes of this mandate, both at baseline and on an on-going basis;
  - 22.3.3. continue to review the evolving medical evidence with regards to COVID-19 vaccination risks and benefits, and to revise and revisit this mandate should it prove necessary; and
  - 22.3.4. call on all members of the University community to promote voluntary uptake of vaccination, through carefully-crafted public health messaging in the case of the Executive, and awareness-raising by both them as well as other members of the community.
23. On 14 October 2021 the fourth and fifth applicants made certain submissions concerning the vaccination mandate, which submissions are attached hereto marked “**FA2**”.
24. In those submissions the first and fourth applicants sought to comment on the senate motion. The aforesaid applicants took issue with UCT’s *vires* to impose a vaccination mandate given its empowering statutes, the procedural fairness of the process, and complained that the in-principle mandate was irrational, unreasonable and otherwise unconstitutional. We return to this aspect further below.

25. On 20 October 2021 the offices of the Vice Chancellor issued a communication entitled “UCT Council approves in-principle a proposal on vaccination as a condition of campus access”. This communication is attached hereto marked “**FA3**”.
26. It appears from the communication that the UCT Council, *inter alia*:
- 26.1. Approved in-principle, to take effect as from 1 January 2022, a proposal requiring that all staff (as a condition of being able to perform their duties) and students (as a condition of registration) provide acceptable proof of having been vaccinated against COVID-19;
- 26.2. Resolved that the university executive should proceed to establish an appropriately constituted panel, whose task would be to develop the operational details required to implement the campus access dispensation as referred to above, including the principles and guidelines for exemption from a requirement to provide proof of vaccination;
- 26.3. The UCT executive we will be required to report back to Council at its December 2021 meeting.
27. Applicants’ attorneys of record dispatched correspondence to the offices of the Vice Chancellor on 27 October 2021, attached hereto marked “**FA4**”. The aforesaid correspondence requested that UCT furnish our attorneys of record with the date upon which UCT intended issuing its mandate in final form, the actual “in principle” decision taken by the UCT Council, and the minutes of such meeting. Our attorney also requested a response by 29 October 2021.



28. On 29 October 2021, our attorneys of record received correspondence from the attorneys for UCT, attached hereto marked "**FA5**", indicating that they required time to consult and would provide a comprehensive response by 9 November 2021. The attorneys for UCT also indicated that the timeline imposed by our attorney was unreasonable.
29. It is unclear how the information requested by our attorneys of record, being the request for a date upon which UCT intended to impose its mandate, the actual "in-principle" mandate, and minutes of the meeting at which such an "in principle" decision was taken, could not have been provided in the time period provided. We point out that the applicants did not request a substantive response from UCT.
30. On 5 November 2021 our attorneys received correspondence from UCT's attorneys of record, attached hereto marked "**FA6**", this time indicating that it was "taking longer than anticipated to respond to [our] letter" and that they would only be in a position to respond comprehensively on 12 November 2021.
31. On 12 November a further letter was received from UCT's attorneys of record indicating that UCT had appointed the panel directed by the council at its meeting on 16 October 2021. The panel held its first meeting on 10 November 2021. The panel would report to the council on 4 December 2021 and following that meeting UCT would make an announcement concerning the way forward. We attach this letter hereto marked "**FA7**".
32. On 16 November 2021 our attorneys addressed correspondence to UCT's attorneys of record, indicating that their letter was not informative and sought

clarity on the issues referred to in our letter of 27 October 2021. We attach this letter hereto marked “**FA8**”.

33. On 17 November 2021 our attorneys received correspondence from UCT’s attorneys of record indicating that:

33.1. The council would make a decision regarding the way forward on 4 December 2021;

33.2. The content of the in-principle decision taken by the council on 16 October 2021 appears from the announcement made by the Vice-Chancellor on 20 October 2021;

33.3. The minutes of that decision had not yet been approved by the UCT Council, and that are likely to be approved on 4 December 2021.

34. Further background to be [inserted].

35. The decision taken by UCT was finally communicated on [insert] December 2021, the decision is attached hereto marked “**FA9**”. The content of the mandate is the following:

[INSERT MANDATE]

36. As conveyed by our attorneys in their initial letter of 27 October 2021, the process adopted by UCT in relation to its vaccination mandate, in particular, its decision to finally issue the mandate at some point in December 2021 was deeply regrettable.

37. UCT's process has, in effect, necessitated the institution of the present interim interdict application, caused solely by their inability to take a decision timeously in circumstances where they were advised that a challenge to the vaccine mandate was likely and that they were no doubt seeking to ensure that any contemplated application would need to be brought in **late December** and would necessarily have to be brought urgently.
38. As appears from that which is set out in Part B to this application, the issues raised in the review application, particularly where we complain that the mandate is otherwise unconstitutional, raise significant issues of constitutional law which will have a profound effect on South African society going forward and ought to be ventilated fully.
39. Whatever one's view on vaccination may be, the question of whether an entity such as UCT can require students or staff members by mandate to have an available vaccine administered, raises contentious constitutional issues. Critically, the questions which arise are, *inter alia*:
- 39.1. When is it Constitutionally permissible for an entity such as UCT to require persons to be vaccinated and seek to limit their rights to bodily integrity;
- 39.2. To what extent are the applicants entitled to rely upon their rights to thought, conscience and belief to object to a vaccination mandate;
- 39.3. To what extent is UCT required to make reasonable concessions where it seeks to limit the aforesaid rights of the applicant.

40. It also bears mentioning that since February 2021 South Africa has been sourcing vaccines (initially for front-line workers). By June 2021 it became apparent that the vaccines would be rolled out widely.
41. UCT waited until October 2021 to take an “in-principle” decision and only appointed the panel, foreshadowed in the Senate motion, to consider its mandate in and during late October / early November 2021, as appears from the communication to students dated 10 November 2021 attached hereto marked “**FA10**”. The communication merely refers to the panel already having commenced their work, although, it is unclear when they commenced working.
42. UCT ought to have appointed the panel prior to having canvassed the mandate with the student body. Instead UCT issued an incomplete “in-principle” mandate without the full breadth exemptions which it would consider. Simply put, the message from UCT was get vaccinated or do not register and/or return to campus.
43. Against this backdrop, we turn now to address the requirements for interim interdictory relief.

#### **THE REQUIREMENTS FOR INTERIM INTERDICTORY RELIEF**

44. We are advised that the requirements for an interim interdict are:
  - 44.1. *a prima facie* right, namely, *prima facie* proof of facts that establish the existence of a right in terms of substantive law;

- 44.2. a well-grounded apprehension of irreparable harm if the interim relief is not granted, and the ultimate relief is eventually granted;
  - 44.3. that the balance of convenience favours the granting of an interim interdict; and
  - 44.4. the applicant has no other satisfactory remedy.
45. We are further advised that these requirements must not be considered separately or in isolation, but in conjunction with one another in order to determine whether the Court should exercise its discretion in favour of granting the interim relief.
46. We address each of these requirements in turn.

### **Prima Facie / Clear Right**

47. Though we are advised that in order to obtain an interim interdict we are required to show a *prima facie* right (which may be open to some doubt) on the facts of this matter we respectfully aver that applicants possess a clear right.
48. Applicants in this matter are:
- 48.1. currently registered students who, but for the vaccination mandate, would be entitled to continue their studies at UCT; or
  - 48.2. prospective students who have been accepted to UCT who, but for the vaccination mandate, would be entitled to commence their studies at UCT.

49. First, in passing the vaccination mandate in its present form and having adopted the procedure it did, applicants contend that UCT rendered a decision which is reviewable in terms of the Promotion of Administrative Justice Act 3 of 2000 (“**PAJA**”). This is apparent from Part B to the present application. In the circumstances, the applicants are possessed of a right to fair administrative action and of which they have been deprived.
50. Second, applicants are possessed of the right to bodily integrity as appears in section 12(2)(b) of the Constitution of the Republic of South Africa, 1996 (“**the Constitution**”), this right too would be breached if applicants are required to have a currently available vaccine administered to them;
51. Third, applicants are possessed of the right to freedom of conscience, religion, thought, belief and opinion as appears in section 15 of the Constitution. Applicants all hold the thought, belief and opinion that they are not desirous of having an available vaccine administered to them.
52. Fourth, applicants possess a right to further education as appears from section 29(1)(b) of the Constitution as well as a contractual right to continue their studies at UCT. The aforesaid applicants have met the requirements to continue their studies. UCT now seeks to amend the conditions of registration in circumstances where such an amendment would deprive applicants of the abovementioned constitutional rights.
53. We respectfully submit that applicants are possessed of a clear right which entitles them to approach a court to vindicate same.

### **Reasonable apprehension of irreparable harm**

54. If applicants are required to be vaccinated as a precondition to registration their rights to bodily integrity, in particular, their rights to security and control over their bodies would be indelibly infringed.
55. If, on the other hand, applicants do not wish to be vaccinated they would then be precluded from continuing or commencing their studies at UCT, in circumstances where there is no bar to the foregoing, save for the requirement that they be vaccinated.
56. Moreover, if the mandate in its current format were allowed to stand it would constitute an approval of administrative process would be in clear breach of PAJA.
57. Critically, if the vaccine mandate is allowed to stand in its current form, the constitutional rights of applicants are irreparably breached.

### **Balance of Convenience**

58. We respectfully aver that the balance of convenience favours applicants.
59. As appears from the notice of motion the relief sought is framed in the alternative. In the first instance applicants are desirous that the vaccination mandate in its current form be suspended pending the review thereof. In the alternative, applicants seek to register to commence and/or continue their studies either online and/or by attending at campus upon presentation of negative PCR tests on a weekly basis.
60. It bears mentioning that since the declaration of the national state of disaster in March 2020 UCT has adopted a system of online learning. It is unclear why an

accommodation cannot be made for students who do not wish to be vaccinated to continue to study online.

61. Moreover, fifth applicant [name], is a postgraduate student who has no need to attend at campus. It is unclear why their supervision cannot continue online, over the many platforms which are available for such online consultations.
62. It also bears further mention that certain faculties, such as the law faculty, have indicated that while there is a plan for students to attend at campus next year, the law faculty will be operating on the basis of a half-density campus with a combination of on-campus and remote teaching and learning. We attach the communication received from the Dean of Law on 12 November 2021 marked "FA11".
63. In any event, and from a logistical perspective, UCT in the form of its current mandate will be required to exempt students who have medical reasons for not being vaccinated. An accommodation will need to be made for these students both for purposes of their registration and for purposes of their continued learning. It is unclear why such an accommodation cannot be made for students who do not wish to be vaccinated, at the very least, on an interim basis and pending the outcome of the review in Part B.
64. Ultimately, the question of convenience resolves to the following, should UCT be able to run roughshod over the constitutional rights of applicants in circumstances where it has the underlying systems to allow applicants to continue their studies online, on an interim basis, as it has been doing for the past two years. Moreover, if applicants were required to attend campus any risk



can be mitigated by proving that they are not infected by way of appropriate testing at appropriate intervals.

65. Moreover, it cannot be the case that UCT cannot make an exemption for applicants in circumstances where its mandate, in any event, contemplates medical exemptions to it.
66. In the premises, we respectfully aver that the balance of convenience favours applicants.

### **No other satisfactory remedy**

67. As appears from that which is set out above, applicants are possessed of no other remedy save to approach this Honourable Court.
68. We cannot apply for an exemption inasmuch as we do not qualify to make such an application given the present construction of the mandate.
69. For applicants we are either required to forego our education, in certain instances where I and fourth applicant, for example, are in our final years, or alternatively, agree to be vaccinated in circumstances where, as we contend, the mandate constitutes a severe infringement of our constitutional rights.
70. It bears mentioning, that in the event that I cannot complete my degree, I will be required to repay the funding I have received from NSFAS, in circumstances where I would have been precluded from registering and completing my degree by virtue of the vaccination mandate. This will obviously have a significant deleterious effect on me financially.

71. It is also no salve to say that we can attend other universities. We have been accepted to UCT and/or are entitled to continue our studies having completed the requirements for our continued studies. In my case I cannot complete my course of study at another university.
72. Moreover, [Applicant XX] specifically chose UCT to complete their [postgraduate degree] so that they could work with Professor [Insert name].
73. If this interim interdict is not granted and if the review is ultimately successful, we will be unable to register and complete our studies. If the vaccine mandate is ultimately set aside we would have given up a year of study. For those applicants going into their final years, such as myself and fourth applicant for example, we would be precluded from seeking employment in our respective fields.
74. In the premises, we respectfully submit that we have no other satisfactory alternative remedy save to approach this Honourable Court.

## **URGENCY**

75. UCT issued its mandate in final form on [insert date]. The mandate becomes effective from [XX] January 2022.
76. Registration will commence at UCT from [insert date].
77. This application was launched on [insert date]. We respectfully contend that we have not delayed in instituting the present application. In fact, this application was instituted some [XX] days after the vaccine mandate was published.

78. UCT has been afforded some [insert] number of days to respond to Part A of the Application.
79. It would be ideal if this application could be disposed of prior to registration commencing at UCT, however, this is unlikely to occur.
80. As will appear from that which is set out below, we have no doubt that in seeking to justify its mandate UCT will put up a barrage of scientific evidence which we will likely be required to address in our supplementary founding affidavit.
81. Given the time of the year it will be impossible for us to consult with experts, some of whom are not in South Africa, and obtain the necessary reports to address the evidence which UCT will put up.
82. It must also be remembered that UCT only rendered its final decision on [XX] December. UCT elected to issue an aberrant “in-principle” mandate in October 2021, which could not be challenged inasmuch as it was not a final decision, nor could it be interdicted.
83. UCT’s conduct necessitated our having to bring this application urgently in late December 2021 by delaying in issuing their mandate in final form. Either this decision was taken purposefully, or alternatively, belies the fact that it put the cart before the horse by issuing an “in principle” decision before it had consulted with its expert panel.
84. This conduct is deeply regrettable and ultimately required us to move with significant haste to institute the present application.

## **RELIEF SOUGHT IN THE URGENT INTERIM INTERDICTIONARY PROCEEDINGS**

85. As appears from the notice of motion, our relief is framed in the alternative. We take the view that vaccine mandate falls to be reviewed and set aside inasmuch as it suffers from certain insurmountable administrative difficulties.
86. That being said, and with full reservation of our rights, we seek, in the alternative, an accommodation that we may register notwithstanding the mandate. If necessary, we are content to continue our studies at UCT online (as we have been doing since March 2020) and if we need to attend campus, we are similarly content to present proof that we are not infected with COVID-19 by way of the appropriate testing as well as undergoing daily health screenings.
87. We respectfully aver that the relief sought would not overburden UCT and seeks to balance the rights of those members of the student body who are vaccinated and will be entitled to attend campus to study. Our challenge is aimed at ensuring that we are not forced to be vaccinated but may continue our studies online, alternatively, that if circumstances require us to attend campus (which we are loathe to do) we will present negative PCR tests on a weekly basis.
88. In fact, and given the requirement that numbers should be limited in enclosed venues such as lecture theatres, we see no reason why our desire to continue learning online is inimical to limiting the spread of infection. It is in fact conducive to limiting the spread of infection.

## **PART B – THE REVIEW**

89. For purposes of interim interdict pending a review application, we are advised that it is advisable to address the review proceedings in the founding affidavit to the interim interdict application, inasmuch as it, in part, underpins the *prima facie* right predicated upon the right to just administrative action.
90. Once we are furnished with the record of decision in terms of Rule 53, we will supplement this affidavit in due course.
91. This review application is structured as follows:
- 91.1. First, we explain why the decision taken by UCT constitutes administrative action as envisaged by PAJA. If it does not, we contend that UCT exercised a public power and its decision falls to be reviewed and set aside in terms of the principle of legality;
- 91.2. Second, we make certain introductory remarks concerning the ambit of the challenge;
- 91.3. Third, we address the grounds of review, namely:
- 91.3.1. The decision was unlawful;
- 91.3.2. The decision was procedurally unfair;
- 91.3.3. The vaccine mandate, in its current form, is irrational and unreasonable;
- 91.3.4. The vaccine mandate is otherwise unconstitutional.

## **ADMINISTRATIVE ACTION**

92. UCT is a juristic person which exercise a public power or performs a public function, namely the provision of tertiary education, in terms of the Higher Education Act.
93. The decision to impose a vaccination mandate affects the rights of students and staff and has a direct external legal effect.
94. Consequently, we respectfully aver that the decision to impose a vaccination mandate constitutes administrative action as contemplated in section 1 of PAJA.
95. If it is contended that the vaccination mandate does not amount to administrative action, we respectfully contend that it is nonetheless the purported exercise of a public power and is, as such, reviewable in terms of the principle of legality.
96. This application for review, is accordingly framed in the alternative.

#### **INTRODUCTORY REMARKS PERTAINING TO THE REVIEW APPLICATION**

97. Mandatory vaccination is a contentious and divisive issue. Regrettably, those who object to vaccination on principled constitutional grounds have been tarnished with the same brush as those who would engage in the spread of disinformation and conspiracy theory.
98. We are entitled to control over our bodies; to freedom of thought, belief, opinion and conscience; and to education and to privacy. We are also entitled to ventilate these issues.

99. For purposes of this review application, we accept that vaccination will reduce the severity of Covid-19 symptoms and limit the likelihood of death if Covid-19 contracted. We also accept that Covid-19 constitutes a grave and serious risk to the Republic and indeed globally.
100. We object, however, to the power of an institution such as UCT to require us to be vaccinated in circumstances where evidently less restrictive means exist for UCT to achieve its objects and which would not run roughshod over our constitutional rights.
101. Moreover, for purposes of this review application, we do not seek to engage in presenting scientific or medical arguments. UCT is, of course, entitled to present the scientific and medical research it obtained in rendering its decision. We will address these issues in the supplementary founding affidavit once it is made available as part of the record of decision.
102. Critically however, even if one were to accept UCT's scientific research it does not necessarily save the mandate from the administrative law challenges as set out in this affidavit.

#### **THE DECISION WAS PROCEDURALLY UNFAIR**

103. As appears from that which is traversed further above, UCT called for comments in respect of an incomplete vaccination mandate in and during September 2021.
104. Students were asked to make submissions on the proposed mandate in circumstances where no mandate was, in fact, presented for consideration and comment.

105. It is, with respect, not procedurally fair for an administrator to state that a decision will be taken and to call for comments in circumstances where the decision is not circulated to those who are expected to comment.
106. Once submissions were made in and during October 2021, UCT took an “in principle” decision. Once again, the content of this “in-principle” decision did not include the full picture of vaccination mandate. Indeed, UCT left it to a panel of experts to decide what exemptions there would be, if any, to a vaccination mandate.
107. Students and interested parties were not given an opportunity to make submissions to the panel of experts formulating the mandate, nor would this have been possible, inasmuch as there was no mandate in respect of which submissions could be made.
108. UCT purported to adopt a process of engagement with students, however, this appears to have been no more than proverbial box-checking exercise. We contend as such for if UCT was truly desirous of a public participation process it would have furnished students with a full mandate which could have been properly commented upon.
109. [Add comments if they allow people to comment on the final mandate, if they do, we may have to remove the procedural fairness challenge. It also bears mentioning at this juncture that no argument can be made that just because an administrator disagrees with you it is procedurally unfair.]
110. By failing to provide students with a full mandate to comment upon, we respectfully submit that UCT’s decision was procedurally unfair.



111. In the premises, the vaccination mandate falls to be reviewed and set aside for want of procedural fairness as contemplated in 6(2)(c) of PAJA, alternatively the principle of legality.

### **THE DECISION WAS ULTRA VIRES**

112. We respectfully submit that UCT's decision is *ultra vires* the powers which it holds in terms of the Higher Education Act and the Statute of the University of Cape Town, Government Gazette 42967, 24 January 2020 (**"the UCT Statute"**).
113. The functions and powers of the Senate are set out in section 22 of the UCT Statute as read with section 28 of the Higher Education Act. In terms of section 22(1) and (2) of the UCT Statute it is clear that the Senate has no power to deal with issues surrounding vaccination mandates. Its competence relates to academic and research functions.
114. It also does not appear from the Senate motion that, when passing the motion, it was acting in terms of any functions assigned to it by the UCT Council as contemplated in section 22(3)(a), (b) and (c), to the extent that such an assignment was even possible.
115. In this regard, the UCT Council's powers are circumscribed by the UCT Statute and the Higher Education Act. There is no express power in the UCT Statute or the Higher Education Act which empowers the UCT Council to impose specific health measures, particularly, as wide ranging a health measure as requiring students to be forced to take specific medication. Understandably so,

inasmuch as the University is not entitled to direct which medical measures may be forced upon students.

116. We respectfully contend that UCT was not entitled to issue a vaccination mandate inasmuch as no power exists for UCT to have done so in terms of the UCT Statute or the Higher Education Act.

117. In the premises, the vaccination mandate falls to be reviewed and set aside for want of lawfulness as contemplated in section 6(2)(a)(i) of PAJA, alternatively the principle of legality.

### **THE DECISION IS UNREASONABLE AND IRRATIONAL**

118. The decision to impose a vaccination mandate in its present form is unreasonable and irrational. We contend that the decision is so unreasonable that no reasonable decision maker could have come to the decision which UCT did.

119. The reasonableness challenge is predicated upon the following:

119.1. The mandate requires unwilling students to accept risks attendant with vaccination;

119.2. The mandate makes no provision for reasonable exemptions;

### **Risk**

120. It is not contentious to state that there are reported side effects arising out of the vaccines. Some side effects are of a minor nature and are temporary. There are similarly reports of longer lasting and severe side-effects in a percentage of those who receive the vaccine. [Insert Details re myocarditis].

121. Even if the risk is miniscule, it is unreasonable for an entity such as UCT to require its student body to accept such a risk.
122. [If no medical exemption deal with risk of allergic reactions].

### **No reasonable exemption**

123. [can only be drafted once the mandate is seen].
124. In the premises, we respectfully aver that the vaccination mandate is unreasonable and irrational and falls to be reviewed and set aside in terms of section 6(2)(e)(vi) of PAJA, alternatively, the principle of legality.

### **OTHERWISE UNCONSTITUTIONAL**

125. On the assumption that this Honourable Court were to accept that the vaccination mandate was lawful and procedurally fair we respectfully submit that the vaccination mandate remains unconstitutional.
126. As indicated the requirement to be vaccinated constitutes a limitation, by way of a law of general application to the student body, of the rights to:
- 126.1. Bodily integrity;
- 126.2. Thought, belief, conscience and opinion; and.
- 126.3. Higher education.
127. As we have indicated above, the vaccine mandate purports to limit the rights of students who do not wish to be vaccinated. It requires students to elect between giving up certain rights or being precluded from continuing their higher education at UCT.

128. For purposes of the constitutional challenge, we structure same as follows:

128.1. First, we consider the rights which are implicated in the vaccine mandate;

128.2. Second, we consider whether or not the vaccine mandate constitutes a reasonable limitation of the rights as aforesaid;

128.3. Third, we set out our conclusion.

### **The rights implicated**

129. The thesis advanced by applicants is that the present decision is otherwise unconstitutional and as such falls to be reviewed and set aside.

130. Critically, the question for resolution in the present application is the extent to which the rights of applicants extend in contradistinction to the rights of other students who claim that by not vaccinating, applicants are placing them at risk.

131. We address the content of each of the rights implicated in turn below. We deal with the issue of justifiable limitation further below.

### Bodily Integrity

132. Section 12(2)(b) of the Constitution provides as follows:

*“Everyone has the right to bodily and psychological integrity, which includes the right*

...

*(b) to security in and control over their body...”*

133. In requiring students to be vaccinated as a condition of registration such students are, in effect being deprived of control over their bodies.
134. Even if it were accepted that vaccination is entirely safe, the question remains as to whether or not, notwithstanding the fact that vaccinations are safe, it is constitutional to require that a person be vaccinated.
135. Applicants contend that it is not, under the present circumstances, permissible to require a person to be vaccinated. Given that the vaccines are effective in limiting serious illness and death, those persons who elect to be vaccinated are protected.
136. If it is contended by UCT that unvaccinated students constitute a greater risk of the spread of disease this risk can be mitigated by requiring unvaccinated students to (a) continue their studies online as far as possible and (b) in the event that their degrees have a practical component to require that they present negative Covid-19 tests upon entry to the classroom.
137. If the harm which UCT is seeking to obviate is the spread of disease this can be managed as indicated above. In any event, it would be unvaccinated students who take on a greater risk given that, if they do contract Covid-19, they are more likely to get seriously ill or die.
138. Pointedly, applicants do not seek to foist their decision on the general student body. They are content to continue their studies online or to attend campus and provide negative Covid-19 tests.
139. A general vaccine mandate, which makes no provision for online learning of those who choose not be vaccinated and/or attendance at campus subject to

negative Covid-19 tests, must, with respect, amount to a breach of the right to bodily integrity.

140. In the circumstances, the vaccine mandate breaches the right to bodily integrity inasmuch as applicants are being deprived of the right to security and control over their bodies. Applicants are, in effect, being forced to vaccinate in circumstances where they do not wish to be vaccinated.

Conscience, religion, thought, belief, and opinion

141. Section 15 of the Constitution provides as follows:

*“(1) Everyone has the right to freedom of conscience, religion, thought, belief and opinion.”*

142. Applicants object to being vaccinated on the ground that it is offensive to their conscience, religion, thought, belief and opinion.

143. By requiring students to be vaccinated in circumstances where they have a principled objection to being vaccinated, such a requirement constitutes a breach of section 15. It matters not whether the objection to being vaccinated is predicated upon legitimate scientific bases or not. The sincerely held belief of the applicants is that vaccination is not appropriate for them and moreover that the potential of adverse consequences of vaccination constitutes a risk that applicants are not willing to accept.

144. We are further advised that for purposes of a challenge predicated upon section 15, the reasonableness of the held belief is not in issue. Even if our objection to vaccination was predicated upon spurious grounds, the purpose of this

section is to protect the right to hold such the belief, however spurious it may be.

145. In the circumstances, to the extent that UCT requires us to be vaccinated it constitutes a limitation of the right as contained in section 15.

#### The right to higher education

146. Section 29(1)(b) of the Constitution provides as follows:

“(1) Everyone has the right— (b) to further education, which the state, through reasonable measures, must make progressively available and accessible.”

147. The applicants to this application are either prospective students or current students who, but for the vaccination mandate, are precluded from registering at UCT to commence or continue their studies.

148. We reiterate that an argument that proceeds along the lines that the rights of applicants are not being limited because they can attend other universities falls to be rejected.

149. Applicants chose UCT because of the profile of the university [further detail if certain postgraduates wanted a specific professor as a supervisor]

150. For continuing students, they have paid fees and completed all the requirements to continue studying, it is not appropriate to suggest that they ought to abandon their studies and/or attend a different university, which may or may not accept them and which university may or not be of the same standard as UCT.

151. In any event, it appears that most universities are intent on issuing vaccination mandates, some of which are permissive than others, by way of example [insert WITS mandate / Stellenbosch Mandate / UFS Mandate and so forth].
152. That being said, it cannot be suggested that even if there is a university which has an acceptable mandate that they are required to forego their education at UCT, particularly, in circumstances where they may be required to leave the province.
153. The vaccine mandate precludes a student from registration in absence of proof of vaccination, it does not provide for a reasonable exemption save for medical reasons. It cannot be contended that the vaccine mandate does not limit the right of applicants to higher education.

#### Conclusion on the rights implicated

154. It would be difficult for UCT to contend that certain constitutional rights are not being limited. Indeed, the Senate Motion provides as follows:
- “...any ensuing limitation of rights will be reasonable and justifiable in accordance with section 36 of the Constitution, given the overwhelmingly important purpose served by the measure and the minor nature of any limitation imposed by it.”*
155. UCT must therefore, on a principled basis, accept that the rights of students who do not wish to be vaccinated are being limited.
156. Simply put, the mandate is a decision taken by UCT which states, either be vaccinated or you may not continue your studies at UCT.



157. We have explained above why we contend that UCT was not entitled to pass such a mandate as part of the *ultra vires* challenge. If, however, it is accepted that UCT possessed the power to pass the mandate and that power was exercised in a procedurally fair manner, the abiding question which remains is that of constitutionality and in particular whether the limitation of rights, which is seemingly accepted by UCT, is justifiable.

### **The limitation is not justifiable**

158. The basis of the justification for the mandate appears from the Senate Motion. The justification can be divided into the following categories:

158.1. Covid-19 has had a negative effect on South Africa, in particular, but not exclusively by the poorest and most disadvantaged members of the UCT community;

158.2. Students, parents and staff faced significant difficulties with remote learning;

158.3. Remote learning could result in harm to mental health arising out of alienation from and unfamiliarity with working and researching remotely;

158.4. A number of members of the UCT community have comorbidities, weakened immune systems and are elderly;

158.5. The vaccines are safe and effective;

158.6. Rapid vaccination roll-out will prevent new variants from emerging and taking hold.

159. Moreover, UCT recognises, in the Senate Motion, *inter alia*, that:

159.1. Health, safety and well-being of all is enhanced when eligible persons are vaccinated against the virus;

159.2. While the University must continue to pursue other measures to mitigate the risk of the spread of Covid-19, the costs and/or logistics of doing so, in combination with the aerosolised mode of transmission, mean that other measures will be inadequate to properly protect staff and students;

159.3. A third year of disruption to UCT's pedagogical and research endeavours will be extremely damaging, particularly for those who most need the support of the structures available in a fully functioning academic environment, and that UCT has an ethical obligation to the current generation of students who have entrusted the University with their education, to re-open safely as soon as possible;

159.4. That every effort must be made by the University and national, provincial, and local authorities to encourage voluntary vaccination of staff and students through meaningful and respectful engagement, public information, and advocacy role-modelling and peer support; and

159.5. That the near-universal vaccination of all staff and students of UCT will serve:

159.5.1. as a public health measure to reduce the frequency and severity of infections and prevent COVID-19 related deaths within the University Community;

- 159.5.2. contribute to promoting vaccine roll-out more broadly in our communities and thereby facilitate reduction of transmission at a population level;
  - 159.5.3. provide a mechanism to support the orderly and safe return to campus of all staff and students, thereby enhancing the education of students in allowing for contact-based learning and collegial scholarship; and
  - 159.5.4. allow for research activities that are currently interrupted to be resumed and thereby reduce further negative impacts on the university's scientific outputs.
160. On this basis, UCT holds that *“any ensuing limitation of rights will be reasonable and justifiable in accordance with section 36 of the Constitution, given the overwhelmingly important purpose served by the measure and the minor nature of any limitation imposed by it.”*
161. To the extent that it is necessary to do so, we will address the scientific underpinnings of UCT's contentions in our supplementary founding affidavit. However, we note that the question to be answered in the present application does not concern the safety, desirability or effectiveness of vaccination.
162. The question for determination in this application is that even if it is accepted that vaccination is safe and effective, to what extent may a person be required to be vaccinated, and if found that they possess a right not to be vaccinated, to what extent can their rights be limited.

163. Ultimately, any limitation of rights by virtue of law of general application. We contend that the decision to impose a vaccine mandate is analogous to a law of general application, inasmuch as it applies to all current and prospective students.
164. Alternatively, if it is held that the vaccine mandate is not a law of general application, the question of proportionality still falls to be considered in dealing with any purported limitation of rights.
165. We are advised that it is trite that the limitation of constitutional rights for a purpose that is reasonable and necessary in a democratic society involves the weighing up of competing values, and ultimately an assessment based on proportionality.
166. In the balancing process the relevant considerations will include the nature of the right that is limited and its importance to an open and democratic society based on freedom and equality; the purpose for which the right is limited and the importance of that purpose to such a society; the extent of the limitation, its efficacy and, particularly where the limitation has to be necessary, whether the desired ends could reasonably be achieved through other means less damaging to the right in question.
167. Applicants' central contention is that there are less restrictive means for UCT to achieve its objects, namely, the continued provision of online learning for those students who do not wish to be vaccinated. Alternatively, if such students are required to be on campus, they are able to demonstrate by the appropriate testing that they are not infected with Covid-19.

168. Applicants accept that their decision not to be vaccinated carries consequences with it, namely, that their access to campus may be limited as far as possible and if they are required to attend campus, they will do so observing all safety protocols and demonstrating that they are not infected or infectious.
169. Applicants, however, do not accept that their right to higher education may be stripped from them by virtue of the vaccine mandate, in circumstances where:
- 169.1. UCT has been offering online learning since the declaration of the national state of disaster and has continued to do so for nearly two years;  
and
- 169.2. UCT intends to continue with an online component of study in an effort to reduce the number of students on campus.
170. UCT's purports to justify its attempt to move back to physical learning on the basis that online learning is not desirable, presents logistical difficulties and may lead to mental anguish and alienation.
171. Even if online learning is less desirable, presents logistical difficulties and may lead to mental anguish and alienation, surely the consequences of same fall to accepted by those who elect not to be vaccinated.
172. This is further underscored when one considers the nature of the rights which are being infringed, in particular, the right to bodily integrity as well as the right contained in section 15 of the Constitution.

173. The fact that the views of applicants are unpopular have no bearing in respect of the question as to whether or not they are entitled to protection in terms of the Constitution.
174. It also does not fall to a court to determine whether or not their belief is underpinned by any rationality. The only question is whether or not the belief is sincerely held, which, in this case, we contend that it is. Were any court to start questioning the rationality of belief, it would, in effect, scupper the right contained in section 15 of the Constitution.
175. Applicants accept that their rights must considered together with the rights of other students and staff members.
176. We respectfully submit that if we take the view that we will continue our studies online, as far as possible, and if we are to attend at campus, we will do so upon presentation of a negative Covid-19 test, it cannot be that we are in any way infringing the rights of other students or staff members.
177. If UCT's view, on the other hand, is that it is logistically difficult to allow for a dual system of online and in person learning and that online learning is undesirable, with respect, the fact that something may be logistically difficult is not a basis upon which to deprive a person of their constitutional rights. Particularly so, in circumstances where, for the past two years, the solution which we propose has, in any event, been utilised.
178. As to the question of undesirability, we are prepared to accept the less desirable means of instruction, if it means that we are not required to be vaccinated.

179. As to the analysis in terms of section 36 of the Constitution we contend that the limitation is not reasonable and justifiable in an open democratic society based on human dignity, equality and freedom. In fact, the vaccine mandate seeks to scupper the rights of the individual, it is profound limitation of the right to bodily integrity.

180. It bears mentioning that a limitation of the right to bodily integrity constitutes a serious and egregious breach and has a potentially deleterious effect on the rights of the individual going forward.

181. Moreover, as to the relevant factors to be considered in a justifications analysis, UCT will have to explain why its mandate is justifiable when it files its answering affidavit. However, we note the following:

181.1. We accept that limiting the spread of Covid-19 is important as contemplated in section 36(1)(b) of the Constitution. We note, however, that the mandate which we propose would, in fact, limit the number of students on campus. If UCT intends to limit the number of students on campus, it is unclear why those students who do not wish to attend campus cannot continue to do so from their homes, if they elect to do so.

181.2. As to section 36(1)(c), we contend that the nature and extent of the limitation is overbroad for reasons already traversed.

181.3. As to section 36(1)(d), namely the relation to the limitation and its purpose, if the limitation is to ensure that there is a lessening of the spread of Covid-19, it can hardly be contended that requiring everyone

to return to campus would, in fact, reduce the spread of Covid-19 and achieve the objects which UCT contends it would. What the limitation in fact does, is to contend that, if students are vaccinated, they have a lower chance of contracting Covid-19 and if they do, they are less likely to become seriously ill or die. This is a risk mitigation measure.

181.4. If the view is taken that the unvaccinated students constitute a greater risk in respect of the spread of Covid-19, the relief sought in this application addresses this question. It will require students to remain at home and only attend campus upon presentation of a negative Covid-19 test. We do not see how such a requirement could be unreasonable.

181.5. As to whether or not there are less restrictive means to achieve the purpose, we have addressed this issue above.

182. In the premises, we contend that a vaccination mandate which does not allow for students to object to being vaccinated on constitutional grounds, and allow them to continue to study online, or, if they are required to be at campus, by presenting negative Covid-19 tests, is an unjustifiable limitation of the rights listed.

183. In the circumstances, we respectfully submit that the administrative action is otherwise unconstitutional and falls to be reviewed and set aside in terms of section 6(2)(i) of PAJA, alternatively, the principle of legality inasmuch as an unconstitutional mandate cannot be countenanced by virtue of section 2 of the Constitution.



**CONCLUSION AS TO THE REVIEW APPLICATION**

184. For the reasons set out above, we accordingly contend that the vaccination mandate is administrative action which falls to be set aside on the basis that it is procedurally unfair, unlawful, unreasonable and otherwise unconstitutional.

185. Alternatively, the vaccination mandate falls to be set aside in terms of the principle of legality.

**WHEREFORE**, we pray for an order in terms of the Notice of Motion.

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**MAPETEKE TSHEGOFATJO MOGASHOA**

Thus signed and sworn to before me at \_\_\_\_\_ on this \_\_\_\_\_ day  
of \_\_\_\_\_ **2021** the Deponent having acknowledged that the deponent  
knows and understands the contents of this affidavit, that same are all true and correct,  
that the deponent has no objection to taking the prescribed oath, and that the deponent  
considers the prescribed oath to be binding on their conscience

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**COMMISSIONER OF OATHS**