



KRIEK WASSENAAR & VENTER ING

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Our ref: PJ Wassenaar/es/QB0886

Your ref:

6 August 2021

**MINISTER OF EMPLOYMENT AND LABOUR
PRETORIA**

URGENT

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**DEPARTMENT OF EMPLOYMENT AND LABOUR
PRETORIA**

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Sir/Madam

SAKELIGA NPC / MINISTER OF EMPLOYMENT AND LABOUR & OTHERS

1. We represent Sakeliga NPC ("our client").
2. It has come under our client's attention that the Minister of Employment and Labour ("the Minister") and the Department of Employment and Labour ("the Department") issued a press release on 14 June 2021, which promotes the implementation of *mandatory vaccination programmes* by employers. From what our client can glean from the press release and also the Minister's directions issued in terms of regulation 3 of the lockdown regulations issued in terms of section 27(2) of the Disaster Management Act 57 of 2002 ("DMA"), the Minister is of the view that employers are entitled to require mandatory vaccination of employees. The apparent basis for the Minister's position is sections 8 and 9 of the Occupational Health and Safety Act 85 of 1993 ("OHS").
3. It has also been brought to our client's attention that certain employers, including state-owned entities, have now embarked on a process of requiring mandatory vaccinations of employees and independent contractors. In terms of these schemes, employees and contractors are required to get vaccinated against the COVID-19 pathogen. Our client has also been advised

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that some of these employers, specifically including state-owned entities, have employed various mechanisms to compel employees to be vaccinated accordingly. Some of these schemes include threats of dismissal or disciplinary penalties.

4. Our client is of the view that these practices are unconstitutional and also constitute unfair labour practices.
5. It is our client's position that the Minister's directions have not made it lawful for employers to institute mandatory vaccination programmes:

- 5.1 As far as they relate to the purported mandatory vaccination programmes, the directions do not constitute a direction, regulation or law of equal application under the DMA or OHSA, but a policy guideline. The policy regarding so-called mandatory vaccination programmes has not made it mandatory for employers to implement such programmes;

- 5.2 The policy guideline explicitly recognises that employees and contractors have the right to refuse vaccination based on medical and constitutional grounds. The Minister's guidelines specifically recognise the right to bodily integrity (section 12(2)) and the right to freedom of religion, opinion and belief (section 15) as possible Constitutional grounds for such a refusal;

- 5.3 The policy guideline is given its contents, oxymoronic. The policy clearly does not authorise or mandate any actual mandatory vaccination programmes;

- 5.4 Our client is also of the view that your reliance on sections 8 and 9 of the OHSA is misplaced. It is our client's position that neither the DMA nor the OHSA has the power to authorise a gross infringement of bodily integrity or any similar programmes for mandatory vaccination of people;

- 5.5 There is currently no legislation of general application which would allow for the contravention of a person's right to bodily integrity.

- 5.6 Even if the OHSA could be applied to a scheme of mandatory vaccinations by an employer, which interpretation our client rejects, the Act by its construction:

- 5.6.1 Does not authorise an employer to issue penalties where an employee refuses to comply with an instruction by the employer when relying on medical or constitutional rights;
 - 5.6.2 Does not override the employer's contractual employment obligations towards the employee;
 - 5.6.3 Does not authorise the employer to issue penalties against employees who fail to comply with a mandatory scheme intended to infringe upon an employee's constitutional rights;
 - 5.6.4 Does not require that employers institute policies that are not reasonably practicable or possible in terms of the law;
 - 5.6.5 Will not constitute grounds on which an employee or contractor's services may be terminated for failing to comply with instructions of the employer;
6. Our client supports voluntary programmes. However, our client's view is that the public has misinterpreted the Minister's guidelines on mandatory vaccinations and that its application will lead to gross infringements of the constitutional rights of employees and contractors in the corporate arena. The policy has in the last week caused significant legal uncertainty amongst employers and employees regarding the actual position of the law and creates a dangerous legal precedent distinctly undermining the constitutional rights of contracting parties. Despite our client's doubts about the constitutionality of any mandatory vaccination programme, the current structure of the law simply does not allow for such programmes.
7. It is our client's view that the Minister and the Department should, as a matter of urgency, withdraw the policy direction in as far as it relates to an ostensible programme for 'mandatory' vaccinations of people. Our client also requests that you issue a press release to inform the public of the correct legal position regarding the right to constitutional integrity.
8. We request a response by no later than 12 August 2021.

Yours faithfully


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