EMPLOYMENT LAW
ALERT

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Even before Ernest Lowe finalised a policy restricting access to its workplace to curb the spread of COVID-19, the employee made it clear to her employer that she was unwilling to receive the COVID-19 vaccine. Instead, she was willing to submit a weekly COVID-19 test provided it was at the employer's expense. The employer informed the employee that it would not pay for the COVID-19 test and would therefore not allow the employee onto its premises, and ultimately, the no-work-no-pay principle would apply.

In anticipation of the policy restricting access to the workplace coming into effect, Solidarity wrote a letter on behalf of the employee to the employer informing it that the proposed "*site entry policy*" was in contravention of the Consolidated Direction on Occupational Health and Safety Measures in Certain Workplaces, issued on 11 June 2021 (Direction) and that, by adopting such a policy, the employer unilaterally changed the employee's terms and conditions of employment. Undeterred by the complaints raised in Solidarity's letter, the employer notified all employees on 13 December 2021 that admission to its premises would only be granted to employees who (i) had been fully vaccinated, or (ii) produced a weekly negative COVID-19 test result, and that it would not contribute to the costs of the tests.

OBLIGATIONS UNDER THE OHSA

Disputing Solidarity's allegations, the employer informed the union that it implemented the admission policy in terms of its obligations under sections 8 and 9 of the Occupational Health and Safety Act 85 of 1993 (OHSA). These sections set out the employer's duty to provide and maintain, as far as is reasonably practicable, a working environment that is safe and without risk to its employees' health, as well as an undertaking that persons who are not its employees but may be directly affected by its activities are, as far as is reasonably practical, not exposed to hazards to their health or safety.

The dispute materialised when the employee arrived at the employer's premises on 4 January 2022 and was refused entry. The employee launched an urgent application challenging the admission policy following a letter from the employer maintaining its position set out in the policy.

The employee argued that the admission policy breached several provisions of her contract of employment; the Direction must be read as constituting implied, or alternatively, tacit terms and conditions of her employment contract; the site entry policy constituted a mandatory vaccination policy; and the employer did not comply with the requirements set out in the Direction to lawfully implement such a policy.

The employer disputed that the admission policy constituted a mandatory vaccination policy, and further, that its implementation breached the employee's contract of employment. It argued that the admission policy was introduced in

A first look into judicial findings on vaccination status and workplace access

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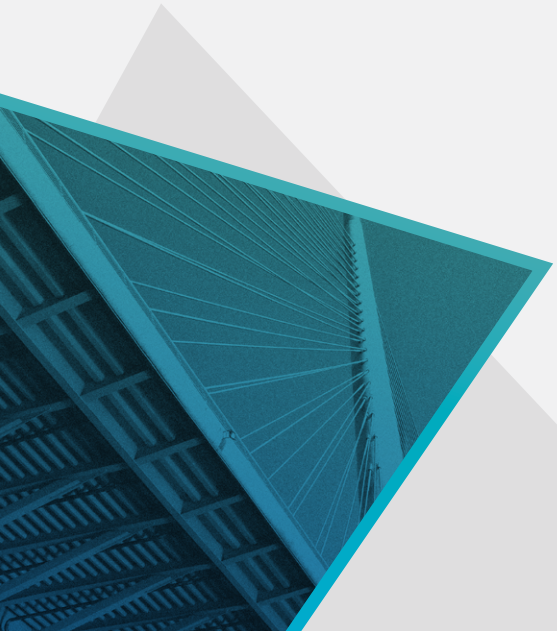

compliance with sections 8 and 9 of the OHSA. Further, the admission policy was not mandatory as employees had the options set out in (i) and (ii) above.

LABOUR COURT FINDINGS

The Labour Court was therefore tasked with determining whether the employer's conduct by virtue of adopting a *"site entry policy"* constituted a breach or unilateral change to the terms and conditions of the employment contract, and whether the employer was obliged to adhere to the requirements set out in the Direction but failed to do so, which manifested into a breach of her contract of employment.

In relation to the first determination, the court found that:

- the employee was unable to identify a specific term of her employment contract that was breached because of or by the adoption of the admission policy; and
- there was no provision of the contract of employment that the employer alleged was unilaterally changed by the introduction of the admission policy either.

In light of this, the court stated that there were no provisions that needed to be restored as the employee's contract had not been changed or breached.

In relation to the second determination, the Labour Court found that the employee failed to plead and demonstrate how the admission policy amounted to a mandatory vaccination policy. The admissions policy does not refuse unvaccinated employees' entry to the work premises, indeed for employees to access the premises, they have two options, namely vaccination or submitting weekly negative COVID-19 tests at their own expense, which the court found was not a breach of the contract of employment or a unilateral change to the terms of employment.

Therefore, the court was unable to find that the admissions policy constituted a mandatory vaccination policy and was not breach of the Direction and the OHSA. In fact, the court found that the employer acted in accordance with its duties in terms of section 8 and 9 of the OHSA, as well as the Direction. The court therefore dismissed the urgent application.

Whether the court's interpretation that there is a distinction between an admission policy and a mandatory vaccination policy is competent, is yet to be seen. However, this remains to date the most authoritative decision South Africans have on access to the workplace for employees who are not vaccinated.

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Our BBBEE verification is one of several components of our transformation strategy and we continue to seek ways of improving it in a meaningful manner.

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