

OPINION

FOR

STELLENBOSCH UNIVERSITY

ABOUT

**THE LEGALITY OF
A COVID-19 VACCINATION RULE**

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I INTRODUCTION

1. We have been instructed by Stellenbosch University (**SU** or **the University**) to provide an opinion on whether it can require students and staff to be vaccinated against Covid-19, either to remain as students and staff, or to access SU's campus and other in-person activities.
2. We address the question by dealing with students and staff separately. Staff are regulated by various labour laws, which effect the legality of possible vaccination rules. No such labour laws regulate students.
3. With respect to students, our opinion is:
 - 3.1. SU is empowered under the Higher Education Act 101 of 1997 (**HEA**) to make a rule requiring vaccination to access its campus and certain in-person activities. Rules made under the HEA are laws of general application that can limit constitutional rights.
 - 3.2. A rule requiring students to be vaccinated will limit several rights in the Bill of Rights in Chapter 2 of the Constitution of the Republic of South Africa, 1996 (**Constitution**), namely the right to equality in s 9, the right to freedom of conscience, religion, thought, belief and opinion in s 15, and the right to further education in s 29.
 - 3.3. While we cannot provide definitive advice without the draft of an intended rule and further instructions on some issues, in our view, the limitation of those rights is likely to be reasonable and justifiable under s 36(1) of the Constitution. Vaccinations will protect students and staff and allow a return to in-person teaching. Alternative protection measures will not achieve the same benefits.

- 3.4. Regarding medical students, their status as such is largely irrelevant to the constitutionality of vaccination rules. SU should consult with the relevant hospitals before making any vaccination rule.
4. With respect to **staff**, our opinion is:
 - 4.1. SU is bound by the recent **June Direction** made by the Minister of Labour. The Direction allows SU to develop a mandatory vaccination plan for its staff. SU can meet the requirements for such a plan.
 - 4.2. Most importantly, if it makes a mandatory vaccination plan SU will have to reasonably accommodate employees who refuse to be vaccinated on medical or “constitutional” grounds. However, since reasonable accommodation must include avoiding unjustifiable cost to SU and a consideration of preventing the spread of Covid-19, this requirement is not particularly onerous.
5. In Part II of this opinion, we address students; in Part III we address staff.
6. We emphasise that this opinion is based on a number of assumptions about both the content of the vaccination rule SU may make, and some facts on which we do not have full instructions. It may be necessary to amend this opinion if those assumptions are wrong, or new facts emerge.

II STUDENTS

7. In assessing the constitutionality of a vaccination rule for students, we consider the following issues:
 - 7.1. What would the content of a vaccination rule be?

7.2. Does SU have the power to enact such rules?

7.3. If so, would they be constitutional?

VACCINATION RULES

8. Before we can assess whether SU can pass a vaccination rule, and whether it will be constitutional, we need a working model of what such a rule would do, and not do.

9. Based on our instructions, we consider two basic options:

9.1. **Hard exclusion:** Students must be vaccinated in order to remain a student at SU. Students who cannot prove they are vaccinated will be expelled, and no prospective student who cannot prove they are vaccinated will be admitted as a student.

9.2. **Soft exclusion:** Unvaccinated students will not be allowed to physical access to SU's campus, including all residences, buildings, grounds, and other facilities. The rules will deny access to compulsory, in-person activities involving other students and staff, even if off-campus.¹ However, the person will remain a student and will be entitled to study through any online mechanisms.

10. Whether SU opts for hard exclusion or soft exclusion, we make the following assumptions about the content of the vaccination rule:

¹ This is an important addition to cater for medical students. As we understand it, medical students might be working with other students off-campus at a hospital. The addition also caters for activities that are part of a course that occur off-campus but entail the risk of Covid-19 spreading. This may include learner-teachers doing practical training at schools, if that involves other students and staff.

- 10.1. The rule will commence only when all students have had a reasonable opportunity to be vaccinated. That will, at the earliest, be in early 2022.
- 10.2. The rule will allow for a procedure where a student can request to be exempted from vaccination for medical reasons and possibly religious and conscience-based reasons (we discuss this below).² It will not apply to students who cannot obtain a vaccination (such as students below 18, if vaccinations are not available for them).
- 10.3. The rule may apply additional restrictions to exempted students (mask wearing, regular negative Covid-19 tests).
- 10.4. The rule will require non-exempted students to produce a vaccination card to demonstrate that they are vaccinated.
11. Below when we refer to the **vaccination rule**, we mean a rule which involves either hard exclusion or soft exclusion. Where we do not distinguish between hard and soft exclusion, we refer to both.

SU'S AUTHORITY TO MAKE A VACCINATION RULE

12. The powers of universities are set out in HEA. In our view, the powers of a university include passing a vaccination rule.
13. Section 27(1) provides that the council of a public higher education institution must govern the public higher education institution, subject to HEA and the institutional

² It appears that the Department of Education requires teachers to submit a detailed medical report showing how taking the vaccine would pose a health hazard to them. The SU Policy should contain a similar clause. See <https://www.news24.com/news24/southafrica/news/no-jab-no-job-education-dept-says-no-teacher-is-compelled-to-get-covid-19-vaccination-20210728>.

statute. Section 32(1) empowers the council to pass an institutional statute to give effect to any matter not expressly prescribed by HEA, and then institutional rules giving effect to the statute. Health and safety are not matters expressly prescribed by HEA.³

14. SU's latest institutional statute (**2019 Statute**) was – as required by s 33(1) of the HEA – approved by the Minister of Higher Education, and published in the *Government Gazette*.⁴ We assume the Minister also tabled SU's institutional statute in Parliament, as required by s 33(2).
15. In addition, the HEA makes students “*subject to such disciplinary measures and disciplinary procedures as may be determined by the institutional statute or the institutional rules.*”⁵ And SU has the power – through its Council and after consultation with its Senate – to determine its admission policy, including entrance requirements and the requirements for readmission.⁶
16. According to the 2019 Statute, the Council is empowered to make or approve rules and policies for the University.⁷ The Registrar must publish any rules made under the 2019 Statute, and the rules are only enforceable after they have been published.⁸ Council must also oversee risk management.^{9, 10}

³ Compare language in section 27(2).

⁴ Government Notice 1062 in *Government Gazette* 42636 of 16 August 2019.

⁵ HEA s 36.

⁶ HEA s 37(1).

⁷ Clause 10(3)(b) and (7)(b) of the 2019 Statute.

⁸ Clause 61 of the 2019 Statute.

⁹ Clause 10(3)(e) of the 2019 Statute.

¹⁰ In addition to its powers under the HEA and the 2019 Statute, SU has the common-law powers of the owner of its property or of a lessee (in the case of properties it leases). Those powers include deciding who may or may not access its property. To the extent vaccination rules may be limited to regulating access to property that SU owns or leases, it will also be authorized by those common-law powers.

17. In short, SU – through its Council – is empowered to make institutional rules under HEA and the 2019 Statute which:
 - 17.1. Make vaccination a condition for admission or re-admission;
 - 17.2. Make being on campus without being vaccinated a disciplinary offence; and/or
 - 17.3. Provide that students are not allowed access to campus unless they are vaccinated.
18. There is one caveat to SU’s power – any vaccination rule SU may make must comply with any relevant regulations or directions made under section 27(2) of the Disaster Management Act 57 of 2002 (**DMA**). For example, at present the DMA Covid-19 Regulations and the DMA Directions for the management of the 2021 academic year limit the size of indoor gatherings. SU could not move to in-person teaching of groups larger than the then applicable limit – even if it put in place a vaccination requirement (or ‘mandate’ as it is called in the United States of America). It is likely that we will remain in a state of disaster for many more months with variable limitations on gatherings depending on the stage of the pandemic. SU will have to consider that in crafting any vaccination rule.

CONSTITUTIONALITY

19. The next question is whether a rule requiring vaccination to attend SU, or to enter its campus would be constitutional.
20. Constitutional analysis in Bill of Rights litigation regarding legislation happens in two stages. First, the party challenging the law must prove that a law limits a right in the Bill of Rights. Second, and if so, the party relying on the law must show that the

limitation of the right is reasonable and justifiable in terms of s 36(1). We consider each stage in turn. In relation to the second stage, we also consider whether a vaccination rule would be a law of general application envisaged in s 36(1).

Would a vaccination rule limit any fundamental rights?

21. Determining whether a right(s) in the Bill of Rights is limited by a law entails examining (a) the content and scope of the relevant right(s) and (b) the meaning and effect of the impugned enactment to see whether there is any limitation of (a) by (b).¹¹ Courts interpret constitutional rights broadly.¹² **A court might find that the following rights are limited by a vaccination rule:**
- 21.1. The right to bodily and psychological integrity in s 12(2)(b);
 - 21.2. The right to freedom of conscience, religion, thought, belief and opinion in s 15(1);
 - 21.3. The right to equality in s 9(3);
 - 21.4. The right to further education in s 29(1)(b);
 - 21.5. The right to health care services in s 27(1)(a); and
 - 21.6. The right to privacy in s 14.

¹¹ *Mlungwana and Others v S and Another* 2019 (1) SACR 429 (CC) at para 42.

¹² *S v Makwanyane* 1995 (3) SA 391 (CC) at para 100.

The right to bodily integrity

22. Section 12(2)(b) of the Constitution provides that everyone has the right to bodily and psychological integrity, which includes the right to security in and control over their body. The Constitutional Court has described this right as “*largely negative*” – the right entitles one to protection from physical incursions against one’s body.¹³ Security of the person, in particular, “*encompasses personal autonomy involving control over a person’s bodily integrity*”.¹⁴
23. As a vaccination entails inserting a needle so as to inject a foreign substance into a person’s body, it undoubtedly interferes with bodily integrity.¹⁵ If a person was forcibly vaccinated, it would undoubtedly limit the right in s 12(2)(b).
24. The more difficult question is whether making access to a university contingent on voluntary vaccination constitutes a limitation of s 12(2)(b). SU does not contemplate – and probably lacks the power – to compel vaccinations. It can however incentivize vaccination by providing that only those who choose to be vaccinated may access its campus.
25. In our view, this is not a limitation of the right in section 12(2). SU would not be forcing students to take a vaccine. Students never lose security in or control over their bodies. Such a vaccination rule has no necessary physical implications for students. SU might incentivise those who want access to campus to get vaccinated. But that is a far cry from undermining students’ bodily integrity. To the extent that the rule may incentivise

¹³ *AB and Another v Minister of Social Development* 2017 (3) SA 570 (CC) at para 308.

¹⁴ *Id* at para 314.

¹⁵ Compare *S v Huma* 1996 (1) SA 232 (W) at 236I-237B (inserting a needle to draw blood for testing limit s 12(2)(b)) and *S v Gaqa* 2002 (1) SACR 654 (C) (removing a bullet from a person’s body for forensic examination limits s 12(2)(b)).

undergoing a physical procedure: (a) this is no different from the various social pressures one experiences daily to undergo certain medical procedures; and (b) does not result in non-consensual medical treatment. On the contrary, students who get vaccinated to access campus are still choosing to get vaccinated. Their choice is an exercise of their right to bodily control, not a limitation of it.

26. Nonetheless, a Court might consider the indirect pressure to undergo a medical procedure a limitation of section 12(2). There is a risk that a court may think that at least for some students, particularly those who are under socio-economic pressure to attend university, the measure leaves them with no choice but to get vaccinated. Or a court may think that a rule which excludes unvaccinated students from campus or from university activities, undermines the psychological integrity of students who are fearful of vaccination generally or Covid-19 vaccines in particular.

Right to freedom of conscience, religion, thought, belief and opinion

27. Section 15(1) of the Constitution guarantees “*the right to freedom of conscience, religion, thought, belief and opinion.*” The Constitutional Court has held that section 15(1) “*implies an absence of coercion or constraint and that freedom of religion may be impaired by measures that force people to act or refrain from acting in a manner contrary to their religious beliefs*”.¹⁶
28. The right to freedom of religion includes three elements: “*(a) the right to entertain the religious beliefs that one chooses to entertain; (b) the right to announce one’s religious beliefs publicly and without fear of reprisal; and (c) the right to manifest such beliefs*”

¹⁶ *S v Lawrence, S v Negal; S v Solberg* 1997 (4) SA 1176 (CC) at para 92.

by worship and practice, teaching and dissemination.”¹⁷ Vaccination rules would potentially limit the third aspect. They would create consequences – full or partial exclusion from SU – for manifesting a belief that one should not be vaccinated (generally, or for Covid-19 specifically).

29. Courts are not permitted to enquire into the correctness of religious beliefs as a matter of religious doctrine.¹⁸ The question is whether the person sincerely holds the belief, not whether it is true or correct. That seems an inevitable approach for religious and other comparable beliefs that rest on faith, not facts.
30. It is not clear whether courts can entertain the correctness of non-religious beliefs or opinions that are susceptible of scientific proof or falsification. A belief that God prohibits work on the Sabbath, or that war is inherently immoral is not capable of proof one way or the other. But a belief that a Covid-19 vaccine is ineffective, or dangerous, or will insert a 5G microchip into one’s body, is capable of being disproven. In our view, there is a reasonable argument that a belief or opinion about facts, is not protected by s 15(1) at all. In the words of Daniel Moynihan: “*Everyone is entitled to his own opinion, but not his own facts.*” The Constitution does not oblige respect for demonstrably false factual beliefs.
31. However, it seems that there may still be people whose beliefs are not about facts at all. Religious beliefs are not about facts. Similarly, deeply held convictions that are uninformed by and unaffected by facts, are precisely the type of beliefs and opinions

¹⁷ *Prince v President of the Law Society of the Cape of Good Hope* 2002 (2) SA 794 (CC) at para 38.

¹⁸ *Ibid* at para 42.

s 15 is meant to protect. While not everyone who claims they do not want to be vaccinated will be protected by s 15, some may well be.

32. Accordingly, in relation to such people, a vaccination rule would limit this right. It would outlaw the practice on campus of their religious belief or non-religious (possibly, conscience-based) belief that people should not be vaccinated. Similarly, a rule that prohibited students wearing turbans or hijabs, growing beards or dreadlocks, or praying on campus, would limit the right.
33. This right is, therefore, different from s 12(2)(b). That is a negative right – the right not to have one’s bodily integrity interfered with. Section 15 protects the positive right to practice one’s religion or belief. If you prevent a person from doing that on campus, you limit the right.

Right to equality

34. Section 9(3) of the Constitution prohibits organs of state from unfairly discriminating on several grounds, including religion, conscience and belief. This challenge would have to be brought in terms of the Equality Act,¹⁹ in the Equality Court.²⁰ However, the content of the statutory equality right and the constitutional equality right are identical.
35. The analysis of the right – whether under the Constitution or the Equality Act – involves two stages:

35.1. The claimant must prove there is a differentiation on the prohibited ground.

¹⁹ Act 4 of 2000.

²⁰ *MEC for Education: Kwazulu-Natal and Others v Pillay* 2008 (1) SA 474 (CC) (*Pillay*) at para 40.

- 35.2. If the claimant does so, the respondent must establish that the discrimination was fair.²¹
36. Here, a student might argue that a vaccination rule unfairly discriminates between people based on religion, conscience or belief. As regards the latter, for example, students who believe the vaccine is unsafe are prevented from coming to campus, while those who think the vaccine is safe are entitled to full access. Similarly a student who has a religious or non-religious belief that they may not be vaccinated is treated differently from a student who has no such belief.
37. It does not matter that the vaccination rule may not directly treat groups differently based on their religion, conscience or belief – it will have a different effect on them. The Constitution and the Equality Act prohibit both direct and indirect discrimination. A seemingly neutral rule that has a disparate impact on someone because of their religion, conscience or belief is a form of indirect discrimination on that ground. For example, a school’s code of conduct that prohibits the wearing of nose studs discriminates against Hindus for whom wearing a nose stud is a form of cultural or religious expression.²²
38. We are aware of only one case where a court has found discrimination on these grounds: *Labia Theatre*.²³ The Equality Court concluded that the Labia Theatre had unfairly discriminated on the basis of conscience and belief when it refused to rent a theatre to the Palestinian Solidarity Campaign (PSC) for the screening of a pro-Palestinian documentary. It reasoned that the PSC held “*the genuine and reasonable belief that*

²¹ *Harksen v Lane NO and Others* 1998 (1) SA 300 (CC) and Equality Act s 14.

²² *Pillay*.

²³ *Labia Theatre CC v South African Human Rights Commission and Others; Palestinian Solidarity Campaign v Labia Theatre CC and Other* [2021] ZAWCHC 63.

Palestinian people are ‘being subject to illegal Israeli occupation’”, and this fell within the meaning of “conscience or belief”. The Court concluded the discrimination was unfair because the only reason the Labia had refused to rent the theatre was its disagreement with the PSC’s belief as expressed in the documentary.

39. For similar reasons, it is difficult to avoid the conclusion that a vaccination rule would discriminate on the basis of religion, conscience or belief.²⁴ The same distinction drawn above concerning s 15 between factual beliefs, and non-factual beliefs would apply here.
40. The more difficult issue would be whether SU could show that the discrimination was fair. An assessment of unfairness is substantively identical to a section 36 analysis.²⁵ The outcome will therefore likely be the same as the limitations analysis we consider below.

The right to further education

41. Section 29(1)(b) protects the right to further education, which the State, through reasonable measures, must make progressively available and accessible.²⁶ Whether this right will be limited depends on whether SU adopts a hard or soft exclusion rule.
42. Our understanding is that SU is currently using a mixed form of teaching, i.e. limited in-person teaching and with most lectures being delivered or made available online. If this remains the case for the duration of any vaccination rule, and if SU adopts a soft

²⁴ The meaning of “beliefs” in section 9 has not been explored by the Constitutional Court. We note that foreign jurisdictions have taken a broad view of the term. See for example *Maya Forstater v CGD Europe and Others*: UKEAT/0105/20/JOJ, where the belief that sex is immutable was considered a belief under UK equality law.

²⁵ See Equality Act s 13.

²⁶ Section 29(1)(b).

exclusion rule, most students refusing to get vaccinated could then still access their education, with only a minor difference from vaccinated students. Some students – such as medical students – would not be able to access their education because they would be required to attend in-person activities.

43. However, we assume that because SU is a residential university its systems are such that in-person teaching is preferable to and more effective than remote teaching, and that SU wants to return to in-person teaching as soon as it is safe to do so. Even with a soft exclusion approach, when SU moves back to in-person teaching, those who are not vaccinated would no longer be able to access the teaching unless SU kept it available online especially for them.
44. Section 29(1)(b) would then be limited by SU's vaccination rule. Section 29(1)(b), like all socio-economic rights, has a negative and positive facet. The negative facet is a right against interference with existing access to a particular resource. For instance, if someone currently has a home, and the State takes the home away, or allows private third parties to take their home away, then the negative facet of their right to housing is limited.²⁷ In the context of basic education, the Constitutional Court has held that the negative right can be limited by "*a failure to respect the existing protection of the right by taking measures that diminish that protection*".²⁸
45. Currently, students who refuse to get vaccinated have access to further education. If SU adopts a vaccination rule which denies them access, or reduces the extent of further education they can access, it will limit the negative right in section 29(1)(b). The precise

²⁷ *Jaftha v Schoeman and Others, Van Rooyen v Stoltz and Others* 2005 (2) SA 140 (CC) (*Jaftha*) at para 34.

²⁸ *Governing Body of the Juma Masjid Primary School & Others v Essay N.O. and Others* 2011 (8) BCLR 761 (CC) at para 58.

extent of that limitation will depend on the content of the rule and the extent to which SU continues to permit students to learn online.

The right to access to health care services

46. Section 27(1)(a) protects “*the right to have access to health care services*”. The right has a positive and negative element. According to the Committee on Economic, Social and Cultural Rights,²⁹ the negative element includes “*the right to be free from interference, such as the right to be free from ... non-consensual medical treatment*”.³⁰ Accordingly, the duty to “respect” the right to health includes the obligation to “*refrain ... from applying coercive medical treatments, unless on an exceptional basis for ... the prevention and control of communicable diseases.*”³¹
47. This raises essentially the same debate as the right to bodily integrity. Does withholding a benefit unless a person undergoes a medical procedure constitute a limitation of the right? In our view, for the same reasons, it does not. There are always consequences for accepting or refusing a medical procedure. Those can include social consequences. As long as a person remains free to accept or refuse those consequences, there is no limitation of the right.

²⁹ CESCR General Comment No. 14: *The Right to the Highest Attainable Standard of Health (Art. 12)* (2000) (GC). The Committee is a body of 18 independent experts that monitors implementation of the International Covenant on Economic, Social and Cultural Rights by its States parties.

³⁰ GC at para 8.

³¹ GC at para 34.

48. However, as with the right to bodily integrity, a court may take the view that making access to a public university contingent on undergoing a medical procedure – even a minor one – limits the right to have access to health care services.
49. The other reason that mandating vaccines could limit the right to health would be if they posed health risks. The WHO, South African regulators, and regulators across the world have approved various Covid-19 vaccines for use. Since late 2020 over 2.2 billion people worldwide have been vaccinated. Serious side effects are extremely rare. Save for those persons with a known specific medical reason to avoid vaccination – which should be catered for by the vaccination rule – vaccination is likely to be safe. The risk of serious illness and death from contracting Covid-19 is far higher than from the vaccine.

The right to privacy

50. The right to privacy is affected because, in order to enforce any vaccination rule, SU will need to know whether a student is vaccinated or not. That requires disclosure of what would ordinarily be private medical information. That type of information is protected by the right to privacy in s 14 of the Constitution.³²
51. It is however also protected by the Protection of Personal Information Act 4 of 2013 (**POPI**), which Parliament has enacted both to protect personal information and to identify the justifiable limitations on the right to privacy in this context.

³² *NM and Others v Smith and Others* 2007 (5) SA 250 (CC).

52. In line with the doctrine of subsidiarity:³³
- 52.1. A party seeking to enforce the right to privacy, must rely first on POPI, and cannot rely directly on s 14 of the Constitution; and
- 52.2. If SU is permitted to require disclosure under POPI, that will be constitutional (unless a party attacks the constitutionality of POPI).
53. We therefore confine our inquiry to whether or not requiring students to disclose whether they have been vaccinated is consistent with POPI.
54. POPI applies to the “*processing*” of “*personal information*”:
- 54.1. Processing includes “*the collection, receipt, recording, organisation, collation, storage, updating or modification, retrieval, alteration, consultation or use*” of personal information; and
- 54.2. Personal information includes “*the medical ... history*” of a living natural person.
- It follows that collecting, receipt, recording, storage and retrieval of students’ vaccination status – all of which would be indispensable for a vaccination rule – constitutes the processing of personal information.
55. There are two requirements SU would have to meet in order to comply with POPI.

³³ *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism and Others* 2004 (4) SA 490 (CC) paras 21-26, the first decision to give explicit recognition to what is now known as ‘the doctrine of subsidiarity’. As to the doctrine generally, see *My Vote Counts NPC v Speaker of the National Assembly and Others* 2016 (1) SA 132 (CC) para 53 n 100, *per* Cameron J, for the minority, approved by the Constitutional Court in *Public Servants Association obo Ubogu v Head, Department of Health, Gauteng and Others* 2018 (2) SA 365 (CC) para 25.

56. First, medical information is subject to a special presumptive prohibition. Section 26 states that a responsible party – which includes SU – “*may, subject to section 27, not process personal information concerning the ... health ... of a data subject*”. Section 27³⁴ however permits the processing of health information if:
- 56.1. It is with the consent of the data subject. Consent is defined as “*any voluntary, specific and informed expression of will in terms of which permission is given for the processing of personal information*”; or
- 56.2. It is “*necessary for the establishment, exercise or defence of a right or obligation in law*”.
57. In our view, SU can adopt a vaccination rule that complies with POPI:
- 57.1. It can make the consent to disclose vaccination status a condition for admission to campus or for continued admission to the University. Students will be free to refuse to provide that information. SU will not process any health information without students’ consent. But if they do not provide the information, they cannot access the campus. In our view, this is consistent with POPI. POPI does not prohibit institutions providing services only to people if they consent to disclose personal information.
- 57.2. SU can assert that processing students’ vaccination status is necessary to fulfil its legal and constitutional obligations to protect its students and staff. As we set out below, SU does have these obligations, and it cannot fulfil them without knowing the vaccination status of those who regularly enter its premises.

³⁴ Section 32 contains further, specific conditions in which health information may be processed. In our view, none of those are applicable here.

58. Second, SU must comply with the eight conditions for lawful processing all personal information set out in Chapter 2 of POPI. As these are standard requirements for all personal information, and we presume SU already has policies in place to ensure it complies with them, we do not address them. We state only that they apply to how SU processes students' vaccination status.

Conclusion on limitation of rights

59. In our view, a vaccination rule will limit the following rights:
- 59.1. The right to freedom of religion, thought, belief and opinion;
 - 59.2. The right to equality; and
 - 59.3. The right to further education.
60. In our view, a vaccination rule will not limit the rights to bodily integrity and to access to health care services, but a court may find this type of coercive rule constitutes a limitation. Provided SU complies with POPI, a vaccination rule will not limit the right to privacy.

A law of general application

61. Section 36(1) of the Constitution permits rights to be limited "*in terms of a law of general application*" only. Before we consider the substance of a limitations analysis, we must determine whether the exclusion of a student in terms of an SU rule occurs "*in terms of a law of general application*".

62. This is a difficult theoretical question. The Constitutional Court has not fully delineated what does and does not constitute a law of general application. It has not adopted categories of instruments that fall within or outside this concept, or adopted a set of requirements against which an instrument must be measured.³⁵ Statutes and regulations are clearly laws of general application. But are university rules? In its most recent decision on the question, the Constitutional Court held that rules regulating access to a public shelter were not laws of general application, but contracts.³⁶
63. **However, in our view, a Court will conclude that the exclusion of a student in terms of a university's rule is in terms of a law of general application.** There are five ways to reach that conclusion.
64. First, the HEA is a law of general application and it authorizes the Council to govern SU and to make institutional rules for SU. It also authorizes admissions policies and disciplining students in terms of a code of conduct. Decisions taken within that framework are "in terms of a law of general application". As Cameron J has explained: "*In terms of* is much broader than 'by' or 'under'. It is advisedly capacious. It allows that the policy at issue here, though not itself law, may be sourced in law."³⁷
65. Second, the SU Statute too is a law of general application. It is determined under the HEA, published in the *Government Gazette*, and tabled in Parliament. It has all the

³⁵ Academics have, however. See Woolman & Botha 'Limitations' in Woolman & Bishop *Constitutional Law of South Africa* (2 ed,

³⁶ *Dladla and Another v City of Johannesburg* 2018 (2) SA 327 (CC) (*Dladla*) at para 52.

³⁷ *Dladla* at para 98 (Cameron J was writing in dissent. However, his analysis is not inconsistent with the majority's position. The majority treated the rules at issue as a contract, not a policy enacted in terms of an authorizing law. In our view, a Court is likely to follow Cameron J's analysis.)

characteristics of a law of general application. Decisions taken in terms of the powers in the Statute are also “*in terms of a law of general application*”.

66. Third, the admissions policy and code of conduct are expressly envisaged by the HEA. Decisions to discipline or not to admit students are expressly envisaged by the HEA. Those type of decisions are clearly “*in terms of a law of general application*”.
67. Fourth, under the SU Statute, rules adopted by Council must be published before they come into force. This is because those rules are meant to have the effect of laws of general application to the persons bound by them. Decisions taken under those rules are taken “*in terms of a law of general application*”.
68. Fifth, a decision by SU about allowing or denying access to property that SU owns or leases is “in terms of” the common law. The common law is law of general application.³⁸
69. What a court regards as the relevant law of general application is unlikely to affect the outcome. In this context we have no doubt that a court will conduct a limitations analysis, on the substance of SU’s vaccination rule. We proceed on that basis.

Justification

70. **A section 36(1) analysis is effectively an exercise in proportionality.** The question is whether “*the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom*”. The analysis considers all relevant factors, including the following:

³⁸ *Du Plessis and Others v De Klerk and Another* 1996 (3) SA 850 (CC) at paras 44 and 136.

- 70.1. the nature of the right;
 - 70.2. the importance of the purpose of the limitation;
 - 70.3. the nature and extent of the limitation;
 - 70.4. the relation between the limitation and its purpose; and
 - 70.5. less restrictive means to achieve the purpose.
71. We have already considered the nature of each right. We now consider the remaining listed factors, and then consider other relevant statutory provisions, and comparative law and practice.

Nature and extent of the limitation

72. The nature and the extent of the limitation varies depending on the right at stake.
73. First, if the right to bodily integrity or the right to of access to health care services is limited, the limitation is slight for four reasons:
- 73.1. Students are not being physically forced to vaccinate.
 - 73.2. Administering the vaccine itself is a minor intrusion compared to, for example, removing a bullet.
 - 73.3. The data is clear that the vaccine is safe for almost all recipients.³⁹ Government has decided that the vaccine is safe. Objections to the vaccine have roundly

³⁹ <https://www.dailymaverick.co.za/article/2021-07-26-everything-you-need-to-know-about-vaccines-our-only-viable-strategy-for-living-with-covid-19/>. We refer also to the emails sent to us as part of the brief from various experts at SU.

been demonstrated to be grounded in misinformation.⁴⁰ The vaccines currently available in South Africa have been approved by our health and medical authorities, as well as those of many other countries. The vaccines are not experimental drugs, but approved drugs used to combat the spread of Covid-19. Over 2.2 billion people worldwide have received at least one dose of a vaccine.

73.4. The rare cases where a person might be adversely affected by a vaccine are normally preventable by health professionals identifying persons with counter-indications for vaccination. For that reason, any vaccination rule should allow for medical exceptions. Accordingly, the rule would not (indirectly) require persons to undergo procedures that would undermine their physical health.

74. Second, the extent of the limitation of the right to religion, conscience and belief will be mixed, but also limited:

74.1. The extent of the limitation will vary from person to person because it depends on how central not being vaccinated is to the person's religion or belief system. Centrality must be evaluated subjectively.⁴¹ For many people, avoiding a Covid-19 vaccination is likely to be a recent and minor part of their belief system. But there may be some for whom it is a long-standing and deeply-held belief.

74.2. Students would not be prevented from practicing their anti-vaccination belief at all, only from practicing it on SU's campus. They would remain free to be

⁴⁰ <https://www.bbc.com/news/world-latin-america-57893466>.

⁴¹ *Pillay* at paras 86-88.

unvaccinated anywhere else. While this is not a complete answer,⁴² it does reduce the extent of the limitation.

75. Third, as to the right to further education, the extent of the limitation will depend on SU's remote learning policy. If the vaccination rule together with SU's remote learning policy mean that unvaccinated students cannot learn at SU effectively, then the limitation will be severe. Unvaccinated students previously had full access to tertiary education; but the rule coupled with the policy will strip that access away entirely. This would have a significant impact on unvaccinated students.
76. The nature of the limitation, however, is still such that the student could easily recover their full access. By making a vaccination rule SU would not deprive students of further education permanently. Besides the fact that the rule will be likely temporary – it will probably remain in force during the Covid-19 pandemic and no longer – the choice to return lies with the student. If they undergo a minor medical procedure that is safe and readily available, then they can have access to further education. It is not the case, as with *Jaftha* and *Juma Masjid*, where the negative facet of the socio-economic right was limited by a potentially permanent deprivation of existing access beyond the control of the applicant.⁴³
77. On the other hand, if SU continues to offer remote learning after in-person teaching has resumed, the extent of the limitation will be insignificant for most students. There will still be some students who cannot learn remotely, including medical students who must attend in-person training at hospitals. For those medical students, however, the nature

⁴² *Pillay* at para 92.

⁴³ In *Jaftha*, the applicant's home was attached for failing to pay a debt while in hospital.

of the limitation is not severe for the reasons given above. They can choose to get vaccinated.

Purpose of the limitation

78. The primary purpose behind a vaccination rule would be to prevent the spread of Covid-19 among SU's students and staff. The greater the number of students at SU who are vaccinated, the less likely Covid-19 will spread on SU's campuses and at SU's compulsory in-person events. This purpose is undoubtedly legitimate and important.
79. We consider under the next heading whether a vaccination rule is likely to achieve that purpose. Here, we focus on the multiple ways that reducing the spread of the virus will benefit SU, its students, and its staff.
80. First, Covid-19 is a deadly virus. To date, the data shows it kills around 2 percent of the people it infects. On a campus of 30 000 students, this would equate to 600 students dying, though we accept the age and health profile of SU's students (i.e. they are mostly young and healthy) means the number of students at risk will probably be lower than in the general population. The age and health profile of SU's staff, on the other hand, probably makes them more susceptible than the general population to serious illness and death if they become infected by Covid-19 by unvaccinated students. If SU can reduce the chance of Covid-19 spreading on campus, it reduces the chances of students and staff dying. It also reduces the chances of students catching the virus on campus and transmitting it to third parties who may die.⁴⁴ In this way, reducing the spread of

⁴⁴ In para 95 and following below we discuss whether vaccines make it less likely that a person will transmit the disease to others.

the virus protects and promotes students' and staff's right to life,⁴⁵ as well as the right to life of people with whom students and staff come into contact outside SU.

81. SU owes a legal duty to its staff to provide a safe work environment,⁴⁶ and to its students to provide a safe learning environment.⁴⁷ During the pandemic, it achieves that by limiting personal interaction, and requiring social distancing, mask wearing, and so on. Once vaccines are available to students, if SU wants to return to normal or near-normal, it must ensure that its students and staff will be safe. The vaccination rule would be aimed at fulfilling that legal duty.
82. Second, even if Covid-19 does not kill its host, the virus results in a wide range of symptoms. Some of these symptoms can be serious and long-lasting. Even the milder symptoms, present in most cases, can be debilitating and impede learning and teaching at SU. Preventing the spread of the virus ensures that fewer students experience these symptoms. The upshot is that preventing the spread of the virus promotes and protects various rights of students and staff and those outside SU with whom they come into contact. These rights include the right to bodily and psychological integrity, the right to an environment that is not harmful to their health or wellbeing,⁴⁸ the right to further education,⁴⁹ and the right to equality.
83. With respect to the right to equality, the right is implicated because certain persons may be disproportionately impacted by contracting Covid-19.⁵⁰ For instance, staff, older

⁴⁵ Section 11 of the Constitution.

⁴⁶ Section 8(1) of the Occupational Health and Safety Act 85 of 1993.

⁴⁷ See, for example, *Gibbins v Williams, Muller, Wright & Mostert Ingelyf en Andere* 1987 (2) SA 82 (T).

⁴⁸ Section 24.

⁴⁹ The assumption being that persons with debilitating Covid-19 cannot work and learn.

⁵⁰ A disproportional impact establishes that discrimination is indirect. See *City Council of Pretoria v Walker* 1998 (2) SA 363 (CC) at para 32.

students and persons with comorbidities (who are more likely to suffer from debilitating Covid-19) are disproportionately impacted by a decision to allow Covid-19 to spread through a campus. Accordingly, by preventing the spread of Covid-19, SU is ensuring that students and staff are not discriminated against on the basis of age. Another example of potential discrimination is disability. Some studies suggest that persons with pre-existing health conditions or certain disabilities are more susceptible to aggressive Covid-19 symptoms or death. These persons would be disproportionately impacted by the spread of Covid-19 on SU campuses.

84. In *Goliath* the High Court was concerned with whether the mandatory detention of applicants with multi-drug resistant tuberculosis was contrary to section 12(1) of the Constitution. The Court held that the purpose for the detention—preventing the spread of an infectious disease—was legitimate. The Court held that the compulsory “*isolation of patients with infectious diseases is universally recognised in open and democratic societies as a measure that is justifiable in the protection and preservation of the health of citizens, even though it necessarily involves some intrusion upon the individual liberty of the patients concerned.*”⁵¹
85. The purpose of vaccination rules is no different from the rationale behind detaining persons with dangerous infectious diseases. The point is to prevent the spread of a disease that is likely to kill or make sick other people. This is a recognised legitimate reason to limit the right to bodily integrity.
86. Third, Covid-19 regularly requires hospitalization and health care. The national health system has come under severe pressure during the pandemic. If SU prevents the spread

⁵¹ *Minister of Health of the Province of the Western Cape v Goliath and Others* 2009 (2) SA 248 (C) at para 19.

of Covid-19 among its students and staff and those with whom they come into contact, it plays its role in reducing hospital admissions. The implication is that others' right to access health care services is promoted.⁵² This was part of the rationale for suspending retails sales of both tobacco and alcohol at times during the Covid-19 pandemic. Our courts have accepted that it is a legitimate purpose.⁵³

87. Fourth, a vaccination rule is a move towards returning to in-person learning and pre-Covid-19 campus life. Subject to national Covid-19 regulations, if everybody who enters SU's campus is vaccinated, life can return to near-normal with far less risk of harm than would otherwise be the case. Campus activities like sport, culture, societies, social interactions, and entertainment can resume. Lectures can all be in-person. Libraries can re-open. Other campus facilities, like laboratories, art studios, special venues, gyms, and food halls can operate. A vaccination rule, consequently, would promote several rights of students, including the right to further education, freedom of association, freedom of expression, cultural rights, and dignity.
88. Finally, with respect to medical students, a vaccination rule would mitigate the risk of them passing the virus onto vulnerable health patients. This is not to say that SU is under a legal duty to prevent patients from contracting Covid-19 in hospitals. As we understand it, once students are in hospitals for training purposes, any harm wrongfully and negligently caused by students to patients may sustain in a delictual claim against the Western Cape Department of Health, not SU. The reason is the students are trained

⁵² Section 27(1)(a).

⁵³ As to tobacco, see *Fair-Trade Independent Tobacco Association v President of the Republic of South Africa and Another* 2020 (6) SA 513 (GP) at para 29; contrast *British American Tobacco South Africa (Pty) Ltd and Others v Minister of Co-operative Governance and Traditional Affairs and Others* [2020] ZAWCHC 180. As to alcohol, see *South African Breweries (Pty) Ltd v Minister of Corporative Governance and Traditional Affairs and Another* [2021] ZAWCHC 135.

in the hospitals under the supervision of healthcare professionals employed by the Department. The Department could also impose a vaccination requirement for any person – including SU students – working at its facilities.

89. However, SU still has an interest in ensuring that its students do not transmit Covid-19 to each other while in a hospital, or to patients whom they are treating. The importance of this reduction in the risk to patients cannot be gainsaid. Persons in hospital may be particularly vulnerable to suffering severely or even dying from Covid-19. Vaccination will also reduce the risk that medical students will bring Covid-19 onto campus, or into their residences.

Relation between limitation and purpose

90. **The purpose of a vaccination rule is laudable, but will it achieve its purpose? Yes.** To understand why, it is necessary to understand what the vaccines do, and do not do. What follows is a combination of information provided to SU by medical experts and our own research. It is important that SU check its correctness with their medical experts.
91. Vaccines do not provide 100% protection from becoming infected with Covid-19. But they provide good protection both from becoming infected at all, and extremely good protection against serious illness and death. The efficacy of vaccines also differs from vaccine to vaccine and depending on the variant of Covid-19. They are generally more effective against the original they were designed for. But they still provide protection against the newer Beta, Gamma and Delta variants.

92. The two vaccines currently in use in South Africa – those produced by Pfizer-BioNTech (**Pfizer**) and Johnson & Johnson/Janssen (**J&J**) – are extremely effective:
- 92.1. The Pfizer vaccine has an efficacy of 95% against symptomatic SARS-CoV-2 infection. Other studies show it is 84% effective at preventing disease after six months, although efficacy against severe disease is 97%.⁵⁴
- 92.2. The J&J vaccine has been found to have an efficacy of 85.4% against severe disease and 93.1 % against hospitalization. A single dose has an efficacy of 66.9% against symptomatic moderate and severe infection.⁵⁵ (The initial result of the Covid-19 Sisonke Implementation Study amongst South African health care workers, shows the J&J vaccine is around 91-96% effective against death and has been found to be effective against the Delta variant.⁵⁶)
93. Studies are still being conducted and the numbers vary depending on the variant. But the current evidence shows that vaccines are extremely effective at preventing severe illness and death, and effective at preventing disease at all.
94. However, vaccines are not 100% effective. Vaccinated people are still at risk from the disease, although that risk is significantly reduced. This is important for the issues considered in this opinion. If vaccines provided 100% protection, it might not be necessary to require others to get vaccinated. The choice to vaccinate or not would only affect the individual, not others they come into contact with.

⁵⁴ <https://www.yalemedicine.org/news/covid-19-vaccine-comparison>.

⁵⁵ <https://www.who.int/news-room/feature-stories/detail/the-j-j-covid-19-vaccine-what-you-need-to-know>.

⁵⁶ <https://www.iol.co.za/news/covid19/sisonke-study-finds-j-and-j-covid-19-vaccine-up-to-96-effective-against-death-dacd30-a4b8-412d-955e-fe0cd08fb5f5>.

95. A key question is whether vaccines make it less likely that a person will transmit the disease to others. According to interim recommendations made by the World Health Organisation Strategic Advisory Group of Experts on Immunization, last updated on 25 June 2021: *“There is currently no substantive data are available related to impact of Pfizer BioNTech vaccine on transmission or viral shedding. In the meantime, we must maintain and strengthen public health measures that work: masking, physical distancing, handwashing, respiratory and cough hygiene, avoiding crowds, and ensuring good ventilation.”*⁵⁷
96. The information on the topic of transmissibility provided to us and which we have found, suggests this may be overly cautious.
97. If the Pfizer vaccine is able to prevent most Covid-19 infections, then vaccination should significantly reduce a person’s risk of passing on the virus to others. The same should apply to the J&J vaccine. As “The Scientists Collective” explained in a recent article published in the Daily Maverick:⁵⁸ *“Preliminary data suggest there are fewer people infected in households where more members are vaccinated. This makes sense, as people who are vaccinated tend to shed less virus when they get infected. However, it has been shown that the Delta variant makes you shed far more virus than other variants.”*
98. Indeed, while larger studies are still being conducted, there is evidence that shows that unvaccinated persons are more likely to spread Covid-19 than vaccinated persons. We

⁵⁷ [https://www.who.int/vietnam/news/detail/06-07-2021-the-pfizer-biontech-\(bnt162b2\)-covid-19-vaccine-what-you-need-to-know](https://www.who.int/vietnam/news/detail/06-07-2021-the-pfizer-biontech-(bnt162b2)-covid-19-vaccine-what-you-need-to-know).

⁵⁸ <https://www.dailymaverick.co.za/article/2021-08-15-variants-the-fourth-wave-vaccines-and-the-unlikelihood-of-herd-immunity-what-might-happen-in-south-africa/>

were referred to an article that summarises the current studies as follows:⁵⁹ *“the Pfizer or AstraZeneca vaccine reduced the chance of onward virus transmission by 40-60%. This means that if someone became infected after being vaccinated, they were only around half as likely to pass their infection on to others compared to infected people who weren’t vaccinated.”* The preliminary studies that have been conducted show that *“vaccination is likely to substantially reduce virus transmission by reducing the pool of people who become infected, and reducing virus levels in the nose in people with breakthrough infections.”*

99. We draw two important conclusions from the above evidence:

99.1. Because vaccines are not 100% effective, unvaccinated people pose a risk of illness and death to vaccinated people. A decision not to be vaccinated is not merely a personal choice, but one that has risks for others.

99.2. The more people who get vaccinated, the lower the risk for everybody in the community. While there is debate among scientists about whether countries will ever reach “herd immunity” from Covid-19 (especially with the emergence of new variants),⁶⁰ because vaccines reduce serious infection, and appear to reduce transmission, increased rates of vaccination will lead to decreased serious illness, hospitalisations and death. That is obvious from the data in those countries or parts of countries with high vaccination rates. While infections have

⁵⁹ <https://bhekisisa.org/health-news-south-africa/2021-05-26-can-you-still-spread-the-coronavirus-after-getting-a-vaccine/>

⁶⁰ See, for example, C Aschwandern ‘Five reasons why COVID herd immunity is probably impossible’ *Nature* (18 March 2021), available at <https://www.nature.com/articles/d41586-021-00728-2>

increased markedly, deaths have not. And evidence shows that the vast majority of people who die from Covid-19 in those countries are unvaccinated.

100. Accordingly, there is a clear link between a rule at SU requiring vaccination for accessing its campus, and the purpose of reducing the risk that students and staff will become seriously ill or even die from Covid-19. While it is not 100% effective, it is one of the most effective measures.

101. However, there are some issues to consider that may weaken that link.

102. First, a vaccination rule relies on being able to determine who is vaccinated and who is not. The most effective way is to use “vaccination cards” that are provided to people after they have been vaccinated. However, there has been evidence overseas of people faking these cards.⁶¹ The effectiveness of the rule will depend on either: (a) people not faking vaccination cards (something beyond SU’s control); or (b) SU being able to detect fake vaccination cards. We have no instructions on how large a risk this is likely to pose to enforcing the rule.

103. Second, there is an argument that once enough people in a community are vaccinated, the community develops “herd immunity”. The virus is unable to spread so that even unvaccinated people are protected. If that were achieved for SU, a vaccination rule would no longer be required – unvaccinated people would pose no additional risk. However, this does not appear to be an argument against the rule at this stage:

103.1. As we understand the position, herd immunity would have to be reached in the entire community. Students and staff are not confined to the University – they

⁶¹ See, for example, <https://www.npr.org/2021/06/08/1004264531/fake-covid-vaccine-cards-keep-getting-sold-online-using-one-is-a-crime>.

interact with people outside the University every day. It is only if that entire community with whom students and staff come into contact is protected by herd immunity, that the University will be protected.

103.2. It is uncertain whether herd immunity will ever be achieved for Covid-19.⁶²

103.3. Even if it can be, that day appears a long way off. The most optimistic projections are that South Africa will achieve herd immunity in March next year. If that was achieved, then SU could always reconsider its rule.

104. Third, a vaccination rule depends on SU's ability to regulate access to its campus. Unlike other universities, SU does not have a closed campus. The main campus in particular is integrated into the town of Stellenbosch with numerous entrances to and exits from its various buildings. If SU cannot ensure that only vaccinated students (and staff) enter the campus, a vaccination rule will not be effective. SU will have to determine whether it can enforce a rule. If not, it may be a reason to prefer hard exclusion as it does not require constant enforcement of campus security.
105. Fourth, students and staff are not the only people on SU's campus. There are visitors, parents, contractors and others. SU has the legal power to deny access to its premises to any person who is not vaccinated. But again, we are unsure of whether it will be possible for SU to do so. If not, the efficacy of a vaccination rule may be reduced, but will not be significantly undermined. The vast majority of people on campus will remain students and staff.

⁶² C Aschwandern 'Five reasons why COVID herd immunity is probably impossible' *Nature* (18 March 2021), available at <https://www.nature.com/articles/d41586-021-00728-2>

106. Fifth, SU's ability to achieve the goal of returning to in-person teaching may be limited by DMA regulations. If they continue to restrict the number of people that can gather indoors, SU may need to continue to teach primarily online. A vaccination rule may, in those circumstances, achieve only some of the purposes outlined above. It would ensure safety for those on campus. But it would not be able to hasten the return to full in-person teaching.

Less restrictive means

107. When deciding whether the limitation of a right is proportional, a court will consider whether less restrictive means exist that could be used to achieve the same purpose. The existence of less restrictive means does not necessarily render a provision unconstitutional, but it is an important consideration to be weighed up in the proportionality analysis.⁶³

108. We consider four less restrictive means.

109. First, SU could continue with its current pattern of strict enforcement of Covid-19 protocols, limited in-person teaching and heavy reliance on online learning. In our view, this is not an effective less restrictive means because:

109.1. It seems unlikely to be as effective as a vaccination rule at preventing the spread of Covid-19 among members of the SU community, and preventing serious illness and death.

⁶³ *Mlungwana* at para 95.

- 109.2. One of the purposes of a vaccination rule is precisely to return to in-person teaching, and possibly to allow the relaxing of mask-wearing and social distancing on campus. Vaccination may permit that because the risks are sufficiently low if everyone is vaccinated. Of course, SU could decide to require vaccination, and nevertheless to continue with requiring mask-wearing and social distancing on campus to further reduce risk even among the vaccinated.
- 109.3. We are instructed that compliance with Covid-19 protocols of mask-wearing, social distancing and sanitizing is inconsistent. The advantage of a vaccine is that it works all the time, and does not depend on conscious action.
110. Second, SU could offer an exemption not only for those with medical conditions, but also for those with religious or other conscience-based reasons for refusing to be vaccinated. This would avoid or minimise limitations of the right in s 15, and the right to equality. It is a form of reasonable accommodation. That principle states that *“sometimes the community, whether it is the State, an employer or a school, must take positive measures and possibly incur additional hardship or expense in order to allow all people to participate and enjoy all their rights equally. It ensures that we do not relegate people to the margins of society because they do not or cannot conform to certain social norms.”*⁶⁴
111. As we discuss below, these **exemptions** are used in American universities and have been an important reason why the University of Indiana’s vaccine policy was upheld by a court there. However, they also have **risks**:

⁶⁴ See *Pillay* at para 73.

- 111.1. They are much more difficult to administer than a medical exemption. There is a well-known set of medical conditions that are known render Covid-19 vaccines unsafe. But there is no closed list of beliefs against Covid-19. And each application will need to be individually assessed to determine whether the student sincerely believes she should not be vaccinated.
 - 111.2. There is a risk of abuse. Because of the difficulty of objective assessment, students who do not wish to be vaccinated because they falsely believe the vaccine is unsafe, may be able to claim to have a religion or conscience-based belief against vaccination. If sufficiently large numbers of students do this, it may undermine the purpose of a vaccination rule.
112. American universities have tried to deal with this difficulty by requiring any person who is exempted from getting a vaccine (whether for medical or religious reasons) to instead provide regular negative Covid-19 test results. This too has its disadvantages:
- 112.1. It will be difficult to administer as each test will have to be checked.
 - 112.2. Covid-19 tests are expensive. Requiring regular testing may operate unfairly against poor students.
 - 112.3. Even twice-weekly tests are no guarantee that an infected and infectious person will not be on campus for several days before they become symptomatic, assuming that happens, or before their next test reveals their infection.
113. Third, instead of mandating vaccines, SU could seek to educate students and encourage or incentivize vaccination, without making it a requirement to attend campus. There is an argument that this can be more effective at getting people to be vaccinated than

mandatory requirements.⁶⁵ Vaccine requirements tend to create distrust and may harden the positions of those who might have been open to persuasion. While many universities overseas have opted for vaccine requirements, others have opted for a vaccine promotion.

114. In our view, vaccine promotion is unlikely to be as effective as a vaccine rule. While it may result in more students ultimately being vaccinated, that is not SU's primary concern. Its primary concern is ensuring students on campus are vaccinated, and therefore that the virus does not spread amongst its students and staff. Assuming that it can be enforced, a vaccine mandate will necessarily achieve that goal more effectively than vaccine promotion. While SU may wish to consider this option, it is not constitutionally required to adopt it.
115. Fourth, soft exclusion appears to be a less restrictive means than hard exclusion. The former allows students to continue to study, but not from campus. However, it comes at a cost. For soft exclusion to work, SU needs to continue to offer online learning for students who are not on campus. If they cannot learn while off campus, then soft exclusion has exactly the same effect as hard exclusion.
116. The question is whether SU intends to continue to offer online learning, and permit students to study without physical attendance:
- 116.1. If SU intends to continue to offer online learning – whether or not all its students on campus are vaccinated – then in our view SU is required to adopt soft

⁶⁵ See, for example, <https://theconversation.com/mandatory-covid-19-vaccines-on-university-campuses-an-obvious-solution-or-a-problem-164738>.

exclusion rather than hard exclusion. It would impose no additional costs on SU, and so there would be no reason not to prefer it.

116.2. However, if SU would prefer to cease offering online learning, and would do so only to accommodate students who refuse to be vaccinated, then soft exclusion is probably not constitutionally required. Whether it is required would depend on how costly it would be to accommodate unvaccinated students. The higher the cost, the less likely a court will find SU is required to adopt that path.

117. Fifth, we have been asked to consider the possibility of requiring unvaccinated medical students to sign an indemnity. It is not clear whether the indemnity would indemnify SU from harm to the unvaccinated student, or from harm the unvaccinated student could cause to others, or both. In our view, this is not a less restrictive means that will achieve the goals of a vaccination rule:

117.1. SU cannot be liable to a student who chooses not to get vaccinated. If that person contracts Covid-19 during their studies at SU, they will have been the primary cause, not SU.

117.2. Due to the complexity of problem and the competing rights at stake, if SU decides against a vaccination rule it is unlikely that our courts will find that its failure to make and enforce such a rule is a wrongful omission attracting delictual liability to persons who are infected by unvaccinated students on its campus.

117.3. As discussed above, SU is not liable to patients who may contract Covid-19 from a student.

117.4. Indemnity will not in fact increase safety – it will only avoid legal liability.

Additional factors

118. There are three further factors relevant to the section 36 enquiry:

118.1. Existing vaccination requirements in law;

118.2. SU's other policies; and

118.3. Foreign and international law.

Vaccination requirements

119. Several pieces of legislation provide for various forms of interference with personal autonomy to advance public health.

120. First, the National Health Act 61 of 2003 (**NHA**) provides for a framework for uniform health system in South Africa.⁶⁶ The NHA provides, as a default, that the consent of a user must be obtained before health services are provided to them.⁶⁷ Consent must be informed, which means that the user must be informed of their health status, alternative options, the pros and cons of each option, and their right to refuse the service.

121. Section 7 provides for exceptions to the rule that a user consents to health services.⁶⁸ If one of these exceptions applies, a person can be forced by a health services provider to get medical treatment. Section 7(1)(d) permits non-consensual health services if the

⁶⁶ Preamble.

⁶⁷ NHA ss 6-8.

⁶⁸ Section 8 provides that even if a person is not required to consent, they are still entitled to be informed according to section 6. The upshot would be that even if a person does not need to consent to being vaccinated, they are still told of their health status and the advantages of vaccination.

“failure to treat the user, or group of people which includes the user, will result in a serious risk to public health”.

122. Section 7(1)(d) thus allows for instances where the public interest for the treatment outweighs individual interests against the treatment. With respect to the section 36 limitation analysis, its relevance is that Parliament has endorsed the idea that in exceptional circumstances an individual’s autonomy must yield to the public health interest. A vaccination rule at SU would attempt to do the same in far more constrained, tailored circumstances.
123. The Minister of Health, acting under the NHA, has made Regulations relating to the Surveillance and the Control of Notifiable Medical Conditions, 2017.⁶⁹ The regulations permit mandatory medical examination, isolation and quarantine of a person with a notifiable disease (i.e. one which poses a public health risk). This, too, shows that in exceptional circumstances an individual’s autonomy must yield to the public health interest.
124. Second, South Africa has enacted in our domestic law the International Health Regulations adopted by the World Health Assembly at Boston on 25 July 1969.⁷⁰ These include: *“Vaccination against yellow fever may be required of any person leaving an infected area on an international voyage.”*⁷¹ Similarly, the Immigration Regulations, 2014 make yellow fever vaccination a requirement for most visas if the person has travelled from a country where yellow fever is endemic. Indeed, it is a requirement even for South Africans who travel to yellow fever countries.

⁶⁹ Government Notice 1434 in *Government Gazette* 41330 of 15 December 2017.

⁷⁰ International Health Regulations Act 28 of 1974.

⁷¹ International Health Regulations, reg 67(1).

125. Third, as we discuss in more detail below, the Minister of Labour, acting under the DMA, has issued an authority for and guidelines about mandatory vaccination for Covid-19 in the workplace.
126. Fourth, although the existing DMA regulations do not mandate vaccination, they do impose a range of other restrictions on constitutional rights. They limit movement by imposing curfews and compulsory isolation for those who contract Covid-19 or come into contact with someone who has contracted Covid-19. They limit rights to assemble and associate by limiting the size and nature of gatherings. They limit the right to trade by limiting the sale of alcohol or the ability of restaurants to trade freely. They limit the right to religion by limiting religious gatherings. Courts have, generally, upheld these rights limitations as necessary to protect people from Covid-19.⁷²
127. All this demonstrates that the idea of requiring vaccination for public health reasons is well-established in South Africa. It is not a controversial idea. The only question is the circumstances under which it would be justified, and how it is enforced.

SU's Policies

128. SU already has policies designed to ensure a safe campus. It has rules for an alcohol-free campus and policies on a gun-free campus, removing hazardous waste products from campus, risk management and safeguarding students in emergency situations. These rules and policies share a goal: ensuring the wellbeing and safety of students and staff on campus.

⁷² See, for example, *South African Breweries (Pty) Ltd v Minister of Corporate Governance and Traditional Affairs and Another* [2021] ZAWCHC 13; *Minister of Cooperative Governance and Traditional Affairs v De Beer and Another* [2021] ZASCA 95.

129. Some of the rules and policies may not have been necessary, and they may implicate competing interests. For example, it may be that SU did not need to prohibit the display of weapons on campus and doing so marginally interferes with others' rights. Similarly, SU did not need to pass a rule stating that students causing physical harm to others will be suspended.
130. The same must be true of a vaccination rule. The rule might not be strictly necessary. It might tread on competing interests. But if SU can ban hazardous substances from its campus, or prevent guns from being displayed, then SU should be able to prevent persons likely to spread Covid-19 from coming onto campus.

Comparative Practice

131. Foreign countries and employers have made vaccination compulsory in some form or another. Where the policies have been challenged, foreign courts have mostly upheld these policies.
132. In France, the government has made vaccination compulsory for medical workers. The USA, at a federal level, has introduced various measures to incentivise vaccination. Saudi Arabia takes perhaps the hardest line: "no jab, no job". In May, its government said employees in the public, private, and non-profit sectors must be vaccinated before they can return to work. It followed Italy, which in March introduced a requirement for health workers, including pharmacists, to be vaccinated before treating patients. Those who refuse face suspension without pay for the rest of the year. In Moscow, 2 million people in public-facing jobs, including frontline health workers, have been told they must be vaccinated. Businesses will be monitored to make sure they comply – at least 60% of employees were expected to have had their first dose by 15 July or firms risked

being fined. The UK government will make covid vaccination mandatory for care home staff from October and is considering whether to extend the policy to NHS staff.⁷³

133. 726 US universities have imposed some form of vaccine requirement.⁷⁴ Universities in Canada have also imposed vaccine requirements, either for all staff and students, for those living on campus, or for those engaging in activities with a high risk of transmission.⁷⁵

134. In *Bridges*, the court considered a requirement by a local hospital network in Texas that its staff be vaccinated against Covid-19. Nearly 25 000 employees were vaccinated, but more than 150 did not, and have since either been dismissed or resigned. The case before the court was brought by one of the dismissed employees, a former nurse. It was rejected by a district court judge, who said it was necessary “*to clarify that Bridges has not been coerced. Bridges says that she is being forced to be injected with a vaccine or be fired. This is not coercion. [The Hospital] is trying to do their business of saving lives without giving them the COVID -19 virus. It is a choice made to keep staff, patients, and their families safer. Bridges can freely choose to accept or refuse a COVID -19 vaccine; however, if she refuses, she will simply need to work somewhere else.*”⁷⁶

⁷³ <https://www.bmj.com/content/373/bmj.n1645>

⁷⁴ <https://www.chronicle.com/blogs/live-coronavirus-updates/heres-a-list-of-colleges-that-will-require-students-to-be-vaccinated-against-covid-19>.

⁷⁵ <https://theconversation.com/mandatory-covid-19-vaccines-on-university-campuses-an-obvious-solution-or-a-problem-164738>.

⁷⁶ *Bridges v. Houston Methodist Hospital* available at <https://foxrothschild.gjassets.com/content/uploads/2021/06/Bridges-v-Houston-Methodist-Hospital-SDTX.pdf>

135. In *Klaassen*, a US district court refused to grant students an interim interdict against vaccination rules passed by the University of Indiana.⁷⁷ If not vaccinated or exempt, students are not permitted on campus, their emails and University accounts are suspended, and their access cards are deactivated. Faculty members (academic staff) and other staff who refuse vaccination face dismissal. The vaccination rules include religious and medical exemptions and do not apply to students who are only enrolled in an on-line program. Students who have a vaccine exemption must wear a face mask in public spaces, must participate in frequent surveillance testing, must quarantine if they have contact with someone who has tested positive for Covid-19 and must leave the campus or quarantine if there is a serious outbreak.
136. The standard for constitutional validity in the US is lower than here – the policy merely needed to be rational. Nonetheless, the courts’ reasoning in *Klaassen* is instructive.
137. Leichty J, in the court of first instance, held that:
- 137.1. Preventing the spread of Covid-19 is a pressing, legitimate purpose.
- 137.2. This is not a situation where the University of Indiana is forcing students to be vaccinated. Rather, the University is presenting the students with a choice of getting the vaccine, applying for an exemption, or getting educated elsewhere. The court held that such a choice does not amount to coercion.
- 137.3. The University, relying on a panel of experts and the latest data, reasonably believes that the vaccines promote the safety not only of its students, but of its entire community. The court rejected the students’ argument that the vaccine

⁷⁷ The judgment is available at <https://www.courthousenews.com/wp-content/uploads/2021/07/klaassen-indiana.pdf>.

may be ineffective or unsafe. The Court found that “*Indiana University has a rational basis to conclude that the COVID-19 vaccine is safe and efficacious for its students. The vaccine has been used on about 157 million Americans; and data now about eight months later ... is considerable and shows major side effects are rare.*”

137.4. The University had determined, roughly, how many staff members were vulnerable to Covid-19 and immunocompromised (about 8 500). It had conducted a survey to determine whether the policy would be supported, which it was.

137.5. As for the little competing medical evidence on vaccines and Covid-19, the court held that it must defer to experts and to deliberative bodies, like the University’s council. It held: “*With ever evolving COVID-19 science, more will be known tomorrow, next month, and next year; but a courtroom is no place for guesswork today*”.

137.6. The decision to refuse a vaccination does not only affect the student making the decision. The refusal to be vaccinated, while also not complying with heightened safety precautions, could “*sicken and even kill many others who did not consent to that trade-off.*”

138. The students appealed, but the appeal was rejected by the Seventh Circuit Court of Appeals.⁷⁸ Easterbrook J emphasized that the policy allowed for both medical and religious exemptions. He reasoned that “[v]accination protects not only the vaccinated

⁷⁸ *Klaassen v University of Indiana*, available at <http://media.ca7.uscourts.gov/cgi-bin/rssExec.pl?Submit=Display&Path=Y2021/D08-02/C:21-2326/J:Easterbrook:aut:T:2741753:S:0>

persons but also those who come in contact with them, and at a university close contact is inevitable.” He also drew an analogy to other “rights limitations” that are inevitable at university – you have to pay your fees, and read and write on the topics prescribed in order to attend. *“If conditions of higher education may include surrendering of property and following instructions about what to read and write, it is hard to see a greater problem with medical conditions that help all students remain safe when learning.”* Finally, he emphasized that vaccination would allow the university to function:

“A university will have trouble operating when each student fears that everyone else may be spreading disease. Few people want to return to remote education – and we do not think that the Constitution forces the distance-learning approach on a university that believes vaccination (or masks and frequent testing of the unvaccinated) will make in-person operations safe enough.”

139. Indeed, the US Constitution permits even mandatory state vaccination without exemption. In *Jacobson*, in 1905, the US Supreme Court upheld the constitutionality of a law mandating vaccination of smallpox. Failure to get vaccinated resulted in the forfeiture of five dollars. The plaintiff refused to get vaccinated and challenged the law, arguing it violated his right to liberty. The Court rejected his argument. It held:

“But the liberty secured by the Constitution of the United States to every person within its jurisdiction does not import an absolute right in each person to be, at all times and in all circumstances, wholly freed from restraint. There are manifold restraints to which every person is necessarily subject for the common good. On any other basis, organized society could not exist with safety to its members. Society based on the rule that each one is a law unto himself would soon be confronted with disorder and anarchy. Real

liberty for all could not exist under the operation of a principle which recognizes the right of each individual person to use his own, whether in respect of his person or his property, regardless of the injury that may be done to others.”⁷⁹

140. The Court went on to find that the vaccination policy was a reasonable restraint on liberty. It emphasized that “*it was the duty of the constituted authorities primarily to keep in view the welfare, comfort and safety of the many, and not permit the interests of the many to be subordinated to the wishes or convenience of the few*”. It also reasoned that the legislation was no different from the mandatory quarantine required of persons arriving on ships when there had been outbreaks of infectious diseases.
141. Many of these reasons would apply to a vaccination rule at SU, especially the points concerning experts making the decisions regarding the necessity of vaccination and the safety of vaccination. A court should and will be slow to contradict our government’s position that the vaccine is safe.

Conclusion on limitations analysis

142. Ultimately, it is necessary to consider all the relevant factors and weigh whether the limitation of rights is reasonable and justifiable. In our view, there are good prospects that a court will conclude that a vaccination rule at SU is a justifiable limitation of rights. We hold that view for the following main reasons:

- 142.1. Vaccines are safe and effective at preventing disease. But they are not perfect; vaccinated people can still contract Covid-19. While there is no clear evidence

⁷⁹ At 26.

as yet, there are good reasons to believe that vaccination will assist in reducing transmission of the disease.

142.2. SU has a legitimate interest (and a legal obligation) to ensure a safe environment on its campus. It has a legitimate interest in moving, as fast as possible to in-person teaching. Ensuring vaccination will achieve those goals. It is likely to be more effective than relying only on other mechanisms. It will protect SU students and staff from serious illness and possibly death. The constitutional rights of those who do get vaccinated justify the limitations of the rights of those who (without legitimate reason) refuse to be vaccinated.

142.3. The limitations of all the rights are slight, particularly if it includes an exemption provision at least for medical conditions, and possibly for religious and conscientious objections as well.

142.4. Existing national law, and comparative examples, show that coercive or mandatory vaccination is justifiable in open and democratic societies.

143. However, we do have **some concerns and some recommendations:**

143.1. SU should think carefully about how it will enforce a vaccination rule, particularly how it will police access to campus.

143.2. SU should only adopt such a rule after advice from experts, and the surveying of and consultation with its community.

143.3. SU must consider whether it wants to align its vaccination rule with a return to full in-person teaching without an online option, or if it wants to retain an online option that unvaccinated students could use.

143.4. While a vaccination rule will likely be justifiable, it will come at a “cost” to the rights of those whose fundamental rights will be limited and possibly also to SU as a whole (if e.g. it is perceived to be overbearing by many inside and outside the university community). SU should assess whether those costs are worth the benefits it would obtain with, for example, a policy to incentivize and encourage, rather than require, vaccinations.

144. These considerations are unlikely to affect the ultimate justifiability of a vaccination rule under section 36(1). But they will affect its design and the process leading up to the making of any such rule by the Council. In order to provide firm and final advice, we would need to see a draft rule, and have additional instructions on the issues identified above.

III STAFF

145. The position regarding staff is different to, and less complicated than, the position for students. In addition to the constitutional rights set out above, SU as an employer is bound by labour laws. These labour laws constrain how SU can regulate the vaccination of its staff. The most relevant of these laws is the **June Direction**.⁸⁰ The Direction consolidates various duties employers have under the Occupational Health and Safety Act 85 of 1993 (**OHSA**), the Labour Relations Act 66 of 1995, and the Employment Equity Act 55 of 1998 (**EEA**). It applies those duties specifically in the context of Covid.

⁸⁰ Consolidated OHSA Directions COVID-19 Notice 499 of *Government Gazette* 44700 of 11 June 2021.

146. If SU complies with the requirements of the June Direction, it will comply with the relevant requirements of other labour legislation. Under the principle of subsidiarity, if it complies with that legislation, it will also comply with employees' constitutional rights. If an employee wished to challenge a rule that complied with the June Direction, it would have to challenge the constitutionality of the Direction itself.
147. We express our preliminary views on the contents of the Direction below. We may, subject to consultation with SU's labour experts, need to amend these views.
148. Once again, we cannot advise SU without making some assumptions about the vaccination rule it intends to pass. For the purposes of staff, we make the following assumptions:
- 148.1. The rule will prohibit staff from coming on to campus or attending other in-person events without getting vaccinated.
- 148.2. The rule will attempt, where necessary, to reasonably accommodate staff who are unable or unwilling to get vaccinated.
- 148.3. The rule might include a provision allowing for the dismissal of staff who refuse to get vaccinated and cannot reasonably be accommodated. We discuss this requirement in detail below.
149. The Minister of Labour promulgated the June Direction to deal with safety in the workplace regarding Covid-19. The Direction applies to all workplaces operational under the various Covid-19 regulations.⁸¹ The Direction deals with various Covid-19 measures in the workplace, including social distancing, mask-wearing, sanitising, and

⁸¹ Direction 2(1).

sick leave. Employers, in effect, are under various duties to reduce the risk of Covid-19 spreading in a workplace. Employees are obliged to follow measures implemented by employers under the Direction.⁸²

150. The Direction allows employers to implement a mandatory vaccination policy. There are four requirements for a mandatory vaccination plan.

151. First, the employer must conduct a risk assessment.

151.1. The risk assessment must consider the specific circumstances of the workplace.

151.2. The risk assessment must include whether the employer intends to make vaccination mandatory. If so, it must identify which workers must be vaccinated, either because of their risk of transmission or vulnerability.

152. Second, the employer, if it has not already done so, must develop a safety plan based on the risk assessment. The plan must identify the employees required to be vaccinated, and whether vaccination will be compulsory when vaccines become available for employees.

153. Third, the vaccination plan/policy⁸³ must be consistent with any relevant collective agreements. We are advised that there are no relevant collective agreements binding SU.

⁸² Direction 13.

⁸³ The body of the Direction refers to a “plan”, whereas Annexure C (discussed below) refers to a “plan” and a “policy”.

154. Fourth, the vaccination plan/policy must consider employees' rights to bodily integrity in section 12(2) and freedom of conscience in section 15.⁸⁴
155. Fifth, the employer must consider, but is not bound by the guidelines in Annexure C to the Direction. Employers are entitled to depart from the guidelines in justifiable circumstances. Annexure C provides the following:
- 155.1. A mandatory vaccination plan/policy must notify employees of their duty to get vaccinated when a vaccine becomes available to that employee.
- 155.2. It must notify employees of their right to refuse vaccination on medical grounds, or on "*constitutional grounds*".
- 155.3. It must inform employees of their right to consult a health and safety representative or a worker representative or a trade union official.
- 155.4. An employer, if reasonably practicable, should transport employees to and from the vaccination centre.
- 155.5. If employees suffer from side effects from a vaccine, then they must be given paid leave to recover.
- 155.6. If employees refuse to be vaccinated on constitutional or medical grounds, then the employer should:
- 155.6.1. counsel the employee and allow them to consult with a health and safety representative or a worker representative or a trade union official.

⁸⁴ Direction 3(4) incorrectly refers to section 13.

155.6.2. refer the employee for further medical examination should there be a medical contraindication for the vaccine;

155.6.3. “if necessary”, take steps to reasonably accommodate the employee in a position that does not require the employee to be vaccinated.

155.7. Reasonable accommodation means any modification or adjustment to a job or the working environment that will allow the employee to continue to work while not being vaccinated. This might include an adjustment that permits the employee to work offsite or at home or in isolation within the workplace or working outside of ordinary hours, or, in instances of limited contact with others in the workplace, a requirement that the employee wear an N95 mask. See, further, para 160 below.

156. We do not foresee that it will be difficult for SU to comply with most of these requirements. The only requirement that warrants discussion is that the mandatory vaccination plan/policy must consider, and, if necessary, reasonably accommodate, employee’s constitutional rights. We make three points about this requirement.

157. First, the Direction does not suggest that a mandatory vaccination plan/policy is *per se* inconsistent with those rights—otherwise it would not permit a mandatory vaccination plan/policy.

158. If SU makes vaccines mandatory for physical access to campus, then many of the reasons given above concerning infringements of students’ constitutional rights apply with equal force here:

- 158.1. SU's rule would be narrowly tailored to reduce the spread of Covid-19. SU would not adopt a blanket rule that all unvaccinated employees will be dismissed. As a first step, SU would require that unvaccinated staff refrain from situations where they are more likely to spread Covid-19.
- 158.2. Such a rule would not demand a great deal from employees. Vaccines are safe and freely available. SU may even transport employees to and from the vaccination sites. If an employee develops side effects from a vaccine, then they will be entitled to paid time off.
- 158.3. As we explain below, a refusal to get vaccinated will not result in automatic dismissal. The unvaccinated employee will be accommodated by SU if it is reasonable to do so.
159. Accordingly, such a vaccination plan/policy will properly consider and balance employees' constitutional rights.
160. Our second point relates to an employee who refuses to get vaccinated for non-medical reasons. The Direction suggests that SU, if necessary, should reasonably accommodate the employee. The Direction imports the requirement of reasonable accommodation from the Code of Good Practice on Employment of Persons with Disabilities (issued in terms of section 54 of the EEA) (**Code**).⁸⁵
161. The EEA defines reasonable accommodation as "*any modification or adjustment to a job or to the working environment that will enable a person from a designated group to have access to or participate or advance in employment*".⁸⁶ Reasonable

⁸⁵ Published under Government Notice 1085 in *Government Gazette* 39383 of 9 November 2015.

⁸⁶ Section 1.

accommodation implies that an employer takes proportional steps to ensure that a person can continue working despite their disability.⁸⁷ An employer is not expected to incur unjustifiable hardship in accommodating a disability.⁸⁸

162. Failure to accommodate reasonably a person with a disability can amount to unfair discrimination or (if the person is dismissed) an unfair dismissal. However, if an employer cannot reasonably accommodate an employee, and dismisses them, then their dismissal may be substantively fair. If the employer is unable to retain the employee through reasonable accommodation, then the employer may terminate the employment relationship.⁸⁹

163. The net result is that SU were to adopt a mandatory vaccination policy/plan for its staff, it will be obliged by Annexure C to the Direction to retain unvaccinated staff insofar as it is reasonable to do so, but not if retaining them would be unreasonable. Reasonable accommodation will depend on each job. We cannot advise in the abstract whether a particular refusal to be vaccinated cannot be reasonably accommodated. We can however make two general points about reasonable accommodation in the Covid-19 context:

163.1. First, the weight afforded to a non-medical refusal to get vaccinated should not be over-emphasised. As we explained above, the right in section 12(2) is not limited by a rule restricting access to campus or, if it is, then it is limited to a slight extent only. Generally, a mandatory vaccination policy/plan will not undermine an employees' control or security over their body. It will tie access

⁸⁷ Clause 6 of the Code. The same applies for religious beliefs. See *Pillay* at para 76.

⁸⁸ Clause 6.11.

⁸⁹ Clause 12.

to the workplace to a decision of the employee to get a simple, safe vaccine to prevent the spread of a pandemic.

163.2. Second, in the context of Covid-19, reasonable accommodation must also include a consideration of whether the unvaccinated employee places colleagues and students at risk. If an unvaccinated employee's job requires constant contact with others, then it may be unreasonable to allow them to continue to work on campus. This is especially so if people sharing the workplace are immunocompromised.

164. SU is of course entitled to depart from Annexure C. It could take the view that it will not reasonably accommodate non-medical refusals to get vaccinated. We would advise against this view. First, reasonable accommodation will never result in SU incurring unjustifiable expenses. Generally, it may not cost SU much to accommodate reasonably unvaccinated staff, especially if those staff can perform their jobs remotely. Second, SU will expose itself to risk if it decided to dismiss all staff who refused to get vaccinated for non-medical reasons. Staff might be able claim that their views on the vaccine can easily be accommodated by SU. It will be difficult to argue against this, especially if the staff member can perform their duties without seeing other employees or students.

165. Finally, the third point is that, in our view, the June Direction is constitutional. The Direction does not unjustifiably limit any right. The Direction has clear guidelines on vaccination policies. The Direction has a built-in proportionality requirement by incorporating the concept of reasonable accommodation. If an employer passes a rule that requires vaccines, a refusal to get vaccinated must be reasonably accommodated. Whether a refusal should be accommodated entails weighing up the interests of the

employer and employee. If ultimately an employee is dismissed for failing to get vaccinated, it will only be because their dismissal is proportional in the circumstances. For the reasons given above with regard to students, this type of rule would constitute a justifiable limitation of rights.

IV CONCLUSION

166. SU has the authority to make a mandatory vaccination rule. With respect to students, a carefully tailored vaccination rule will likely be constitutional. Such a rule will appropriately balance a pressing public health imperative against a slight incursion of some students' constitutional rights. However, there are details about the design of the rule that need to be considered before we can provide final advice.
167. As for staff, SU is also empowered to make vaccinations compulsory. However, a refusal to vaccinate should be reasonably accommodated. Generally, this will mean that those unvaccinated employees who can perform their task remotely will continue to do so. As for the employees who cannot be reasonably accommodated, they could face dismissal. Whether a dismissal is warranted will, however, depend on the facts of each case.

Andrew Breitenbach SC

Michael Bishop

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Chambers, Cape Town

18 August 2021