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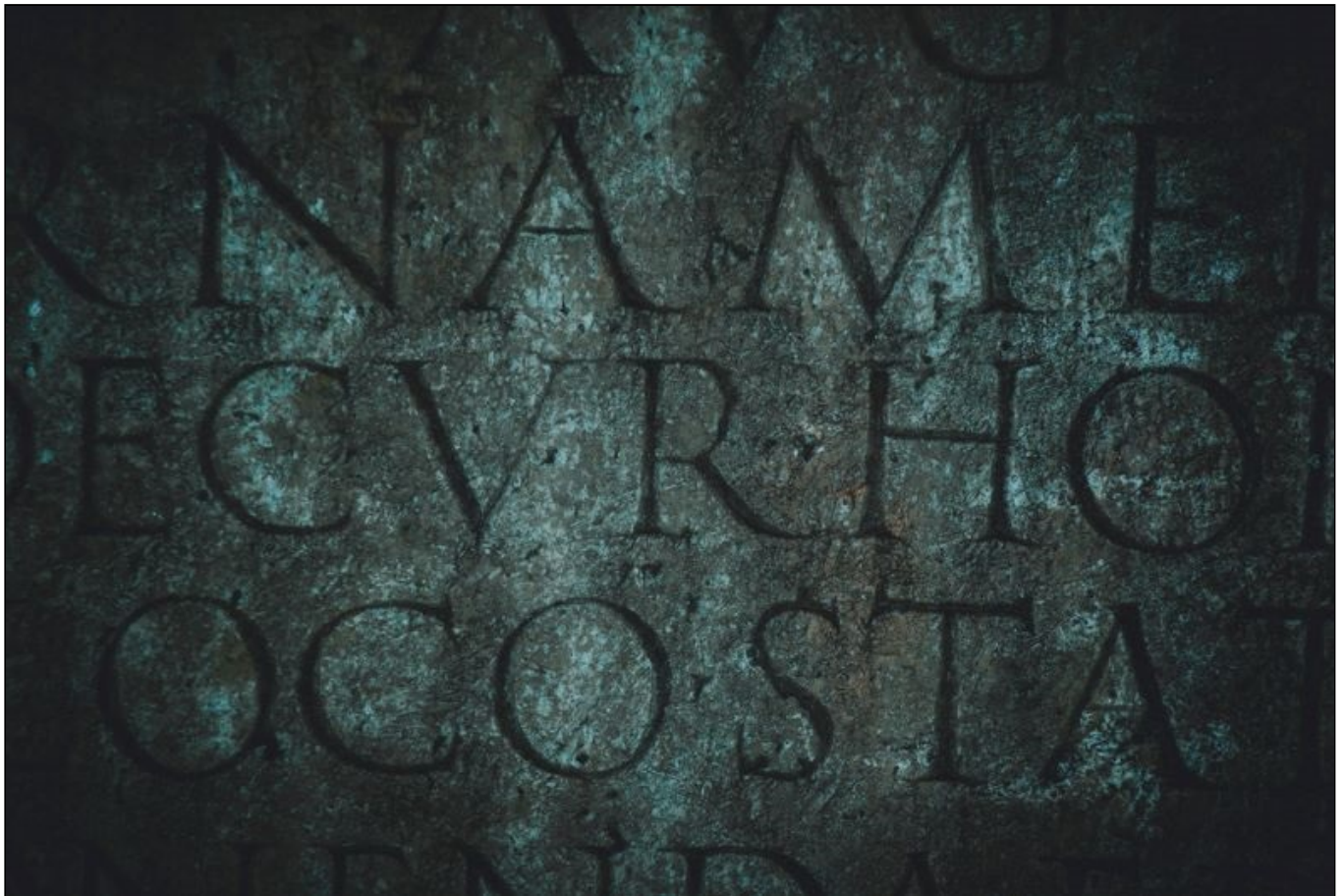
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# Right to refuse a vaccination is not cast in stone



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By **HILDA GROBLER**

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05 Oct 2021

Governments worldwide face the same dilemma: Do existing human rights prevent them from compelling their citizens by legislation to be vaccinated?

There is much uncertainty as to whether the Directions which were issued in June 2021 entitles South African employers to introduce mandatory vaccination at the workplace as the Bill of Rights states at section 12(2)(b) of [the Constitution](#) that “Everyone has the right to bodily and psychological integrity, which includes the right (b) to security in and control over their body.” In simple terms this means that people can refuse to be injected with the vaccine.


Does this mean that individual rights outweigh the rights of the employer and fellow employees to a safe and healthy workplace?

The answer to this question might very well be found in s 36 of the Bill of Rights which speaks to the limitation of rights when such limitation is reasonable and justifiable.

The principle that individual rights are outweighed in certain circumstances is well established in our law.

In [Minister of Safety and Security and Another v Gqqa](#) (26 February 2002), the High Court permitted medical doctors to surgically remove a bullet from the leg of a criminal suspect so that it could be sent for ballistic tests after two people were shot dead. The purpose was to solve a serious crime.

In [Minister of Health of the Province of the Western Cape v Goliath and Others](#) (28 July 2008) the High Court ordered that people who were diagnosed with “highly infectious extensively drug-resistant tuberculosis (XDR-TB)” could be held against their will in isolation in the Brooklyn Chest Hospital until they had sufficiently recovered to return to society. The rationale was to prevent the spread of the disease.

In [Life Health Care Group and Another v JMS and Another](#) (2014) the Court held that doctors could administer a blood transfusion to the minor child of Jehovah’s Witness parents who were opposed to it for religious reasons. The child’s right to life outweighed the parents’ religious beliefs. 

In July 2021 the Land Claims Court varied an eviction order in the matter of [Sibanyoni and Others v Vindex \(Pty\) Ltd and Others](#) to prohibit the eviction of a child and his parents “from the farm before Thabang completes his schooling term.” The court held that “section 28(2) of the Constitution provides that a child’s best interests are of paramount importance in every matter concerning the child. Therefore, Thabang’s schooling is of paramount importance in this matter, should he be evicted from the farm with his parents, at this stage, his education will be disrupted. In terms of section 29(1)(a) of the Constitution, Thabang has a right to basic education.”

The [Occupational Health and Safety Act](#) (OHSA) requires employers to provide a safe work environment. The employer is obliged to take steps to protect the health and safety of employees, co-workers and others who might be put in harms’ way at the workplace.

Clause 8 of the Directions issued on 4 June 2021 (No R 639) identified COVID-19 as a new hazard at the workplace which, it stands to reason, shall endanger the health and safety of all concerned.

This can only mean that, depending on the nature of the workplace, there might be certain circumstances in which individual rights are outweighed by the requirement to give effect to the provisions of the OHSA.

This fact, when read with the Labour Appeal Court (LAC) decision in the matter of [Pikitup \(Soc\) Ltd v South Africa Municipal Workers’ Union obo Members and others](#) [2014], bodes well for the implementation of mandatory vaccination at certain workplaces.

The LAC held at paragraph [40] *et seq* that employers must perform risk assessments and consider what could or should be done when they know of conditions or activities which might endanger the lives of others.

The importance of these judgments is that they confirm that an individual’s right to refuse being vaccinated in terms of section 12(2)(b) of the Constitution is not cast in stone.

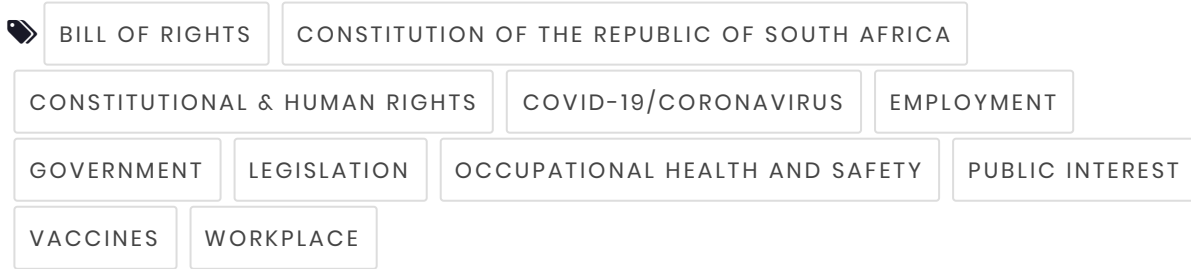
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### [Hilda Grobler](#)

Hilda Grobler has over 30 years' experience in conducting arbitrations, mediations and workplace facilitations, as well as in the chairing of disciplinary enquiries and appeal hearings. She presided in the... [Read more about Hilda Grobler](#)

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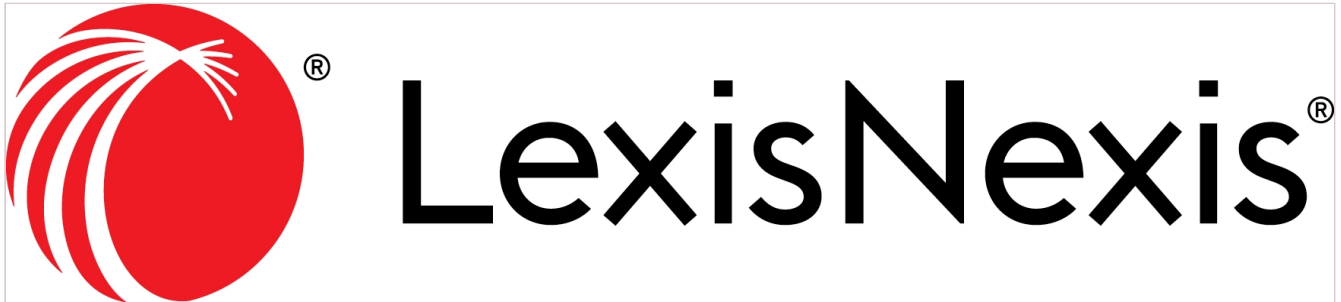
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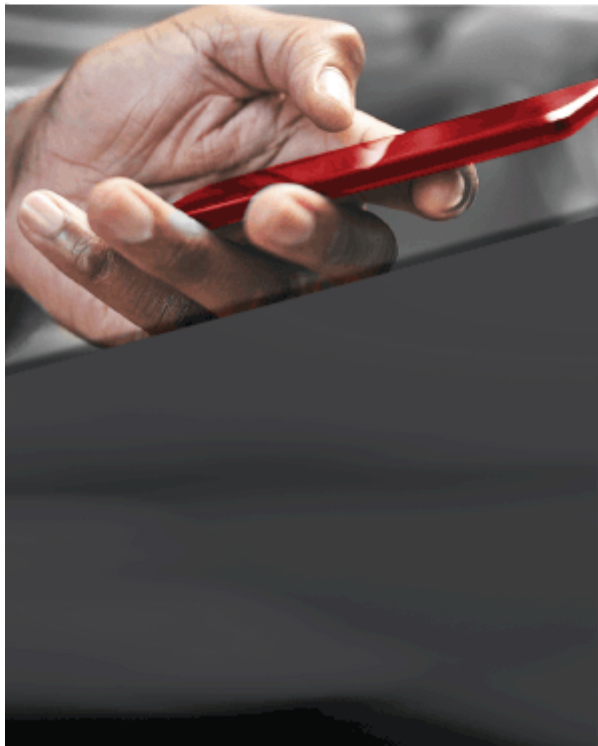
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