

HERD IMMUNITY OR POLITICAL POWER?

by Samantha Smit*



Abstract

This article evaluates the vaccine rollout plan in South Africa and whether it intends to achieve herd immunity or gain more power for the government. The importance of South Africa achieving herd immunity will be considered alongside the restrictions preventing the private sector from gaining access to vaccines thus, arguably, slowing the process of achieving herd immunity. Finally, this article explores different strategies that the government could consider in order to accelerate the vaccination rollout without relinquishing its political power.

1 Introduction

Load. Aim. Fire. This was the consequence faced by many people who formed part of the Jewish community in the Second World War Holocaust, where the life expectancy was staggeringly low, and most people felt they had a fifty-fifty chance of surviving to the end of the

* BCom Law (penultimate), University of Johannesburg. ORCID iD: 0000-0003-1525-3943. I am very grateful and indebted to Mr Louis Koen and Mrs Brooke Badenhorst (Hanson) for their valuable comments, patience, and encouragement. I would also like to thank my Dad for all our discussions and debates surrounding this article and his continued love and support throughout the process. Importantly, I could not have done this without my editor and brother, CJ. All mistakes and views remain solely mine.

war.¹ Never in our wildest dreams did our generation think we would face similar odds outside of a war. However, for people with comorbidities or other health risks, the odds have appeared very similar to those encountered during the Second World War.²

This might seem like a dramatic view, but it may be justified by the fact that even though COVID-19 is a relatively new virus, it has nonetheless given rise to a devastating global pandemic.³ When COVID-19 arrived in South Africa on 05 March 2020, no vaccines were available worldwide.⁴ However, as the situation progressed, the world's scientists and epidemiologists came together to develop a vaccine for the deadly virus.⁵ Typically, it takes 10-15 years before a vaccine is fully developed, however, in this instance, the quickest vaccine ever developed took only four years.⁶ Creating and testing the COVID-19 vaccine was very cumbersome and several pharmaceutical companies invested capital in producing it at an unprecedented rate.⁷ These companies are now asking for an above-market price for the vaccine as they have had to invest a lot of capital and, currently, only rich countries are willing and able to pay these prices.⁸ These high vaccine prices are not always attainable for the governments of developing countries with many only being able to secure a limited number of vaccines due to their limited resources.⁹

When vaccines became available to purchase, the South African government did not immediately start the procurement process and only announced on 11 January 2021 that South Africa had begun buying vaccines.¹⁰ This was after other countries such as Canada had already signed deals for prospective vaccines as early as August 2020

1 P Tammes 'Survival of Jews during the Holocaust: the importance of different types of social resources' (2007) 26 *International Journal of Epidemiology* at 331.

2 IS Kalla & A Laher 'COVID-19: The concept of herd immunity – is it a strategy for South Africa?' (2020) 2 *Wits Journal of Clinical Medicine* at 39.

3 *Mohamed v President of the Republic of South Africa* 2020 (5) SA 553 (GP) para 7.

4 National Institute for Communicable Diseases 'First case of COVID-19 coronavirus reported in SA' 5 March 2020 <https://www.nicd.ac.za/first-case-of-covid-19-coronavirus-reported-in-sa/> (accessed 8 May 2021).

5 M Apuzzo & DD Kirkpatrick 'Covid-19 changed how the world does science, together' *New York Times* 14 April 2020 <https://www.nytimes.com/2020/04/01/world/europe/coronavirus-science-research-cooperation.html> (accessed 10 May 2021).

6 G Grey 'The Scientists' Collective 10-point proposal for equitable and timeous access to COVID-19 vaccine in South Africa' (2021) 111 *South African Medical Journal* at 89.

7 A Dhai 'COVID-19 vaccines: Equitable access, vaccine hesitancy and the dilemma of emergency use approvals' (2020) 13 *South African Journal of Bioethics and Law* at 77.

8 As above.

9 Grey (n 6) 89.

10 The Presidency Republic of South Africa 'Statement by President Cyril Ramaphosa on South Africa's vaccine rollout plan' <http://www.thepresidency.gov.za/speeches> (accessed 10 April 2021).

while the vaccines were still undergoing trials.¹¹ There is a concern that South Africa and other developing countries were kept out of discussions concerning the vaccine's initial distribution due to their inability to pay the high prices required for these vaccines.¹² Even though developed nations such as Canada, the United Kingdom (UK), and the United States of America (USA) only represent 14% of the world's population, they had (at date of writing) already purchased 53% of the most promising vaccines.¹³

This article will, firstly, discuss the South African government's initial vaccine rollout strategy. Secondly, the importance of South Africa achieving herd immunity will be discussed together with the consequences of not doing so. Thirdly, the different role-players prohibiting private citizens and companies from procuring and administering COVID-19 vaccines will be identified. Finally, possible recommendations on how the government can fast-track its vaccine rollout strategy to achieve herd immunity will be discussed.

2 A brief synopsis of the vaccine rollout strategy in South Africa

In an address to the nation, President Ramaphosa stated that the vaccine rollout would start in February 2021. The planned vaccine rollout has three phases that would prioritise different categories of people with each phase. In phase one, essential health care workers, who amount to 1.2 million of the country's population, would be prioritised.¹⁴ This phase was planned to start during February and to be completed by the end of March.¹⁵ In phase two, essential workers such as teachers, police officials, municipal workers, and other frontline personnel would be prioritised.¹⁶ People in institutions such as old age homes, shelters, and prisons, and everyone over the age of 60 would be prioritised together with adults with comorbidities.¹⁷ The total number of people that the government planned to vaccinate in

11 D Ljunggren 'Canada signs deals with Pfizer, Moderna for experimental Covid-19 vaccines' *India Times* <https://health.economicstimes.indiatimes.com/news/pharma/canada-signs-deals-with-pfizer-moderna-for-experimental-covid-19-vaccines/77379276> (accessed 10 April 2021).

12 Grey (n 6) 90.

13 Staff Writer 'Rich countries hoarding Covid vaccines, says People's Vaccine Alliance' *BBC News* 9 December 2020 <https://www.bbc.com/news/health-55229894> (accessed 12 April 2021).

14 National Institute for Communicable Diseases 'All you need to know about COVID-19 and Vaccines' (2021) 3 *Wits Journal of Clinical Medicine* (NICD) at 86.

15 M Merten 'From May to October Phase Two should see 13 million vaccinated, Zweli Mkhize claims' *Daily Maverick* 30 March 2021 <https://www.dailymaverick.co.za/article/2021-03-30-from-may-to-october-phase-two-should-see-13-million-vaccinated-zweli-mkhize-claims/> (accessed 13 April 2021).

16 NICD (n 14) 86.

17 As above.

this phase was around 16 million.¹⁸ During phase three, the government planned to vaccinate the remaining adult population of approximately 22.5 million people.¹⁹ Phase three was initially set for completion by the end of 2021.²⁰

Although the phase one rollout was initially scheduled to be completed at the end of March, the government had since moved the target to later in the year.²¹ It is clear that it will not be successful in vaccinating all essential healthcare workers by the initially scheduled date.²² The government had stated that phase one of the vaccine rollout would only be concluded in the middle of May.²³ It is, therefore, apparent that the government's vaccine rollout plan had hit a few speed bumps in terms of meeting its planned targets. One of the main reasons for the belated administering of vaccines is the global vaccine shortage.²⁴ Developed countries such as Canada, the USA, and the UK started procuring vaccines much earlier and had thus potentially monopolised the vaccine market.²⁵ As a result, developing countries such as South Africa had struggled to secure sufficient vaccines. Canada had, for example, procured enough vaccines to inoculate its entire population five times over – resulting in it having a surplus of vaccines that it could possibly sell at an above-market price due to the global shortage.²⁶ Considering government projections (at the date of writing), and the pace at which vaccines are currently being administered, South Africa will only reach herd immunity by 2022.²⁷ This is in the absence of a modified approach which South Africa desperately needs.

18 The Presidency Republic of South Africa (n 10).

19 NICD (n 14) 86.

20 South African Government 'COVID-19 Coronavirus strategy' <https://www.gov.za/covid-19/vaccine/strategy> (accessed 12 April 2021).

21 Merten (n 15).

22 SAMRC 'Presentation to the portfolio committee on health: Update on the COVID-19 vaccine rollout' 30 March 2021 <https://www.samrc.ac.za/sites/default/files/attachments/2021-03-24/PortfolioCommittee.pdf> (accessed 22 April 2021).

23 SAMRC (n 22).

24 *Solidarity and Another v Minister of Health and 16 Others* (3623/21) (*Solidarity*) Health Justice Initiative Application for Admission as an *Amicus Curiae* para 31.

25 Dhai (n 7) 77.

26 Staff Writer 'Moral issue: African official blasts Covid-19 vaccine inequality' *News24* 10 December 2020 <https://www.news24.com/news24/africa/news/moral-issue-african-official-blasts-covid-vaccine-inequality-20201210> (accessed 6 May 2021).

27 Bhekisisa Team 'SA is not reaching herd immunity. Our new goal is containment – here's how it works' *News24* 3 June 2021 <https://www.news24.com/health24/medical/infectious-diseases/coronavirus/sa-is-not-reaching-herd-immunity-our-new-goal-is-containment-heres-how-it-works-20210603-2> (accessed 6 September 2021).

3 Reaching herd immunity as a matter of urgency

3.1 The loss of life due to COVID-19.

COVID-19 is a rapidly changing pandemic and the strategy to combat it has constantly been adapted to prevent the unnecessary loss of life and to improve health standards.²⁸ Nevertheless, the best strategy to save lives is to achieve herd immunity.²⁹ In order to achieve herd immunity safely and successfully, the state aims to vaccinate 67% of the population which is approximately 40 million people in South Africa.³⁰ Since the start of the pandemic, and at the time of writing this article, 84 751 people in South Africa have died as a result of COVID-19.³¹ In light thereof, it should be the government's primary objective to vaccinate as many people as quickly as possible to prevent a continued rise in COVID-related deaths.

3.2 The impact of COVID-19 on the South African economy

Following the surge in COVID-19 numbers and the state-imposed lockdowns, a recession had hit the economy with the gross domestic product (GDP) of several countries declining significantly.³² Unemployment is, globally and locally, at its highest in ten years and continues to increase.³³ It is projected that countries that are close to achieving herd immunity will be able to resume normal economic activities and their economies will be in a far better position.³⁴ Therefore, South Africa will likely remain in a recession for years to come if the current vaccination strategy is not changed drastically to achieve herd immunity sooner. In the absence of a different approach by the government, South Africa will not achieve herd immunity soon

28 *Esau v Minister of Co-operative Governance and Traditional Home Affairs* 2020 11 BCLR 1371 (WCC) paras 155.1 & 157.

29 World Health Organisation 'Coronavirus disease (COVID-19): Herd immunity, lockdowns and COVID-19' 31 December 2020 <https://www.who.int/news-room/q-a-detail/herd-immunity-lockdowns-and-covid-19> (accessed 18 April 2021).

30 NICD (n 14) 86.

31 H Ritchie et al 'Coronavirus Pandemic (Covid-19) – the data' 12 September 2021, 18 Months since the start of the pandemic in South Africa' <https://ourworldindata.org/coronavirus> (accessed 30 April 2021).

32 Stellenbosch University Bureau for Economic Research 'Economic activity expected 2020-2022: first quarter' (2021) 36 *BER: Economic Prospects* at 3.

33 A O'Neill 'Number of unemployed persons worldwide from 1991 to 2021 and projections until 2022' <https://www.statista.com/statistics/266414/unemployed-persons-worldwide/> (accessed 23 April 2021).

34 Stellenbosch University Bureau for Economic Research (n 32) 8.

enough to enable the resumption of normal economic activities in the planned period.³⁵

3.3 Return to rationality

COVID-19 has had a substantial effect on the population's general mental well-being. The fear of contracting the virus has led to elevated levels of stress.³⁶ Many isolate themselves to avoid infection and this restricts their social interactions with others to the bare minimum with no physical contact.³⁷ This behaviour causes anxiety and depression.³⁸ Additionally, unemployment, fatality rates, continuous lockdowns, and movement restrictions have significantly changed daily lives and have ultimately led to mental health problems and increased substance abuse.³⁹ This increase in substance abuse has led to a significant increase in reports of gender-based violence cases in South Africa throughout the year.⁴⁰ This is now commonly referred to as the 'second pandemic' in South Africa.

Social interactions such as hugging or shaking hands have also been cautioned against.⁴¹ This was instituted as part of the safety protocols to limit the amount of close contact that individuals have with one another and to reduce the virus' spread.⁴² Social gatherings such as religious services, sports events, visiting family, and attending funerals have also been restricted.⁴³ These events give people a sense of belonging and form a substantial part of who we are in our societies.⁴⁴ Mental health issues will thus continue to rise until the virus is under control through herd immunity.

35 Bhekisisa Team 'South Africa's not reaching herd immunity. Our new goal is containment' *Mail and Guardian* 04 June 2021 <https://mg.co.za/health/2021-06-04-south-africas-not-reaching-herd-immunity-our-new-goal-is-containment/> (accessed 8 September 2021).

36 Y Lahav 'Psychological distress related to COVID-19 – The contribution of continuous traumatic stress' (2020) 277 *Journal of Affective Disorders* at 129-137.

37 As above.

38 E Mbunge 'Effects of COVID-19 in South African health system and society: An explanatory study' (2020) 14 *Diabetes and Metabolic Syndrome: Clinical Research and Reviews* at 1809-1814.

39 S Dubey 'Psychosocial impact of Covid-19' (2020) 14 *Diabetes and Metabolic Syndrome: Clinical Research and Reviews* at 779-788.

40 C Gould 'Gender-based violence during lockdown: Looking for answers' (2020) 113 *Servamus Community-based Safety and Security Magazine* at 56-57 (accessed 3 May 2021).

41 Department of Health 'Mental Health and Covid-19' 22 October 2020 <https://sacoronavirus.co.za/2020/10/22/mental-health-and-covid-19/> (accessed 7 May 2021).

42 O Home 'COVID-19: Protecting people and societies' <https://www.oecd.org/coronavirus/policy-responses/covid-19-protecting-people-and-societies-e5c9de1a/> (accessed 2 May 2021).

43 Disaster Management Act, 2002: Amendment of Regulations Issued in Terms of Section 27(2) 2002 (Disaster Management Act Amendment of Regulations) sec 36(4)(ii).

44 Department of Health (n 41).

4 The different role players prohibiting private citizens and companies from procuring COVID-19 vaccines

4.1 The role of legislation: To protect and promote, or to restrict?

In South Africa, no person may purchase vaccines from abroad and distribute them if the vaccines have not been registered with and approved by the South African Health Products Regulatory Authority (SAHPRA).⁴⁵ This is because SAHPRA's function is, among others, to ensure that the vaccines meet the standards of quality, safety, efficiency, and efficacy.⁴⁶ For a vaccine to be used in South Africa, SAHPRA must either register it or grant authorisation for its emergency use. Moreover, even if a vaccine is approved for use or emergency use by the government, private entities are still precluded from importing the vaccine.⁴⁷ This means that neither the government nor a private entity may import the COVID-19 vaccine without SAHPRA's approval.⁴⁸ The government has reiterated that until now (at date of writing), the issue precluding private institutions from procuring the vaccine has been that it was only approved for emergency use. Thus, it could only be procured by the government as only it has authorisation.⁴⁹

The government had attained authorisation for emergency use of the vaccine instead of registering the vaccine to make it quickly available as possible means to addressing the COVID-19 health crisis.⁵⁰ The government has applied for a licence under section 21 of the Medicines and Related Substances Act to temporarily allow for the sale of the unregistered COVID-19 vaccine, such as the AstraZeneca vaccine, as the process of registration takes time and may cause a delay in the rollout.⁵¹ During this time multiple other vaccines, such as the Johnson and Johnson, Pfizer, Coronavac, and Sputnik V vaccines, were going through the formal registration process.⁵²

45 Medicines and Related Substances Act 101 of 1965 (Medicines Act) sec 21.

46 Medicines Act (n45) sec 2B(1)(a).

47 *Solidarity* (n 24); Director-General of the National Department of Health Affidavit <https://powersingh.africa/wp-content/uploads/2021/02/50F-0001-Minister-of-Health-Answering-Affidavit-2021-02-22.pdf> (National Department of Health Affidavit) para 13.3.2. This matter has, however, been withdrawn.

48 Medicines Act (n 45) sec 21(1).

49 Medicines Act (n 45) sec 21.

50 Grey (n 6) 89.

51 Medicines Act (n 45) sec 21.

52 SAHPRA 'COVID-19 Vaccines Regulatory Status Update' https://www.sahpra.org.za/wp-content/uploads/2021/01/SAHPRA_COVID-19-vaccines-update.pptx (accessed 10 July 2021).

The private sector could, therefore, not import any COVID-19 vaccines because it had not gone through the formal process of registration. However, since 31 March 2021, COVID-19 vaccines have been approved by SAHPRA and private institutions are now eligible to apply for licences to import them.⁵³ This licence to import is generally approved by SAHPRA.⁵⁴ If SAHPRA approves licences for private institutions to import registered COVID-19 vaccines, they can start negotiations with pharmaceutical companies for purchase agreements. Currently, private companies can still not import their own vaccines, however, the government does provide approved private institutions to inoculate their employees.⁵⁵

4.2 The government's responsibilities: Reducing inequalities versus saving lives in a global pandemic

When all the effective vaccines have been successfully registered with the SAHPRA and private persons and institutions have obtained licences, they will be allowed to import COVID-19 vaccines.⁵⁶ For them to get over the final hurdle of administering the vaccine after it is imported, private institutions need the government to approve them as a vaccine facility. Furthermore, only a doctor or nurse may administer the vaccine if they have been approved by the government to do so.⁵⁷ The government has expressed concern that if private persons and institutions were to be granted licences, the supply of vaccines available to it would be significantly reduced.⁵⁸ Thus, it can be argued that the government is indirectly preventing private persons from being able to procure vaccines with procedural hurdles and is, as a result, limiting their right to acquire the various lifesaving COVID-19 vaccines.⁵⁹

Even if the private sector received approval from the SAHPRA, it would not be able to buy the COVID-19 vaccines as it is not permitted to administer them. When private institutions approached the government for permission to purchase and administer the vaccines

53 SAHPRA 'SAHPRA Registers the COVID-19 Vaccine Janssen AD26.COV2-S [Recombinant] With Conditions' 01 April 2021 <https://www.sahpra.org.za/news-and-updates/sahpra-registers-covid-19-vaccine-janssen-ad26-cov2-s-recombinant-with-conditions/> (accessed 09 May 2021).

54 Medicines Act (n 45) sec 22C(1)(b).

55 South African Government News Agency 'Government prepares for businesses to start offering COVID-19 vaccines to workers' 02 June 2021 <https://www.sanews.gov.za/south-africa/government-prepares-businesses-start-offering-covid-19-vaccines-workers>.

56 Medicines Act (n 45) sec 22C.

57 S Rall 'Medical staff have been trained to administer Covid vaccines' 1 February 2021 <https://www.iol.co.za/news/south-africa/kwazulu-natal/medical-staff-have-been-trained-to-administer-covid-vaccines-8e22c080-5b6e-4f7c-84d5-99f2c1f50bb0> (accessed 5 June 2021).

58 National Department of Health Affidavit (n 47) para 14.4.2.

59 Constitution of the Republic of South Africa, 1996 (Constitution) sec 27(1).

for their employees, the government denied the request or allowed only a selected few companies to administer the vaccines.⁶⁰ As the private sector is no longer precluded from importing the vaccines, the government is actively preventing it from administering the vaccines. This effectively invalidates the private sector's ability to import the vaccine.⁶¹ Currently, only Impala, Sibanye, and Discovery are among the few private institutions that are permitted to administer vaccines.⁶² If the government approves more private institutions, then more people will be vaccinated quicker, and herd immunity will be reached sooner.

The government explains that this would, in its view, promote an unequal wealth distribution as rich companies with better resources will be provided with vaccines sooner than the government can get access because private institutions can pay the inflated prices.⁶³ It is also concerned that private institutions may be able to provide vaccines with a higher efficacy rate, that is, the Pfizer and Moderna vaccines which have a 90% efficacy rate as opposed to the Johnson and Johnson vaccine which has a slightly lower efficacy rate of 85%.⁶⁴ This can create a situation where people with more resources receive better vaccines before those who may need it more but could not afford to purchase these vaccines on their own – such as the elderly or people with comorbidities.⁶⁵ By not granting the private sector the ability to administer the COVID-19 vaccine, the government is the sole source from which South Africans can access vaccines.⁶⁶ It is argued that if a person has the available resources to procure the COVID-19 vaccine through their medical aid or other financial means then they

- 60 N Wilson et al 'Private sector wants in on SA's vaccine rollout' *Sunday Times* 22 March 2021 <https://www.timeslive.co.za/sunday-times-daily/news/2021-03-22-private-sector-wants-in-on-sas-vaccine-rollout/> (accessed 14 May 2021).
- 61 C Nortier 'Private sector can procure vaccines from government, Mkhize tells National Council of Provinces' *Daily Maverick* 25 February 2021 <https://www.dailymaverick.co.za/article/2021-02-25-private-sector-can-procure-vaccines-from-government-mkhize-tells-national-council-of-provinces/> (accessed 10 May 2021).
- 62 D Slater 'Mining healthcare sites gear up to increase vaccine rollouts' 25 June 2021 <https://www.miningweekly.com/article/mining-healthcare-sites-gear-up-to-increase-vaccine-rollouts-2021-06-25> (accessed 26 June 2021).
- 63 National Department of Health Affidavit (n 47) para 14.4.3.
- 64 LH Sun 'Pfizer, Moderna vaccines 90 percent effective in study of essential workers' *The Washington Post* (Washington D.C.) 29 March 2021 <https://www.washingtonpost.com/health/2021/03/29/vaccine-effective-essential-workers-study/> (accessed 26 April 2021); WHO 'The Johnson & Johnson COVID-19 vaccine: What you need to know' <https://www.who.int/news-room/feature-stories/detail/the-j-j-covid-19-vaccine-what-you-need-to-know> (accessed 6 May 2021).
- 65 United Nations 'Unequal Vaccine Distribution Self-Defeating, World Health Organization Chief Tells Economic and Social Council's Special Ministerial Meeting' 16 April 2021 <https://www.un.org/press/en/2021/ecosoc7039.doc.htm> (accessed 10 May).
- 66 P Mukherjee & N Dlodla 'Experts urge state to share vaccine plan with private sector' 20 January 2021 <https://www.businesslive.co.za/bd/national/2021-01-20-experts-urge-state-to-share-vaccine-plan-with-private-sector/> (accessed 29 April 2021).

should not be precluded from protecting themselves against a possibly fatal virus. The government is thus using its power to restrict people's right to life and access to health care services instead of promoting and protecting these important rights, as COVID-19 is a deadly virus.

In Indonesia, the government allowed private institutions to purchase their vaccines.⁶⁷ In this model, two vaccine rollout strategies are happening simultaneously with the main goal of inoculating as many people as possible as Indonesia also has high COVID-19 infections.⁶⁸ In both strategies, vaccines will be bought from foreign suppliers and these vaccines have been approved by their regulatory authority.⁶⁹ The government's rationale behind this decision was that it would reduce the pressure on the national budget and lead to more people being vaccinated sooner.⁷⁰ Indonesia, similarly to South Africa, is a developing country. The South African government could use Indonesia as an example that shows that a joint effort between the private and public sectors is possible.⁷¹

The government's current plan is to procure all the vaccines with the funds available in the public purse and to distribute and administer the vaccines as it sees fit. The government has also informed all private institutions that it will introduce a vaccine rollout plan that will be managed independently and solely by it. With a global health pandemic, the concern of the government should not be that wealthy people will be afforded better medical treatment as they have better resources available, but to vaccinate as many people as soon as possible. The government is concerned that if it allows private institutions to procure and administer vaccines for their employees, that will increase the inequalities in South Africa as private companies have the means to procure these vaccines.⁷² As such, it has decided to remain the main provider of the COVID-19 vaccine and to allocate it primarily based on need thereby linking South Africa's hope to achieve herd immunity to the government's available resources.

The question which arises is whether the government is placing the right to be treated equally above all other rights such as the right to bodily integrity and right to health care through gaining access to

67 J Emont 'A New Covid-19 Experiment from Asia: Letting Companies Buy Vaccines' 5 March 2021 <https://www.wsj.com/articles/businesses-to-buy-covid-19-vaccines-for-employees-in-indonesias-plan-to-ease-pandemic-11614940206> (accessed 12 May 2021).

68 Emont (n 67).

69 As above.

70 As above.

71 N le Roux & A Schoeman 'A comparative analysis of the design of special economic zones: The case of South Africa, Malaysia and Indonesia' (2016) 9 *Journal of economic and Financial Sciences* at 756.

72 LO Gostin, SA Karim & BM Meier 'Facilitating Access to a COVID-19 Vaccine through Global Health Law' (2020) 48 *Journal of law, Medicine & Ethics* at 623.

the lifesaving COVID-19 vaccines.⁷³ In *S v Makwanyane*, Langa J stated the following:⁷⁴

I place more emphasis on the right to life. Section 9 of the Constitution proclaims it in unqualified terms. It is the most fundamental of all rights, the supreme human right.

As such, the right to life and lifesaving medicine should supersede the right to equality and the government should not place the right to equal medical treatment above people's right to life. If the government continues to prevent private companies from administering vaccines, then it effectively places the right to equality above the right to life thereby endangering people's lives unnecessarily.

4.3 Pharmaceutical companies' dilemma: Protecting humanity or maximising profits?

When the global vaccine rollout started, no restrictions were put on the number of vaccines that a country could buy. This led to the unequal distribution of COVID-19 vaccines with developed countries being able to procure a surplus of vaccines.⁷⁵ Some developed countries have almost reached herd immunity and have more vaccines available than they need to reach herd immunity, while most developing countries have not been able to vaccinate even 10% of their populations.⁷⁶ Pharmaceutical companies have placed no restrictions on the purchasing of vaccines as the only requirement is the ability to pay.⁷⁷ This has thereby created a shortage of vaccines available.⁷⁸ The United Nations (UN) condemned this practice by developed countries and implored them to refrain from buying more vaccines than they require so that all countries can achieve herd immunity.⁷⁹ Thus, a balance must be struck when considering the protection of humanity versus the profit margin of private institutions.

73 Constitution (n 59) sec 12(2).

74 1995 (3) SA 391 (CC) para 217.

75 United Nations 'Human Rights and access to COVID-19 vaccines' 17 December 2020 https://www.ohchr.org/Documents/Events/COVID-19_AccessVaccines_Guidance.pdf (accessed 22 April 2021).

76 A Mirza & E Rauhala 'Here's just how unequal the global coronavirus vaccine rollout has been' *The Washington Post* 06 May 2021 <https://www.washingtonpost.com/world/interactive/2021/coronavirus-vaccine-inequality-global/> (accessed 11 May 2021).

77 United Nations (n 75) 1.

78 S Shah et al 'Vaccine delays in developing nations risk prolonging pandemic' 17 February 2021 <https://www.wsj.com/articles/faltering-covid-19-vaccine-drive-in-developing-world-risks-prolonging-pandemic-11613557801> (accessed 9 May 2021).

79 United Nations (n 75) 2.

5 Recommendations

5.1 Partnering with private companies in procuring vaccines

As stated by the United Nations Committee on Economic, Social and Cultural Rights, the right to the highest attainable standard of health is one of the fundamental human rights of every human being.⁸⁰ The right to health is important, and as stated in the Constitution, the government must take reasonable legislative measures to achieve the progressive realisation of this right.⁸¹ If the government is concerned that allowing private institutions to purchase and administer vaccines will create vaccine inequalities, then it should work jointly with the private sector. This can be done, for example, by negotiating with the private sector to pay for the vaccines procured by the government thus ensuring that its employees receive the vaccines earlier. Conversely, for every dosage of the vaccine bought for their employees, companies could be required to donate an additional dosage thereby saving the government's limited resources. This way the government would be procuring vaccines for both the private sector which can afford the vaccines as well as for the vulnerable members of society who are reliant on the state to vaccinate them.

Private companies have offered assistance in purchasing vaccines and it is advised that the government make use of the offer and create a joint effort between the private and public sectors.⁸² Should the government remain reluctant to partner with the private sector and access its extensive resources, it will not bode well for South Africa.⁸³ If the government remains steadfast in not relinquishing its political power, then our society's ability to access vaccines and combat the pandemic will be adversely affected.

In a global health crisis, such as the COVID-19 pandemic, there is no room for political arm wrestling as the government's main focus should be to protect lives and to prevent the unnecessary loss of life. In the context of COVID-19, the best way to prevent the unnecessary loss of life is to achieve herd immunity as soon as possible. Through preventing private institutions from assisting the government in rolling out the vaccine strategy, it is compromising the process of saving lives. As such, the government should find an amicable solution that includes the private sector even if it results in an inequitable distribution of the vaccine.

80 UN Committee on Economic, Social and Cultural Rights (Committee on ESCR) 'Substantive issues arising in the implementation of the International Covenant Economic, Social and Cultural Rights: General Comment 14' (04 May 2001) UN Doc E/C/12/2000/4 (2001).

81 Constitution (n 59) sec 27(1).

82 Wilson et al (n 50).

83 Grey (n 6) 93-94.

Such a solution would allow people to get vaccinated at the cost of private institutions, thereby granting the government the opportunity to use its allocated funds to address shortcomings in the budget which is already under enormous strain.⁸⁴ Another benefit of partnering with private institutions to procure these vaccines is that private institutions have more funds available and have the discretion to pay more for vaccines than the government. Private institutions could, for example, purchase these vaccines from Canada at an above market price as they have the resources to pay the inflated prices whereas the government does not have the luxury of overpaying for medical supplies when there are many other commitments and obligations that the government must address.

In the government's court papers for the case of *Solidarity v Minister of Health*,⁸⁵ it was stated that by allowing private persons and institutions to purchase their vaccines the vaccine supply available to the government would reduce. If that is the government's concern, then it should rather ask private persons and institutions to not procure vaccines that are of interest to the government, such as the Johnson and Johnson vaccine.⁸⁶ This will eliminate the competition between the government, private persons, and institutions for the same vaccine supply and more people will be vaccinated in a shorter period which is what the government's ultimate goal is. Accordingly, private persons and institutions should be given the necessary permission to administer the vaccine so that they can start their process of procurement, negotiations, and distribution.

Although the government is conscious of creating vaccine inequalities, allowing the private sector to help buy these vaccines may not necessarily translate to unequal distribution. The government will remain in control of the vaccine rollout, and vulnerable people will still be vaccinated, but not at the government's expense.

The government has recently started to partner with private institutions with the aim of increasing the number of vaccinations per day.⁸⁷ The government is allowing private institutions to apply to become a vaccination site and if they are approved then the government supplies them with vaccines. Although the government is still the sole purchaser of the vaccines in South Africa, it is now distributing some of these vaccines to private institutions to vaccinate

84 *Public Servants Association and Others v Minister of Public Service and Others* 2021 3 BLLR 255 (LAC) para 31.

85 National Department of Health Affidavit (n 47) para 14.4.2.

86 C Zimmer, J Corum & S Wee 'Coronavirus Vaccine Tracker' *New York Times* 4 May 2021 <https://www.nytimes.com/interactive/2020/science/coronavirus-vaccine-tracker.html> (accessed 10 May 2021).

87 South African Government News Agency (n 55).

their employees.⁸⁸ This is already a step in the right direction to accelerate the achievement of herd immunity in South Africa.⁸⁹ The number of private vaccination sites is also steadily increasing resulting in more people being vaccinated every day.⁹⁰

5.2 Compulsory licence

As can be seen from past pandemics, such as the influenza pandemic,⁹¹ herd immunity is the best defence against a contagious virus such as COVID-19.⁹² However, as the government of a developing country, the South African government does not have the same resources as developed countries to purchase these vaccines at retail prices. Furthermore, the UN has suggested that the COVID-19 vaccine must be treated as a public good instead of a marketplace commodity where access thereto is reliant only on a country's ability to pay.⁹³

A compulsory licence is granted when a patent holder cannot meet the demand for the patented product – as is the case of the COVID-19 vaccine – or when the price of the product is too high.⁹⁴ South Africa's patent law does provide for compulsory licensing, but this route of procuring the vaccines will take time and there is also the burden of litigation costs.⁹⁵ Therefore, if the government does not want to partner with private institutions or deregulate some of the current controls, then it should apply for a compulsory licence to produce these vaccines domestically so that the population has access to adequate vaccines to achieve herd immunity.⁹⁶ An effective response to the COVID-19 virus entails timely access to affordable vaccines as a shortage of this lifesaving medicine will lead to the unnecessary loss of life.⁹⁷

88 S Carmen 'How the private sector can support South Africa's Covid-19 vaccine rollout' *News24* 10 August 2021 <https://www.news24.com/health24/medical/infectious-diseases/coronavirus/how-the-private-sector-can-support-south-africas-covid-19-vaccine-rollout-20210810>.

89 As above.

90 As above.

91 JK Taubenberger & DM Morens '1918 Influenza: the Mother of All Pandemics' (2006) 12 *Emerging Infectious Diseases* at 17.

92 World Health Organisation (n 29).

93 United Nations (n 75).

94 M du Bois 'State Use Provisions for Patent Law, and Expropriations: Some Comparative Law Guidelines for South Africa during the Covid-19 Crisis and Beyond' (2020) 23 *Potchefstroom Electronic Law Journal* at 3.

95 Patents Act 54 of 1978 sec 4.

96 Oxfam International 'Campaigners warn that 9 out of 10 people in poor countries are set to miss out on COVID-19 vaccine next year' 09 December 2020 <https://www.oxfam.org/en/press-releases/campaigners-warn-9-out-10-people-poor-countries-are-set-miss-out-covid-19-vaccine> (accessed 10 May 2021).

97 World Trade Organisation 'Waiver from certain provisions of the TRIPS Agreement for the prevention, containment and treatment of COVID-19' 02 October 2020 <https://docs.wto.org/dol2fe/Pages/SS/directdoc.aspx?filename=q:/IP/C/W669.pdf&Open=True> (accessed 12 May 2021).

In the height of the HIV/AIDS endemic, the antiretroviral (ARV) medicine was patented and as a result, its accessibility was limited.⁹⁸ The effect was that only a small percentage of the people infected had access to the medication.⁹⁹ From the start of the HIV/AIDS pandemic and up until 2019, 7.5 million people in South Africa were infected and 72 000 people died in 2019 as a result.¹⁰⁰ Currently, according to the World Health Organisation's (WHO) head of emergencies, it is estimated that one in ten people will be infected with the COVID-19 virus.¹⁰¹ This means that 10% of the population, which is roughly 6 million people, will be infected with the virus in South Africa, and 84 751 people have already died.¹⁰²

Patenting the ARV medicine meant that people across the world were dying because of the high costs and the lack of access to this lifesaving medication. If the World Trade Organization (WTO) does not allow for a temporary compulsory license, less privileged and poorer countries will experience detrimental effects due to the patent on the COVID-19 vaccine. In November 2001, the WTO Ministerial Conference in Doha adopted the Declaration on Trade-Related Aspects of Intellectual Property Rights (TRIPS) and Public Health.¹⁰³ The Doha declaration introduced two flexibilities into the TRIPS agreement. Firstly, that the TRIPS agreement should not prevent people from protecting public health and should rather promote access to medicine for all.¹⁰⁴ Secondly, it was submitted that compulsory licensing for non-commercial use – which means that the patent can be used without the patent holders' consent – is allowed in certain circumstances.¹⁰⁵

With HIV/AIDS, this flexibility was relied upon by Rwanda and Canada.¹⁰⁶ Canada wanted to produce generics of the ARV medicine

98 HP Hestermeyer 'Access to Medication as a Human Right' (2004) 8 *Max Planck Yearbook of United Nations Law* at 103.

99 JT Gathii 'Rights, Patents, Markets and global AIDS pandemic' (2002) 14 *Florida Journal of International Law* 261 at 334.

100 Avert 'HIV and AIDS in South Africa' <https://www.avert.org/professionals/hiv-around-world/sub-saharan-africa/south-africa> (accessed 22 April 2021).

101 J Keaton 'WHO: 10% of world's people may have been infected with virus' *AP News* 5 October 2020 <https://apnews.com/article/virus-outbreak-united-nations-health-ap-top-news-international-news-54a3a5869c9ae4ee623497691e796083> (accessed 13 May 2021).

102 Ritchie (n 31).

103 M Kaplan 'The 2008 H1N1 Swine Flu Pandemic: Reconciling Goals of Patents and Public Health Initiatives' (2010) 20 *Fordham Intellectual Property, Media & Entertainment Law Journal* at 991.

104 TRIPS: Agreement on Trade-Related Aspects of Intellectual Property Rights (15 April 1994) Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, 1869 UN Treaty Series 299 (TRIPS Agreement) Art 31.

105 As above.

106 D Harris 'TRIPS after 15 years: Success or failure, as measured by compulsory licensing' (2011) 18 *Journal of Intellectual Property Law* at 390.

so that the people of Rwanda who could not afford it would have access to the generics.¹⁰⁷ The process from obtaining the compulsory licence to distributing the medicine in Rwanda took four years.¹⁰⁸ If we follow the same procedure with the COVID-19 vaccine, the delay by the pharmaceutical companies will result in thousands, if not hundreds of thousands, of deaths. That is why a compulsory licence should be granted for the vaccine for COVID-19 until countries like South Africa can achieve herd immunity.

There is also a socio-economic perspective that must be considered. The right to health in Article 12 of the International Covenant on Economic, Social and Cultural Rights (ICESCR), has been interpreted by the Committee on Economic, Social and Cultural Rights (CESCR) to place prioritised duties on states regarding essential medicines.¹⁰⁹ The COVID-19 vaccine is expensive because it has been patented. Many countries do not have access to this vital medication as developed countries have the resources to pay for this lifesaving medicine. The developed countries have also received the first choice of easily affordable vaccines.¹¹⁰ The result is that poor and developing countries such as South Africa receive fewer vaccines in comparison.

If the South African government is considering the route of obtaining a compulsory licence, it should consider amending the Patents Act to provide clarity on aspects such as whether prior negotiations are a requirement and how remuneration should be decided. The COVID-19 pandemic has shown the government that a situation where a compulsory licence is needed may arise and that the legislation on when and how such a licence may be issued is crucial.¹¹¹ For this reason, the government needs to ensure that its Patents Act is in line with Article 31 of the TRIPS Agreement and that in a situation of emergency, the government has the power to issue a compulsory licence without prior negotiations on how the patent holder's remuneration will be decided.¹¹² If the government does not want to partner with private institutions then it should apply for a compulsory licence to ensure that South Africa is not left behind in the process of procuring vaccines and achieving herd immunity.

South Africa and India approached the WTO in October 2020 to issue a patent waiver on COVID-19 health technologies which would increase the production of COVID-19 vaccines by issuing compulsory

107 Harris (n 106) 389.

108 Harris (n 106) 391.

109 International Covenant on Economic, Social and Cultural Rights (16 December 1966) United Nations Treaty Series (1993) 3 (ICESCR) Art 12.

110 A Dhali 'Access to COVID-19 vaccines as a global public good: A co-ordinated global response based on equality, justice and solidarity is key' (2021) 14 *South African Journal for Bioethics and Law* at 2.

111 du Bois (n 94) 27.

112 As above.

licenses.¹¹³ The waiver has not yet been granted due to some hesitancy on the parts of various stakeholders. Pharmaceutical companies invested a lot of capital into developing these vaccines in a very short period and are hesitant to now make them freely available. Therefore, the government should consider involving the private sector in its negotiations as they have more funds available than the public sector which would fast-track the herd immunity process in South Africa.

5 Conclusion

If the government continues with its current plan in trying to obtain herd immunity, it will take South Africa many years to achieve its goal and a lot of people will die in the process. Thus, the government needs a new strategy.

As it stands, the application has still not been granted by the WTO and months have passed during which people are still dying because they do not have access to COVID-19 vaccines. Although a compulsory licence is a more effective strategy in the long run due to the limited availability of COVID-19 vaccines, the process is still lengthy. Thus, in the short run, the government should partner with private institutions. The private and public sectors cannot each retreat to their separate corners – they must collaborate and create a joint strategy with the primary goal of saving as many lives as possible.¹¹⁴ The government does not know if and when its application for the compulsory licence will be granted and, in the meantime, people are still being infected and dying. It is, therefore, recommended that the government consider partnering with private institutions in the short run to prevent the unnecessary loss of life in South Africa.¹¹⁵

Anne Frank said during the Holocaust that '[w]hat is done cannot be undone, but one can prevent it happening again'. Throughout history, humanity has often paid dearly for the foolhardy and autocratic leadership in times of dire crisis. As South Africans, we can only hope that this pandemic will not reflect in our history as one of those decisive moments.

113 World Trade Organisation 'Waiver from certain provisions of the trips agreement for the prevention, containment and treatment of COVID-19' <https://docs.wto.org/dol2fe/Pages/SS/directdoc.aspx?filename=q://IP/C/W669.pdf>.

114 JM Pietersen 'The nexus between public administration and disaster management: A case of Covid-19 in South Africa' (2020) 3 *Journal of Public Sector Development and Governance* at 43.

115 Pietersen (n 114) 44.