

ProBono.Org Durban:

On the road to being fully vaccinated

By Shamika Dwarika, Regional Director, Durban



The decision whether to vaccinate or not is a difficult one. There are concerns that the vaccine is experimental and can have serious side-effects. But this can be said of many things that we consume on a daily basis. When one looks at the research done by experts in the field and medical professionals, studies have shown that the vaccine prevents people who contract COVID-19 from getting seriously ill or dying. Moreover, the majority of health care workers were not only willing, but desperate, to avail themselves of the vaccine. Vaccination is our only hope to getting this virus under control. It has worked with polio and smallpox and can definitely work here too.

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of community service

In celebration of 15 years in existence, we have redesigned our website, which we hope you will find interactive and easy to navigate.

See www.probono.org.za

Write for us



We would like to invite legal practitioners to contribute to our bi-monthly newsletters by writing an article of up to 400 words (one page) on a topical issue of law. Please indicate your interest to the editor at margaret@probono.org.za

The deadline for articles for the next issue will be:

1 December 2021

When one looks at the advantages and benefits of being vaccinated, staff at the Durban office of ProBono.Org knew that vaccination was the way to go. As there are many people who are unable to get vaccinated due, for example, to being under the age of 18 or because they have allergies or certain illnesses which preclude them from accessing the vaccine, we felt that it was the responsible thing to vaccinate. All staff at the Durban office who were eligible to vaccinate have had at least one dose to date.

Here are some comments from staff at the Durban office:

"I believe that we have a duty to protect those more vulnerable than ourselves. Having a young child, my fear throughout the pandemic has not just been for myself. I have also been worried about contracting COVID-19 and passing it on to him. Now that I've received both doses, I feel an enormous sense of relief in that regard."

Shamika Dwarika, Regional Director

"Although I was afraid at first, I was really excited to get vaccinated as this meant that I would be a step closer to living in a COVID-free environment. Getting vaccinated means protecting myself and my loved ones from getting the virus. It also felt like a civic duty to restore a sense a normalcy to the general public."

Mayenziwe Khoza, Intern

"I was excited and happy to receive my first dose of the vaccine and I am eager to receive my second dose so that I can be fully vaccinated. It feels like I am doing my bit to help society fight this virus and return to normal. No more masks!!!"

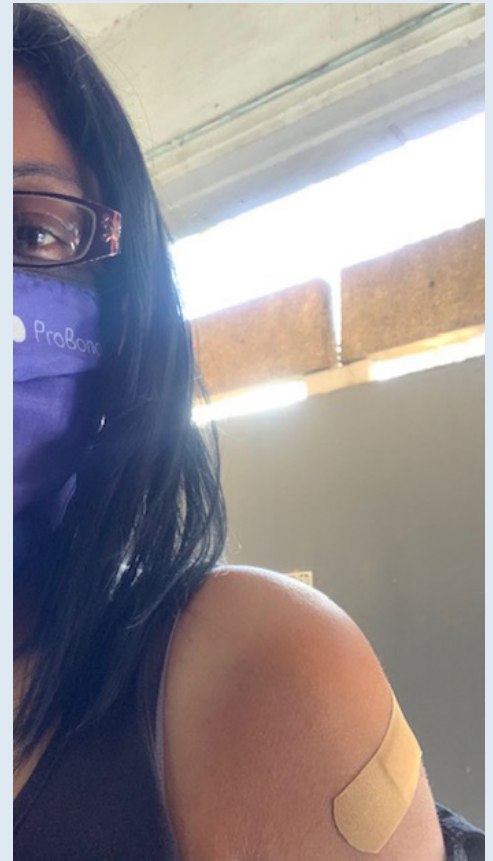
Seshni Govender, Staff Attorney

"Now that I have been vaccinated, I feel more protected against the coronavirus. I also feel good knowing that my decision to get vaccinated means I am also keeping the people that I am in regular contact with, such as colleagues and family, safe."

Ntandoyenkosi Mkize, Intern

"I am someone who has always believed in the power of choice and also believed that our choices affect us and those around us. I chose to get vaccinated because I want to protect myself and those around me as much as it is within my abilities, and I am happy with my choice."

Gugulethu Makhanya, Administrator



COVID-19 VACCINATION RECORD CARD

VACCINEE DETAILS
Surname: Govender
First name(s): Seshni
ID number/Passport number: [redacted]
Next appointment date: [redacted]
EVIS vaccination number: [redacted]

VACCINE DOSE	VACCINE NAME	MANUFACTURER	BATCH NUMBER	VACCINE DATE
1 st Dose	Pfizer	Comirnaty	FG8643	21/09/21
2 nd Dose				
3 rd Dose				

VACCINATOR DETAILS
Surname: Ngcobo
First name(s): Nomonde
DATE: 21/09/21

COVID-19 VACCINATION RECORD CARD

VACCINEE DETAILS
Surname: Dwarika
First name(s): Shamika
ID number/Passport number: 20210917
Next appointment date: [redacted]
EVIS vaccination number: [redacted]

VACCINE DOSE	VACCINE NAME	MANUFACTURER	BATCH NUMBER	VACCINE DATE
1 st Dose	Comirnaty	Pfizer	[redacted]	21/08/21
2 nd Dose	Comirnaty	Pfizer	[redacted]	21/09/21

VACCINATOR DETAILS
Surname: [redacted]
First name(s): Thembelike Hlangwe
DATE: 20/09/21

Media collaboration – Umhlobo Wenene FM

By Nwabisa Sobekwa, Cape Town intern

In the spirit of Women's Month in August, ProBono.Org's three offices and Umhlobo Wenene FM collaborated in a three-part radio series to educate women in their vernacular about their rights in relation to certain areas of law.

The first segment kicked off on 11 August 2021 where Cape Town Legal Intern, Nwabisa Sobekwa was interviewed by radio presenter Tozama Ngconogolo regarding Domestic Worker rights.

Nwabisa introduced the organisation and informed listeners about our three regional offices, the matters we assist with and our exclusions. She also provided our contact details, physical address and the ProBono.Org website.

There were four main questions asked by Tozama, whereafter listeners were given an opportunity to participate by calling in with their questions.

The first question concerned the definition of a domestic worker and whether the definition was restricted to females who are employed to fulfil household duties. Nwabisa explained that a domestic worker is a person who is employed to work as a gardener, driver, babysitter, or carer for the aged, sick or disabled in a private household.

The next issue addressed the obligations pertaining to the registration of domestic workers with the Department of Labour. Nwabisa explained that an



uMhlobo
Wenene fm

employer who has a person working for more than 24 hours per month is obliged to register their domestic worker for UIF with the Department of Labour. Furthermore, the employer must pay a total contribution of 2% (1% contributed by the employee and 1% contributed by the employer), which must be paid within a prescribed period.

Another question concerned the grievance procedure and enforcement of rights when issues arise within the workplace. Nwabisa outlined various

scenarios that can put a dent in the employer-employee relationship. She advised that when a domestic worker is disgruntled about working conditions, unfair dismissal/treatment in the workplace, they can refer the dispute to the CCMA within a prescribed period of 30 days after the dispute arose. The process for dispute resolution at the CCMA was briefly explained as well.

The conversation included other rights relating to leave, salaries/wages and working

hours. In relation to salaries, a domestic worker is entitled to a minimum wage of R19.09 per hour (in accordance with the national minimum wage regulations). Furthermore, the employee cannot work more than 45 hours per week and anything over and above those hours entitles an employee to be paid overtime. Moreover, work on Sundays is voluntary and a domestic employee cannot be forced to work on a Sunday or on public holidays. In addition, domestic workers who work on a Sunday or public holiday must be paid double the daily wage. With regards to leave provision, domestic workers are entitled to annual leave, sick leave and maternity leave. The annual leave is calculated in such a way that a domestic worker is entitled to 3 weeks' leave per year or an agreement can be reached for 1 day's leave every 17 days worked. Due to time restraints we were unable to tackle maternity leave and sick leave.

The listeners were then invited to ask questions relating to the topic.

In response to a question whether an employer can force their domestic worker to get vaccinated against COVID-19, Nwabisa advised that an employer cannot force them to get vaccinated. According to South African law everyone has the right to freedom of choice and the right to bodily integrity and therefore a domestic worker can refuse to be vaccinated on constitutional and/or medical grounds.

Another listener asked what precautions an employer needs to take when hiring a domestic



worker from a different country. Nwabisa advised the listener that many women migrate to South Africa without proper documentation to seek better opportunities. Sometimes the only document they may have is a temporary residence permit or a passport. In most cases these expire, and the domestic worker becomes an illegal immigrant. It is important that employers check whether their employees are documented and, if not, assist with renewal or an application for a work visa. The listener was advised that employing a person who is undocumented is risky and that the employer should obtain certified copies of the domestic worker's documents as a precaution.

Another listener asked whether a worker could claim from UIF if they resign based on bad treatment by their employer. Nwabisa advised that when an employer makes the working conditions unbearable to an extent that the employee makes a decision to resign, an employee would be able to claim for

constructive dismissal from the Department of Labour.

Nwabisa's overall experience of the radio interview with Umhlobo Wenene FM was exciting and nerve wracking at the same time. She believes it was an opportunity to be able to pass on vital information in respect of domestic worker rights to community members in their mother tongue. It further made her realise the importance of legal education to ensure that people are aware of their rights, have access to information and know how to go about obtaining services that they may not have known existed.

Further sessions in the three-part series were held on:

- 18 August, where the topic for discussion was Domestic Violence by Durban Legal Intern, Ntandoyenkosi Mkize; and
- 25 August, where the topic for discussion was Divorce by Johannesburg Legal Intern, Khanyisa Molaoa.

Visit our website at www.probono.org.za for podcasts of the series. ●

Customary marriages and the Law of Succession in South Africa

By Ntandoyenkosi Mkize, Durban Intern

The Recognition of Customary Marriages Act, 1998 ("The Act") makes provision for the recognition of customary marriages, provides the requirements that need to be met for a customary marriage to be deemed valid, regulates the registration of customary marriages, and regulates the proprietary consequences of customary marriages and the capacity of spouses of such marriages. The registration of a customary marriage is particularly important as it makes it easier to obtain maintenance, to claim a right to the assets of a deceased spouse, to prove rights to a deceased estate, and for a wife to enforce her property rights if her husband takes other wives.

According to section 4(2) of the Act, either spouse may apply to the registration officer in the prescribed form for the registration of their customary marriage and must furnish the registering officer with the prescribed information and any additional information which the registering officer may require to satisfy themselves as to the existence of the marriage. Section 4(4)(a) of the Act states that a registering officer must, if satisfied that the spouses concluded a valid customary marriage, register the marriage by recording the identity of the spouses, the date of the marriage, any lobola agreed to and any other particulars prescribed.

Section 4(9) of the Act does, however, state that a customary marriage is not invalid if it is not registered, but an unregistered customary marriage makes it difficult to prove that a marriage exists without de facto proof – a marriage certificate. One of the most common issues wives face in customary marriages is their marriage not being recognised because it was never registered. Wives often rely on their husbands



to register the marriage, believing that they do not have the power to do so themselves, or they do not have access to the Department of Home Affairs because they live in remote areas. In most instances, wives only find out upon the death of their husband that the marriage was never registered and only then do they begin to understand the consequences of this.

As mentioned above, although marriages are not statutorily invalidated by non-registration, institutions, like the Master of the High Court (Master's

Office), regard registration as the benchmark for validity. People are required to produce a marriage certificate whenever their marital status comes into question. Spouses in customary law marriages can only obtain marriage certificates by going to Home Affairs to register the marriage once they have completed the traditional customary marriage process, which includes lobola and a celebration. If spouses in a customary marriage do not register their marriage, they

cannot be issued with a marriage certificate, and if they do not have a marriage certificate, institutions are unlikely to accept that they are married.

In a case like this, a surviving spouse in a customary marriage is not able to prove that they were married to the deceased to give effect to their right to inherit from the deceased's estate, as the Master's Office only accepts a marriage certificate or proof of registration of a customary marriage. Surviving spouses are however still able to register a customary marriage after the death of their husband. Home Affairs officials may request that the wife bring a family member of the husband to confirm the marriage, but the husband's relatives may choose to dispute the marriage in order to inherit from the deceased's estate if the deceased died intestate.

Where a non-registered customary marriage has existed for many years and one of the spouses dies, Home Affairs may not be properly equipped to make an inquiry into a customary marriage and a surviving spouse has to make an application to court to have the customary marriage recognised. This may prove to be too costly for surviving spouses, as many of them come from low-income and rural backgrounds.

At ProBono.Org, we have had numerous clients approach our organisation for assistance because their customary marriages were not registered and they are not able to inherit from their deceased spouse's estate. One client found out, upon the death of her husband, that her customary marriage was never registered. The client approached the Master's Office to have a letter of authority issued to her as the

surviving spouse of the deceased, but the Master's Office required a marriage certificate, which she did not have. When the client approached Home Affairs, she was advised by a department official that she needed to come with witnesses to have her marriage registered. The client's family were willing to stand as witnesses, but her deceased spouse's family refused, saying that she has no claim over his estate.

Another client also found out after her husband's death that her civil marriage was never registered at Home Affairs. Her husband then entered into polygamous customary marriages with two other women without her consent. Under normal circumstances, where the civil marriage is registered, the client would have had to consent to her husband taking another wife through a customary marriage and approach the High Court to have their civil marriage regime changed as civil marriages do not permit polygamy.

The consequences of having the client's civil marriage registered and declared valid could mean that the registered customary marriages with the second and third wives would be declared null and void, placing them in a disadvantaged position. In 2015, in the case of Leli Nhlapo as applicant and first wife of the deceased, she made an application to the Pretoria High Court to have her non-registered customary marriage declared valid, and the civil marriage of the second wife of the deceased declared null and void on the basis that she was not aware of it and did not consent to it in terms of Ndebele customary union law. Further, the first wife sought relief from the Master of the High Court to withdraw the second wife's appointment to handle her

late husband's estate and order her to disclose all funds she had collected and pay them over into the trust account of the first wife's attorney. The court ruled in favour of the first wife in this matter and granted the relief sought.

It is evident that in cases where a non-registered customary marriage exists and the husband dies intestate, women are disadvantaged and put in a position where they are expected to negotiate the registration of marriage with the family of their deceased spouse to have their rights realised after the death of their spouse.

Registration to ensure legal certainty in respect of the legal existence of a customary marriage needs to be prioritised in policy and legislation. There also needs to be more education of rural women on the requirements of registration, as legislation provides that either party can register the marriage. Where one party registers the marriage, the Department of Home Affairs should be equipped to investigate and establish whether there is in fact a valid marriage that was concluded for the purposes of the registration. We recommend that strict standard operating procedures be adopted and implemented to guide the discretion of the Department of Home Affairs clerks and provide clear frameworks on the investigation outcomes.

While registration of marriages is important to provide legal certainty and ensure women's rights are protected, the prioritisation of registration can only be meaningful if women's lived realities are considered so as to ensure that access to such registration is feasible and not another obstacle that women have to overcome. ●

The proposed National Health Insurance Bill

By Sibusiso Makhukhule, Johannesburg intern

The National Health Insurance (NHI) is defined as a health insurance system that will provide financial assistance to people so they can access quality health care. It will be available to all South Africans regardless of their income or their socio-economic status.

Purpose of the NHI

The objective of the NHI is to ensure that access to health care does not result in people being out of pocket. Moreover, the insurance seeks to make sure that every South African has universal coverage health care. This means that every individual who has registered with NHI will have the right to access quality health care, free of charge at clinics, hospitals and private doctors. The main objective of the NHI is the right to access health care in terms of section 27 of the Constitution and the right of every child to basic health care services under section 28 of the Constitution. In the case of Grootboom it was stipulated that the right of access to health care cannot be treated in isolation as rights should go hand in hand and are inter-related. In the case of Soobramoney it was stated that the quality of life is totally based on the quality of health care that is provided by the government.

Is NHI in operation?

NHI will be created in stages over a 14-year period, which started in 2012. It will be established through the creation of a single fund that will buy services on behalf of the entire population, established through a combination of various

mandatory pre-payment sources, primarily based on general taxes.

Will NHI work in South Africa?

The NHI fund will be publicly administered and there are currently no plans to outsource to the private sector. South Africans have a low level of confidence in the government resulting from the evidence of corruption, state capture and the financial crisis within state-owned entities such as South African Airways and Eskom. The State's capacity is being questioned and the public has no guarantee of a strategy or system being put in place to provide reassurance. South Africa has the capacity to bring the NHI into operation only if they can get rid of corruption by its leaders.

Comparison of foreign jurisprudence: Ghana and Rwanda

Ghana's National Health Insurance Scheme was created to promote solidarity, equality and proper health care. The people of Ghana are guaranteed oral care, eye care, delivery care, generic health care as well as emergency services. Just like the National Health Insurance Bill of South Africa, chronic renal failure, organ transplants and certain drugs that are not listed are not covered under Ghana's health scheme. There is also a referral system in that procedures must be followed for the Scheme to cover certain costs. Patients must first report to the first level of care and then the second and then the third by referral. The scheme is financed by a National Health Insurance Levy (NHIL) of 2.5% on selected

goods and services and through a 2.5% deduction on Social Security and National Insurance Trust (SSNIT) from the formal sector. It is also funded by an annual premium from the informal sector and annual budget allocations from the government.

To achieve universal coverage, Rwanda came up with a national health insurance scheme named Mutuelles de Sante. Since its inception in 1999, the scheme has been successful and has covered the entire country. Rwanda's health care system is funded by both the public and the private sectors. The key to the success of Rwanda's scheme is in the government's crucial support of investment in the health care of the country. Rwanda also has effective legislation in place that is important for the protection of the vulnerable and less advantaged. They have developed a nationwide plan of action that is intensive and forward looking. The country has also reached a consensus regarding the achievement of equality among its people.

In conclusion I would like to submit that the true feasibility of our national health insurance scheme will be tested by the government's ability to provide and make medical services available to those who really need them. Proper exercise of this is an important constitutional right and will be a major bridge between the rich and the poor. South Africa has prospects of success in bringing NHI into operation if it can source the necessary investments and loans. ●

Birth registration as regulated by the Births and Deaths Registration Act of 1992

By Karabo Mokgatlhe, Johannesburg intern

This article seeks to address the circumstances of those who, for various reasons, did not have their births registered in the Republic. Not being registered, or rather being undocumented, restricts a person in many ways and could result in the person being arrested for being unregistered.

The Naki case is one of an unmarried father who would like to register his child's birth under his name. Sections 9 and 10 of the Births and Deaths Registration Act, as well as practices of the Department of Home Affairs, have prohibited unmarried fathers from registering the births of their children in the absence of the mother, or in a situation where the mother of such child is undocumented or her whereabouts are unknown.

These sections rendered such children stateless because their unmarried fathers were excluded from registering their births. Section 10 required that such registration shall be under the surname of the mother, which does not necessarily consider the best interests of the child as provided for by section 28(2) of the Constitution of South Africa.

The Constitutional Court in the Naki case held that section 10 of the Births and Deaths Registration Act impedes the realisation of the fundamental rights of the children and unmarried fathers and is inconsistent with the Constitution. The interim remedy that the Constitutional Court provided is that section 10 of the Act should read:

Notice of birth of a child born out of wedlock shall be given:

1. Under the surname of the mother; or
2. Under the surname of the father where the father is a person giving notice of the child's birth and acknowledges his paternity in writing under oath; or



3. At the joint request of the mother and of the person who in the presence of the person to whom the notice of birth was given acknowledges himself in writing to be the father of the child.

The case has secured the rights of unmarried fathers, while on the other hand it has secured and protected the interests of children, which remains of paramount importance.

Late birth registration is split into three categories:

- After 30 days but before 1 year
- After 1 year but before 7 years
- After 7 years and above

1. Registration of birth after 30 days but before 1 year

The following documents need to be submitted to the Department of Home Affairs:

- Notice of birth form.
- If the child was born at a health facility then a parent or guardian must submit the proof of birth form. If the child was born at home then parents must submit a proof of birth affidavit.
- An affidavit giving reasons for late registration of birth.



- Biometrics (palm, foot or fingerprint) of the child to be registered.
- Fingerprints of the parent(s).
- Certified copies of the parents' ID documents (and where one or both parents are not South African, certified copies of valid passports, visas or asylum documents).
- If a parent has died, a death certificate of that deceased parent.
- Proof of payment of an application fee (Department of Home Affairs determines the amount from time to time; one needs to enquire with them about the current application fee).

In certain situations, the Department of Home Affairs may decide that the parents must be interviewed by a panel, and if one of the parents is not South African and not married, the department may ask for a DNA test. The costs of the tests are solely for the client, and not the department.

2. After 1 year but before 7 years:

- A completed notice of birth form.
- A certificate from the hospital or maternity home where the child was born. The certificate must be signed by the person in charge, and contain the institution's official stamp. If the child was born at home then a proof of birth affidavit must be submitted.
- A completed department affidavit giving reasons for late registration of birth.
- A completed department affidavit in support of the notice of birth.
- Biometrics (palm, foot or fingerprint) of the child to be registered.
- Fingerprints of the parent(s) of the child.
- ID or passports of the parent(s).

3. 7 years and above:

If a child is older than 7 and has not been registered, they will need:

- Notice of birth form.
- Proof of birth form for children born at a health facility or proof of birth affidavit for children born at home.
- A completed department affidavit giving reasons for late registration of birth.
- A completed department affidavit in support of the notice of birth.
- Biometrics (ID-size photo and fingerprint) of the person to be registered.
- Fingerprints of the parent(s) of the person to be registered.
- ID or passport of the parent(s) of the applicant.

This means that even if one cannot produce all these documents and one parent cannot be there, the application must still be accepted and considered by Home Affairs. ●