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Dear SALLR colleague

RE: SLIP AND TRIP ALERT NOTICE 14 OF 2025

This is the fourteenth alert notice of those issues that will cause YOU to slip and definitely trip in 2025. These notifications have been compiled largely on the basis of queries that our call-centre receive, as well as the solutions provided thereto by our fast-tracking team.

Some of these alert notice issues will eventually be incorporated into our mouth-watering annual seminar workbook, as well as our delicious and spicy PowerPoint presentation compiled on an annual basis.

Two schools of thought developed over the years in South Africa as to the purpose of severance pay. The first school holds that an employee would be entitled to severance pay from the employer on the basis of loss of employment – the purpose of severance pay is thus to compensate an employee for loss of accrued rights to a job. The opposing school of thought is of the view that the purpose of severance pay is to tide the employee over after dismissal – consequently, severance pay received is influenced by the period of unemployment.

The labour court recently had to grapple with these two schools of thought when dealing with the question of establishing the consequences where a retrenching employer assisted the acquiring employer with certain issues when the acquiring employer wishes to employ the retrenched employee.

Apart from this issue, this fourteenth alert notice also deals with the following two tricky issues:

- the entitlement of the CCMA to appoint an arbitrator who is also a member of a panel of accredited arbitrators appointed by the council to arbitrate a dispute that arises within the jurisdiction of the council
- the approach to be adopted by the CCMA in determining whether or not the termination of a fixed-term contract amounts to a dismissal



We look forward to YOU being part of the CCMA and *SALLR* continuing learning events – to secure YOUR seat, kindly register by completing the attached registration form.

Your hardworking CCMA and *SALLR* teams



Director: Brian van Zyl
Reg No: 2012/131276/07



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FURTHER DETAIL OF THE IDENTIFIED TRICKY ISSUES

- Two schools of thought developed over the years in South Africa as to the purpose of severance pay. The first school held that an employee would be entitled to severance pay from her employer on the loss of employment – severance pay's purpose was to compensate an employee for the loss of his accrued rights to his job, irrespective of whether, after the dismissal, the employee was unemployed. The opposing school of thought was of the view that the purpose of severance pay was to tide the employee over after his dismissal, in his efforts to search for another job – consequently, severance pay received was influenced by the period of unemployment. The period of unemployment and the reason for such unemployment are important factors in applying the second school of thought. The labour appeal court, in *Irvin & Johnson Ltd v CCMA and Others* [2006] 7 BLLR 613 (LAC), per Zondo JP, thus held that the legislature did not intend, in its enactment of s41(4) of the BCEA, that an employee dismissed for operational requirements would be able to secure for himself severance pay and a salary from alternative employment. With reference to s203(3) of the LRA and item 11 of the Code of Good Practice on Dismissals Based on Operational Requirements, Zondo JP further held that, where an employee accepts alternative employment, arranged by the employer, he forfeits his right to receive severance pay. How did the labour court recently apply this approach in the scenario where, in essence, the retrenching employer assisted the acquiring employer with whatever information was required to offer alternative employment to retrenched employees and there was no specific term in an agreement between these two employers to the effect that the acquiring employer will employ the employees at the same rate of remuneration?
- The scenario is as follows: the retrenching employer provided the acquiring employer with a list of employees who were likely to be affected by the proposed retrenchment. The retrenching employer arranged for a meeting room on its premises so that the acquiring employer could meet the potentially affected employees. At such meeting, the affected employees were given employment applications by the acquiring employer. The meeting was scheduled during the employees' working time, for which no pay was deducted. At no stage were the employees so employed by the acquiring employer unemployed. With reference to this scenario, on what basis did the labour court recently hold that the said retrenched employees were not entitled to severance pay?
- On what basis did the labour court recently find that a retrenched employee bore the overall onus of proof to prove that he was entitled to compensation in the form of severance pay? On what basis did the labour court also make the finding that the employer bore an evidential burden to lead its defence in rebuttal of the allegations made against it in the above regard?
- If in enforcement proceedings a non-party to a bargaining council objects to the appointment of an arbitrator appointed by such council and the CCMA then appoints an arbitrator in terms of s33A(4)(b) of the LRA, can the CCMA appoint an arbitrator who is



also a member of a panel of accredited arbitrators appointed by the council to arbitrate disputes that arise within the jurisdiction of the council?

- In the scenario where employees have been employed on a series of limited duration contracts and in terms of such contracts services would automatically be terminated when the employer's client indicated that it no longer required specific services from the employer or, alternatively, where a client required a reduction in the number of employees assigned to it, on what basis did the labour court recently, with reference to *NUMSA and Another v Metal and Engineering Bargaining Council and Others* [2023] JOL 63506 (LC) and *Mahlamu v CCMA and Others* (2011) 32 ILJ 1122 (LC) find that such automatic termination does not affect the employee's right to pursue an unfair dismissal claim?
- What are the five steps recently identified by the labour court that should be followed by a commissioner in a dispute in determining whether or not the termination of a fixed term contract amounts to a dismissal?

