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Dear SALLR colleague

RE: SLIP AND TRIP ALERT NOTICE 4 OF 2026

This is the fourth alert notice of those issues that will cause YOU to slip and definitely trip in 2026.

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 our delicious and spicy PowerPoint presentation compiled on an annual basis.

The attached notice deals, amongst others, with the following 'prickly pear' issues:

- in a demarcation dispute, a wide range of approaches and outcomes is inevitable and the approach recently confirmed is that, on review, the labour court should defer from interfering with an arbitrator's demarcation determination
- determining whether, in a demarcation matter, a material error of law committed by the arbitrator in determining the relevant bargaining council's registered scope is, in itself, a ground of review in terms of s145 of the LRA, divorced from any consideration of reasonableness
- the interpretation recently adopted by the labour appeal court as to the development that, in review matters, reliance is only to be placed on unreasonableness as a ground for review and without reference to the circumstances in which a material error of law ought to be recognised as a discrete ground for review
- the basis upon which the labour appeal court recently determined that the requirement of reasonableness on review is not applicable to an arbitration award concerning a question of law that can produce a single correct answer (e g the interpretation of words or phrases in the certificate of registration)
- by now you are familiar with the phrase subsumed by the constitutional standard of reasonableness – the latest development also supports grounds of review subsumed by the constitutional standard of lawfulness

We look forward to YOUR being part of the CCMA and SALLR continuing professional 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 'PRICKLY PEAR' ISSUES

- With reference to, *inter alia*, *Bargaining Council for the Civil Engineering Industry v CCMA and Others* (2022) 43 ILJ 2702 (LAC), *National Bargaining Council for the Road Freight Industry v Marcus NO and Others* [2011] 2 BLLR 169 (LC), para 22, and *Coin Security (Pty) Ltd v CCMA and Others* [2005] 7 BLLR 672 (LC), more than often, no single correct answer is applicable in a demarcation dispute and a wide range of approaches and outcomes is inevitable. On what basis did the labour appeal court recently confirm that a review court should defer from interfering with an arbitrator's demarcation determination?
- On what basis did the labour appeal court recently confirm that the approach on review is limited to an interference only in those cases where the boundary of reasonableness is crossed if the demarcation award concerns the application of an agreed interpretation of a bargaining counsel's registered scope to a given set of facts?
- On the other hand, on what basis did the labour appeal court recently determine that there is no room for such deference (i.e. a light touch on review) where the issue is the interpretation of a bargaining counsel's registered scope and the ground for review relies on a material error of law committed by the arbitrator?
- In the above circumstances where the ground of review concerns a material error of law committed by the arbitrator (when so interpreting the bargaining counsel's registered scope), does such material error of law in itself serve as a ground for review in terms of s145 of the LRA divorced from any consideration of reasonableness?
- In *Herholdt v Nedbank Ltd (Congress of SA Trade Unions as Amicus Curiae)* 2013 34 ILJ 2795 (SCA) (*Herholdt*), the supreme court of appeal held that material errors of fact, as well as the weight attached to particular facts, are not in and of themselves sufficient for an award to be set aside, but are only of consequence if their effect is to render the outcome unreasonable.
- Following *Herholdt*, a similar view was adopted by the labour appeal court in *Head of Department of Education v Mofokeng and Others* [2015] 1 BLLR 50 (LAC) (*Mofokeng*). *Mofokeng* contains the following structure within which an alleged material error of fact or law is to be considered, namely: firstly, identify the errors or irregularities allegedly committed by the arbitrator; secondly, determine their materiality – i.e. determine if, but for the error or irregularity, the arbitrator would have come to a different result; and, thirdly, if so, the result arrived by the arbitrator is *prima facie* unreasonable, and then the inquiry moves on to a consideration to determine whether the result is nonetheless capable of justification having regard to the totality of the evidence. And, lastly, in *Goldfields Mining SA (Pty) Ltd (Kloof Gold Mine) v CCMA and Others* [2014] 1 BLLR 20 (LAC) (*Goldfields*), the labour appeal court suggested that it was not sufficient for an applicant to establish merely one or more of the grounds of review contained in s145, but the applicant always had to establish that the result of the award was unreasonable. On what basis did the labour court recently confirm that the said approach is not applicable when the subject of the review concerns a single correct answer, such as interlocutory rulings made by arbitrators, also described as jurisdictional rulings (e.g. whether the referring party is an employee i/o s213 of the LRA, or the existence of a dismissal for the purposes of s186(1) of the LRA)?



- In the development of the 'correctness review', the labour court shows no *Sidumo*-like deference to the arbitrator and the approach assumed that the arbitration award under review may be set aside if it is incorrect – nothing more need be established. A perusal of case law suggests that the 'correctness review standard' was regularly applied by the labour courts, often in the face of reviews, relying only on unreasonableness as a ground for review and without reference to the circumstances in which a material error of law ought to be recognised as a discrete ground for review. The aforesaid led to the development of what the labour appeal court termed a 'bifurcated review standard'. How did the labour appeal court recently interpret this development?
- *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others* 2008 (2) SA 24 (CC) (*Sidumo*) concerned the exercise of a value judgment by an arbitrator in relation to fairness concerning the penalty for misconduct – by definition it concerns a range of responses and thus subsumed by the requirement of reasonableness. With reference to, *inter alia*, *MacDonald's Transport Upington (Pty) Ltd v Association of Mineworkers and Construction Union and Others* (2016) 37 ILJ 2593 (LAC) and *Democratic Nursing Organisation of SA obo Du Toit and Another v Western Cape Department of Health and Others* (2016) 37 ILJ 1819 (LAC), on what basis did the labour appeal court recently determine that such approach is not applicable to an arbitration award concerning a question of law that can produce a single correct answer, such as a dispute about the interpretation of words or phrases in a certificate of registration or similar instruments and, furthermore, that, in this regard, s145 of the LRA must be read as subsumed by the constitutional standard of lawfulness?
- In the instance where the CCMA does not invite written representation by means of a notice published in the Government Gazette, seeing that it believes that the demarcation question is not of substantial importance, is there still a duty on the CCMA to consult NEDLAC prior to the issuing of a demarcation award?
- Under what circumstances will it be held that there has been substantial compliance with s62(9) of the LRA, which requires a commissioner to consult NEDLAC before making a demarcation award?
- In the scenario where, on review to the labour court, a demarcation award is successfully challenged, on what basis should a declaratory order, instead of referring the matter back for demarcation by the CCMA, be considered – i.e. can the jurisdiction of the labour court be extended to demarcations by means of a declaratory order to s158(1)(a)(iv) of the LRA?
- The scenario is as follows: the CCMA determined that the Prescription Act 68 of 1969 is applicable to an employer's right to take disciplinary action against an employee for misconduct. On review, the stance is taken that this amounts to an error of law and is subject to correctness review and not reasonableness review. How did the labour court recently apply the approach adopted by the labour appeal court in *National Bargaining Council for the Road Freight and Logistics Industry v Deyzel NO and Others* (2025) 46 ILJ 1679 (LAC) to determine not whether the arbitrator's ruling was justifiably rational or reasonable, but, objectively speaking, correct or not?



- Does the Prescription Act 68 of 1969 apply to an employer's right to take disciplinary action against an employee?
- In *Makate v Vodacom Ltd* (2016) 4 SA 121 (CC) (*Makate*), the constitutional court held that a debt for the purposes of the Prescription Act 68 of 1969 is an obligation to pay money, deliver goods or render services and does not include every obligation to do something or refrain from doing something apart from such circumstances. In *Pieman's Party*, the constitutional court further held that a claim based on an unfair dismissal seeks to enforce three possible kinds of obligations against an employer, namely, reinstatement, re-employment or compensation and these three obligations fit within the definition of a debt. With reference to the above, how did the labour court recently deal with the following approach: the rendering of services to an employer by an employee is regarded as an obligation that the employee must discharge. If the employee fails to do so, such defective rendering of services or positive mal-performance gives rise to misconduct proceedings against the employee. Does the required service to the employer constitute a debt obliging the employer to make an election either to terminate the contract, claim damages, or call for specific performance, which options prescribe if delayed for more than three years?



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