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Dear SALLR colleague

RE: SLIP AND TRIP ALERT NOTICE 6 OF 2026

This is the sixth 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:

- the extent to which the approach adopted in *Natal Joint Municipal Pension Fund v Endumeni Municipality* is applicable to determine whether or not an employer is entitled to terminate a fixed-term contract before its expiry date
- the consequences where a contracting party regards himself/herself bound by a document not seen or read by him or her
- the consequences of the failure of an employer to indicate to an employee where he/she can find conditions of service referred to in an employment contract
- the entitlement to deduct severance pay and leave pay an employee received from the amount representing the unexpired period of the contract
- the extraterritorial jurisdiction of the CCMA or relevant bargaining council where the employee is employed at an employer's undertaking falling outside of South Africa

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 a reference to *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 (4) SA 593 (SCA) (*Endumeni Municipality*), *Capitec Bank Holdings Ltd and Another v Coral Lagoon Investments 194 (Pty) Ltd* 2022 (1) SA 100 (SCA) (*Capitec*) and *University of Johannesburg v Auckland Park Theological Seminary and Another* 2021 (6) SA 1 (CC) (*University of Johannesburg*), all recently followed by the labour appeal court in *Herbert v Head of Education: Western Cape Education Department and Others* (2022) 43 ILJ 1618 (LAC) (*Herbert*), it is clear that the interpretation of an employment contract (like any other document) begins by considering the text contained in the document, then how the text is situated within its own textual context, then its extra-textual context and then, finally, consideration of the purpose of the document. How was this test recently applied by the labour court when determining whether or not an employer was entitled to terminate a fixed-term contract before its expiry date?
- Prior to *Endumeni Municipality*, the approach adopted was to determine the text's 'ordinary meaning' and then only invoke context and purpose if the 'ordinary meaning' created an absurdity. Post-*Endumeni Municipality*, what role does the meaning of the text now play?
- Incorporation of contractual terms by reference is something that has long been recognized in our law (e.g. *Cape Group Construction (Pty) Ltd t/a Forbes Waterproofing v Government of the United Kingdom* 2003 (5) SA 180 (SCA), para 12, and *Africa Solar (Pty) Ltd v Divwatt (Pty) Ltd* 2002 (4) SA 681 (SCA)). In the scenario where the contracting party regards himself bound by a document not seen or read by him/her, does an application of the aforesaid principles entitle the other party to regard the document as binding on them?
- A fixed-term agreement has a clause to the following effect: 'Your attention is drawn to the fact that all appointments are subject to the articles contained in the conditions of service of the employer'. When the employee received the appointment letter containing the above clause, he was not made aware of where he could find 'the conditions of service of the employer', or even if these conditions existed in a specific document.
- With reference to, *inter alia*, *Siyotula v Mogale City Local Municipality and Others* (unreported judgment dated 5 April 2024, case number J224/2024), what is the approach to be adopted to determine whether the said conditions of service of the employer have been incorporated by reference into the employment contract between the parties?
- What is the content of the *contra proferentem* rule as set out in *Cape Group Construction (Pty) Ltd t/a Forbes Waterproofing v Government of the United Kingdom* (*supra*) and so recently applied by the labour court in respect of appointment letters and termination policies?
- In the scenario where an employer terminates an employment contract, and such termination amounts to the repudiation of such contract, if the employee accepts such repudiation and sues for damages, how is the quantum of damages to be calculated, with reference to the approach adopted in *Buthlezi v Municipal Demarcation Board* (2004) 25 ILJ 2317 (LAC), referring to *Myers v Abramson* 1952 (3) SA 121 (C)



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- In the scenario where an employee's fixed-term contract has been terminated by the employer, and same constituting a repudiation of the contract, the labour court recently held that the severance pay and leave pay the employee received as a result of his/her purported retrenchment must be deducted from the amount representing the 'unexpired period of the contract'. What other amounts must be deducted over and above the severance pay and leave pay?
- With reference to *Holmdene Brickworks (Pty) Ltd v Roberts Construction Co Ltd* 1977 (3) SA 670 (A), what is the content of the onus on an employer to prove, in the circumstances described above, that the employee did not act reasonably in attempting to mitigate his/her damages?
- When determining whether or not the CCMA or relevant bargaining counsel, inclusive of the labour court, has extraterritorial jurisdiction, the starting point is to determine the locality at which the employee was employed. If the employee was employed at an employer's undertaking falling outside South Africa, it still has to be determined whether or not such external undertaking is independent or inextricable from an employer's undertaking within South Africa. What are the other relevant factors to be taken into account to determine whether such extra-territorial jurisdiction exists?
- To what extent are parties to an employment contract able to choose whatever law as the law that must be applied in resolving a dispute between themselves arising out of an employment contract – e g an employer and an employee agree that labour disputes to be resolved in Malawi, a Malawian court has to apply South African law, including the BCEA and the LRA?
- With reference to, *inter alia*, *SA Rugby Players Association and Others v SA Rugby (Pty) Ltd and Others* (2008) 29 ILJ 2218 (LAC), at para 40, what is the review test to be applied in respect of jurisdictional rulings?
- In order to succeed in an application ito s145(3) of the LRA to stay the enforcement of an arbitration award pending review, an applicant must establish the following: an injustice is sought to be averted, that there is a well-grounded apprehension that execution is taking place at the instance of the respondent, that irreparable harm will ensue if the execution is not stayed and the applicant is ultimately successful in establishing its clear right and, lastly, that good cause exists for it not to utilise the alternative remedies in terms of s145(7) and s145(8) of the LRA. How did the labour court recently apply these requirements in *JDJ Diagnostics (Pty) Ltd v Kruger and Others* (unreported case number D705/23)?



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