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Dear *SALLR* colleague

RE: SLIP AND TRIP ALERT NOTICE 10 OF 2026

This is the tenth 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 binding effect of pension fund rules that do not permit in-service transfers
- the extent to which pensioners must be consulted as stakeholders before the conclusion of collective agreements dealing with pension funds
- the extent that reliance can be placed on both PAJA and a legality review when attempting to have a collective agreement set aside
- when considering the validity of a collective agreement, the extent of the presence of *ultra vires* acts, the lack of rationality and improper motives for the conclusion of such agreement
- public powers can obviously be exercised not only by the state and public authorities but also by private actors, such as employers – the implication of this approach, when determining whether or not a collective agreement (plant level or otherwise) should be set aside on review
- the basis upon which it is held that a collective agreement binding employees, who are not members of the registered trade union or trade union party to such agreement, is only reviewable under the principle of legality
- the factors to be taken into account to determine whether or not a specific bargaining council, acting in accordance with a collective agreement, is acting unlawfully
- the basis upon which the constitutional court recently found that the extension of a collective agreement by a bargaining council amounts to the exercise of a public power or the performance of a public function

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

FURTHER DETAIL OF THE IDENTIFIED 'PRICKLY PEAR' ISSUES

- In *Municipal Employees Pension Fund and Another v SAMWU National Provident Fund and Another* 2019 ZASCA 42, it was held that the number of members which a pension fund has directly affects the viability of the fund and hence the benefits which the members will receive. It was further held that the obligation to join one of the pension funds and to retain membership until the individual was no longer employed by a local authority was done to ensure the viability of these funds to secure pension benefits from local authorities' employees. In view of the acceptance recently by the supreme court of appeal of this approach and findings as correct, how are collective agreements dealing with the following issues to be considered: (a) purports to give employed members of the same fund an election to leave their benefits as 'paid up' and purports to allow them to transfer their membership to an accredited account; or (b) stipulates that the participating employers (municipalities) will withdraw from that fund; or (c) stipulates that the municipalities will be entitled to stop contributing to the former and start contributing to the new accredited fund?

- The fact of the matter is that, while in-service transfers are not prohibited by the Pension Funds Act 24 of 1956, fund rules that do not permit such transfers are binding (confirmed, *inter alia*, in *Sasol Ltd v Chemical Industries National Provident Fund* [2015] ZASCA 113 (7 September 2015) (*Sasol*) and *MEPF v SAMWUNPF* [2019] ZASCA 42. In view of this, is it permissible in a collective agreement to state that an in-service member of an existing fund, that has not applied for accreditation and whose rules do not permit in-service transfer, may make an election to be assigned the status of a paid up member in that fund and to thereafter transfer to another fund?

- Where a collective agreement envisages the potential of large-scale transfers of memberships from benefit retirement funds to other funds, with reference to *Tek Corporation v Provident Fund and Others v Lorentz* (1999) 20 *ILJ* 2797 (SCA), to what extent must pensioners be consulted as stakeholders before the conclusion of such collective agreement?

- Unionised employees cannot escape their decision to be members of a union. By virtue of the union membership, they voluntarily assume the risks that may result from the implementation of a collective agreement concluded by the trade union. What is the role recently identified by the constitutional court to be played by the majoritarian principle (dealt with, *inter alia*, in *Transport and Allied Workers Union of SA v Putco Ltd* (2016) 37 *ILJ* 1091 (CC) (*Putco*) and *Association of Mine Workers and Construction Union and Others v Chamber of Mines of SA and Others* [2017] 7 BLLR 641 (CC) (*AMCU*) when determining whether or not an extension of such collective agreement (concluded at bargaining council level) does not amount to an indefinite or far-reaching extension?

- In an attempt to have a collective agreement set aside, to what extent may reliance be placed on both PAJA or a legality review (based on s1 of the Constitution)?

- It is well-established that *ultra vires* acts, lack of rationality or improper motive for the conclusion of an agreement are proper bases for both a PAJA and legality review. How was this approach recently applied by the constitutional court in respect of a collective agreement?

- With reference to *Association of Mineworkers and Construction Union and Others v Chamber of Mines of SA and Others* (*supra*) (*AMCU*), it is apparent that public powers can be exercised not only by the state and public authorities, but also by private actors. What is the implication of this approach when determining whether or not a collective agreement should be set aside on review?

- To what extent does a legality review include rationality and vagueness?

- Are aspects previously considered to be exclusively under the purview of review anchored on the provisions of the PAJA review and how does this approach influence reviewing a collective agreement?

- *AMCU* also clearly stated that a finding that conduct amounts to the exercise of public power does not necessarily mean that this further amounts to 'administrative action'. On what basis was it consequently found, in *AMCU*, that the conclusion of a collective agreement ito s23(1)(d) of the LRA (a collective agreement binding employees who are not members of the registered trade union or trade unions party to the agreement) is only reviewable under the principle of legality?

- Section 28(1)(g) of the LRA empowers a bargaining council to establish and administer pension, provident, medical aid, sick pay, holiday, unemployment and training schemes or funds or any similar schemes or funds for the benefit of one or more of the parties to the bargaining council or their members. Retirement funds owe it to both current employees and retirees, qua members, to ensure that their members are not prejudiced. The constitutional court recently found that funds have every justification to be concerned when a collective agreement purports to give a party to such agreement the right to apply to an accreditation committee for the accreditation of retirement funds, and to apply to the same accreditation committee for withdrawal of a fund's accreditation, in circumstances where the final say is that of an appeal body whose members are chosen by the bargaining council. What types of factors are taken into account by the constitutional court to determine whether or not a council, acting in accordance with such collective agreement, acted unlawfully?

- The SA Local Government Association (SALGA) participated as a local government representative, in the negotiations of and the subsequent conclusion of a collective agreement. The constitutional court recently held that SALGA, by its conduct, undermined the scheme of the Pension Funds Act 24 of 1956 in various ways (e g municipalities, through SALGA, agreed that they would cease paying contributions to unaccredited funds; likewise, the provisions of the collective agreement, purporting to permit an in-service transfer of membership despite the municipalities' knowledge about judgments that confirm the validity of such fund rules that do not permit in-service transfer). On what basis did the Constitutional Court go further and determine that SALGA's conduct in the conclusion of the said collective agreement falls outside of SALGA's mandate as contemplated in s71 of the Local Government: Municipal Systems Act 32 of 2000 (e g organised local government, being the employer party to the collective agreement, did not consider either the budgets of the municipalities or their fiscal capacity and efficiency)?

- It is settled law that a contract that contains an illegal term is rendered null and void in its entirety unless the term is rendered severable from the rest of the contract (e g *Sasfin (Pty) Ltd v Beukes* 1989 (1) SA 1 (A), at 17D-E). What are some of the factors to be taken into account to determine, when a finding is made that some of the terms of a collective agreement are illegal, whether or not it is possible for the above severability to take place?

- In the scenario where a bargaining counsel arrogates to itself the power to extend the application of a collective agreement, on what basis is it to be found that this amounts to the exercise of a public power or the performance of a public function (i e extending a collective agreement to non-parties)?

- When a collective agreement is concluded by private bodies and such bodies, in terms of a collective agreement, have wide powers to adversely affect a wide sphere of the public life, due to their impact on public funding, such power constitutes a public power and is subject to being reviewed under the principle of legality. How is this approach, recently followed by the constitutional court, to be reconciled with the reasoning adopted in *AMCU* (*supra*) – which accepted that although collective agreements do not constitute administrative action, they may still be subject to a legality review if they involve the exercise of public power?