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Dear *SALLR* colleague

RE: SLIP AND TRIP ALERT NOTICE 11 OF 2026

This is the eleventh 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 jurisdiction of the labour court to review decisions made by exemption bodies of bargaining councils dealing with the consequences that the application of a uniform standard regulated by an industry collective agreement at the bargaining council causes hardship to a particular employer
- the application of exemption criteria to determine whether or not an exemption from a bargaining council agreement should be granted
- it is wrong to regard an exemption from a sectoral collective agreement to only be applicable in the case where the employer can prove financial hardship or an inability to comply with a collective agreement
- where an employer applies for exemption and only wishes to be granted such exemption in respect of employees earning above the industry minimum rates, the type of proposal that would be acceptable for such employees to be paid to comply with the test of reasonableness and fairness
- unfair competition and applications for exemption from sectoral collective agreements

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

<u>FURTHER DETAIL OF THE IDENTIFIED 'PRICKLY PEAR' ISSUES</u>

- Does the labour court have jurisdiction to review decisions made by exemption bodies of bargaining counsels?

- What is the review test that would apply to reviewing decisions of exemption bodies of bargaining councils, if the labour court indeed has such jurisdiction?

- On the one hand, the view is held that the review test that would apply to review applications in terms of s158(1)(g) of the LRA is the test of reasonableness established in *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others* (2007) 28 *ILJ* 2405 (CC). On the other hand, another view is that the kind of review envisaged is indeed a legality review, similar to a review in terms of s158(1)(h) of the LRA – this view was adopted in, *inter alia*, *Golden Arrow Bus Services (Pty) Ltd v SA Road Passenger Bargaining Council and Others* (2021) 42 *ILJ* 1446 (LAC) (*Golden Arrow LAC*). In this sense, legality includes a requirement of rationality. It is a requirement of the rule of law that the exercise of public power by the executive and other functionaries should not be arbitrary – decisions must be rationally connected to the purpose for which the power was given, otherwise they are in fact arbitrary and inconsistent with the rule of law. As a minimum, all exercises of public power are to be lawful and rational (*Khumalo and Another v Member of the Executive Council for Education: KwaZulu-Natal* (2014) 35 *ILJ* 613 (CC). How did the labour court recently deal with the test to be applied in reviewing a decision of an exemption body of a bargaining council, taking into account the above two approaches?

- With reference to *Kem-Lin Fashion CC v Brunton and Another* (2001) 22 *ILJ* 109 (LAC), paras 20 to 21, what is the rationale for the extension of collective agreements by the relevant minister in terms of s32(2) to non-parties to such collective agreements concluded at bargaining council level?

- The importance of sectoral level collective bargaining is to ensure uniformity and consistency of, *inter alia*, wages of employees in an organised and regulated industry. Consequently, a level playing field is created in this industry where businesses do not compete with one another off the back of the wages of employees. The aforesaid is, however, not without anomaly. It may be that the application of a uniform standard regulated by an industry collective agreement at a bargaining council causes hardship to a particular employer, which cannot just be left unchecked. This is especially so when the uniform standard is enforced upon an employer as a result of extensions of a collective agreement in an industry to non-parties, in terms of s32 of the LRA. To what extent did the labour court recently hold, with reference to, *inter alia*, *Golden Arrow LAC*, that it is the concept of exemption that is intended to correct such anomaly?

- In terms of s32(3)(f) of the LRA, every bargaining council must specify exemption criteria which are fair and promote the primary objects of the LRA. Furthermore, in *Trafford Trading (Pty) Ltd v National Bargaining Council for the Leather Industry of South Africa and Others* [2011] ZALAC 35 (*Trafford Trading*), it was held that an applicant for exemption must establish a justifiable reason why the collective agreement should not be complied with and it was furthermore incumbent on such applicant for exemption to place facts and evidence for the tribunal representing special circumstances that justify the exemption sought. How did the labour court recently apply these criteria?

- To what extent can this kind of anomaly not be resolved by way of collective bargaining?

- When dealing with an exemption application to a sectoral collective agreement, the labour court recently held that it is wrong to regard such exemption as competent only in the case where the employer can prove financial hardship or an inability to comply with the collective agreement. Relying upon a judgment of the competition appeal court, in *Sasol Oil (Pty) Ltd v Nationwide Poles CC* 2006 (3) SA 400 (CC), at 415I-J, the labour court took the view that the exemption procedure is to be utilised to remedy a contemplated predicament or hardship, provided that such contemplation is realistic and reasonably likely. What are the types of factors to be taken into account to ensure compliance with this criterion?

- To what extent is it permissible to bring such an exemption application, not on current financial hardship or the inability to comply with a collective agreement, but on the future viability of a business?

- To what extent, when dealing with such an exemption application, must regard be had to the interests of employees?

- In the scenario where an employer applies for exemption and only wishes to be granted such exemption in respect of employees earning above the industry minimum rates, what is the type of proposal that such employees should be paid that may be regarded as reasonable and fair (e g a consumer price index-linked increase, provided it does not exceed the applicable across-the-board increase)?

- With reference to, *inter alia*, *Golden Arrow LAC supra*, how did the labour court recently deal with one of the factors to be taken into account when an exemption application is lodged, namely, unfair competition – one business should not enjoy an advantage over another business in the same industry, just because one business can and is willing to exploit its employees more than the other?

- The scenario is as follows: two employers render the same services using the same resources and equipment to the same customer. The one employer is a long-standing compliant employer in the industry and must pay a prescribed wage rate of, for example, R5 000 per month to its drivers . However, the other employer is a new entrant to the industry and only has to pay its drivers the minimum rate at the time, which, again, for example, is R2 000 rand per month. No matter how one looks at it, the wage disparity created by the regulatory system itself, and nothing else, results in one employer having a significant competitive advantage over another in the same industry, purely off the back of the wages of employees. With reference to such scenario and the approach taken in *J&L Lining (Pty) Ltd, v National Union of Metalworkers of SA and Others (1)* (2019) 40 *ILJ* 1289 (LC), how did the labour court recently deal with this type of situation amounting to an unfair advantage in the industry because the collective agreement in fact provides a competitive advantage off the back of an of employees' conditions of employment?

- In *Putco (Pty) Ltd* v *SA Road Passenger Bargaining Counsel and Others* (2019) 40 *ILJ* 2389 (LC), the labour court took the viewpoint that it is not open for the exemption and appeal authorities to treat an application for exemption as one would deal with a wage arbitration, where the decision-maker's function is largely redistributive in the sense of a balancing of competing interests and the determination of a fair outcome that seeks, as far as possible, to reconcile those interests. In what way did the labour court recently apply this approach in holding that such authorities should focus on the special circumstances presented?

- In terms of s145(4) of the LRA, once an arbitration award is reviewed and set aside, the labour court is entitled to determine the dispute in the manner it considers appropriate. Of course, this section relates to arbitration awards issued by arbitrators of the CCMA where a review is brought in terms of s145 of the LRA. On what basis did the labour court recently hold that such approach is also to be followed in a review application in terms of s158(1)(g) of the LRA (and likewise in respect of a demarcation award set aside on review)?

- Is it compulsory that a sectoral level collective agreement setting terms and conditions of employment for the sector must contain exemption procedures and appeal processes to same?

- Does this entail that only such bodies can deal with exemptions and that the labour court's jurisdiction is ousted in this regard?

- If the labour court makes a ruling that the exemption decision is to be overturned on review and it exercises its jurisdiction to substitute its own decision for the decision of either the exemption board or the appeal board, how is this to be conducted, with reference to, *inter alia*, *National Union of Metalworkers of SA v CCMA and Othe*rs (2022) 43 *ILJ* 530 (CC) (*NUM*), *Palluci Home Depot (Pty) Ltd v Herskowitz and Others* (2015) 36 *ILJ* 1511 (LAC) (*Palluci*) and *Putco (Pty) Ltd v SA Road Passenger Bargaining Counsel and Others* (*supra*)?