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Dear SALLR colleague

RE: SLIP AND TRIP ALERT NOTICE 15 OF 2026

This is the fifteenth 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 of the labour court's jurisdiction deals with disgruntled job applicants or prospective employees in both the private and public sectors
- a grievance raised by an employee relating to the conduct of the state as an employer generally has few or no direct implications or consequences for other citizens and thus does not constitute administrative action. This is a general principle and does not mean that certain employment relationship issues may amount to administrative action within the meaning of PAJA (e g there may be instances where grievances by the state or public sector employees have implications or consequences for other citizens)
- the extent to which it is permissible for a review challenge in the aforesaid regard, in terms of PAJA, to coexist with alternative remedies that an applicant has in terms of the LRA and unfair discrimination grounds in terms of the EEA
- the shortlisting of under-represented candidates as opposed to previously advantaged candidates and affirmative action

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



SCAN TO VIEW FULL BROCHURE

FURTHER DETAIL OF THE IDENTIFIED 'PRICKLY PEAR' ISSUES

The scenario is as follows: an employer advertises a vacant position. A person who is not employed by the employer applies for such job. He is a suitably qualified person. However, he competes for such job with other suitably qualified people. He and other employees are shortlisted and undergo an intensive selection process, which includes a review, an assessment and a test. The applicant obtains an aggregate score of 64.80%, which places him at the top of the list of candidates. However, the consultants involved, in their selection report, found that no candidate was suitable for appointment and recommended that the position be re-advertised. When the job is again re-advertised the applicant again applies for such job. Again, there is an extensive selection process, similar to the one in the first instance. This time, the applicant ranks second highest. This time, in their selection report, the consultants involved recommend either the highest scoring applicant or the applicant should fill the position. However, the job was given to a person who ranked fourth. With reference to this scenario, existing in both the private and public sector, the following issues are of relevance:

- In terms of s158(1)(g) of the LRA, the labour court has jurisdiction, subject to s145, to review the performance, or purported performance, of any function provided for in the LRA on any grounds permissible in law. Furthermore, in terms of s158(1)(h) of the LRA, the labour court has jurisdiction to review any decision taken or any act performed by the state in its capacity as employer, on such grounds as are permissible in law.
 - Does s158(1)(a) of the LRA restrict the labour court's jurisdiction to persons employed by the state as the employer, meaning that job applicants or prospective employees are so excluded or, alternatively, does section provide the labour court with jurisdiction, irrespective of the status of the person, as long as the state performed functions as an employer?
 - In *Gcaba v Minister of Safety and Security in Others* 2010 (1) SA 238 (CC), the constitutional court held that s33 of the Constitution does not regulate the relationship between the state as employer and its employees. Thus, when a grievance is raised by an employee relating to the conduct of the state as employer and it has few or no direct implications or consequences for other citizens, it does not constitute administrative action. The aforesaid approach was subsequently applied by the labour appeal court in *Minister of Labour and Another v Public Servants Association of SA and Another* (2017) 38 ILJ 1075 (LAC) (*Minister of Labour*), at paras 51 to 52, where it was held that the aforesaid approach constitutes a general principle but means that there could be exceptions to this general principle and that certain employment relationship issues (i.e. actions) may amount to administrative action within the meaning of PAJA (e.g. there might be instances where grievances by state or public sector employees have implications or consequences for other citizens). With reference to, *inter alia*, *Minister of Defence and Military Veterans v Motau and Others* 2014 (5) SA 69 (CC) (*Motau*), on what basis did the labour appeal court recently find that, in the above factual matrix, the actions of the employer constitute administrative action within the meaning of the Promotion of Administrative Justice Act 3 of 2000 (PAJA)?



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- To what extent is it legally permissible for a review challenge in the aforesaid regard, in terms of PAJA to co-exist with alternative remedies that an applicant has in terms of the LRA and unfair discrimination grounds in terms of the Employment Equity Act 55 of 1998 (EEA), with reference to, amongst others, the constitutional court judgment in *Commissioner, SA Revenue Service and Another v Richards Bay Coal Terminal (Pty) Ltd* 2025 (5) SA 617 (CC)?
- The gravamen of the doctrine of legality is that the exercise of public power, even if it does not constitute administrative action, must comply with the Constitution. The doctrine of legality, which is an incident of the rule of law, is one of the constitutional controls through which the exercise of public power is regulated – in essence, it entails that such power is constrained by the principle that it may not be exercised or performed beyond that conferred by law. To what extent did the labour appeal court recently find that, in terms of the aforesaid factual matrix, legality review was also available to the applicant?
- To what extent did the labour appeal court, in the above scenario, confirm the legal principle that the employer is not permitted to rely on the conduct of the applicant to raise the defence of estoppel where the exercise of public power is unlawful (and, if upheld, would amount to sanctioning such illegality)?
- To what extent does the 180-day bar in PAJA play a role when a review is brought based on the principle of legality?
- Section 8(1) of PAJA affords courts a wide discretion to grant ‘any order that is just an equitable’. Furthermore, s8(1)(c)(ii)(aa) affords a court a discretion to make a substitution in exceptional circumstances. In *Trencon Construction (Pty) Ltd v Industrial Development Corporation of SA Ltd and Another* 2015 (5) SA 245 (CC), at para 47, the constitutional court formulated the so-called exceptional circumstances test. How did the labour appeal court recently apply this test when it made the finding that an unsuccessful applicant could be instated into the advertised position that he was denied?
- What is the test to determine, so recently applied by the labour appeal court, whether a specific affirmative action is fair?
- It is well established that a designated employer may not adopt an employment equity policy or practice that would establish an absolute barrier to the future or continued employment or promotion of people who are not from designated groups (e.g. *SA Police Service v Solidarity obo Barnard (Police and Prisons Civil Rights Union as amicus curiae)* (2014) 35 ILJ 2981 (CC) (*Barnard*). To what extent did the labour appeal court recently find that, when an employer adopts the approach that it will only shortlist under-represented candidates for promotion, there is not a breach of the aforesaid principle?



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