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Dear SALLR colleague

RE: SLIP AND TRIP ALERT NOTICE 16 OF 2026

This is the sixteenth 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 contractual right to require disciplinary proceedings to take place on a quasi-judicial basis
- the conversion by the chairperson of a disciplinary enquiry of a contractual quasi-judicial enquiry to an enquiry envisaged in *Avril Elizabeth Homes for the Mentally Handicapped v CCMA* [2006] 9 BLLR 833 (LC)
- the right of the parties to, by means of a collective agreement, deviate from the prescripts of the Code of Good Practice on Dismissal introduced on 4 September 2025
- the utilisation of the alternative remedy contained in s77(3) of the BCEA, as opposed to an unfair dismissal claim in terms of the LRA

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

- The scenario is as follows: the employee has a contractual right to require disciplinary proceedings to be conducted in terms of the applicable disciplinary code, seeing that such code is incorporated into the relevant employment contract. In terms of such code, the employee has, *inter alia*, the following rights: the right to lead evidence, the right to call witnesses and the right to cross-examine witnesses. Furthermore, in terms of the said disciplinary code, the chairperson of a disciplinary inquiry has, *inter alia*, the following obligations: he/she must permit witnesses for both the employer and employee to be called, respectively, the employee (or his/her representative must be afforded the opportunity to cross-examine the employer’s witnesses (vice versa, this obligation is also applicable to the employer) and questions for the purposes of clarification may be asked by the chairperson – more importantly, it is reiterated that the chairperson must afford the employee an opportunity to give evidence, which may include the employee describing the events surrounding the alleged transgression and/or furnishing reasons for his/her conduct in this regard. The chairperson made a ruling converting the disciplinary inquiry to a paper-hearing, so relying on *Avril Elizabeth Homes for the Mentally Handicapped v CCMA* [2006] 9 BLLR 833 (LC) (*Avril Elizabeth Homes*). With reference to the aforesaid scenario, the following issues are of relevance:
 - *Avril Elizabeth Homes* is often quoted for the approach that disciplinary enquiries should not mirror court proceedings. To what extent is this approach applicable where a disciplinary enquiry is not conducted in terms of the LRA but, indeed, conducted in terms of the employment contract concluded between the parties?
 - to what extent did the labour court recently confirm that, despite the provisions of the LRA, the parties can agree, by way of a collective agreement or contract of employment or employment policies and practices, that they are not bound by the fairness considerations contained in the LRA, but that which they have agreed upon would apply?
 - to what extent is a presiding officer of a disciplinary enquiry or an employer entitled to unilaterally change terms and conditions of employment relating to the procedure and rights regulating, for instance, disciplinary inquiries?
 - what is the effect of consultation that took place in this regard, as well as discussions?
 - what is the effect of the following words, ‘as far as reasonably possible’, accompanying a contractual arrangement regarding rights of an employee during a disciplinary process, obligations on the employer and obligations on a chairperson?
- In the scenario where an employee is contractually entitled to a disciplinary enquiry based on the adversarial criminal justice model and is frustrating the process by embarking on delaying tactics, how should the employer approach this problem?
- What are the consequences of the denial of a contractual right to lead evidence and a contractual right to cross-examination to be taken into account when considering granting an interdict prohibiting such conduct as well as ancillary relief?



- Where an employee breaches its obligations to conduct an adversarial disciplinary enquiry based on criminal justice principles, it is well-established that, when it comes to the institution of civil proceedings (based on the unlawful conduct of the employer), once a termination has occurred, then specific performance is by no means guaranteed (*Passenger Rail Agency of South Africa and Others v Ngoye and Others* (2024) 45 ILJ 1228 (LAC), paras 30 and 45 to 54). This is particularly so where an employee occupies a post which requires a high degree of trust (e g *Masetlha v The President of the Republic of South Africa and Another* 2008 (1) BCLR 1 (CC), para 88). Obviously the harm that an employee will suffer if an employer does not comply with its contractual obligations regarding the holding of such disciplinary hearing based on adversarial criminal justice principles cannot be remedied by an award of damages. What role do these realities play when considering the granting of an interdict against the conduct of an employer (or a chairperson so appointed by the employer) amounting to breaches of the aforesaid relevant contractual obligations?
- Obviously, an employee who is entitled to a contractually agreed-upon adversarial disciplinary hearing, based on criminal justice principles, faced with an employer not complying with these obligations, has an alternative remedy to dealing with the matter in terms of s77(3) of the BCEA. With reference to *Mpane v Passenger Rail Agency of South Africa (PRASA) and Others* [2021] 1 BLLR 76 (LC), how did the labour court recently take the above alternative remedy entitlement into account in considering the granting of relief based on contractual principles?



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