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Dear SALLR colleague

RE: SLIP AND TRIP ALERT NOTICE 9 OF 2026

This is the ninth 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 entitlement of an employer who faces a reinstatement order requires that, before the employee resumes his/her duties, such employee must produce a relevant competency certificate for the job that he/she used to do, as well as an industry-recognised registration relevant to the job he/she used to do
- *National Union of Metalworkers of SA obo Fohlisa and Others v Hendor Mining Supplies, a Division of Marschalk Beleggings (Pty) Ltd (2017) 38 ILJ 1560 (CC) (Hendor)* is not authority for the proposition that the reinstated employee is only entitled to be paid from the date of his/her factual reinstatement
- the factors to be taken into account to determine whether a specific agreement is a collective agreement in terms of s23 and s213 of the LRA
- the determination as to whether or not a collective agreement concluded at a bargaining council is sanctioned by the main agreement of such bargaining council
- the factors to determine whether or not a party to a collective agreement operated within its mandate when concluding such collective agreement
- whether or not the collective agreement is a plant level collective agreement or a sectoral collective agreement, there must be a rational connection between such agreement and its stated objectives – entailing that, if such a connection is missing, this triggers a legality review
- the factors to be taken into account to determine whether or not the terms of a collective agreement infringe on the required independency from trustees

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 CCMA found that the dismissal of the employee was unfair and made an award reinstating him from a specific date. Such reinstatement date was approximately six months after his dismissal. It also ordered the employer to pay him a certain amount as remuneration for the period from his dismissal to the reinstatement date. When the employee reported for duty, the employer refused to accept his tender of employment services on the basis that it was considering bringing a review application challenging the arbitration award, but the employer never pursued this option. Instead, the employer informed the employee that he was invited to resume his duties on the condition that he produces a relevant competency certificate for the job that he used to do, as well as an industry-recognised registration relevant to the job he used to do. According to the employer, these requirements were necessary for him to execute his functions. The employee disputed the obligation to comply with the conditions stipulated. Eventually, the labour court ordered that the employer reinstate the employee with effect from a specific date (labour court order reinstatement date) – such date was approximately 21 months subsequent to the reinstatement date of the CCMA award. The employee claims payment of his arrear salaries for the period from the reinstatement date, in terms of the arbitration award, to the day immediately prior to his actual reinstatement in terms of the said court order. With reference to the aforesaid scenario, how did the constitutional court recently deal with the following issues:
 - in *National Union of Metal Workers of SA obo Fohlisa and Others v Hendor Mining Supplies, a Division of Marschalk Beleggings (Pty) Ltd* (2017) 38 ILJ 1560 (CC) (*Hendor*), the constitutional court held that a reinstatement order does not restore the contract of employment. The contract of employment is restored when the employer accepts the employee's tender of service pursuant to such reinstatement order. The aforesaid approach was subsequently followed by the labour appeal court in *Kubeka and Others v Ni-Da Transport (Pty) Ltd* (2021) 42 ILJ 499 (LAC), at paras 35 to 36. In the above scenario, when the labour court determined in contempt proceedings that the employer must reinstate the employee with effect from a date approximately 21 months after the reinstatement date contained in the arbitration award and, furthermore, may not impose any conditions upon the employee's return to work (meaning that the employee must be reinstated subject to the same terms and conditions that applied at the date of his dismissal), does such order restore the employee's employment contract, or is it the arbitration award that restored the employee's employment contract?
 - is the employer entitled, when accepting the employee's tender of employment, to impose terms and conditions of employment other than those that constitute the same terms and conditions that applied at the date of the dismissal of the employee?
 - on what basis did the constitutional court find that *Hendor* is not authority for the proposition that a reinstated employee is only entitled to be paid from the date of his/her factual reinstatement?



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- where an employer does not accept an employee's tender of employment in terms of an arbitration reinstatement award and the employee institutes contempt proceedings in the labour court, to what extent is the labour court entitled to make an order, not to the effect that the employer is in contempt, but an order to only the following effect: the employee is to be reinstated from a specific date and no conditions of employment can be imposed on the employee upon his return to work, apart from the fact that he is subject to the same terms and conditions that applied at the time of his dismissal.
- What are some of the considerations that the supreme court of appeal recently identified to be taken into account to determine that a specific agreement is a collective agreement in terms of s23 and s213 of the LRA?
- What are some of the more important principles to be taken into account to determine whether or not a collective agreement, concluded at bargaining council level, is sanctioned by the main agreement of such bargaining council?
- In *Claasen v African Batignolles Construction (Pty) Ltd* 1954 (1) SA 552 (O), at 556H to 557A, the court pointed out that a contract that seems 'perfectly valid on the face of it may stipulate for the performance of an act which is illegal, which would render it void *ab initio*'. With reference to this approach, what are the types of factors to be taken into account to determine whether or not a collective agreement is in conflict with applicable legislation, such as the Pension Funds Act 24 of 1956?
- What are some of the factors to be taken into account to determine whether or not a party to a collective agreement included such collective agreement in terms of its mandate?
- It is well-established that there must be a rational connection between a collective agreement and its stated objectives. If such a connection is missing and a term and/or condition of a collective agreement appears to be arbitrary, this triggers a legality review. What are some of the important considerations to be taken into account when a collective agreement is subject to such legality review – although a review in terms of the principle of legality may involve a lower standard of scrutiny than a reasonableness review under the Promotion of Administrative Justice Act 3 of 2000 (PAJA), it can still be far-reaching as it includes the requirements of rationality, legality, and a duty not to act arbitrarily, capriciously, or with an ulterior motive?
- In a collective agreement concluded at a bargaining council, the appointment and termination of trustees of pension funds are subject to an employer and other parties to a collective agreement, such as the trade unions and employers' organisation, having the right to nominate or appoint such trustees. With reference to, *inter alia*, *PPWAWU National Provident Fund v Chemical, Energy, Paper, Printing, Wood and Allied Workers Union* (2007) 28 ILJ 2701 (W), what are some of the important principles recently identified by the constitutional court to be taken into account to determine whether or not such terms and/or conditions of the said collective agreement infringes on the independency required from trustees?



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