**IN THE LABOUR COURT OF SOUTH AFRICA**

**(WESTERN CAPE LABOUR COURT, CAPE TOWN)**

CASE NUMBER: C817/2012

DATE: 30 OCTOBER 2014

In the matter between:

**DEPARTMENT OF HEALTH, WESTERN CAPE** Applicant

and

**SAMA obo**

**DRS ANTHONY & MITCHELL** First Respondent

**COMMISSIONER GOLDMAN N.O.** Second respondent

**PHSDBC** Third respondent

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**J U D G M E N T**

**STEENKAMP, J**:

This is an application to have an arbitration award of Commissioner Bella Goldman, dated 12 May 2012, reviewed and set aside. The applicant, the Department of Health of the Western Cape, has a significant prior hurdle to overcome and that is the question of condonation.

In terms of the Labour Relations Act 66 of 1995 an applicant for review must file such an application within six weeks.

The applicant in this case delivered its application for review three and a half months after that generous period of six weeks had already expired.

*Mr Van* der Schyff, for the applicant, attempted to argue that that is not an excessive delay. I disagree. It is more than double the generous period already provided for in the legislation. It is clearly excessive. What the Court then has to consider, keeping in mind the test set out in Melane v Santam Insurance Company Limited 1962 (4) SA 531 (A), are the reasons for the delay.

What is startling is that the Department, and more specifically the Director of Labour Relations in the Department who directly deals with applications of this sort, already received the award on 22 May 2012 and according to him or her -- the person is unnamed and did not depose to a confirmatory affidavit -- formed the view that the award was reviewable. He or she then referred the matter to the legal services department of the Office of the Premier a week after he or she received the award, namely on 30 May. The director says that there is a "protocol" in terms of which all matters requiring legal intervention must be referred to that department. He or she does not explain what caused the initial delay of a week before referring the matter to that department.

The department of legal services then took another two weeks to provide the Director of Labour Relations with a written opinion on 14 June 2012, forming the opinion that the matter could be taken on review.

The deponent to the founding affidavit, Mr Feizal Rodriques, is the Deputy Director of Labour Relations in the Department of Health. He says in his affidavit that the opinion from the legal services department of the Office of the Premier came to the attention of one of the deputy directors on 14 June. He does not say who that deputy director is, whether he is referring to himself, and if he is referring to someone else, he does not attach a confirmatory affidavit.

Be that as it may, that deputy director then waited for another week before instructing legal services -- the very department that had already provided the opinion -- on 21 June 2012 to bring the application for review. However, nothing further happened until Rodrigues received a case file from one of his colleagues who left, Mr Duma, as he says “in or about the end of June 2012”. He does not say when. Rodrigues had requested a status report from legal services in “mid June”, i.e. before Duma left.

However, he only received that report "at or about the end of July 2012". That further delay of more than a month is entirely unexplained. Rodrigues then says that he "noticed" that this dispute, i.e. the one involving Doctors Anthony and Mitchell, was not in his disputes register and he requested the file and "saw for the first time when I received it in mid-August 2012" that not only had the Department not applied for review, it had not opposed the doctors' application to have the award in their favour made an order of court.

That further delay is also not explained, but what is even more startling is that Mr Rodrigues, who is a deputy director of labour relations and must be well acquainted with the provisions of the Labour Relations Act, then does absolutely nothing for another month until 18 September 2012.

This gross negligence is not explained at all. Only then does Rodrigues sent an email to legal services "requesting advice on progress". There is then a further two week delay until 1 October 2012 that is also unexplained, when "Legal Services eventually instructed the State Attorney to bring an application to have the award reviewed and set aside." "Eventually" is indeed the operative word. By this time the *dies* for launching the application had already expired on 3 July, i.e. 3 months before.

Yet the State Attorney takes another 3 weeks until 25 October to deliver a simple application for review on a stated case where no evidence was led, dealing only with the interpretation of a short and simple collective agreement and comprising all of 12 pages. The State Attorney and the applicant provide absolutely no explanation for that further delay.

This dilatory and negligent inaction on the side of Government departments and of the office of the State Attorney in Cape Town in particular has attracted the attention of the Constitutional Court before, in Grootboom v National Prosecuting Authority [2014] 1 BLLR 1 (CC). As the highest court in the land pointed out in that case, the applicant seeking an indulgence in that matter -- as it is in this case -- is no ordinary litigant. It is a Government department which can be expected to lead by example. Legal proceedings on behalf of the department are funded by the taxpayer. The department can be expected to assist and to protect the courts by instituting practices which ensure compliance with the rules of Court. In matters of employment law it can be expected to promote the underlying principle of expeditious dispute resolution. Yet, it appears that that stern admonition by the highest court in the land has fallen on death ears as far as this Department, the Office of the Premier of the Western Cape and

the State Attorney are concerned. The delay is excessive and the explanation therefor is so poor as to be non-existent, other than attributing blame to the gross negligence of the Department, its officials, the officials of the Office of the Premier and the State Attorney.

As the Labour Appeal Court has pointed out in Maila v Shai N.O. [2007] 5 BLLR 432 (LAC) at paragraphs 35 to 37, in the absence of a compelling explanation, it is not even necessary to consider the applicant's prospects of success on review. But in any event, the Department's prospects of success on review in this application are so poor as to be non-existent.

Mr *Van der Schyff*'s main argument before Court this morning is that the arbitrator should have called for further evidence; but the parties before the arbitration, both of whom were represented, specifically agreed that the matter would be decided on the papers in terms of legal argument.

The dispute before the arbitrator was the interpretation and application of a collective agreement in terms of section 24 of the LRA. That collective agreement is resolution 3 of 2009, the Occupation Specific Dispensation for medical officers, medical specialists, oncologists, pharmacists and emergency care practitioners.

That is exactly the dispute that the arbitrator was called upon to decide, and that is the dispute that she did decide by agreement between the parties and, as she is enjoined to do by section 138 of the LRA, with the minimum of legal formalities and in the interest of expeditious dispute resolution. There is absolutely nothing unreasonable about that.

The further question to ask, nevertheless, is whether the conclusion that she reached is one that a reasonable arbitrator could reach. It undoubtedly is. She had regard in detail to the common cause facts before her, to the provisions of the OSD agreement and to the question that served before her. Taking all of those into account, she properly interpreted the provisions of the agreement and she came to a reasonable conclusion.

Given the poor prospects of success, the excessive delay occasioned by the applicant in this matter and the poor explanation therefor, it should have been advised not to bring this application belatedly as it did.

This matter should never have served before the Court. Both parties asked for costs to follow the result. There is no reason in law or fairness not to accede to that request.

**THE APPLICATION FOR CONDONATION -- AND THUS THE APPLICATION FOR REVIEW -- IS DISMISSED WITH COSTS.**

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10 **STEENKAMP, J**

APPEARANCES

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| APPLICANT: | Jerome van der Schyff |
| 15 Instructed by: | The State Attorney, Cape Town. |
| FIRST RESPONDENT: | Suzanna Harvey |
| Instructed by: | Hogan Lovells (SA), Sandton. |