



SDF NEWSFLASH - EDITION SDF4/2016

SETA GRANT REGULATIONS: A FURTHER UPDATE

In July 2016, we provided you with an update on the litigation brought by BUSA to challenge the change in the mandatory grant payment from 50% to only 20% of employer's 1% skills development levy.

In summary, the actions at the time of writing our previous update was as follows:

- In a Judgement, which was handed down by the Labour Court in August 2015, The Court declared Regulations 3(11) and 4(4) of the 2012 Grant Regulations to be invalid, and it set them aside. Regulation 4(4) focuses on the percentage of levies paid by an employer during each financial year.
- The Minister initially took steps to appeal against the Labour Court judgement and order, however the Minister instead re-promulgated Regulations 4(4) of the SETA Grant Regulations in terms of section 36 of the SDA and re-instated the invalid regulation in identical terms.
- BUSA then launched renewed review proceedings in the Labour Court on 1 July 2016 to review and set aside Regulation 4(4) as well as the Minister's decision to re-promulgate it.

The Minister was then required to make the record available to BUSA, and from the record it is evident that the Minister adopted the approach that Regulation 4(4) had previously been set aside by the Labour Court only due to a procedural irregularity for the failure to consult. Having since consulted with the National Skills Authority, the Minister was advised to simply re-promulgated Regulation 4(4), on the basis that the defect would have been cured. This approach is fundamentally wrong as the judgment of the Labour Court is clear, in that Regulation 4(4) was set aside not only due to the procedural irregularity, but also on the basis that it was irrational and unreasonable in substance.

Shortly after BUSA launched the renewed review proceedings in July 2016, the Minister applied for the appeal to be reinstated against the Labour Court Judgement of August 2015. Remember, initially the Minister took steps to appeal against the Judgement but rather re-promulgated Regulations 4(4). It would now seem that given BUSA's renewed review application the Minister is reconsidering the route of appeal.

BUSA opposed the Minister's application to reinstate the appeal by delivering a notice of intention to oppose and delivered an answering affidavit. The Minister was not required to deliver any further documents in terms of this process.

There have been no further developments subsequent to BUSA's opposition to the Minister's condonation application to re-instate the appeal. The Labour Appeal Court will either set the matter down for hearing (which means that it will have to be argued in court), or issue a ruling to reject the condonation application.

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As always, we will be sure to keep you informed but until such time as we have clarity around the matter we would like to encourage employers to complete the attached form setting out details of non-payment of any mandatory grants currently being experienced with SETAs. This form will be passed to BUSA and collated with other employer reports for submission to the Skills Development Branch of the DHET.

Kind Regards

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25 November 2016

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