Policy and Regulations on employment of foreign nationals in South Africa

Abstract

With the largest number of migrants in the region, South Africa seems to lack employment policy that strike balance in employment amongst its citizens and foreign nationals particularly in the unskilled labour market. The paper gives an overview of available migration labour policy in South Africa and also highlighting new policy development as per international guidelines. The paper also outlines recruitment practices in the county and interrogate the policy on the employment of the foreign nationals in the public service.

Introduction

Migrant Labour is not a new subject in South Africa. South Africa has been a migrant-receiving country for decades and have been going on since the mineral revolution of the late 19th century (F Wilson, 2001). The majority of those migrants were from neighbouring countries within the Southern African region (Crush, Peberdy, Williams, 2006). Migrant labour provided abundant cheap African labour for white-owned mines and farms, and it continues to be significant in South Africa to this day. Regardless of the general surplus of domestic labour, South Africa's mining industry employed mostly foreign workers since it was established in the late 19th century until the beginning of the 21st century (L Bank · 2017). Employment of unregulated foreign labour enabled mine-owners to exploit the available manpower in pursuit of maximum output.

Farmers seeking to avoid the South African employment practices increasingly seek to employ migrant workers to whom they extend minimal employment benefits.

Since 2000, when Zimbabwe was plunged into an economic crisis, the scale and nature of Zimbabwean migration to South Africa has changed significantly, with increasing numbers crossing the border and staying for longer (Crush, Tevera).

According to a StatsSA report on migration dynamics, the consistently high rate of migration from SADC countries is due to a colonial and apartheid-era regional "history

of labour migration, especially from Mozambique, Lesotho, Malawi, Zimbabwe and Swaziland."

The 2011 census reported that more than 75% of foreign-born (international) migrants living in South Africa came from the African continent. African migrants from SADC countries contributed the vast majority of this, making up 68% of total international migrants. Immigrants from African countries outside of the SADC region made up just 7.3% of all international migrants.

The employment of foreigners is regulated by The Employment Services Act 4 of 2014 of which came into effect in August 2015 and was introduced to promote employment while simultaneously decreasing the unemployment rates within the Republic.

The Immigration Act 13 of 2002 is also responsible for regulating foreign employment in the Republic of South Africa. This act lays out the rules and regulations for admission of foreigners into South Africa, their residence in South Africa and their departure from South Africa as well as the ability for foreigners to work within the Republic.

Regulation for employment of foreign workers in South Africa

The employment service act of 2014, was introduced to promote employment while simultaneously decreasing the unemployment rates in South Africa. This act also sets out the rules and regulations for admission of foreigners into South Africa, their residence and their departure as well as the ability for foreigners to work within South Africa. The Employment Services Act aims to support the employment of foreigners which is consistent with the provisions set out in the Immigration Act.

The Act define any individual who is not a South African citizen or does not have a permanent residence permit in terms of the Immigration Act, is considered a foreign national.

According to the Act, foreign nationals employed in South Africa will be protected by fair labour practices and may only perform work as authorised in terms of their work visas. If an employer employs someone without a valid work visa, there would be consequences

for that employer. Nevertheless, the employee will still be entitled to enforce any claim that he may have in terms of any statute or employment relationship against his employer.

The Act also stipulates that, employers are obliged to ensure that, they have exhausted all recruitment efforts and ensure that there are no South African citizens or permanent residents within South Africa with suitable skills to fill a vacancy before they recruit a foreign national. Once a foreign national is employed, the employer needs to prepare a skills transfer plan for that person in that specific position and employers may not have a foreign national engage in work that is contrary to the terms of his/her work visa.

Section 1 of the South African Constitution of 1996 identifies the achievement of equality and the creation of a non-racial and non-sexist society as one of the founding values of its constitutional democracy. Section 9 also guarantees the right of every person not to be unfairly discriminated against, directly or indirectly, on the basis of race, gender, sex, pregnancy, marital status, ethnic or social origins, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language or birth. The Equality Act 2000, prohibits unfair discrimination (on the grounds listed above), as well as hate speech and harassment in accordance with the Constitution.

In addition to these provisions, South Africa is a party to a number of international human rights instruments, which promote the right to equality and non-discrimination.

Recruitment practices of foreign nationals in South Africa

In South Africa, the employment framework for foreign nationals working in South Africa requires employers to confirm with the department of Home Affairs. If South African employers employs a foreign national, the employer and employee have to confirm employment in terms of the Immigration Act. This has to be done within 90 days of arrival and then annually, otherwise the foreign national will face losing his or her work permit and compromising a chance at permanent residence. Recent amendments to the draft immigration regulations mean that if a foreign national overstay their welcome, on

a valid visa, they could be banned from the country for up to 10 years. There's a heavy burden of proof on foreign nationals coming to work in SA. Foreign nationals coming into South Africa on a general work permit must give the director general of home affairs proof that the worker is still gainfully employed, and provide a job description for that employee.

If a foreign national comes in on a specials skills visa or quota work permit, he/she must give the director general of home affairs the proof of specialised qualifications, relevant experience and professional registrations, the latest South African Qualifications Authority (SAQA) evaluation and registration, a copy of their valid passport, and proof that they have secured employment in South Africa.

As part of the compliance process, the migrant worker must provide a letter confirming continued employment, as well as a copy of the contract. If there is a change of employment, a release letter is needed from the previous employer as is a copy of the prior contract.

The result of non-compliance can see the permit voided, the employee excluded from South Africa and cost the employer a great loss in terms of investment and talent. Some employers don't tell the department that they employ foreigners and risk heavy penalties if they are found in contravention with the act. In terms of specialised skills, a quota work permit is the only way for companies to issue contracts to suitable candidates.

A foreign national doesn't need an offer of employment to enter the country and employers are required to verify their international qualifications and confirm membership to professional bodies.

The department of Public Service and Administration also regulates recruitment and employment of foreign nationals in the public service.

Policy on the Employment of Foreign Nationals in the Public Service

In recent years, the Public Service has experienced a serious loss or shortage of skilled staff in a number of key occupations. Whilst the mechanisms intended for developing

the necessary skills capacity within South Africa but it have not yet been fully implemented, alternative measures need to be taken in the interim to meet the human resource needs in the Public Service. One such alternative is to recruit foreigners from abroad.

Public Service is now faced with the challenge to manage serious staff and skills shortages in a number of occupations in the Public Service.

In order to address these challenges, in 2002 South Africa adopted a Human Resource Development Strategy for the Public Service that defines a number of strategies to be rolled out until 2006. This strategy also included a Scarce Skills Development Strategy that calls for a number of activities to be undertaken in regard to the recruitment and provisioning of scarce skills in the Public Service.

The Department of Public Service and Administration (DPSA), being a stakeholder in improving human resource management throughout the Public Service, developed a Policy on Employment of Foreign Nationals, to establish a uniform approach and practice. The policy is to assist to recruit and utilize foreigners to address staff and skills shortages in their areas of operation.

The policy is based on the employment framework and provisions provided for in the Immigration Act, 2002, the Public Service Act, 1994, the Public Service Regulations, 2001 and other measures reflected in collective agreements and determinations made by the Minister. Emphasis is placed on the concepts of “critical occupations” and “critical skills” as the basis for the application of the policy as well as the need to comply with the Immigration Act, 2002.

The policy also stipulates that, foreign nationals must be employed in critical occupations as determined by departments, South African citizens and permanent residents must receive preference and the recruitment of foreign nationals can only be considered as a last resort. Contracts of employment must provide for the transfer of skills to South African employees and the standard recruitment processes and

approaches are to be applied, except that the Department of Foreign Affairs must be approached to facilitate the process if recruitment takes place in terms of treaties and bi–lateral agreements.

The Immigration Act and Regulations

The employment of foreigners in South Africa is regulated by the Immigration Act 13 of 2002, as amended ("the Immigration Act"). The Immigration Act provides for the admission of foreigners to, their residence in and departure from South Africa and matters connected therewith including the ability of foreigners to work in South Africa.

Section 38 of the Immigration Act provides that no person shall employ:

- An illegal foreigner;
- a foreigner whose status does not authorise him or her to be employed by such person; or
- A foreigner on terms, conditions or in a capacity different from those contemplated in such foreigner's status.

In terms of section 38(2) of the Immigration Act, a duty is placed on an employer to make an effort, in good faith, to ensure that no illegal foreigner is employed by it and to ascertain the status or citizenship of the persons it employs.

Furthermore, section 49(3) of the Immigration Act provides that anyone who knowingly employs an illegal foreigner or a foreigner in violation of the Immigration Act shall be guilty of an offence and liable to a fine or a period of imprisonment not exceeding one year for a first offence.

The Labour Relations Act

The labour relations act gives foreign employees, including those who do not have valid working visas, a legal protection from unfair dismissal.

Section 213 of the LRA defines an ‘employee’ as:

(a) Any person, excluding an independent contractor, who works for another person or for the state and who receives, or is entitled to receive, any remuneration; and

(b) Any other person who in any manner assists in carrying on or conducting the business of an employer.

The Constitution of the Republic of South Africa, Act 5 of 2005 provides in section 23(1) that everyone has the right to fair labour practices and not only citizens.

The law does not declare that a contract of employment concluded without the required permit is void nor does it provide that a foreigner who accepts work without a valid permit is guilty of an offence. What is prohibited is the act of employing a foreign national in violation of the law. All of the liability is therefore attributed to the employer and the law does not penalize the action of the foreign person who accepts work or performs work without valid authorisation. It is the illegal employment of a foreigner that is prohibited.

Foreign national whose work permit expires whilst employed, or who is employed without a relevant work permit is still an employee for the purposes of the LRA. This means that the employee would have recourse to compensation in the case of an unfair dismissal, through the CCMA. Such employees would not be entitled to reinstatement as such an order would be in contravention of the Immigration Act.

In a widely used court case of Mr Lanzetta, an Argentinian national against Discovery Health, who was employed as a call center agent by Discovery and had his contract of employment terminated due to expiry of his work visa.

Following receipt of the termination letter, the complainant, Mr Lanzetta lodged an unfair dismissal dispute at the CCMA. The employer contested the CCMA's jurisdiction to hear the matter contending that the applicant was not an employee in terms of the LRA, as the expiration of his work visa invalidated his contract of employment. It argued that in the absence of a valid contract of employment, the applicant did not qualify as an employee and was therefore not entitled to the protections provided for in the LRA

The CCMA found that it had jurisdiction to consider the dispute. While the CCMA accepted the respondent's argument that the contract was invalid, it found that there was still an employment relationship between the parties. CCMA decided that an employment relationship can exist in the absence of a contract of employment as such a relationship transcends contracts.

On review, the Labour Court focused on two aspects, whether the contract of employment was indeed invalidated by the absence of a valid work permit and whether the applicant could be considered an employee in the event that the contract of employment was invalid.

In respect of the first aspect, the court came to the conclusion that the contract of employment was valid. This was based on the fact that the right to fair labour practices is a fundamental right and therefore, the interpretation of legislation that impacts on a fundamental right must be done in a manner that promotes the spirit, purport and objects of the Bill of Rights. The court explained that section 38 of the Immigration Act must be interpreted in a manner that does not limit the constitutional right to fair labour practices. The court found that awarding section 38(1) of the Immigration Act an interpretation that invalidates a contract of employment where a foreign national does not have the necessary permit to be employed could result in such a person's being severely disadvantaged. The court concluded by saying that, far from defeating the purposes of the Immigration Act, to sanction a claim of contractual invalidity in these circumstances would defeat the primary purpose of s 23 (1) of the Constitution which is

to give effect, through the medium of labour legislation, to the right to fair labour practices.

The court went on to consider what the position would be in the event that the contract of employment was invalid. It stated that the definition of employee in the LRA is not rooted in a contract of employment and in consideration of this definition, the court explained that the enquiry into whether Mr Lanzetta is an employee or not is based on two questions. Firstly, did he work for Discovery Health and secondly, was he entitled to receive remuneration. As the answers to both these questions were in the affirmative, the court reasoned that even if the contract was invalid, Mr Lanzetta qualified as an employee.

Recent Developments in Migrant Employment Policy

The department of Employment and Labour is in a process of developing a National Labour Migration Policy expected to be finalised this year for public comments, which is in response to the African Union (AU) and Southern African Development Community (SADC) protocols and other international agreements that relate to migrant labour.

The new National Labour Migration Policy amongst others, is expected to recommend quotas and identification of labour sectors that will be strictly reserved to South Africans.

This part of the policy is prompted by some labour sectors which employ a high number of foreign workers. These industries include the hospitality, restaurants, security, farming and agriculture sectors. The focus on these sectors and few others is due to their ratio of job opportunities between foreign nationals and South African citizens being skewed towards foreign nationals although South Africa have an oversupply of unskilled labour within its own citizens.

In addition to the development of the National Labour Migration Policy, at the end of 2020, the IFP announced plans to introduce a private member’s bill to parliament which

will introduce further regulations around the hiring of foreign workers in South Africa. This too was provoke by certain sectors overlooking unskilled South Africans in favour of foreign nationals in employment of unskilled labour.

This Employment Services Amendment Bill also aims to address the high representation of foreign nationals employed in lower occupation levels as the number of foreign workers in the unskilled jobs is of concern.

The bill attempts to control the increasing preference by certain sectors in the workforce to employ foreign nationals over South African citizens, without justification on the basis of skills.

Conclusion

South Africa needs a policy that will accommodate migrant workers while addressing the high employment of its own citizens particularly in the un-skilled level. Guidelines are more necessary now than ever to balance employment South African citizens and foreign nationals in those sectors that employ higher numbers of unskilled workers. Another factor that is lacking thus far is inclusion of protection of income for migrant workers during the Covid-19 as the measures adopted by government impacted on their income.

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