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Update on waiver and visa applications of foreign nationals and Zimbabwean Exemption Permits in South Africa



The latest information published by the Department of Home Affairs pertains to the processing outcomes of waiver and visa applications of foreign nationals and the Zimbabwean Exemption Permits (hereafter ZEP) of the Zimbabwean nationals who work and reside in the Republic of South Africa (hereafter RSA).

The law in respect of *the employment of foreign nationals comprises various pieces of legislation* that must be evaluated simultaneously.

The legislation includes the Immigration Act, 2002 (Act No. 13 of 2002) as amended (hereafter Immigration Act); the Labour Relations Act, 1995 (Act No. 66 of 1995) (hereafter LRA); and the Basic Conditions of Employment Act, 1997 (Act No. 75 of 1997) (hereafter BCEA).

Processing outcomes of waiver and visa applications:

Due to the systematic processing backlog of waiver and visa applications experienced by the Department of Home Affairs, the department notified the public on 1 September 2022 that a temporary blanket extension of the aforesaid pending waiver applications and awaiting visa application outcomes was granted until **31 March 2023** for foreign nationals affected by the backlog. The reason is twofold, namely to afford the Department of Home Affairs time to process the pending waiver applications, and to allow for applicants to collect their outcomes and submit their applications for appropriate visas. Furthermore, it provides for an extension on the foreign national's current visa status until 31 March 2023.

Applicants who wish to abandon their waiver or visa applications and depart from the RSA when able to do so, will be permitted to depart from a port of entry on or before 31 March 2023 without being declared undesirable.

With regard to pending visa applications, applicants are not permitted to engage in any activity other than those stated in the visa conditions. Applicants with pending long-term visa applications who originate from countries that are exempt from port of entry visa requirements, and who wish to travel, may do so by presenting their Visa Facilitation Services (VFS) receipts on arrival back at the port of entry for admission into the RSA and collect their visa outcomes. However, those applicants with pending long-term applications who originate from countries that are visa restricted, will require a port of entry visa and their VFS receipt in order to be re-admitted into the RSA.

This notification determines that these temporary measures apply solely to foreign nationals who have been legally admitted into the RSA. Any further extension, modification, or amendments to the terms of these concessions will be communicated in writing by the Department of Home Affairs.

Zimbabwean Exemption Permits:

Furthermore, on 2 September 2022 the Minister of Home Affairs extended the Zimbabwean exemptions granted to Zimbabwean nationals for an additional 6 months until **30 June 2023** to allow the said holders to apply for one or another visa for which they may qualify in terms of the Immigration Act and implemented as follows:

- No holder of an exemption permit may be arrested, ordered to depart, or be detained for the purpose of deportation, or deported in terms of section 34 of the Immigration Act for any reason related to him or her not having a valid exemption certificate (i.e., permit label or sticker) in his or her passport. The holder of the exemption permit may not be treated as a 'prohibited person', 'undesirable person' or an 'illegal foreigner'.
- The holder of the exemption permit shall be allowed to enter or depart from the RSA in terms of section 9 of the Immigration Act, read together with the Immigration Regulations, 2014, provided that he or she complies with all other requirements for entry into or departure from the RSA, save for the reason of not having a valid permit indicated in his or her passport; and
- No holder of exemption should be required to produce–
- a valid exemption certificate; or
- an authorisation letter to remain in the RSA, as contemplated in section 32(2) of the Immigration Act, when making an application for any category of visa, including temporary residence visas.

Duties and Obligations in terms of the Immigration Act:

It is illegal for any person to employ an illegal foreigner or a foreigner whose status does not authorise him or her to be employed by such person, or to employ a foreigner on terms, conditions or in a capacity different from those contemplated in such foreigner's status as stipulated in section 38(1) of the Immigration Act.

Furthermore, section 38(2) of the Immigration Act provides that an employer shall make a *bona fide* (good faith) effort to ensure that no illegal foreigner is employed within his or her company or to obtain the status or citizenship of those in his or her employment. Section 38(4) of the Immigration Act states that an employer employing a foreigner shall for a period of 2 years after termination of such foreigner's employment, keep the relevant prescribed records and shall report such termination and any breach on the part of the foreigner of his or her status to the Director-General.

Offences:

Section 49(3) of the Immigration Act delineates that any person who knowingly employs an illegal foreigner or a foreigner in violation of the Immigration Act, shall be guilty of an offence and, on conviction, liable to a fine or imprisonment not exceeding 1 year, provided that such person's second conviction of such an offence shall be punishable by imprisonment not exceeding 2 years or a fine, and in the event of a third or subsequent convictions, by imprisonment not exceeding 5 years without the option of a fine.

This aspect of employment compliance therefore falls within the scope and responsibility of a company's Human Resources (HR) department and internal or external Labour Law Advisors. In order for an employer or company to avoid being exposed to legal action or found guilty of an offence under the Immigration Act, HR must upon employment and throughout the employment period of the foreign employee, ensure that they have valid visas or permits. Another important aspect to keep in mind is the fact that the method of obtaining and storing the abovementioned information must comply with the Protection of Personal Information Act, 2013 (Act No. 4 of 2013) (POPIA) and Promotion of Access to Information Act, 2000 (Act No. 2 of 2000) (PAIA).

Conclusion:

It is advisable that a company's HR department monitor the expiration dates of the foreign national employees' visas or permit documentation. Should it become evident that an employee's visa or permit will reach its expiry date within a reasonable period such as 3 months, HR can notify the employee of this in writing. The communication will serve to indicate that the company requires the employee's valid documentation and that it remains the employee's responsibility to produce his or her valid visa or permit. In the absence thereof, and to protect the company and employer from any legal action, the company will be within its right to proceed with disciplinary action against the employee.

An employee falling within the scope of the above-mentioned notification published by the Department of Home Affairs, is advised to keep HR and his or her manager informed of the process and finalisation of his or her visa or permit status. By working towards the same goal of legislative compliance, both parties will be aware of the current circumstances and act in accordance and in compliance with the applicable legislation.

SERR Synergy has professional legal teams in both Labour and POPI to assist employers with the various compliance aspects of the aforesaid matter. Our Labour team guides and assists businesses in proactive and supportive ways with regard to the required processes and procedures to ensure compliance with labour legislation and to mitigate the risks to which businesses are exposed in relation to employment issues. Our Information compliance team assists entities to fully comply with procedures as required by POPI by setting up information security management systems policies.

Sources acknowledged:

- *Immigration Act, 2002 (Act No. 13 of 2002).*
- *Labour Relations Act, 1995 (Act No. 66 of 1995).*
- Basic Conditions of Employment Act, 1997 (Act No.75 of 1997).
- Protection of Personal Information Act, 2013 (Act No. 4 of 2013).
- Promotion of Access to Information Act, 2000 (Act No. 2 of 2000).
- Department of Home Affairs 'Temporary measures in respect of foreign nationals in light of a backlog being experienced in processing outcomes on waiver applications and visa applications until 31 March 2023' (1 September 2022).

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