

# CEO TRAINING DIVISION

+ **RAEI WORKSHOP**  
**2023**

# Overcoming Borders

## Tackling Challenges in Employing Foreign Nationals in South Africa

A Practical Perspective



# Your Presenter

+

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# **+ PURPOSE**

- ✓ **Informed & Knowledgeable**
- ✓ **Understanding Legal Framework**
- ✓ **Identification of Challenges**
- ✓ **Practical Solutions**
- ✓ **Compliance Awareness**
- ✓ **Case Studies & Precedents**
- ✓ **Effective Planning**
- ✓ **Practical Implementation & FAQ**

# Introduction

# Overcoming Borders



- This presentation explores the intricacies of work permits and the employment of foreign nationals in South Africa, specifically focusing on the challenges tertiary educational institutions may face when appointing exchange lecturers from international institutions.
- We will delve into the legal framework governing foreign employment, provide insights into the key challenges, and offer practical solutions to ensure compliance and successful international collaborations.
- South African tertiary educational institutions often seek to bring exchange lecturers from international universities and colleges to enhance academic experiences and foster global collaborations.
- However, navigating the legal requirements and challenges related to work permits and employment of foreign nationals can be complex. This presentation aims to demystify the process, addressing legal aspects, potential pitfalls, and best practices to facilitate smoother exchanges.
- National Statistics Agency of South Africa – 3 to 4.5 million foreigners (5 to 7.5%)

# Legal Framework



## Immigration Act 13 of 2002 (& Immigration Regulations)

- Regulates employment of foreign nationals.
- Section 38 - Employers are strictly prohibited from employing:
  - Illegal foreign nationals.
  - Foreign nationals whose status does not authorise them to be employed by a particular employer.
  - Any foreign national on terms, conditions, and in any capacity other than the capacity provided based on their status.
- Section 38(2) – Places a duty 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.
- Section 49(3) – Contravention - Anyone who knowingly employs an illegal foreigner shall be guilty of an offence and liable on conviction to a fine or imprisonment.

## Labour Relations Act 66 of 1995 (LRA)

- Applies regardless of the employee's legal status.
- Governs disputes relating to unfair dismissal and unfair labour practices in employment and regulates the resolution of these disputes.
- Foreign employees, including those who do not have valid working visas, are afforded legal protection from unfair dismissal under the LRA.
- Section 213 - Defines an 'Employee' as:
  - (a) Any person, excluding an independent contractor, who works for another person or the state and receives, or is entitled to, any remuneration.
  - (b) Any other person who, in any manner, assists in carrying on or conducting an Employer's business.



## The Employment Services Act 4 of 2014 (ESA)

- Regulates and facilitates the employment of foreign nationals in a manner consistent with the objects of the Immigration Act.
- Aims:
  - Promote employment.
  - Encourage productivity.
  - Decrease levels of unemployment.
  - Provide training for unskilled workers.
- Gives jurisdiction to the Labour Court to deal with issues relating to the employment of foreign nationals and confirms the sanctions for non-compliance as set out in the Immigration Act.

## The Constitution of South Africa, Act 108 of 1996

- Section 23(1) - Everyone has the right to fair labour practices.
- Not only citizens of South Africa enjoy this right.
- Employers must ensure that any dismissal of a foreign national remains both substantively and procedurally fair.
- The law places the onus on the employer to comply with the relevant legislation and holds the employer liable for the non-compliance thereof.

## Practical Takeaways for Employers:

- **Liability for Illegal Employment:** The law doesn't declare employment contracts without the required permit as void or make foreign workers guilty of an offence for accepting work without a valid permit. Instead, it prohibits employers from "employing" foreign nationals in violation of the law, making the employer solely responsible for compliance.
- **Foreign Workers' Status under LRA:** Even if a foreign national's work permit expires or they are employed without a relevant work permit, they are still considered employees under the Labor Relations Act (LRA). This means they have recourse to compensation for unfair dismissal through the CCMA, but such employees would not be entitled to reinstatement because it would contravene the Immigration Act.
- **Legal Precedent:** - Discovery Health Limited v CCMA & Others [2008] 7 BLLR 633 (LC) - These principles were confirmed, where the employee, a foreign national, was unfairly dismissed after his work permit expired. The CCMA ruled that it had jurisdiction to hear the case and found the dismissal unfair.
- **Protection Under LRA:** Despite their nationality, foreign employees are defined as 'employees' under the LRA, affording them the protections and rights provided by the labour law.
- **Fair Treatment:** Employers must act fairly toward foreign employees, regardless of the legality of their employment, to ensure compliance with labour laws and respect for employee rights.

# Challenges

When tertiary educational institutions in South Africa aim to appoint exchange lecturers from international institutions, they often encounter challenges related to work permits and the employment of foreign nationals. These challenges can vary in complexity and impact, but some of the common ones include:

- ❖ **Visa and Work Permit Delays:** Processing visas and work permits for foreign nationals can be time-consuming. Delays in obtaining the necessary documentation can disrupt academic schedules and affect the overall success of exchange programs.
- ❖ **Compliance with Immigration Laws:** South Africa has strict immigration laws and regulations. Ensuring that all necessary paperwork is in order and that lecturers comply with these laws can be complex and sometimes confusing.
- ❖ **Limited Visa Categories:** Some visa categories may not align perfectly with the specific roles of foreign nationals. Institutions might struggle to find the most appropriate visa category for their international employees, leading to uncertainty about legal compliance.
- ❖ **Changing Immigration Policies:** Immigration policies and regulations can change over time. Keeping up with these changes and adapting to new requirements can pose a challenge for institutions planning long-term exchange programs.
- ❖ **High Costs:** The fees associated with visa applications and work permits can be significant, and institutions may need to allocate additional funds to cover these expenses.



- ❖ **Language and Cultural Barriers:** Foreign nationals might face language and cultural barriers when working in South Africa. These challenges can impact the quality of instruction and the overall experience for employers and clientele/students. Specific sectors – pushback from locals.
- ❖ **Documentation Requirements:** Gathering all the necessary documentation, such as academic qualifications and criminal background checks, from employees in their home countries can be time-consuming and bureaucratic.
- ❖ **Health and Medical Requirements:** Foreign nationals may need to meet certain health and medical requirements, including vaccinations and specific medical checks, which can be challenging if not properly planned.
- ❖ **Work Permit Duration:** Some work permits are issued for specific durations, and renewing them can be cumbersome. Ensuring continuity in exchange programs may require careful planning.
- ❖ **Political and Security Issues:** In some cases, political or security issues in the employee's home country can affect their ability to travel to South Africa, leading to program disruptions. Within South Africa, Xenophobia is, unfortunately, a factor that cannot be ignored.

Employers must have a comprehensive understanding of South Africa's immigration laws, engage with relevant government departments proactively, plan exchange programs well in advance, and allocate resources to facilitate a smooth process. Collaboration with legal experts can also be invaluable in navigating these challenges successfully.

# Solutions & Best Practices

By implementing proactive solutions, tertiary educational institutions in South Africa can navigate the challenges associated with work permits and the employment of foreign nationals more effectively, ensuring successful and compliant international collaborations:

- ✓ **Early Planning and Communication:** Start planning exchange programs in advance to allow ample time for visa and work permit processing. Maintain open communication with prospective foreign employees about the documentation and steps required for their appointment. Communication works both ways.
- ✓ **Understanding Visa Categories:** Thoroughly research the available visa categories to identify the most appropriate one for foreign nationals. Common options include Critical Skills Visas, General Work Visas, and Intra-Company Transfer Visas.
- ✓ **Engage Immigration Experts:** Consult with immigration experts or legal professionals specialising in South African immigration law. They can guide navigating the process efficiently and ensure compliance with the law.
- ✓ **Documentation Preparation:** Assist foreign nationals in gathering and verifying all required documents, such as academic qualifications, criminal background checks, and health certificates, well in advance.
- ✓ **Compliance Training:** Provide foreign employees with information and training on South African immigration laws, regulations, and cultural expectations to facilitate their transition and integration.

- ✓ **Budgeting:** Allocate sufficient funds in advance to cover visa and work permit application fees and any unexpected expenses that may arise during the process.
- ✓ **Government Liaison:** Establish a relationship with the Department of Home Affairs or other relevant government departments to streamline the visa and work permit application process. Proactive engagement can help resolve issues more quickly.
- ✓ **Continuous Monitoring:** Regularly monitor changes in immigration policies and regulations to stay updated and promptly adapt to new requirements. Set up an internal system and checklist.
- ✓ **Language and Cultural Support:** Offer language and cultural orientation programs to foreign nationals to help them adjust to the South African work environment more easily. Proactive inclusivity and employee wellness are important.
- ✓ **Healthcare and Insurance:** Ensure that foreign employees meet South Africa's health and medical requirements, including vaccinations, and provide guidance on obtaining health insurance while in the country.
- ✓ **Renewal Planning:** If foreign nationals stay in South Africa for an extended period, proactively plan for visa and work permit renewals to minimise disruptions to the exchange program.



- ✓ **Alternative Arrangements:** In case of unforeseen delays or challenges, have contingency plans to ensure that academic schedules can be adjusted, or alternative arrangements can be made for foreign employees.
- ✓ **Crisis Management:** Develop a crisis management plan to address any political or security issues in the foreign employees' home country that may affect their ability to travel to South Africa. This applies within South Africa as well.
- ✓ **Regular Assessment:** Continuously assess the effectiveness of your institution's processes for appointing foreign nationals and make improvements based on feedback and experiences.
- ✓ **Establishing vetting processes and staying current:** It is imperative to incorporate updated vetting processes when employing foreign nationals. Fine combing each job applicant is a tedious but necessary task, which forms part of the HR duties and obligations. Understanding permit and visa types, which categories they belong to, and what the accompanying regulations say about employment on that permit or visa is just as necessary. While staying current with legislation is challenging, it is not impossible. There are numerous platforms and resources available to HR departments. Teachings and subsequent implementation of changes to legislation regarding the employment of foreign nationals should be a standard.
- ✓ **Experienced work permit and immigration providers:** The onus rests on the employer and the HR department to provide the relevant assurances that their workforce is fully compliant. For large institutions, this can be a daunting hurdle to overcome. Calling on the experience of an immigration specialist with a sound knowledge of immigration and employment laws and permit and visa requirements will provide the peace of mind that foreign employees have been vetted accordingly. An immigration provider well-versed in the governmental stakeholders' specifications and requirements will know the best course of action to eliminate any risk to the employer. Failing which, ensure you have a labour dispute specialist, should any legal disputes arise.

# Case Studies & Precedents

## Recent Situation - Zimbabwean Exemption Permit (ZEP):

- ❖ The ZEP's validity and ongoing uncertainties were resolved on June 28, 2023, following a Department of Home Affairs (DHA) announcement. The High Court in Pretoria ruled that the termination of the ZEP by the DHA was unlawful and unconstitutional. The DHA must now reconsider the entire process.
- ❖ **Protection for ZEP Holders:** The Court ordered that the DHA is prohibited from arresting, detaining, or deporting any ZEP holder for not having a valid ZEP in their passport.
- ❖ **Extended Grace Period:** Existing ZEP holders have an additional grace period until the end of December 2023 due to this ruling. The second part of the application is still pending.

## Challenges for Courts in Dispute Resolution:

- ❖ **Challenge:** Issues arise when foreign nationals are employed without the required work permits. Sometimes, permits expire during employment.
- ❖ **Legal Status of Unauthorised Foreign Nationals:** The Labour Court (LC) affirmed in *Discovery Health Limited v CCMA* [2008] that the absence of a valid work permit doesn't invalidate their employment contracts, establishing that unauthorised foreign nationals are considered employees.
- ❖ **Fair Dismissal Considerations:** If employment is prohibited by law, the employer can dismiss the employee, but the dismissal must be fair.
- ❖ **Lack of Clarity on Fair Dismissal:** There's a lack of clarity on what constitutes a fair dismissal in such cases. While the CCMA generally agrees that unauthorised foreign nationals are employees, there's no consensus on what makes a dismissal fair. The Labour Court hasn't provided specific guidance.
- ❖ **Inconsistent Approach:** There's no consistent approach to addressing these dismissals. Dismissals of unauthorised foreign nationals don't fit neatly into the permissible grounds for fair dismissal. To determine how to handle the dismissal of an unauthorised foreign national, it's essential for the Courts to consider the existing three grounds for dismissal:



## 1) Dismissals for Conduct

- ❖ **Substantive Fairness:** Dismissals for conduct occur when there's a violation of workplace rules or standards. Five elements are considered to determine if misconduct justifies a fair dismissal.
- ❖ **Procedural Fairness:** Procedural fairness involves 12 elements, including giving the employee a chance to respond to misconduct allegations. The Code of Good Practice (LRA) emphasises the need for dialogue and reflection before a dismissal decision. (*Avril Elizabeth Home for the Handicapped v CCMA* 2006 27 ILJ 1644 (LC)).
- ❖ **Common Grounds for Conduct Dismissals:** Conduct dismissals often involve issues like theft, fraud, assault, gross insubordination, sexual harassment, and racism. These dismissals are related to an employee's bad conduct or behaviour, making them fault dismissals.
- ❖ **Valid Work Permit Requirement:** A valid work permit is a requirement for employment, and employers must ensure compliance during recruitment. Hiring an employee without a valid work permit is not considered misconduct. If an employee's permit expires during employment and cannot be renewed, it doesn't constitute misconduct.
- ❖ **Misconduct for Fraudulent Work Permit:** Disciplinary proceedings may be appropriate if an employee produces a fraudulent work permit. In such cases, the employee can be dismissed for dishonest or fraudulent conduct.

## 2) Dismissals for Incapacity

- ❖ **Dismissals for Capacity:** These dismissals result from an employee's inability to perform their job for various reasons. The Code of Good Practice (LRA) discusses incapacity related to ill health, injury, and poor performance but does acknowledge that other situations can lead to incapacity. (Samancor Tubatse Ferrochrome v MEIBC 2010 8 BLLR 824 (LAC)).
- ❖ **Expanding Definition of Incapacity:** The Labour Appeal Court (LAC) clarified that incapacity extends beyond health-related issues and poor performance. For example, dismissal due to incarceration or the inability to obtain security clearance can be considered dismissal for incapacity.
- ❖ **Supervening Impossibility of Performance:** These dismissals occur when an employee cannot perform their job due to circumstances like legal requirements not being met. Examples of impossibility causes are non-fulfilment of legal requirements, such as obtaining a security clearance or work permit.
- ❖ **Procedural Fairness:** Employees should be given a fair opportunity to present their case before a dismissal decision is made. Simply providing a letter informing the employee of the decision and reasons is insufficient; procedural fairness requires more.
- ❖ **Common Thread - Opportunity for Representation:** Regardless of the type of incapacity, the common requirement is that employees must have the opportunity to make representations before a dismissal decision is finalized.

### 3) Dismissals for Operational Requirements

- ❖ **Definition of Operational Requirements:** Operational requirements are defined in Section 213 of the LRA as needs related to the economic, technological, structural, or similar aspects of an employer.
- ❖ **Context from Code of Good Practice:** Economic reasons pertain to financial management, technological reasons involve new technology, and structural reasons relate to restructuring. Operational requirements may arise when a company faces financial losses and needs to introduce new technology or restructure for economic viability.
- ❖ **Unique Operational Requirement Dismissals:** Operational requirement dismissals can occur in unique situations, such as employees failing polygraph tests (SA Transport & Allied Workers Union v Khulani Fidelity Security Services (Pty) Ltd 2011 32 ILJ 130 (LAC) or dismissals linked to operational needs due to violence against managerial staff. (Tiger Food Brands v Levy 2007 28 ILJ 1827 (LC).
- ❖ **Thin Line with Other Grounds:** The distinction between operational requirements and other grounds for dismissal can be blurry in some cases.
- ❖ **Statutory Prohibition and Incapacity Distinction:** Dismissals due to statutory prohibitions are distinct from operational requirement dismissals. Focus differs between incapacity (employee qualities) and operational requirements (employer decisions).

- ❖ **Consultation and Procedural Fairness:** Section 189 of the LRA emphasises consultation to reach consensus, avoid dismissals, and mitigate adverse effects. Consultation should be genuine, with the goal of seeking alternatives to dismissal.
- ❖ **Non-Possession of Work Permit:** Dismissals due to the lack of a work permit do not typically fall under operational requirement dismissals based on the consultation and consensus-seeking process required in such dismissals.



## **Defining Fairness in the Dismissal of Unauthorised Foreign Nationals:**

### **Appropriate Ground for Dismissal:**

- Dismissal for the non-possession of a valid work permit does not fall under misconduct or operational requirements but rather under incapacity due to the impossibility of performance.

### **Substantive Reason for Dismissal:**

- The non-possession of a valid work permit results in the impossibility of performing the job, categorising it as a dismissal based on incapacity.

### **Procedural Fairness Requirements:**

- To ensure procedural fairness in an incapacity-based dismissal, the employer must follow specific steps.
- The employee should be informed of the intended dismissal and its basis, and an opportunity to make representations must be provided.
- The employer should give the employee a reasonable time to secure the work permit and offer reasonable assistance.
- Communication with the employee should include reminders about work permit expiration, the employee's responsibility for renewal, and the consequences of non-compliance.
- If the employee fails to comply, an incapacity hearing notice should be issued.

### **Incapacity Hearing:**

- At the incapacity hearing, the employee should have an opportunity to make representations.
- After considering these representations, the employer can decide whether or not to dismiss the employee based on incapacity.

# Common Questions

FAQ

## When to Employ a Foreigner:

- Foreigners can be employed if they possess a valid work visa.
- For a general work visa, a job offer is required before the foreign national can apply for the visa.

## Employer Responsibilities:

- Employers must comply with South African immigration laws.
- Employers should not hire illegal foreigners or employ them in positions not allowed by their visas or permits.

## Types of Work Visas:

- There are three main work visas: general work visa, critical skills work visa (no job offer required), and intra-company transfer work visa (for employees transferred from international companies to South African branches).
  - General work visa – Job offer first:
    - An employer must extend a valid offer of employment to enable a foreigner to apply for a general work visa. An employer must prove that they advertised the position and could not find a suitable South African to fill the role.
  - Critical skills work visa – No job offer required:
    - Does not require the employer to make a job offer because the applicant is seen as a worker whose skills and experience are needed in South Africa.

- Intra-company transfer work visa – Transfer from an overseas entity to a branch, affiliate or subsidiary in South Africa:
  - Used by companies who want to transfer employees from an international company to a branch, affiliate or subsidiary in South Africa. The primary purpose is the transfer of skills and knowledge from the overseas employee to South African employees. This visa is considered a temporary arrangement and only valid for up to 4 years.

### **Other Work-Related Visas:**

- Foreign nationals can also work on spouse or life partner permits, work exchange visas, and short-term work visas. Corporate permits are available for South African employers to hire multiple foreign workers for a specific period.
  - Work Exchange Visa:
    - Allows South African employers to hire foreign nationals under 25 years old for 12 months. This visa cannot be renewed. To continue working, individuals must apply for another type of work visa.
  - Short Term Work Visa (Section 11(2) Visa):
    - Also known as a visitor's visa with authorisation for short-term work assignments. Valid for 90 days initially, with an option to extend for an additional 90 days within South Africa if properly motivated. Issued for a maximum of 180 days within a year.
  - Corporate Permit:
    - Enables South African employers to hire many foreign workers for a specific period. After obtaining the corporate permit, foreign national employees can apply for individual corporate worker visas.

### **Processing Time for Work Visas:**

- Processing times vary by visa type, ranging from a few weeks to almost 2 years.
- Critical skills visas may take up to 16 months due to additional requirements.
- General work visas can take up to 10 months.
- Work exchange visas and endorsements on spousal/life partner visas have shorter processing times from 4 to 12 weeks.

### **Cost of Work Visas:**

- Visa costs vary depending on the type of visa and should be checked for updates on the relevant websites and forums.

### **Tips for Visa Success:**

- Collaborate with immigration experts to improve the chances of a successful visa application.
- Start with an immigration eligibility assessment to ensure the applicant meets the visa requirements.

### **Document Retention Requirements:**

- Employers must keep records of foreign national employees, including passport copies, work visas, job descriptions, and earnings proof.
- Records related to the termination of foreign employees should be kept for two years after their departure.

Questions? 😊





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