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NEW IMMIGRATION REGULATIONS SURPRISE ALL BY COMING INTO OPERATION AFTER PROCLAMATION 22nd MAY 2014 TO COMMENCE ON 26 MAY 2014.

We have informed our clients and newsletter subscribers over the last few months that the Immigration Act 13 of 2011 (referred to the as the "Amendment Act") would be coming into operation soon.

We also advise clients that a "consultative process" was initiated in February of this year where draft Immigration Regulations were published for comment by stakeholders, on a very short comment period. Various bodies including our professional body the Law Society of South Africa and its provincial statutory bodies made extensive input and indeed pointed out numerous potential unconstitutionalities and many administrative problems in the proposed regulations.

After that process there was a complete lull in information coming through into the public arena.

Then rather suddenly, on the 22nd May and late in the day we managed to obtain information that the gazette would be published on that very day and come into operation on Monday the 26th May.

Whilst we were aware of the amendments arising from the Amendment Act itself, the content of the proposed new regulations were largely not known.

Whether the Minister had taken cognisance of the considerable input made by stakeholders or not remained a huge question mark.

When the new government gazette appeared it contained a certain provisions, some of which has harsh realities as a consequence and which could simply not be predicted.

The purpose of this section of the newsletter is to give you a brief summary of these specifics.

We would like clients to also note that the use of the word "visa" now applies to all types of temporary permits from holidays to work, study, relatives and business visas.

The word "permit" refers only to permanent residence permits. This is now brought in line with best international practice definitions and is welcomed.

Not necessarily in order as it appears in the regulations, the following need to be taken note of:

1. All applicants have to appear in person for lodgement of their applications at embassies, consular missions, high commissions and applications being lodged locally. The purpose of this is to exclude fraud that was being perpetrated in regard to identity of applicants.

2. The regulations have introduced biometric and/or physical (where machines are not yet installed) identification by way of fingerprinting.

There is simply no way to get around it and this will have to be done. Our office will accompany applicants to the lodgement process and then render our functions as before. As attorneys our ability to represent our clients is not impinged in any way and we will simply continue with our function as in the past.

3. The Department of Home Affairs has outsourced the receiving of applications from applicants to an outside service provider, with particulars of which you will be informed shortly but what is of importance is that this outside service provider will be charging a "handling fee" of R1350 per applicant upon lodgement of the application. It appears at the moment that this will be an additional burden over and above the administrative fee paid to the Department of Home Affairs. The outsourced service provider is Visa Facilitation Services "VFS" who operate offices in all the major centres. They will not be adjudicating the applications but merely taking them in after checklisting that all the documents are there and then forwarding this on to the central adjudication hub of the Department of Home Affairs at head office of the department in Pretoria. Outcomes of applications will ultimately be collected by us from the office of lodgement.

4. A very important note to clients is that the **"administrative penalty"** which could be paid by those who had overstayed their visits either as a straight overstay or as someone who had reached the expiry date of their visa but is still awaiting an outcome of a timeously lodged application for extension of an existing permit or change of conditions of an existing permit, has fallen away by way of a directive of the Department of Home Affairs.

What is disturbing however is that the Director General of Home Affairs on Saturday the 24th May issued a directive stating that overstayers would be declared "undesirable persons" and would be penalised because of this "undesirability" by not being allowed back into the country for a period ranging from 1 to 5 years depending on the length of the overstay and/or frequency of such "offence".

This is an issue that has been taken up urgently by our professional body the Law Society with the Department of Home Affairs by way of urgency but pending resolution of this aspect it is suggested that clients who are in this situation i.e. as overstayers should not travel without consulting one of the attorneys in our practice. The consequences are quite severe as can be seen.

5. The critical skills visa which replaces the quota category of work permit and exceptional skills work permit categories has been compacted into a new visa called a **Critical Skills Visa** but what has happened is that the Minister has not yet gazetted the critical skills visa list and accordingly no applications in this category can be made until such time as the list is published. We have been reliably informed that this will take place soon but as an interim measure, technically applications in this category cannot be lodged until this happens. We will update our website and provide information as it becomes available as well as issuing a newsletter at the appropriate time.

6. The forms provided for in the previous regulations have no force and effect but the new forms which ostensibly came into force with the new regulations are not yet available at either embassies or Home Affairs' offices locally. The Department of Home Affairs have been approached urgently in this regard as not only are the forms not available but are not totally correct and in instances are in conflict with the regulations.

Again we will carry information in this regard shortly.

7. The next point of considerable importance is that the business visa category requires regulation to be gazetted as to the specific amount that needs to be invested in this category. This category used to be the business permit category and previously the "own business/self-employment category which is perhaps a better description. Until such time as the amount is gazetted we presume that applications of this nature similarly cannot be lodged.

A new innovation in the business visa section is that the undertaking to employ at least 5 South Africans into the business or venture has fallen away and being replaced by requirement for 60% of the staffing of the intended or required business must be South African citizens.

8. The relative's visa also carries certain challenges in that the amount required to qualify for co-dependency has also not been gazetted and until this happens the relatives permits would have a difficulty and could not be lodged.

Similarly there has been no gazetting of the amount necessary to qualify for retirement visa and ostensibly this too cannot be proceeded with until there is clarity. At this stage there is no idea as to what these qualifying amounts will be.

9. A further important item is that children will not be allowed to travel into South Africa, whether they are South African or not, without presenting an unabridged birth certificate upon arrival. Our concern at this time is that if a parent does not have an unabridged birth certificate that the procurement thereof can take several months. The above is not a comprehensive list of what the regulations' changes will be. However we have canvased in prior newsletters the predominant legislative changes and we refer you back to our most recent newsletters.

In terms of the new Immigration Regulations which came into operation on the 26th of May it is required that all children travelling must be accompanied by their unabridged birth certificates. The deadline date of the 1st of July in this regard was set.

Because of the delays involved in procuring South African unabridged birth certificates the Department of Home Affairs has done a turnaround and the new deadline date will be the 1 October 2014.

If you have children and are intending to travel, whether they be South African citizens or foreign nationals, then we would suggest that you take the necessary steps urgently and immediately to apply for and obtain an unabridged birth certificate for the child that will be travelling.

10. **Spousal Visas** in respect of foreign nationals married to or in a permanent cohabitative relationship with a South African citizen or resident will now have to prove, from the date of coming into operation of the new Amendment Act and regulations i.e. from Monday 26th May 2014 that the relationship has been in existence or the marriage is older than 2 years. Proof would have to be by way of either Marriage or Civil Union certificate or a Notarial Deed of Cohabitation. The remaining documentary requirements remain much the same with the proviso that we are advising clients to provide as much proof as possible to substantiate the existence of the marriage or spousal relationship.

The other innovation brought in is that the couple will be interviewed separately by an immigration official for what we believe will be a "grilling".

11. At time of writing this newsletter it had been announced that the **Visa Facilitation Service "VFS"** for Pretoria was opening today. Until early today however the VFS website was not taking bookings which is further complicated by the fact that the Akasia regional office for Pretoria was closed to the public on all new temporary residence permit lodgements. Whilst this pertains only to the geographical region of Pretoria, we are expecting similar hiccups with other regions.

South African embassies worldwide are giving out very confusing messages as to the requirements as to the various categories of visas, some are even stating that they have not been advised by the Head office as to what is happening and this message has been carried across so that applicants can be aware of the confusion surrounding advice being given by some of the embassies.

12. Section 11(2) of the Immigration Act 13 of 2002 (as amended) makes provision for a Director General of Home Affairs, at his discretion, to allow a foreign national to enter South Africa on a visitors permit with an authorisation to "conduct work related activities".

This does not constitute the taking up of formal employment in South Africa but covers only a situation where a foreign national is entering the country, without taking up employment, to perform a specific function or task and then to return to their country of origin.

The procedure surrounding the obtaining of this kind of visitors permit for the last year has been that such application must be directed to a Section 11(2) section of the Department of Home Affairs at its head office, complying with all of the relevant requirements including an invitation to the country by the company where the work related activities will be conducted.

The department in a turn-around on the process has summarily and without consultation with any stakeholders and also without making the departmental directive available to any stakeholders at the time, with effect from the 30th of April 2014 implemented a substantial and drastic change to the procedure.

Effectively, and with effect from the 30th of April the power of delegation of authority to issue Section 11(2) work authorisation visas has been re-delegated back to the embassies of the Department of Home Affairs abroad.

The criteria and documentary requirements for a Section 11(2) work authorisation however remain the same although it is important to note that the South African High Commission in Zimbabwe apparently has not heard about the situation and is applying very different criteria.

It would appear that applications that were already pending prior to the 30th of April at head office of the Department will be finalised by Head Office of the department.

It also appears that an individual who is in the country at the time of this new directive will still be able to process his or her application locally although this is not cast in stone.

AS ALWAYS, WE ENDEAVOR TO KEEP YOU UP TO DATE ON ALL IMMIGRATION RELATED ISSUES

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