New immigration **regulations**

Quo Vadis for skilled migrants and investors?

By Julian Pokroy

As indicated in a previous article in *HR Future,* the draft Immigration Regulations were published for comment and indeed the deadline for comments has now passed.

Technically, the public and stakeholder comment must be taken into account, factored in where practical into the new regulations and those "final" drafts must be in a position to muster the approval from a legal perspective of the Department of Home Affairs legal advisors, pass through the state law advisors and then be approved by cabinet before they can be signed and proclaimed by government gazette into operation.

There has been a perceived rush to get this done as quickly as possible.

At the time of writing this letter, 1 April has been mooted as a date for implementation of these new regulations. This is being done with undue haste and the consequences thereof will be dealt with elsewhere in this article.

Again, from a technical perspective, once the draft is "final", regulations come into force then they will be applied immediately.

The draft as last seen, that is, prior to the closing date for comment, was fraught with a series of unconstitutionalities, conflicts between draft regulations and the Immigration Act and forms that are incorrect in so many places that it is not worthy of filling this page with pointing out each and every single one.

The unconstitutionalities and conflicts with the legislation, Administrative law and various other legislations but most specifically the Immigration Act 13 of 2002 (as amended) all certainly led to a large degree of litigation against the Department of Home Affairs and inevitably the Minister of Home Affairs.

The department has been warned as has the minister in many of the comments and inputs that were made, specifically itemising these areas of conflict and unconstitutionality. If the draft regulations do proceed into finality then sufficient caveat has been issued and the Department and Minister of Home Affairs will have to bear the brunt of that exercise which will not only be counterproductive but also costly for the government.

It would be unfair to elaborate further as the final draft has still not been made public at the time of writing this article but the author does reserve the right to deal with these aspects at the appropriate time once the final draft becomes known.

One of the areas of concern and which has not received much public exposure is the fact that the Department of Home Affairs put out a tender in the first quarter of 2013 calling upon the broader public and business by way of an "invitation tender" to provide certain visa facilitation processes.

The process did not receive very much publicity at the time and it is my belief that the tender specifications were such that it was almost tailor-made for one specific service provider. Indeed this view was vindicated in that the speculated service provider was indeed granted the tender. It remains a question for debate as to how open this tender process was.

It remains a question for debate as to **how open** this tender process was.

The relevance of mentioning the above is that, with effect from the date of coming into operation of the "new" regulations, the Department of Home Affairs will no longer be taking in applications for visas and permits both of a temporary and permanent nature through any of their regional offices.

Visa facilitation centres have been set up at this stage in Pretoria, Johannesburg and Cape Town with further centres being set up in a few more regions.

The effect of this is that an applicant will have to present their application to such centre for acceptance, pay the administrative fee payable to the Department of Home Affairs and – surprise, surprise – pay the Visa Facilitation Service a fee for "advising" them on issues surrounding their application.

The process and the charging of this is certainly bad in law. Attempting to exclude outside third parties from advising the foreign national applicant regarding his/her application and then "forcing" or at least leaving them no alternative but to deal with the successful tenderer is anti-competitive and monopolistic to say the least and possibly also unconstutional.

It is not known who is behind the current service provider and whether the money that will be earned, and it will be substantial, from the "fee" for charging applicants will remain in the country or go out of the country.

How many South Africans will be employed in this Visa Facilitation Service is similarly unknown at this time but certainly those that have interfaced with practitioners in this field have all been foreign nationals thus far. You are left to draw your own conclusion in this regard.

An unconstitutionality in this relates to the requirement that all applicants will have to pay this fee. The constitutional and various high courts in our country have decided on numerous occasions that spouses of South African citizens and children of South African citizens do not have to pay such fee as it was deemed to be unconstitutional.

Again, this is left to your imagination as to what will transpire.

In the unlikely event of the Department of Home Affairs taking into account the public comment and input from the various professional bodies, it is hoped they will indeed heed them and bring about these changes in the final draft which is gazetted.

The purpose of this article is not to give you an outline of what the changes will be as it would be speculative until such time as the final regulations become known.

However This will be addressed once this information comes to hand.

What is however abundantly clear at this time is that it is going to become exceedingly more difficult for skilled foreigners to come to South Africa to work. I specifically exclude intra-company transferees for whom the only advantage would be that the two-year period will now go up to four years for such category.

The critical skills list which will form the basis of the new general work permit or critical skills permit will be dependent on a list to be published by the Minister of Home Affairs as to what constitutes these skills. In addition to that, the Department of Labour will now get involved with its laborious, cumbersome and inefficient reporting system to determine whether a South African is available to fulfil such position or not. If, in their infinite wisdom, they decide that there is a South African, even if there actually isn't, then that foreign national is going to have exceptional difficulty getting a work permit.

Strong appeals have been made to give alternatives to the Department of Home Affairs by allowing other outside bodies to do such certifications.

One must also be abundantly aware that there is a draft bill being piloted by the Department of Labour to parliament which in effect creates a Government Employment Agency which will become the central recruiting body for all job seekers in South Africa. What this will do to the personnel and recruitment industry is not ascertainable at this point. There has been strong resistance to the passing of this Bill.

Leaving them no alternative but to deal with the successful tenderer is **anti-competitive and monopolistic** to say the least and possibly also unconstutional.

In terms of investors coming into the country, it is believed that the proposed requirements for business permits are too onerous, too restrictive and leave far too much discretion with the Departments of Labour, Trade and Industry and Home Affairs to determine what is good or not good for the economy and this may very well be a deterrent to foreign investment.

The specifics in each of these categories will be carried in a detailed series of articles on the topic in this publication. ■

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