"I am of the view that, although it is not a prerequisite that one of the disputing parties must formally or even expressly declare a dispute (as was the case under the previous Labour Relations Act), at the very least the issue referred to conciliation must be an issue over which the parties have reached a 'stalemate' in the sense that the employer must have had the opportunity to reject or accept a demand put forward by the employees or their representative. To hold otherwise may, in my view, give rise to a situation where employees may refer the issue to conciliation without first having afforded the employer an opportunity to formulate a negative response or to reject a demand or grievance put forward by the employees or their representative. At the very least the employer should know what the dispute is about what is required to resolve the demand or dispute."

Separately from any requirement established by the LRA, the articulation of a demand and its rejection prior to either party invoking the statutory dispute resolution mechanisms, is not an interpretation that is supported by the wording of the LRA.

The basic substantive requirements for a protected strike are that there must be a grievance or a dispute in respect of any matter of mutual interest between employer and employee.

These requirements can be gleaned from the definition of a "strike" in s213 of the LRA, which contemplates a concerted refusal to work "for the purpose of remedying a grievance or resolving a dispute in respect of any matter of mutual interest ..." (court's emphasis).

The basic substantive requirements for a protected strike are that there must be **a grievance or a dispute** in respect of any matter of mutual interest between employer and employee.

The only issue for determination therefore is whether there is a grievance or dispute in relation to a matter of mutual interest between the parties.

The grievance in the present matter clearly concerns a matter of mutual interest - to the extent that the applicants appear to contest otherwise, they confuse the concepts of a "matter of mutual interest" and a "dispute of interest".

A matter of mutual interest, broadly speaking, is any matter concerning employment (see De Beers Consolidated Mines Ltd v CCMA and Others [2000] 5 BLLR 578 (LC)).

The underlying premise of the applicants' contention appears to be that strikes are pegged by 'demands' and 'deadlocks' in the sense in which these terms were employed under the 1956 Labour Relations Act.

But as Zondo JP pointed out in TSI Holdings (Pty) Ltd and Others v National Union of Metalworkers of SA and Others (2006) 27 ILJ 1483 (LAC):

"[There are] three categories of strikes, namely, those which have a demand, those where there is no demand but there is a grievance and those in which there is a dispute."

The LRA refers only to a "grievance" or a "dispute".

There is thus no statutory requirement for the existence of a deadlock before a referral to either the CCMA or a bargaining council.

In the present instance, the grievance in issue appears in the union's summary of its demands.

The court held that even if it were wrong in coming to the above conclusion, the definition of "dispute" in s213 includes "an alleged dispute".

For the purposes of the definition of a strike, therefore, all that need be established as an objective fact is the allegation of a dispute, not its existence.

Court's stance: jurisdictional ruling

In so far as the applicant contends that the jurisdictional ruling made by the commissioner renders the strike unprotected, while it may be correct that the commissioner found that the bargaining council had no jurisdiction to entertain the referral, the applicants' submissions overlook the fact that it is not necessary under the LRA for a conciliation hearing actually to take place before a strike can be protected.

In terms of s64(1)(a) of the LRA, it is sufficient if 30 days have elapsed since the referral of the dispute.

In other words, the commissioner's ruling affected only the convening of the conciliation process; it says no more than that the bargaining council did not have the jurisdiction to conciliate the dispute.

Since a conciliation meeting is not a precondition for a strike to be protected (because it is sufficient that 30 days have elapsed after the date of the referral) the commissioner's ruling is not a relevant factor.

The court accordingly dismissed the application with costs. ■

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Sudden entry in immigration arena

Minister of Home Affairs launches new immigration regulations without warning.

By Julian Pokroy

On the night of 22 May 2014, news came out that the Minister of Home Affairs had proclaimed the Immigration Amendment Act 13 of 2011, "the Amended Act", and new Immigration Regulations "Regulations" into effect some four days later on 26 May 2014.

The amended Regulations were published under Government Gazette 37679 (Vol 587 and Gazette Nr 10199).

The document, including forms, is 272 pages long and represents quite some drastic changes.

I have written in this publication previously about the anticipated changes, and many of those changes are indeed the very same ones that are now in operation.

Any points have been clarified regarding aspects previously covered and a series of articles on the more important visas and provisions of the regulations and amended Act will be covered in future editions of *HR Future*.

What has however been of some concern, and this does impact on HR Directors and Managers and indeed foreign national applicants for positions as well as foreign nationals wishing to invest in the country, has been this suddenness with which the regulations have been brought into effect. One would have thought that a lead time would have been given in order to set up the mechanisms within the Department of Home Affairs and Department of Labour, but this was not to be. With the proclamation into operation, not even the forms were finalised, and there are many inconsistencies remaining in the regulations which are going to have to be rectified one way or the other.

One of the more drastic provisions that has occurred appears in the Amendment Act and regulations and relates to visa overstayers. To this end, my view is that a person who has wilfully or in bad faith overstayed a visa in all probability deserves what ever comes their way.

But what about the overstayer who has become an overstayer because of inefficiencies of the Department of Home Affairs?

The provisions in the principal Act which allowed for an administrative penalty of up to R3,000 to be paid by an overstayer upon exit from the country and certainly prior to return to the country, was relatively lenient and afforded an opportunity to re-enter the country without consequences in such instances.

However, what about a person who has become an overstayer in a situation, for example, where he or she has applied timeously for an extension of an existing visa, as is required by Law, and the Department of Home Affairs has failed to finalise the application within reasonable time parameters, thus creating a situation where this person has now become an overstayer due to no fault on their part?

The Directive that was published by the Director General of Home Affairs on Saturday 24 May 2014 advising that, with the provisions of the Act doing away with the administrative penalty, a person who was exiting the country and previously could do so as an overstayer, provided he or she was armed with a receipt proving lodgement of the application, and could freely re-enter the country, could now no longer do so.

The consequences will be dealt with in a future article. However, what has happened in terms of Departmental Directive 9 of 2014 is that such person will now be declared and deemed to be "undesirable" and, depending on the duration of the overstay and the frequency of the offence, will not be allowed to re-enter the country for periods of between one and five years. This is indeed a very serious matter!

One of the first "victims" was a young British lass who is married to a South African citizen and who

was in a situation where she had applied for an extension of her spousal visa but four months later had not yet been granted the same, had returned to the UK to visit family together with her husband and child and the new regulations and amended Act came into operation while she was away. This suddenly made her a serious "transgressor" with serious consequences.

The airline refused to board her back to South Africa. She would not have been allowed to land, would upon arrival have been declared an undesirable person if she had been allowed to fly and would not be able to go back to South Africa for a period of twelve months. It had caused a separation from husband and child and potential loss of her job – no laughing matter.

The Law Society of South Africa and its provincial body the Law Society of the Northern provinces will be meeting with the Minister and hopefully Director General of Home Affairs by the time this article is published, in an effort to attempt to sort out the impasse.

At the time of writing this article further lacunae were that the momentary amounts which should have been fixed in the regulations or subsequent regulation in respect of pension requirements for retired persons' visas, relatives' visas and the investor type visa called the business visa had not been published, thereby depriving applicants in those categories from applying for visas until such time as these amounts have been Gazetted.

In previous articles in *HR Future*, I have written about the fact that one of the innovations of the Amendment Act was that the quota and exceptional skills work permits under the principle Act were being compacted into a new type of visa called a critical skills visa.

The foundation of the critical skills visa is that the Minister will publish a critical skills list which will determine the traits, professions and occupations which would qualify an applicant for a work visa in that category.

At the time of writing this article the critical skills visa had not yet been published thereby similarly depriving critically skilled people by definition, to apply for a visa in this category.

A further negative impact, which is probably one of the more problematic in the regulations is that it has now become necessary, once again, to apply for a Department of Labour certification in respect of any applicant for a general work permit.

Previously, an employer could advertise in the national printed media in a regulated sized advertisement with specific content, in an effort to try to secure the services of a South African citizen or resident for the position. The comprehensive interviews would have to take place and ultimately an offer of employment could not be made to the foreign national until an employer had satisfied the Department of Home Affairs that indeed they could not source a South African citizen or resident for the position.

In terms of the new regulations, the Department of Labour must now perform this function as well as the salary benchmarking function which previously could also be done by accredited private benchmarking institutions. This function would now also fall on the Department of Labour.

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into operation of the Amendment Act and new regulations, and it appears they do not have the human resource capacity to deal with the situation.

The process is cumbersome, has not worked previously and no choices are now given to do any of the aforementioned "privately" by an accredited outside body.

Under the previous legislation, Labour Department reporting was abolished because it simply did not work and was delaying applications for three to six months before the application could be lodged at a Home Affairs office, where further delays abound.

What this provision will do to the importation of skilled foreigners, most of them much needed, needs to be carefully thought out in any planning that the Human Resource Department of the company will do.

On a positive note, the intra company transfer work permit has been extended from two to four years but remains a non extendable visa option. In fact, stronger provisions are in place for transferees to return on expiry of their current visas. It would appear that intra company transfer set on these

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who are currently on the old two-year permits cannot extend their permits to encompass the four years and would in fact have to return home. Under this heading, it is also important to note that the applicant must have been in the employ of the company's overseas dispatching office for at least six months prior to qualifying to apply for such visa.

Another very significant development introduced in the new regulations, and which I have alluded to in prior articles in this application is that biometric identification has now become necessary in respect of each applicant and this means that an applicant will have to present himself or herself in person at the time of lodgement of the application for

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biometric identification which at this stage consists of fingerprinting. There is no way around this.

Further significant development is that the Department of Home Affairs has delegated and outsourced a function of receiving applications to a visa facilitation service. These visa facilitation offices are situated in the main centres in South Africa, and this is the place where applications now have to be lodged. A fee is payable to the visa facilitation service which has been determined at R1,350 which is payable prior to making the appointment for lodgement, by way of EFT or cash deposit directly into the service's accounts.

At the time of writing this article most of these centres have not opened despite the Amendment Act and its regulations having come into force.

A further major concern surrounds the situation where an applicant, who was in the process of preparing an application, is suddenly confronted with the change in legislation and regulation coming into effect literally overnight, and who may perhaps no longer qualify for a visa. How this is going to be dealt with is a moot question. A further question mark lies within the situation where an individual has a specific type of visa, for example, a quota work permit under the principal Act, but whose professional occupation does not appear in the critical skills list.

Finally, children accompanying parents into South Africa must carry an unabridged birth certificate otherwise they will not be allowed entry. This includes South African citizen children. One of the major concerns about this is that people do not necessarily automatically have unabridged birth certificates and the application process in order to obtain one is somewhat onerous. The application must be made, the vault copy must be perused by the Department in order to be able to certify by way of an unabridged birth certificate. The delays encountered with this type of application run into months rather than weeks.

Interesting times lie ahead ...

It is suggested that, before making any decisions regarding the deployment of people or the deployment of foreign nationals, you seriously consult a specialist Immigration Attorney to advise of the feasibility thereof. ■

Julian Pokroy is one of South Africa's leading immigration specialist Attorneys, www.immigration.org.za, and currently heads the Law Society of South Africa's Immigration and Refugee Law Specialist Committee and the Immigration, Nationality and Refugee Law Committee of the Law Society of the Northern Provinces. He was recently appointed onto the South African Law Reform Commission Committee dealing with a review of all legislation administered by the Department of Home Affairs.