

may make a demand which he is prepared to later moderate and that a party may sometimes put up a demand that it is aware the other party will not agree to.”

The court *a quo* took the view that the demand for a 13th cheque was an attempt on the part of the employees to break the deadlock and, in that way, perhaps end the strike.

The court *a quo* further expressed the view that the appellant was wrong to characterise the demand for a 13th cheque in the course of the strike as impermissible and rendering the protective strike unprotected.

It is common cause on the evidence that at no stage did the appellant approach the union or the employees directly to establish whether the employees were abandoning their demand for organisational rights.

At best for the appellant, when Mahlangu articulated the demand for a 13th cheque, the situation became doubtful as to whether or not the employees had completely abandoned the issue on which the strike had been called and that the continuation of the strike was now only for the purpose of persuading the appellant to agree to the payment of a 13th cheque.

The appellant's haste in concluding that the strike was not protected and then issuing the first ultimatum was unjustified and perhaps further confused the situation.

The court held the viewpoint that the articulation of the demand for a 13th cheque did not cause the protected strike to transmute to an unprotected strike.

Such a transmutation, as contended for by the appellant, would only occur if it is shown that the employees had used the protected strike as leverage to achieve other objectives in respect of which no strike action could be taken.

In this regard, see *Ceramic Industries Ltd t/a Betta Sanitary Ware v National Construction Building and Allied Workers Union (2) (1997)18 ILJ 671 (LAC)*.

In my view, the court *a quo* correctly came to the conclusion that, on the facts of the present case, this was not the position.

The court *a quo* cannot be faulted in its conclusion that the strike was, therefore, protected and the dismissal of the employees on the grounds of their participation of the strike was automatically unfair.

In the result, the labour appeal court dismissed the appeal with costs. ■

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Changes to the process of acquiring a General Work Visa have not been for the better.

By **Tarryn Pokroy Rietveld**

The Immigration Amendment Act 13 of 2011 which was brought into operation together with the Immigration Regulations on 26 May 2014 has changed the General Work Visa process quite considerably.

Previously, under the 2002 Immigration Act, the General Work Visa required the prospective employer in South Africa, who had found a suitable foreign national for a position, to first advertise any position in the national printed media, in accordance with the requirements as laid out by the Department of Home Affairs and to then prove, as a result of interviews conducted based on the placement of such advert, that they could not find a suitable South African to fill the position. It is required of the prospective South African employer to motivate, before making any application for a General Work Visa for a foreign national, that they have conducted a reasonable and diligent search but have failed to find a suitable South African citizen or South African permanent resident to fill the available position. Only then can they look to possible foreign applicants who may apply for the position.

This is indeed in line with best practice and standards that are followed on a worldwide basis. The idea certainly is that “local is lekker” and, due to the high unemployment rate within South Africa, job opportunities should rather be presented to local citizens before opening such positions up to the international market. “First prize” should always remain employment of local citizens.

Unfortunately, in many instances, the vacancies encountered are simply not skills that are readily available in South Africa.

It is in an instance such as this that an employer then needs to look beyond our borders in order to fill such vacancies.

Under the Amendment Act and its regulations, this advert requirement is no longer contained. However, in its place, is a requirement to obtain a certificate from the Department of Labour to confirm that, among others, a diligent search has been undertaken by the employer and such an employer was unable to find a South African citizen or permanent resident with the appropriate qualifications, skills and experience to fill the position. Accordingly, despite the fact that the advertisement requirement is no longer contained under our Amendment Laws, this remains a requirement with the Department of Labour and the process that needs to be followed with them in order to employ a foreign national under this category of work visa.

This essentially results in a double search to determine the availability of the relevant skills and

New – but not improved – General Work Visa

qualifications within South Africa. The Department of Labour assesses the employer's efforts to locate a South African citizen or permanent resident for the position but then also undertakes its own search to try to achieve the same goal.

In addition to the above, the Department of Labour is also required to confirm in their certificate that the foreign national the prospective employer wishes to hire does indeed have qualifications and skills in line with the job offer. They are also required to conduct a salary benchmarking of sorts in order to confirm that what the foreign national would be paid would not be any less than a South African citizen or permanent resident occupying a similar position would be remunerated.

Finally, in respect of the proposed contract of employment with the foreign national, the Department of Labour confirms that is in line with the relevant labour standards in South Africa.

The Department of Labour, to date, has already made a number of changes to the application process that they require to be completed on their side for such certificate. With the sudden implementation of the Amendment Act and its Regulations, the Department of Labour was certainly caught unaware in respect of the large role that they are now required to play in respect of the General Work Visa process.

The advice provided at time of writing this article was that such an application to the Department of Labour alone would take at least 30 working days to complete. This seems to be rather optimistic.

In addition to undertaking the advertisement process prior to lodgement with the Department of Labour of the request for the certificate, it is also necessary to provide the Department of Labour with an evaluation of such foreign nationals' qualifications onto a South African level by the South African Qualifications Authority(SAQA). Both of these processes can often take anywhere between two and four weeks to complete, calculated from date of lodgement/submission.

Once all of these documents are in place, with the applicant and employer complying with the further remaining requirements for a General Work Visa, it is then necessary to approach the relevant Visa Facilitation Service (VFS) office, if the application is being made locally, or the appropriate South African embassy or high commission.

In both instances, it is required of the applicant to attend personally either at the embassy or high commission or at the relevant VFS office for purposes of lodgement of the application.

The process through our embassies generally takes in the region of one to two months to finalise an application as from date of lodgement. In respect of applications lodged locally such application could take anywhere between two to four months to finalise as from date of lodgement.

Bearing all of the above time frames in mind, it is realistic to state, including preparation of the relevant documentation for the processes to obtain a General Work Visa, that such application process, from start to end, could take, at the very least, six months to process.

In respect of a local employer who does require an individual on an urgent basis, the process outline above will simply take too long and prove too burdensome.

While the aim of our Immigration Law is certainly to facilitate immigration into South Africa and to ensure the continued growth of our economy by way of investment and the transfer of skills to South African citizens (and this is encompassed in the preamble to the Immigration Act and its Amendments, by virtue of what has been contained in these Amendments), it seems that the opposite is true. ■

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