

# Full circle in South Africa's Immigration Law regime

Is this a metamorphosis from skills- and investor-friendly to ... less friendly?

*By Julian Pokroy*

**H**istorically, pre-1994 and with South Africa literally being a pariah in world society, with sanctions ever present, South Africa was a difficult country to invest in and to import skills into largely because of the then prevailing political scenario but also because of world pressure, as a result of which an investor-friendly environment was absent.

However, with the advent of the new Immigration Act 13 of 2002 (in its original format) "the Act" a new era of immigration law regime was in the making.

The Act was only passed in 2002 and only came into operation in 2003 and was an arduous process in the making.

The ultimate Act was preceded by the process leading up to finalisation of the Green Paper on immigration, one of the more consulted upon and stakeholder participative processes in South Africa's immigration law history. The author had the distinction of being one of the parliamentary task-group members which dealt with the finalisation of the Green Paper.

"Roadshows" travelled through the country and consulted with stakeholders at all levels.

In terms of the Westminster-type parliamentary system the Green Paper was followed by the White Paper process which again had a round of consultative roadshows and further consultation with stakeholders, which arose from comments on the Green Paper.

It was only once the White Paper had been formulated that formal policy in terms of immigration law reform was in place and the draft Immigration Bill could be finalised.

The White Paper was put to Cabinet and ultimately passed through parliament in 2002 as referred to above.

The preamble to the Immigration Act contains a very revealing and liberal view towards the importation of skills and attraction of investment. What was advocated in the preamble was that not only should South Africa be seen and viewed as an investor-friendly country but also one that would induce highly skilled foreigners to bring their skills into the country.

Indeed the Act, when it came into operation, was just that.

A quota category of work permit was brought into being in terms of the Act which allowed for certain specified professions, trades and occupations to be listed into the quota category and for persons qualifying in those categories to be allowed a relatively straightforward, at least in terms of immigration law regimes, entry to South Africa. The ultimate goal being to not only attract the skill but facilitate a visa.

The quota category list is based on the critical skills determinations by the Minister of Home Affairs in consultations with the Minister of Trade and Industry and Labour.

As a direct result of the implementation of the Act the brain drain which have taken place over the previous 20 years in South Africa began to gain some traction with a degree of brain gain into the country. Not only was this evident but also the requirements for investors to come into South Africa, open businesses, create jobs and to share their entrepreneurial skills became a bonus to South African economy.

Over the period 2004 – 2007, I regularly delivered seminars in the United Kingdom dealing specifically with “marketing” South Africa as an attractive destination for highly skilled foreigners and investors. Indeed, not only was this category of applicant encouraged but also retirees who wish to migrate to warmer climates.

The economy was booming at the time and things were happening.

Further background to this article is that South Africa was not only experiencing a brain drain but the realities of the world economic market were such that young South Africans qualifying were looking to take their skills, upon qualification from universities, and to follow the dollar/euro/pound, based on the fact that it was not only South Africa experiencing these skills shortages. Migrating with your skills has become a career path to many young professionals in this process.

It is the author's belief that the then Minister of Home Mangosuthu Buthelezi was visionary in terms of his approach towards dealing with all of the above.

However, Ministers come and Ministers go and with the entry of Minister Nosiviwe Mapisa-Nqakula a very different picture began to be painted, indeed followed by her successors Nkosazana Dlamini-Zuma, Naledi Pandor and currently Malusi Gigaba. A series of amendments have taken place to the Immigration Act, some of them appearing to unaware of the harsh consequences that they would precipitate.

The intra-company transfer work permit debacle has travelled full circle and back again by creating

an environment through ill thought out amendments which have made many multinationals wishing to transfer and second employees to South Africa for limited duration to look at other options in terms of where to locate their Africa options. A reduction to two years of intra-company transfer (non-extendable) was brought in without consultation, subsequently amended and currently there has been a great degree of confusion, covered in a previous article in this publication which has resulted in a return back to the *status quo ante* 2003. The wheel has turned a full circle!

Intra-company transferees/secondee do not enter the South African labour market formally and therefore are no threat to jobs of South Africans.

Investor type permits and own business have seen the capitalisation requirements goal being shifted (which is understandable perhaps) but a new concept has been included in the business visa category which demands that an investor must provide proof that their business will be “in the national interest”. The concept of “national interest” was not defined and it is left up to the Department of Trade and Industry to make a bureaucratic decision, which they are not enabled to do at law in this regard, on which the Department of Home Affairs hinges the success or failure of an application for a business visa. The main principle of investment in businesses and the direct and indirect creation of jobs is simply being ignored and many investors are starting to look to far more investor friendly markets to take their entrepreneurial skills and investments.

The quota category of work permit together with the exceptional skills work permit which were designed to make it easy for the highest skilled qualifying applicants to obtain work visas relatively easily have been scrapped and have been compacted into a new “critical skills visa” which in some respects is much the same as the situation which prevailed prior to the amendments of May 2014.

In respect of General Work Visas there has been quite a drastic change.

The main game changer is that the Department of Labour has now been drawn back into the process, (a system which failed dismally pre the implementation of the principal act), whereby the Department of Labour now in essence becomes a recruitment agent and salary benchmarking standards setter and any applications for general work visas must now proceed through the avenue of the Department of Labour.

Time taken to process the Department of Labour recommendation can take several months. Reports

of taking more than 6 months to finalise this aspect have been received on a regular basis. Without the Department of Labour recommendation or a waiver thereof, which is just as onerous a process, the ultimate application with the Department of Home Affairs cannot be lodged.

Accordingly a prospective employer wishing to bring in a higher level skilled applicant would have to factor in potentially 6 months or more waiting time with no guarantee of a positive outcome.

Erroneous and illogical decisions have been emanating from the Department of Home Affairs since the implementation of the May 2014 amendments which has resulted in many applicants applying for a review or appeal of their decisions, with such review and appeal applications also taking an indefinite period of time.

It has become almost impossible to get through to the relevant officials at the Department of Home Affairs and with Visa Facilitation Services (VFS) now operational since May 2014 as the receiving and dispatch agency for the Department of Home Affairs, a virtual shield has been cast around the adjudication team of the Department of Home Affairs at head office level.

South Africa badly needs a reform of its Immigration Policy and indeed a formulation of a new Immigration Policy. However this is not happening despite rumblings over the last 4 or 5 years to this effect.

What does this all mean to a potential skilled migrant applicant and investor?

South Africa is by no means out of step with the bureaucracies that exist in most international Immigration Law Regimes.

However what is present in a disturbing trend over the last 5 to 7 years is a blind denial of the needs from a skills perspective in South Africa. This can only be voiced in this way as one does not make it difficult for a skilled migrant in a much needed trade, profession or occupation unless it is perhaps your underlying intention not to encourage the importation of that skill.

South Africa is experiencing a skills shortage for a host of reasons, none of which are dealt with here. But what is relevant to this article is the fact that skilled South African graduates especially in the sciences are not keeping their skills in the country any longer because of lack of opportunity caused by numerous extraneous factors. The fact that the world economy has not been performing as it did during the last decade obviously is also a contributing factor and this must be balanced off against the situation prevailing at this time.

## Way forward

The way forward has to be for the process of formulation of a “new” immigration policy to be accelerated to bring some element of certainty into the policy situation in the department administered by the Department of Home Affairs and his Director General.

There are urgent reforms that need to take place and to this end the Department of Justice and Constitutional Development constituted a task group to advise that Minister on conflicts, necessary changes and potential unconstitutionality in the legislation administered by the Department of Home Affairs, a report which is currently under review with comment to be made by the 26th of May this year. I had the distinction of serving on that task group as well. The call for comment on this Paper can be accessed on <https://pmg.org.za/call-for-comment/239/>.

One of the unfortunate realities is that the task group completed its work some three to four years ago and much of what has been recommended has been superseded by decisions of the High Court and subsequent amendments to the Immigration Act and Regulations and therefore certain aspects would have become redundant.

The implementation of the Act and the new Regulations needs to be applied consistently at the Department of Home Affairs and high commissions and embassies and consular missions of the South African government overseas.

The time has come for the Department of Home Affairs to relook putting together a “code” on immigration practice and making this available to embassies, consular missions and high commissions so that the law and regulation is applied consistently and with certainty throughout.

Any developments will be dealt with in this publication. ■

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