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EMPLOYMENT

ALERT

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WHAT ABOUT A MINIMUM NATIONAL WAGE FOR SOUTH AFRICA?

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President Zuma recently announced measures to resolve the labour troubles afflicting especially the mining sector. In his state of the nation address he announced, amongst other things, the appointment of an Inter-Ministerial Committee on the Revitalisation of Distress Mining Communities.

Further, he called on the social partners to "deliberate on the wage inequality" and committed the government to investigate the possibility of a national minimum wage. There is no uniform minimum wage that applies nationally.

Minimum wages have been determined in terms of at least twelve sectoral determinations such as the agricultural, security, hospitality and taxi sectors, and for domestic workers. Bargaining Councils determine minimum (and other) wages in Bargaining Council Agreements within their areas of jurisdiction.

A national minimum wage is not uncommon. In Brazil, the minimum wage is adjusted annually by the inflation rate. In the UK, different rates apply based on age and other factors. Usually the rates for domestic workers are set separately to avoid a too-low national minimum.

On 18 May 2014 the Swiss voted on a proposal to increase their minimum wage - of $4,538 per month - by an additional $25 per hour. The attempt was led mainly by the unions to secure equal pay

A hefty 76% of the voters rejected the proposal. In the weeks and months preceding the vote the pros and the cons of mandatory minimum wages were widely debated. Ultimately the argument prevailed that many of the estimated 330,000 workers (10% of the working population) who are paid less than $4,538 per month may end up out of work if the proposal was introduced.

Another growing concern was that the annual immigration of approximately 100,000 workers, including their families and relatives, under the EU/Swiss Free Movement Treaty 2002 would be further increased by the introduction of the increased minimum wage which would have been the highest in the world.

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In South Africa, the SA Institute of Race Relations reported a substantial drop in the number of farm workers from 1993 to 2007, before the recent substantial increase in the minimum wage for farm workers. One of the reasons was increasing mechanisation on farms. Higher labour costs may expedite this unintended consequence.

A minimum wage is usually informed by a demand for a living wage with reference to a percentage of the average income of workers in a country. Various factors will however have to inform a national minimum wage in South Africa. The socio-economic reality is but one.

One of the more serious challenges will be to strike a balance between sectoral determinations, a national minimum wage and the role of collective bargaining in bargaining councils and at plant level. At present, vast differences exist between the (minimum) rates established through these mechanisms for the various sectors.

The level of a national minimum wage will undoubtedly have an effect, especially on collective bargaining in all the existing forums. The collective bargaining structures most probably will attempt to build upon a national minimum wage as a starting point for increases.

Large scale unemployment may continue if the minimum wage is set too high, especially if it is set having regard to a living wage or the average income of workers in employment without also taking into account productivity, affordability and the need to compete in international markets.

Faan Coetzee

THE 'UNDESIRABLE PERSON' PROVISIONS OF THE NEW IMMIGRATION LEGISLATION

The Immigration Amendment Act, No 13 of 2011 (Act), and the new regulations under the Act, provide for what is termed the 'undesirable person'. Essentially, a foreign national who falls within a category listed in s30(1) of the Act can be declared by the Department of Home Affairs (DHA) as an 'undesirable person'.

S30(1) of the Act provides a list of eight instances in which a foreign national can be declared as 'undesirable', that is any foreign national that:

- is likely to become a public charge [s30(1)(a)];
- is declared as such by the Minister of Home Affairs [s30(1)(b)];
- is found to be judicially incompetent [s30(1)(c)];
- is an unrehabilitated insolvent [s30(1)(d)];
- is ordered to depart from the Republic [s30(1)(e)];
- is a fugitive from justice [s30(1)(f)];
- is the holder of previous criminal convictions without the option of a fine for conduct that would be an offence within the Republic [s30(1)(g)];
- has overstayed on a permit issued by the DHA [s30(1)(h)].

This article focuses on s30(1)(h), since it is a new category, which effectively has removed the imposition of fines upon foreign nationals who remain in the Republic on expired permits. Under the Act, foreign nationals who overstay in the Republic can now be declared as 'undesirable'.

The 'undesirable person' in terms of s30(1)(h) and regulation 27(3)

Regulation 27(3) provides that a person who overstays in the Republic after the expiry of their visa will be declared as 'undesirable'. The period of the declaration is determined by examining the foreign national's period of overstay in the Republic. Foreign nationals who overstay in the Republic for a period not exceeding 30 days will be declared as 'undesirable' for a period of 12 months. Foreign nationals who overstay for period exceeding 30 days will be declared as 'undesirable' for a period of 5 years.

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In addition to this, the DHA has also introduced Directive 9 of 2014 (directive) which confirms Regulation 27(3) and stipulates that persons who overstay on their permits will be declared as 'undesirable'.

S30(1)(h), read together with regulation 27(3) and the directive, effectively means that even if a particular foreign national has submitted an application for an extension of an existing visa, where that visa expires after submission such a foreign national can and will be declared as an 'undesirable person'.

The Johnson case

In *Johnson and Others v Minister of Home Affairs and Others; InRe: Delorie and Others v Minister of Home Affairs and Another (10310/2014, 10452/2014) [2014] ZAWCHC 101 (30 June 2014)* (Johnson case), the Western Cape High Court considered the impact on s30(1)(h), regulation 27(3) and the directive on two families separated due to declarations of undesirability.

The Western Cape High Court elected to consolidate the *Johnson* and *Delorie* applications since they both sought to urgently remove the 'undesirable person' status of two foreign nationals who had left the Republic on expired permits.

The background facts

The *Johnson* case concerned Louise Henrikson Egedal-Johnson (Egedal-Johnson) a Danish national who, since 2009, has been married to Brent Johnson (Johnson), a South African citizen. The couple had one child born of the marriage. Since her marriage to Johnson, Egedal-Johnson remained in the Republic on a relative's permit which was issued by the DHA on 28 February 2012. The permit expired on 27 February 2014. On 10 February 2014, Egedal-Johnson applied to have the permit extended.

As at 28 May 2014, her extension application had not been adjudicated upon by the DHA. On 28 May 2014, Egedal-Johnson and her family left South Africa. In departing from South Africa, the immigration officials at Cape Town International Airport issued Egedal-Johnson with a form declaring her as an 'undesirable person' since she had overstayed in the Republic for a period of approximately 90 days.

When Egedal-Johnson attempted to re-enter the Republic, she was refused entry by immigration officials and was subsequently deported to Denmark with her child.

The *Delorie* application concerned David Ross Henderson (Henderson), a Zimbabwean national, who was married to Cherene Theresa Delorie (Delorie), a South African permanent resident. The couple had two children born of the marriage. Henderson remained in the Republic on a valid work permit, which expired on 21 April 2014. Henderson was unable to apply for an extension of his work permit before its expiry. As such, when he left South Africa on a business trip to Nigeria, immigration officials at the Cape Town International Airport declared Henderson as an 'undesirable person' since he had overstayed in the Republic for a period of approximately 30 days.

Henderson was unable to return to the Republic due to his 'undesirable' status.

It is within the context of these facts that Johnson and Delorie, on behalf of their families, applied for urgent relief from the Western Cape High Court.

Court's finding

Yekiso J made the following key findings:

- Shortly before Egedal-Johnson and Henderson had departed from the Republic on 28 May 2014, the immigration laws relating to 'undesirable' persons had fundamentally changed and the introduction of s30(1)(h) meant that foreigners who overstayed on expired permits could be declared as 'undesirable'.
- Their status as 'undesirable' persons meant that Egedal-Johnson, Henderson and their respective families were suffering prejudice and they had no alternative remedy available to them at the time of instituting the urgent applications.
- It was held that the 'undesirable' status of Egedal-Johnson and Henderson is suspended.
- Egedal-Johnson and Henderson were permitted to enter and remain in the Republic.

Subsequent to the enactment of the Act and regulations, the DHA introduced an appeal process for persons who had been declared as 'undesirable' after overstaying on expired permits.

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The applicants were invited by the DHA to institute appeals against their 'undesirable' status and the applicants elected to lodge such appeals. However, at the time at which the matter was adjudicated upon, the appeals lodged by the applicants had not yet been processed by the DHA. It was for this reason that Yekiso J was of the view that the court should consider the application. Yekiso J also considered the urgent nature of the applications and the fact that the applicants had demonstrated the possession of a prima facie right to relief.

Appeal process

Importantly the notice of 'undesirable' status issued to any foreigner declared by the DHA as such provides that such a foreigner is entitled to appeal such a decision by lodging a formal appeal with the DHA. The formal appeal must include the following documentation:

- written representations stipulating reasons why the declaration should be removed;
- a copy of the declaration of undesirability;
- copies of the foreigner's passport; and
- copy of the acknowledgement of receipt if the foreigner has applied for an extension of their visa.

The DHA has indicated that appeals will be adjudicated upon within approximately 48 hours. However, there is no guarantee that this will be the case in practice.

Conclusion

Employers who employ foreign nationals should endeavour to inform such individuals of the implications of the 'undesirable person' provisions of the Act.

Further, foreign nationals who seek the extension of existing visas must ensure that such applications are made at least 60 days prior to expiry of their existing visas. A failure to do so may result in such foreign nationals being declared as 'undesirable' persons.

Foreign nationals who are declared as 'undesirable' can lodge a formal appeal to remove that declaration on good cause shown. If the DHA does not consider the appeal within a reasonable period of time, foreign nationals may be able to institute court action in order to remove that declaration.

Michael Yeates and Shane Johnson

WEHNCKE V SURF4CARS (PTY) LTD: RIDING THE WAVE INTO THE AMENDMENTS TO S187(1)(C) OF THE LRA

The recent case of *Solidarity obo Wehncke v Surf4cars (Pty) Ltd (JA63/11) [2014] ZALAC 6 (20 February 2014)* concerned an alleged automatically unfair dismissal where the alleged reason for the dismissal was to compel the employee to accept a demand in respect of a matter of mutual interest.

On his employment with Surf4cars, Wehncke was provided a company vehicle, of which he had unrestricted use. There was, however, no written contract of employment which governed the relationship between the parties and/or the use of the vehicle.

Six months later, Wehncke was presented with a written contract, which made provision for payment, by him, of any excess on insurance claims if the vehicle was involved in an accident. As a result of the inclusion of this clause, Wehncke refused to sign the contract unless this term was removed. Due to his refusal to accept the term of his employment, he was dismissed.

Solidarity, on behalf of Wehncke, instituted proceedings in the Labour Court, claiming that the dismissal was automatically unfair.

The basis of Wehncke's claim was grounded in s187(1)(c) of the Labour Relations Act, No 66 of 1996 (LRA), which provides that a dismissal is automatically unfair if the reason for the dismissal is to compel the employee to accept a demand in respect of any matter of mutual interest between the employer and employee.

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In adjudicating the matter, the Labour Court found that Wehncke had failed to prove that the employer had dismissed him in order to compel or persuade him to sign the contract of employment. The court found that there was consequently no demand from Surf4cars. As such, the Labour Court dismissed Wehncke's claim.

On appeal, the Labour Appeal Court noted that the reach of s187(1)(c) had been decided in *Fry's Metals v NUMSA & others [2003] 2 BLLR 140 (LAC) and CWIU & others v Algorax (Pty) Ltd [2003] 11 BLLR 1081 (LAC)*. These cases were decided on the basis that, in order for a dismissal to fall within the scope of s187(1)(c), the dismissal must be 'conditional'. What is meant by this is that the dismissal would be withdrawn, on the employee's acceptance or compliance with the demand.

In the case at hand, the dismissal was not conditional. The dismissal was final and irrevocable. While it was based on Wehncke's unreasonable refusal to accept a term in the contract, there was no conditional offer to reinstate him should he accept the demand.

Wehncke's appeal succeeded on the following basis, not on the basis that his dismissal was automatically unfair:

- When adjudicating an automatically unfair dismissal claim, which on the facts appears to be a matter that should have been referred to the Commission for Conciliation, Mediation and Arbitration (CCMA) for the arbitration, ie as a dismissal for misconduct, the Labour Court has the power to stay the proceedings and refer the matter for arbitration or, with the consent of the parties, arbitrate the matter itself.
- In this matter, the dismissal was not arbitrated by the CCMA and as such, the Labour Appeal Court decided to refer the matter for arbitration.

Accordingly, the appeal against the Labour Court's ruling that the dismissal was not automatically unfair was dismissed. The court ordered that the matter be referred to the CCMA for arbitration, in terms of s158(2)(b).

It bears mentioning that, if the amendments to the LRA had been in effect, the outcome in relation to the Labour Appeal Court's determination on the dismissal might have been different. In terms of the amendments, s187(1)(c) no longer requires the employer to have intended to compel the employee to accept its demand – the requirement is merely that the employee was for rejecting the employer's demand.

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