

THE EMPLOYMENT RIGHTS OF IMMIGRANTS/ FOREIGN NATIONALS IN SOUTH AFRICA

Employers who hire foreign nationals should take note of the recent judgement of **Sithole v Metal and Engineering Industries Bargaining Council & others (JR318/15)** which was delivered on 24 November 2017, where an employee had been dismissed as he did not have a valid work permit. The above mentioned case provides what the position is concerning a foreigners' employment rights in South Africa and if such foreigner has any employment rights when they do not have a valid work permit.

In the above case the employee is a Zambian national who had been employed and working for the Employer Spray Systems since 2009, only after 5(five) years of service did the Employer inquire about the employee's work permit. The Labour Court took into account the **Immigration Act 13 of 2002** which provides in terms of **section 38(1)** that no person shall employ an illegal foreigner, a foreigner whose status does not authorise him to be employed by such person, or a foreigner on terms, conditions or in a capacity different from those contemplated in such foreigner's status. The Company relied on this provision in the Immigration act to justifying the dismissal of the employee.

The Labour Court then referred to the matter of **Discovery Health Limited v Commission for Conciliation, Mediation and Arbitration and Others**. In

this matter the Court looked into the interpretation of the provision relied upon by the employer in the Immigration act. The Court found that should it have been the intention of Immigration Act to invalidate a foreigner's contract of employment this would lead to the unfair consequences regarding the rights on the foreign employee. The Court found that this could not be the intention that the Immigration Act had in mind where a foreigner has partially breached the Immigration Act.

The Court further provided that the contract of employment was not invalid despite the employee not having a valid work permit. The Court came to this decision by referring to section 213 of the **Labour Relations Act (LRA)** which defines what constitutes an employee. Therefore a foreigner who has worked for another person, receives remuneration and carries out business for an employer is considered to be an employee irrespective of being a citizen or a foreigner. The foreigner is therefore entitled to the rights contained in the LRA as the definition of an employee is not dependant on the validity of an employment contract.

In light of the above the Court found that the employee had been dismissed in terms of the LRA and further provided that the Immigration Act was never intended to allow employers to dismiss foreigners who are in breach of the Immigration Act. Therefore employers should take note that when employing foreigners, such

foreigners are afforded the same rights as South African employees meaning that the same procedures must be followed when considering dismissal.

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