

Full Length Research Paper

Challenges encountered by foreigners in order to obtain the necessary permits to work and reside in South Africa

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This article examines the various problems being faced by foreigners on a daily basis in order to obtain the necessary permits to work and reside in South Africa. The article highlights that the major obstacle is unnecessary bureaucracy by the officials of the Home Affairs who are responsible for the processing of permits. The article also examines how executive bureaucracy is affecting administrative actions and what the courts are doing in order to ensure that foreigners receive just administrative actions on the applications made. The article concludes that with proper oversights on the low ranking officials, bureaucracy will be drastically minimized and this will serve as solution to the plight of foreigners especially the skilled workers in South Africa.

Key words: Executive bureaucracy, administrative justice, rights of foreigners, work permits, home affairs, officials of home affairs.

INTRODUCTION

Aliens or foreigners in South Africa and elsewhere are often looked at with squint eyes and wry mouths as if they are personae non grata. They are viewed as potential pests and usurpers of local financial resources and perceived as coming to take jobs due to their willingness to accept remuneration below the minimum wage thereby disadvantaging the South African citizens and locals from job opportunities. Against this backdrop, when a foreigner applies for a permit, it takes time and when the permit is either issued or denied, the officials of the Home Affairs more often than not will not notify the applicant of the outcome. The situation has degenerated to the extent that some skilled workers who have been invited (by various companies) to work in various industries have become disillusioned and redundant as a result of failure of the Department of Home Affairs to process their work permits or renew existing ones. In an attempt to resolve this problem, these skilled workers from various countries came together to institute a class action in Cape Town, South Africa, to challenge the unnecessary bureaucracy,

undue delays and seek relief from the courts to compel the Department of Home Affairs to issue or renew their work permits. This process is in conformity with section 33 of the Constitution of the Republic of South Africa (1996) which expressly provides that:

“Everyone has the right to administrative action that is lawful, reasonable and procedurally fair; and that everyone whose rights have been adversely affected by administrative action has the right to be given written reasons.”

Section 33(3) of the Constitution provides that national legislation must be enacted to give effect to these rights and must:

“Provide for the review of administrative action by a court or where appropriate, an independent and impartial tribunal; impose a duty on the state to give effect to the rights in subsections (1) and (2) and promote an efficient administration.”

It must be mentioned that there are existing policies and laws in place to tackle this problem; the government has now decided to renew its effort to effectively implement the policies and laws thereby minimizing or totally

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eradicating the bureaucracy thereby prevent unnecessary litigations in courts. One of the steps taken was the immediate intervention by the Minister of Home Affairs Dr. Nkosazana Dlamini-Zuma, who directed the officials of the home affairs to clear the backlogs and fast track subsequent applications DME (2010).

HISTORICAL BACKGROUND

In South Africa, when the Aliens Control Act (1991) now repealed by the immigration Act (2002) was passed in 1991, it was to provide for the control of the admission of persons to reside in and depart from the country and for matters connected therewith. Furthermore, it "empha-sized the need for proper control measures to protect the local labour market (SAMA, 1998). It is against this background that the then Minister of Home Affairs, Eugene Louw declared that more punitive measures would be taken to constrain employers from exploiting the weak economic situation across South African borders at the expense of the local labour market for purposes of cheap labour. Migration to South Africa is currently the subject of intense political debate within the country and the region. Most migrants are from the Southern African Development Community (SADC) region notably; Lesotho, Mozambique, Swaziland and Zimbabwe due to economic upheaval in these countries. According to the Department of Labour, until 1994, South Africa was an important destination for white immigrants from Europe due to globalization and economic opportunities as against political and social crisis in other parts of Africa (Maja and Nakanyane, 2007). The influx of immigrants was precluded by the racist immigration policies. It was only after the de-racialized immigration policies by the 1994 Constitution that the new democratic government created various policies and enabling environments to welcome foreigners into South Africa (Maja and Nakanyane, 2007).

METHODOLOGY

This study is concerned primarily with exploring how to combat the excesses of officials of the Home Affairs through proper oversights by their superiors and the executive in order to discourage or out rightly put a stop to various administrative injustices being committed on a daily basis regarding the permit applications of foreigners. The units of analysis and units of observation in this study are the executive bureaucracy, application of administrative justice and rights of foreign nationals in South Africa. Units of analysis refer to the 'what of your study: What object, phenomenon, entity, process, or event you are interested in investigating. The units of analysis in a study are typically also the units of observation (Mouton, 2001). The points of focus of this article are the characteristics, orientations and actions of the objects being studied which is how to overcome executive bureaucracy in the application of administrative justice to foreigners in South Africa.

This study makes use of content analysis methods. Content analysis methods may virtually be applied to any form of

communication. It analyses the content of texts or document such as speeches, annual reports, newspapers, letters, laws, policy documents and constitutions. The term 'content' itself refers to words, meaning, pictures, symbols, themes or any message that can be communicated (Babbie and Mouton, 2001). Content analysis is therefore best suited to the purpose of this article because laws and legislation are analysed to determine the extent of the rights of foreigners to administrative justice and whether it has been established; examine existing primary documents to determine if the right has been realised and factors responsible for non-realisation; analyses various legislations relating to application of administrative justice, causes of executive beauracracy and how to combat them and finally, examine some policies and government interventions that were inspired or influenced by administrative justice to determine how they can enhance prompt administrative actions in the process of foreigner's permits in South Africa.

REASONS FOR THE INCREASE IN THE NUMBERS OF MIGRANTS TO SOUTH AFRICA

The reasons and causes of the massive growth in migrants movement to South Africa are various and complex, historical and contemporary. Due to the relative absence of legal mechanism for entry and work in South Africa, irregular and illegal migration increased in the 1990's, especially after the collapse of the apartheid regime which was strict in the control of immigration (Maja and Nakanyane, 2007). After 1994, there was an increase in the number of migrants from all parts of Africa to South Africa. Prior to 1994, it had only been those from neighboring countries (Maja and Nakanyane, 2007). More importantly, though South Africa is a developing country, but in terms of infrastructure and industrial activities, it ranks to some extent at per with the developed countries (Crush and Williams, 2005). This is one of the attractions for migration by skilled laborers to South Africa; however, African migrants appear to be most affected by intolerance, xenophobia and denial of just administrative actions. These may threaten the gains made so far except there is political will on the part of government to right the wrongs.

Post 1994 labour migration to South Africa

Before 1994, immigration policy was a naked instrument of racial domination and the official definition of immigration was that anybody migrating to South African should be able to assimilate into the white population (Crush and Williams, 2005). By this definition, therefore, Africans were not considered immigrants (Crush, 2008). Rather, they came to South Africa as temporary contract migrants under bilateral agreements between the apartheid government and neighbors, including Lesotho, Mozambique and Malawi (Crush and Williams, 2005). However, after 1994, the South African government started formulating various policies and laws appropriate to the country's new role in a changing regional, continental and global migration regime (Crush and Williams, 2005).

Against the new role, the Constitution in terms of section 23 provides for bill of rights which includes labour rights as one of the fundamental rights. This provision makes the right to fair labour practices applicable to everyone in South Africa, irrespective of citizenship or legal status (Tara, 2010).

Ancillary to the protection of labour rights in the Constitution, there are other laws enacted specifically towards this end such as Labour Relations Act 66 of 1995 (LRA) and Minimum labour standards such as Basic Conditions of Employment Act 75 of 1997 (BCEA) and Employment Equity Act 55 of 1998 (EEA). The Labour Relations Act was enacted in 1995 with the express purpose amongst others of giving effect to section 39 of the Constitution and also to give effect to the public international law obligations of the Republic relating to labour relations. Hence section 23 of the constitution provides that everyone has the right to fair labour practices.

The LRA led to the enactment of the BCEA which was subsequently amended in 2002. The BCEA seeks to give effect to and regulate the right to fair labour practice by virtue of section 23(1) of the Constitution, by establishing and enforcing basic conditions of employment and to give effect to the state's obligation as a member of International Labour Organisation (ILO) (Human Right Watch, 2006).

In 1998, the EEA was enacted. The purpose of this Act is to achieve in the workplace by promoting equal opportunity and fair treatment in employment through elimination of unfair discrimination and by implementing affirmative action measures to redress the disadvantages in employment expressed by designated groups to ensure their equitable representation in all occupational categories and levels in the workplace. This Act is considered as amongst the most progressive in the world.

Similarly, with the institutional framework established under the Skills Development Act of 1998, its path was set for a substantive change to skills development and the method of training workers (DPRU, 2007). According to the report of the Development Policy Research Unit (DPRU), Policy Brief Series, the issue regarding immigration of skilled workers has important economic principles because it will assist the country to tackle the problem of scarce skills and contribute immensely towards the transfer of skills to South African citizens by teaching and research at various educational sectors particularly at the tertiary educational level (DPRU, 2007).

The DPRU concludes by recommending that in order to solve these problems, the medium to long term solutions must be optimally administered in the form of closed-economy solution (DPRU, 2007). Consequently, in order to speed up the process, South Africa needs to import skills from other countries thereby employing an open-economy solution (DPRU, 2007). A key recommendation is therefore to drastically reduce restrictions on skilled

foreign immigration working in South Africa (DPRU, 2007). The implication of this is that there should be full implementation and performance of various initiatives and laws that promote just administrative actions by the people who are responsible for the issuance of permits to these skilled workers.

In 2002, the Immigration Act was enacted. It regulates the immigration system in South Africa. Section 38(1) of the Act deals with the employment of foreigners and provides that no person shall employ *inter alia* illegal foreigners or a foreigner whose status does not authorize him/her to be employed by such person. The Immigration Act further provides that anyone who knowingly employs an illegal foreigner or a foreigner in violation of this Act shall be guilty of an offence and liable on conviction to a fine or imprisonment. While section 38(1) is commendable as it seeks to ensure that foreign workers in the country possess requisite valid documents to work. However, in a situation where the employer and the employee have made applications for a work permit but due to the unnecessary or inordinate delays at the Home Affairs, this might make the employer violate section 38(1). This is the reason why we strongly advocate for the overcoming of this administrative bottleneck and bureaucracy in this study.

International legal frameworks

When the United Nations was founded in 1945, South Africa was part of it and soon thereafter, its racial policies occupied the organisation's time and energies (SAIIA). It also became a charter member of the United Nations on 7 November 1945 and subsequently one of the 51 founding members of the UN after its inception (SAHO). It was only in November 1974 that the president of the UN General Assembly ruled that the South African delegation to the General Assembly could not continue to participate in the Assembly because its delegation's credentials had not been accepted by the assembly (Jhabvala). Since then, no South African representative was permitted to sit behind the South Africa's nameplate in the General Assembly because of its racial policies which were viewed as not representing the large segment of the people of the country (SAIIA). However, in 1994, following the dismantling of apartheid and its transition into democracy, South Africa was re-admitted to the UN General Assembly (SAHO).

South Africa's development programmes and policies, including those that are directly related to, or impacted upon by migration must be understood in the context of the African continent in general and the SADC in particular. While it is true that in global terms, South Africa is a developing country that faces the myriad of issues that other developing countries around the world are faced with, in continental and sub-regional terms, South Africa often takes on the role of a 'developed' country and this

has particular implications in terms of international migration (Crush, 2008).

Frameworks on the protection of migrants

In 1948, the United Nations adopted the universal declaration of human rights. This declaration serves as the foundation of the international system of protection for human rights regardless of legal status (Amnesty International). Article 14(1) state that “everyone has the right to seek and to enjoy in other countries asylum from prosecution.” Article 15 states that “everyone has the right to a nationality” and that “no one shall be deprived of his nationality nor denied the right to change his nationality.” These articles have a persuasive influence in South Africa since the Bill of Rights as enshrined in the Constitution is designed to give effect to the Universal Declaration of Human Rights and other international Human Rights instruments.

Section 39(2) of the constitution requires a court when it develops the common law or customary law to promote the spirit, purport and objects of the Bill of Rights. In *Carmichele versus Minister of safety and security and another* (Centre for Applied Legal Studies, 2001), the Constitutional Court invoked decisions of the European Court of Human Rights, the Convention on the Elimination of All Forms of Discrimination against women and United Nations guidelines to develop a new rule of common law (Dugard, 2005). Section 39 further provides that when interpreting the Bill of Rights, the courts must look at the international laws such as the universal declarations on human rights and the way courts in other countries have decided similar cases.

In 1985, the United Nations proclaimed the declaration on the human rights of individuals who are not nationals of the country in which they live and this declaration was designed to ensure that the fundamental human rights provided in the International Covenants on Human Rights were also being guaranteed to non-citizens. The Covenants are legally binding documents which require each state which has ratified them to protect certain human rights for all individuals within its territory and subject to its jurisdiction.

It establishes the rights of legitimate aliens to security, privacy, to be equal before the courts, to choose a spouse, to marry, freedom of thought, the right to leave the country, and the right to be joined by a spouse and dependent children (Article 5 (1) of the Declaration). The Declaration also stipulates that aliens have the right to a safe working environment (Article 8 (1) of the Declaration).

The World Conference against racism, racial discrimination, xenophobia and related intolerance was adopted on 8 September 2001 in Durban, South Africa. The main aim of this conference was to explore the effective methods to eradicate racial discrimination and to promote

awareness in the global struggle against intolerance (Braun, 2001). This conference further acknowledged that immigrants in most parts of the world have been denied asylum and human rights by racist agenda and furthermore it calls on states to ensure that the laws and polices relating to all immigrants are in accordance with the Universal Declaration of Human Rights. As a result of that, South Africa is now considered the breadbasket of Africa and a country of mixed migration because it serves as a model that welcomes other nationals to seek for better economic opportunities and greener pastures (Domfeh).

International labour organization

South Africa joined the ILO in 1919, but it left the organization in 1966 because of the ILO’s position concerning the government’s apartheid policy (Bhoola). However, South Africa was re-admitted as a member of the ILO in 1994 and subsequently led in an agreement between the South African government and ILO being signed in Geneva on 5 June 1995 and it was ratified by parliament in October 1995 (DIRC, 2004). By this, it meant that South Africa is also bound by the treaty of Migration for Employment (ILO 97) 1952. Article 4 stipulates that each member state will facilitate the departure, journey and reception of migrant for employment. The treaty also provides in Articles 2 and 5 that upon arrival migrant workers are entitled to help finding employment, medical care and to be treated no different than a legal citizen in regards from discrimination, social security, housing and rights to collect a salary.

Proposed changes to the Immigration Act No 22 of 2002

There is an ongoing debate in the parliament on amendment to the Immigration Act. While some provisions in the bills are welcome as they addressed various teething problems being faced by foreigners and migrants, sadly, there are some provisions which are anti-progress. There is a provision in the Bill which contained increases in punishment for various offences relating to immigration if the Bill became law. As it has been highlighted earlier on that there are too many inefficiencies and incapacity to handle various tasks by the Department of Home Affairs by including additional tasks of criminalization of immigration, offences will definitely be counterproductive because of lack of capacity (PMG, 2010).

For those entering South Africa fleeing from persecution, that is, asylum seekers, they will be given 5 days to get to the nearest refugee office from their port of entry. These applications will be processed within 14 days. But if the application fails, the applicant is expected to leave the country, otherwise, if apprehended, will be

liable to imprisonment for 4 years. There have been a lot of criticisms of this proposed provision by different NGO's in the country and they have advocated that such provision should be removed from the Bill. But government is adamant and the parliament seems to be supporting this position. Suffice to mention that a refugee who fled his country of origin as a result of upheavals, wars and violence, would rather prefer to violate the provision if refused and go to jail where he is assured of his security, safety and all the rights accruable to a prisoner.

However, on the positive side, The Bill recognizes the enormous contributions of skilled people in key industries that are contributing to the economy regardless of their origins. Against this backdrop, the NGOs, in their presentations to the parliament, reinforces the need to do away with unnecessary stereotypes and categorizing which have led to negative behavior towards foreign nationals (PMG, 2010). The critical skills permit will replace the exceptional skills and quota permits. Again, the Minister will publish the list of skills that the economy requires from time to time in the Government Gazette, only those whose professions are listed will have their applications considered.

With regard to establishing business by foreigners, the Bill provides that business visas will not be readily granted. The Minister will publish the sectors requiring investment in the Government Gazette from time to time. Only those people who are interested in starting a business in those sectors will have their applications considered.

Efficacy of these approaches

The various policies, laws, measures, strategies, initiatives and international legal frameworks discussed present a very unique opportunity for South Africa to control and at the same time ensure that there is a workable system on how to handle various issues regarding the immigration of foreigners to South Africa either to work or study.

It should be noted that by improving the efficiency of the staff handling these applications, the Home Affairs will be able to protect legal foreigners and also manage to control the number of foreigners entering the country. The recent granting of permits to all Zimbabwean nationals is remarkable and the promise to extend this to other nationals is welcome.

Admittedly, South Africa is facing a critical problem regarding scarce skills in various fields such as engineering, sciences and so on. These fields have been, over the years, overwhelmingly dominated by the Whites. For reasons best known to some of them, they have left the country after the beginning of the new democratic dispensation in 1994. As a result of this, there is a huge gap created in these fields. In order for the country to continue to excel in its industrial activities, there is a need to bring in skilled workers who will fill this gap. It is

against this backdrop that the majority of the industries are currently recruiting skilled labourers from other countries. However, the problem is that the Home Affairs and its official's unnecessary beauracracy is a major stumbling block to realize this. And as earlier mentioned, the government has decided to intervene and it is hoped that they should continue.

The attitude of the officials of Home Affairs towards foreigners during the processes of regularizing or legalizing their stay in South Africa could also go a long way in abating vices such as xenophobia and attacks on foreign nationals.

RIGHTS OF FOREIGNERS UNDER THE CONSTITUTION AND STATUTORY LAW

The Constitution and Promotion of Administrative Justice Act (PAJA) are complimentary and mutually inclusive regarding the right to just administrative action. The Bill of Rights applies to all the people regardless of their nationality in the country. Section 7(1) of the Constitution provides: "The Bill of Rights is a cornerstone of democracy in South Africa. It enshrines the rights of all people in our country and affirms the democratic values of human dignity, equality and freedom." With regards to the issue of administrative justice, section 33 provides for the right to just administrative action and this is also applicable to all nationals in the country as prescribed by section 7(1).

Section 33(1) states "Everyone has the right to administrative action that is lawful, reasonable and procedurally fair." The terms "everyone" and "any person" have already been interpreted by the Constitutional Court to be susceptible to an ordinary literal meaning to include even foreigners (Larbi-Odam, 1998). However, when the issue is about application of just administrative action to foreigners, the Home Affairs and their officials have been found not to have actively complied with the provision of Section 33(1). Ancillary to this provision is section 3 of PAJA (2000) which provides that any person should be heard in any situation where decision is about to be taken that can affect such a person's rights. It also makes provision for such person to obtain legal representation in complex cases. With regard to applications to obtain permits at the Home Affairs, in most cases, the applicants are denied the rights or allowed opportunities to state their cases personally. If denied, most applicants are unable to seek redress because they might not be able to afford the costs of legal representations.

Section 3(4) gives the administrator who is taking such an administrative decision the discretion to move away from the requirements of section 3(2). In doing so, the administrator has to consider the purpose, effect, urgency and objects of taking such an administrative action. It cannot be said that the Home Affairs has exercised this discretion in good faith as some applications have never been responded to and those that were responded to

were sometimes denied. However, the victims can compel the officers or home affairs to release the reason and information for denying the applications by virtue of section 32 of the Constitution which provides for access to information held by the state and any person required for the exercise or protection of any rights. In some cases, the applications stop at the reception counter. The receptionist might decide to forward the application to the relevant officers thereby, at the onset, denied the applicant without giving any reason or justification. These acts are tantamount to violation of section 3(2) of PAJA and section 33 of the constitution.

Effects of PAJA on just administrative action

On 30 November 2000, the PAJA came into operation to compliment section 33 of the Constitution. It is on the basis of the foregoing that section 8 of the Immigration Act provides that before making a determination adversely affecting a foreigner, the Department of Home Affairs shall communicate the contemplated decision and related motivation to such person and give him/her the opportunity to make representations and that such a person shall be notified in writing of his/her rights under this section and other prescribed matters and may not be deported before the relevant decision is final (PAJA 2000). In the same manner, section 34(1)(a)(c) of that Act provides that an illegal foreigner shall be notified in writing of the decision to deport him/her and his/her right to appeal such a decision, and shall be informed upon arrest or immediately thereafter of such rights. These provisions are obviously a break from the notorious past. More importantly, the preamble to the Immigration Act categorically states that it is to ensure that immigration control is performed within the highest standards of human rights protection.

Despite such legislative and judicial niceties, executive bureaucracy still dictates the course of administrative justice in the offices of the Department of Home Affairs. In the case of *Ruyobeza et al.* (2003) where the refugee applicant from Burundi wrote a letter to the Standing Committee for Refugee Affairs for a refugee certificate, there was no response whatsoever from the committee to the letter for more than three months or any written reminders elicit any answer. The committee ignored him completely without any acceptable explanation. The court held that the unreasonable delay in responding to such application constitutes a ground for review.

JURISPRUDENCE IN THE SOUTH AFRICAN COURTS

During the apartheid era

During the apartheid era, the courts were not prepared to impute liability to government functionaries who discharged legitimate government business and carried out

functions prescribed by legislation (Okpaluba, 2006). Consequent upon this, draconian legislation passed during the unsavoury past (Lawyers for Human Rights) of the apartheid era to regulate the entry into and residence in South Africa made life unbearable for many foreigners because of the arbitrary powers of the executive coupled with the bureaucratic procedures that must be met at the then Secretary of the Interior office (Section 8(2) Aliens Control Act of 1937). This approach was vigorously challenged and gave rise to the institutions of various suits and litigations in the various courts. In the case of *Sachs* (1934), ouster clauses contained in the statutes were invoked by the then Supreme Courts in order to support the action of the executive whereby the executive might not give any reason for administrative measure taken. It is worth mentioning that in the case of *Barclay* (1967), the then appellate division categorically held that there was certainly no express provision either in the then Aliens Act or in the Regulations imposing on officials a duty of giving an affected alien an opportunity of the *audi alteram partem* rule. Similarly, in *Everett* (1981), the applicant was given less than a day as a holder of a temporary residence permit to leave Cape Town for Britain. The Cape Provincial Division held that the notice of the Minister had to be set aside because the *audi alteram partem* rule was not applied. The respondent Minister of the Interior had opposed the application on the ground that there was no obligation on respondent to afford applicant an opportunity to put her case to him when the respondent acted in terms of section 8(2) of the 1937 Aliens Act. "She had just married a few hours before the application and marriage was arranged long before. No reasons were given to her, ejecting her from South Africa."

One would have expected that there would be a new beginning with the advent of constitutional democracy in 1994 pertaining to the plights of foreigners. However, this is not the case because it seems that the hands of some presiding judges are still tied because they still deliver judgments in favour of the executive where it is very apparent that there have been violations of just administrative actions. This notwithstanding, there are other judges who still uphold the right to just administrative actions in their various decisions. The different attitudes would be reflected subsequently.

Post apartheid era

The new constitutional democratic dispensation brought a remarkable change due to the enforcement provisions empowering the courts to grant appropriate relief and to make just and equitable orders for the enforcement of the guaranteed rights, remedies and recovery of damages for government wrongs in particular (Okpaluba, 2006). The other factor influencing the development of bureaucratic delictual liability is the peremptory constitutional

injunction that the courts must develop the common law having regard to the spirit purport and objects of the bill of rights and this gave rise to power of courts to grant appropriate relief. Section 39(2) empowers the courts to award damages for breach of fundamental rights through common and foreign influence (Okpaluba, 2006).

While there have been adequate provisions in various laws regarding the right to just administrative actions since 1994, the reality is that those who are responsible for the implementation and performance are still very far from achieving the major goal of applying and performing just administrative action in their various callings. This situation is exacerbated by the courts delivering judgments against the victims where it is very apparent that there has been violation of the rights to just administrative action.

One of the first post-apartheid cases in 1995 that dealt with the plights of foreigners in South Africa was the case of Parekh (1996). The applicant had applied for permanent residence whilst holding a temporary residence permit. The application was turned down without any reason. The court held, on the judicial precedent set by the cases of Tsang (1995) and Naidenov (1995), that the applicant for a permanent residence permit does not have any rights, interests or expectations. Therefore, provisions of section 24(c) of the interim Constitution could not be invoked in order to apply the principle of *audi alteram partem* and no reason was adduced for the refusal of the application. The court concluded that once a state has an absolute discretion, it would never be obliged to give reasons for refusing anyone admission to its territory.

The right to be heard

It is one of the rules of natural justice, it requires judicial officers, arbitrators or administrative officials to hear the other side before any decision is taken; prejudicial facts must be communicated to the person who may be affected by the administrative decision, in order to enable him or her to rebut such facts; the administrative organ exercising the discretion must be impartial, as a general rule, it may be said that the principles of natural justice apply whenever an administrative act is quasi-judicial if it affects the rights and liberties of an individual (Baxter, 1979). This rule was applied and upheld in the post-apartheid case of *Discovery* (2008) where the legal question before the court was, whether a foreign national who works for another person without a work permit issued under the Immigration Act was an employee as defined by the Labour Relations Act. The court held that the right to fair labour practice is a fundamental right. The court held further that the contract concluded between *Discovery Health* (the applicant) and *Lanzetta* (the respondent) was valid. The respondent was therefore an employee as defined in the LRA and the CCMA had jurisdiction to determine the unfair dismissal

dispute referred to it.

Another important decision which upheld the rule of law was the case of *Kasiyamhuru et al.*, (1999) where Mthinyane J (as he then was) held that the First Applicant, a citizen of Ghana, was a holder of a residence/work permit which was extended from time to time. All of a sudden, in February 1998, he was informed by the Department of Home Affairs that it was finally extended to 31 March 1998 and that he had to leave the country by that date. The court held that the Minister's wide discretion was not absolute and was subject to the Constitution and that there is nothing in the Constitution to indicate that an alien is not entitled to procedurally fair administrative action and that the case of *Foulds* was "more in line with the Constitution". Therefore, the holding in *Parekh*, *Xu* and *Naidenov* cases, that the State had an absolute and exclusive discretion on allowing foreign nationals into South Africa without giving reason is against the rule of law: "In my view", continued Mthinyane J: "the Constitution has placed South African law on the sound basis that every individual who comes before the courts in this country, whether high or low, poor or rich, alien or local, is entitled to enjoy the benefits flowing from the supremacy of the Constitution, which affect his or her rights, interests or legitimate expectations" (Tetty, 1999).

That was a move in the right direction, moving from executive bureaucracy to just administrative action.

Unreasonable delay in processing of applications

A similar situation involving the heart-rending apathy and disinterest of the Department of Home Affairs unfolded in the case of (*Centre for Child Law*, 2005) which involved a number of unaccompanied foreign children detained at Lindela Repatriation Centre facing imminent and unlawful deportation. For almost six months, the children had been in prolonged detention and their state of mind had deteriorated to the extent that there had been incidents of attempted escape, threats of suicide and a stabbing and the Department of Social Department had failed to bring the children before the Krugersdorp Children's Court despite a court order.

The court held that the respondent's behavior was a serious infringement of the children's fundamental rights. And held further that detention of these children is unlawful and should cease immediately because the manner in which the children were deported was unlawful and shameful.

More importantly, the court admonished the States and the persons in positions of authorities that are responsible for the implementation of laws and policies by stating categorically that: "As South Africans, we are justifiably proud of our country and of our democracy... We are proud of those policies that are enshrined in the Constitution, a Constitution which is unparalleled in Africa

and, indeed, equals most advanced countries in the world in terms of liberality and compassion. We have Nelson Mandela, who has become an icon world-wide because of his love for all children and continued efforts towards caring for those in needs. We subscribe to the principles in the international treaties. We claim to enforce the laws put in place to protect the rights of illegal immigrants. Yet, all these lofty ideas become hypocritical nonsense if those policies and sentiments are not translated into action by those who are put in positions of power by the State to do exactly that; who are paid to execute these admirable laws, and yet, because of apathy and lack of compassion, fail to do so (Kiliko, 2006)."

Conditions of detention

It is pertinent to reiterate that a foreigner seeking asylum in South Africa is regarded as an illegal alien and risks being arrested, detained and deported (Section 9(4) of the Immigration Act), prior to the issuance of an asylum-seeker permit. It is therefore incumbent on the department to speed-up processes of the application because of the deplorable and unhygienic conditions where asylum seekers are kept. Such deplorable situation was experienced for days by the applicant in the case of Kiliko (2006) who had to sleep outside Cape Town offices on different occasions without means, support systems, family, friends or acquaintances and any sympathy, assistance or interest from the department. The department was aware that the state is obliged to respect the basic human rights of any foreigner who has entered its territory, and that such person is protected by Constitution, entitled to all the fundamental rights entrenched in the Bill of Rights (Kiliko, 2006). However, the department's lackadaisical attitudes to the enabling laws specifying their responsibilities to the applicants are aptly described by Mercredi (1993) thus: "You can have it in your books, but it is not going to apply to us (Mercredi, 1993). The inordinate delays at the instance of department to process applications are considered as violation of the fundamental rights of the foreign asylum seekers under the Constitution (Sections 10 and 12.) and also under the Refugees Act (No. 130 of 1998 (sections 21 - 22).

It does happen that even where the Minister of Home Affairs has to exercise the discretion personally with regard to some foreigners' applications, the implementation will still be carried out by the low ranking officials in the Departmental and they may refuse to act or apply their minds to factual questions and fail altogether to exercise the discretion prescribed by the Act (Littlewood et al., 2006). There have been instances where officials have randomly arrested and detained foreigners by carrying out a blanket policy of detaining all persons perceived to be illegal immigrants without any caution, thereby exercising their discretions unreasonably. This amounts to violation of right to movement and liberty of the victims (Ulde, 2009).

Obviously, this administrative recklessness ought to be controlled and checked in order not to expose the department to constant litigations which is usually funded through the tax payer's money.

South Africa should not emulate the writings of Lord Steyn's which states to the effect that "in a time of war, armed conflict, or perceived national danger, even liberal democracies adopt measures infringing human rights in ways that are wholly disproportionate to the crisis (Du Plessis, 2009). This statement was echoed by the American decision in Hamdi (2004) but the decision in Salim (2006) reversed this and declared the use of military commission at Guantanamo Bay unlawful. South Africa should guard against potential government abuse of power (Du Plessis, 2009).

In Jeebhai (2009), the case involves the attitude of Home Affairs officials in dealing with foreigners and abuse of rights where one Rashid appeared to have been subjected to a disguised extradition or extraordinary rendition to Pakistan (Du Plessis, 2009). Rashid was suspected of terrorism and other anti-state elements and was subsequently handover to Pakistan. As a result, Rashid's removal from South Africa was unlawful and unconstitutional. Rashid was not informed of his right to legal representation before being deported. This evidence makes it clear that Rashid was not informed of his right to demand that assurance be sought from Pakistan by the Republic of South Africa that he would not face torture or other gross human rights abuses on his arrival in Pakistan. All the stated circumstances indicated the elements of extraordinary rendition despite the report of Amnesty International and Human Rights Watch that Pakistan has co-operated with the United States of America and committed numerous human rights violations against those suspected of being involved in terrorism.

The cases involving foreigners coming before courts are usually only the tip of an iceberg. Hundreds of foreigners are given cold shoulder treatments and are never accorded the human dignity they deserve in terms of the constitution. The Immigration and the Refugees Acts were enacted to protect and ensure the rights of the foreigners; however, cases discussed above indicate that though the country is seventeen years into constitutional democracy, executive bureaucracy is still the order of the day. Lamenting on this concern, Justice Brandeis aptly said that: "In a government of laws, existence of the government will be imperiled if it fails to observe the law scrupulously. Our government is the potent, omnipresent teacher. For good or for ill, it teaches the whole people by its example. If government becomes a law breaker, it breeds contempt for law; it invites every man to become a law unto himself; it invites anarchy (Olmstead)."

In the same vein, in Kiliko (2006), the court observed that the State is required to lead by example and administrative convenience is not acceptable as an

excuse. In Jaipal (2005), the Constitutional Court had held that all those involved in the public administration must take all reasonable steps to ensure maximum compliance with constitutional obligations even under difficult circumstances in upholding fundamental rights. The foregoing decisions have shown that some jurists are sensitive to both the public clarion calls and at the same time ready to uphold the rule of law no matter the circumstances. The judges act as guardians against overarching and they do so in a manner that is democratically affirming (Du Plessis, 2009).

CONCLUSIONS

The South African government is currently working tirelessly to ensure that foreign nationals in the country are treated with respect and dignity. The laws are there but the problem is with implementation, performance and the necessary oversights by the high level officials to ensure that low ranking officials who are usually the primary contact persons regarding various applications at the department dutifully perform their works. It is against this backdrop that there have been drastic moves towards strengthening the law which is now having some positive impacts and this is mainly due to proper implementation, monitoring and evaluation. However, the concern is that officials continue to violate human rights of foreigners on a daily basis in different ways. Most of the victims are usually indigents who may not be able to challenge this in courts as provided by the Constitution of South Africa in section 33(3)(a) as those who are detained are never informed of their right to legal representation before deportation.

There is also a need for ensuring that unnecessary litigation are avoided by doing everything possible to enable those skilled foreign nationals who come to South Africa after having been invited by South African companies to reside and work in the country.

It is hoped that the effort that the Minister of Home Affairs are putting in order to find a lasting solution to the Zimbabweans living in South Africa will be maintained throughout and applied to other foreign nationals. As a signatory to most international treaties and conventions, South African law offers a wide range of remedies to any aggrieved foreign nationals as they are not limited to the provisions of the domestic laws. Recourse can be had from these international instruments as they have become a part of the South African law after ratification.

In as much as South Africa stands to learn from the jurisprudence and approaches from other countries, and the way the courts have applied these laws, it should also be noted that its position is clearer than that in the United States of America.

The proposed changes to the Immigration Act will go further in giving effect to its preamble: "The South African economy may have access at all times to the full measure of needed contributions by foreigners and

"xenophobia is prevented and countered both within government and civil society (Immigration Act 13 of 2002)."

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