



# Workplace Bulletin

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## DOES ALL THE LAWS OF SA ALSO APPLY TO FOREIGNERS?

Employers must be aware that all South African Labour Laws also apply to foreigners and it is appropriate to refer to an article in The South African Labour Guide by Ivan Israelstam;

### **Recent Labour Court case shows general assumption's fallacy**

Many employers have long assumed that illegal immigrants or employees without work permits have no legal rights in South Africa. Many employers have consequently mistreated illegally employed staff believing they have no recourse to labour law. That is, employers have paid illegal immigrants low wages, deprived them of employee benefits and have dismissed them at will.

They have based their actions on the assumption that their so called "illegal employees" are unable to use the law to take the employer to task. However, it has recently been confirmed that this type of employer is labouring under a dangerous misapprehension. In the case of Discovery Health Ltd v CCMA & others (CLL Vol 17, April 2008) a Mr Lanzetta, an immigrant, obtained a temporary residence permit and later a work permit to work for a business called MPCS.

He later joined Discovery Health as a call centre agent before his work permit was renewed. He claimed that Discovery had delayed giving him the documents he needed to renew his work permit which then expired. Discovery then terminated his employment on the grounds that his continued employment would breach section 38(1) of the Immigration Act that effectively prohibits persons from employing foreigners whose status does not authorise their employment.

Lanzetta then referred a dispute of unfair dismissal to the CCMA. Discovery then contested the CCMA's jurisdiction to consider the dispute on the grounds that his employment contract had been voided by his illegal status and that Lanzetta was therefore not an employee. It is law that the CCMA does not have jurisdiction over cases referred by people who are not employees.

The CCMA decided that, as long as an employment relationship existed it did have jurisdiction to deal with the matter. The employer, dissatisfied with this jurisdictional finding, took it on review to the Labour Court.

The court found that:

- Although Lanzetta's employment status may have been illegal, he was resident in South Africa legally.
- It had been the employer and not Lanzetta who had contravened the Immigration Act, because the wording of that act prohibited employers from employing certain foreigners rather than prohibiting the foreigners from accepting employment.

- Section 23 of the Constitution provides that "everyone" has the right to fair labour practice. There is no indication in the Constitution or in the Immigration Act that illegally-employed foreigners are excluded from this constitutional right.
- The Immigration Act's prohibitions against the employment of so-called "illegal" foreigners does not void the employment contract of such a foreigner.
- The definition of an employee as per the Labour Relations Act (LRA) does not require there to be an employment contract in order for a person to be an employee.
- Neither does section 23 of the Constitution require the existence of an employment contract.
- International law and ILO Convention 87 supports this principle.
- The definition of employee does also extend to people who work without the existence of a contract.
- The court therefore agreed with the CCMA that Lanzetta was an employee in terms of labour law and that the CCMA did have jurisdiction to consider his dispute.

It is important to note that this most important court decision did not include a finding that Lanzetta had been unfairly dismissed. The court was merely asked to decide whether the CCMA was entitled to hear Lanzetta's matter. This ruling only allows the CCMA process to get going.

It is still to be decided whether it was unfair of the employer to dismiss Lanzetta due to the fact that his continued employment breached the provisions of the Immigration Act. Nevertheless, employers need to take heed of the warnings that stem from the Lanzetta case.

That is, employers should not:

- Employ people whose employment is illegal.
- Delay in assisting foreign employees to obtain the documents they need to maintain the legality of their employment.
- Treat foreign or illegal employees any differently to other employees.
- In dealing with the problem of illegally employed staff members, terminate their employment without following legal procedure.
- Become the meat in the sandwich between the provisions of the Immigration Act on the one hand and the requirements of the LRA on the other. Instead, employers should obtain expert advise before taking any decisions or any action in this regard.

**It is therefore advised that if you as the employer are not sure who you may employ and what your obligations are, contact us for assistance.**

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