

EMPLOYMENT OF FOREIGN NATIONALS WITHOUT VALID WORK PERMITS: LEGAL RISKS AND DISMISSAL PROCEDURES



The employment of foreign nationals has become a pressing issue in recent months, particularly with the march scheduled for 30 June 2026.

Nationwide, joint operations between the Department of Employment and Labour (DEL), the Department of Home Affairs (DHA), and the South African Police Service (SAPS) have intensified. Surprise labour inspections and enforcement actions at companies are now commonplace, underscoring the seriousness of compliance with immigration and labour laws.

In a previous article we outlined what employers can expect from a *labour inspection* and how to prepare, in this article we look at employer's obligations for hiring foreign nationals in South Africa.

Which laws govern the employment of foreign nationals in South Africa?

The **Immigration Act 13 of 2002** places strict obligations on employers regarding the hiring of foreign nationals.

Section 38(1) prohibits employers from employing--

1. an illegal foreigner;
2. a foreigner whose immigration status does not permit employment; or
3. a foreigner working outside the scope of their visa or permit.

Employing a foreign national in contravention of the Act is a criminal offence. In terms of **section 49(3)**, knowingly employing an illegal foreigner or one in violation of the Act may result in fines and imprisonment.

The proposed **Employment Services Bill** (29 May 2026) introduces harsher penalties, such as fines of up to R100 000 per illegal employee and possible imprisonment.

At the same time, the ***Employment Services Act 4 of 2014*** ensures that foreign employees—even without valid work permits—retain the right to enforce employment-related claims against employers.

This means that while employers may face penalties, employees are not automatically stripped of labour protections.

In a 2017 case, ***Sithole v Metal and Engineering Industries Bargaining Council and Others***, the Court held that even if an employment contract was argued to be invalid due to the foreign national's permit status, the individual could still qualify as an employee in terms of **section 213 of the Labour Relations Act of 1995 (LRA)**.

What are the employer's obligations for hiring foreign nationals in South Africa?

Employers must ensure that foreign employees--

- o possess valid documentation authorising them to live and work in South Africa;
- o work strictly within the conditions and limitations of their permits or visas;
- o do not perform duties outside the authorised scope of their immigration status.

The relevant documentation may include work visas; Zimbabwean Exemption Permits (ZEPs); Lesotho Exemption Permits (LEPs); refugee permits; asylum seeker permits; or approved waiver, visa or appeal applications. Employers should verify the authenticity of documents, as fraudulent permits remain a significant risk.

How should an employer deal with undocumented personnel or expired permits?

If an employee's permit or visa has expired or additional documentation is required, a formal request for the relevant documentation should be issued to the employee.

What should an employer do if an employee cannot produce a valid work permit or visa?

Employers must follow proper procedures under the **LRA. Section 188** of the Act states that a dismissal will only be considered fair if the employer can prove that the reason for dismissal is fair and relates to the **employee's conduct, capacity, or the employer's operational requirements**, and that the dismissal was carried out in accordance with a fair procedure.

The Code of Good Practice: Dismissals and relevant case law guide this process. While the Code often addresses incapacity due to ill-health or poor performance, incapacity also extends to situations where employees cannot legally perform their duties, such as lacking a valid work permit. This is known as **general incapacity**, where the employee is unable to continue working because they do not meet a legal requirement necessary for employment.

- If the employee is unable to produce a valid Work Permit/Visa/document within a reasonable period after a written demand requiring proof of legal status had been issued, the employer should conduct an incapacity hearing.
- If the employee presents fraudulent documentation knowingly, disciplinary action can be taken.

Conclusion

General incapacity due to non-compliance with legal requirements is a recognised ground for dismissal under South African labour law. However, employers must balance their duty to comply with immigration laws with employees' constitutional right to fair labour practices.

A fair incapacity process requires proper investigation, a reasonable opportunity for the employee to provide documentation, and adherence to the LRA and the Code of Good Practice. Only then will termination of employment be considered lawful and fair when an employee cannot meet the legal requirements necessary to perform their duties.

SERR Synergy assists employers in understanding and complying with all employment-related legislation, helping businesses reduce legal risk, remain compliant, and manage foreign national employment processes with confidence.

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