Date 15/06/2018

CIRCULAR TO THE INDUSTRY

ENFORCEMENT OF CLAUSE 58(1)(b) OF THE MAIN COLLECTIVE AGREEMENT

1. Purpose

The purpose of this ruling is to provide guidance to employers and employees regarding the interpretation and enforcement of clause 58(1) (b) of the Main Collective Agreement in respect of the obligations of employers in the road freight and logistics industry regarding the employment of foreigners.

2. Interpretation

For purposes of this ruling, all the words and phrases defined in the Immigration Act, 2002 (Act No. 13 of 2002), bear the meaning ascribed to them in that Act.

3. Background

Clause 58(1)(b) of the Main Collective Agreement prohibits an employer from knowingly employing a person who is an illegal immigrant.

The source of this prohibition is section 38(1) of the Immigration Act, 2002 (Act No. 13 of 2002). That section prohibits anyone from employing:

- An illegal foreigner (which has the same meaning as an “illegal immigrant” as contemplated in clause 58(1)(b));

- A foreigner whose status does not authorise him or her 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.

In terms of the Immigration Act:

- An employer is obliged to make a good faith effort to ascertain that no illegal foreigner is employed by him or her or to ascertain the status or citizenship of those whom the employer employs; and

- Anyone who knowingly employs an illegal foreigner or a foreigner in violation of the Immigration Act commits an offence punishable by a fine or imprisonment for a period not exceeding one year.

This ruling is intended to give content to the meaning of clause 58(1)(b) in conformity with the Immigration Act.

4. Interpretation of clause 58(1)(b)

As a matter of law, clause 58(1)(b) must be interpreted in conformity with the Immigration Act. The Immigration Act already imposes the obligations referred to in paragraph 3 above on employers in relation to the employment of foreigners.

As far as the authority of foreigners to conduct work in the Republic is concerned, the Immigration Act makes a distinction between foreigners who are permanent residents and those who are not:

- Foreigners issued with permanent residence permits have all the rights, privileges, duties and obligations of a citizen, save for those rights, privileges, duties and obligations, which a law or the Constitution explicitly ascribes to citizenship. In the result, holders of permanent residence permits may lawfully conduct work within the Republic;

- For those foreigners who are not holders of permanent residence permits, the Immigration Act provides for a visa system: a visa is the authority to temporarily sojourn in the Republic for a specific purpose authorised by the visa. Each category of visa (and at times each individual visa) provides differently regarding the rights, duties and privileges of its holder to conduct work in the Republic; and

- In addition, foreigners who have been granted asylum in terms of the Refugees Act, 1998 (Act No. 130 of 1998) have the right to seek employment in the Republic. This is also the case for those foreigners issued with an asylum seeker permit by the Department of Home Affairs only if the particular permit allows the holder thereof to conduct work in the Republic.

In the result, clause 58(1) (b) must be interpreted to mean that an employer is prohibited from employing:

- an illegal foreigner,

- a foreigner whose status does not authorise him or her 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, as contemplated in the Immigration Act.

It is incumbent on each employer to ascertain whether a foreigner employed or sought by such employer is permitted by the Immigration act to be employed by such employer and on terms, conditions or in the capacity contemplated in such foreigner's status.

5. Enforcement

In terms of its constitution, one of the objects of the Council is to enforce collective substantive agreements on wages, benefits and other conditions of employment.

The Council intends to henceforth enforce clause 58(1)(b) as interpreted in paragraph 4 above.

Section 38(4) of the Immigration Act, read with Regulation 35 of the Immigration Regulations, 2014 (GN R413 in *GG* 37679 of 22 May 2014), requires an employer employing a foreigner to keep certain prescribed records relating to each foreigner employed by such employer during the currency of that foreigner's employment and for a period of two years after the termination of that foreigner's employment.

These prescribed records are:

- a certified copy of the foreign employee's passport;
- a copy of the relevant visa or permanent residence permit of that employee;
- proof of the capacity in which the foreigner is or was employed; and

- a copy of the foreigner's IRP5 form or certificate of earnings and job description, respectively.

In conducting their enforcement functions in relation to section 58(1)(b), the Council's agents will require unfettered access to the prescribed records held by employers in respect of each foreign employee employed by such employer. Employers are expected to comply with this requirement.

6. Authority for ruling

This ruling is issued by the Council in terms of clause 68 of the Main Collective Agreement.

7. Should you require any assistance please do not hesitate to contact your local Designated Agent.

Kind regards,

Musa Ndlovu
NATIONAL SECRETARY

(This document has been sent electronically and is therefore not signed)