

## **STEFANIE DE SAUDE DARBANDI: Let us hope the visa landscape shifts from obstruction to collaboration**

As we step into 2024 it is necessary to cast a retrospective eye on the intricate tapestry of SA immigration and citizenship law that has been woven over the past few years. The seismic waves of the Covid-19 pandemic have not only disrupted lives and businesses but also intensified challenges within our immigration system, resulting in formidable backlogs.

In a year that tested our resilience we found ourselves at the forefront, spearheading nearly 90 high court cases, including four pivotal delay cases that encapsulated the frustration of about 800 applicants waiting on waivers or visas. Despite our victory in the Supreme Court of Appeal, where the court emphasised the minister's ultimate responsibility for the department of home affairs' actions and criticised obstructive and dilatory stances, the delays persisted.

These legal battles, spanning family ties, skills, business ventures or financial contributions to SA, underscore the pressing need for streamlined immigration processes. The court's condemnation of the department's unconscionable and disgraceful approach further highlights the urgency of reform within home affairs.

Amid these trials a glimmer of hope emerged. The home affairs parliamentary portfolio committee demonstrated commendable diligence in holding the minister to account for the backlog. Its proactive stance, devising solutions and aiding the public with applications, is a positive stride forward. In addition, the extension of the Zimbabwe exemption permit and Lesotho special permit offers a lifeline to nationals from these countries, providing sustained stability for those who call SA home.

A landmark Constitutional Court judgment marked a paradigm shift, allowing foreign spouses of South Africans with children in the country to transition from visitor visas to other visas. This ruling also extends the privilege to foreign parents, enabling them to work on a relative visa. It is a pivotal development that acknowledges and bolsters family units within immigration matters.

However, amid these positive developments a less auspicious event demands attention — the recently published white paper on migration. It erroneously attributes SA's migration issues to bad laws rather than flawed implementation, particularly misguided international law. This misdiagnosis forms the crux of the paper's shortcomings.

The misidentification of the root causes of the migration crisis in the white paper is concerning. It argues that the issues arise from flawed laws, sidestepping the department's responsibility and incorrectly assuming foreigners are a net negative. The core mistake lies in assuming SA's refugee laws primarily result from international law, overlooking their direct derivation from the SA constitution. Even if SA withdraws from the relevant treaties, the constitutional obligations will persist.

Then, less than a week ago, we encountered a publication headlined "Leaked memos expose SA's visa chaos", which shed light on the daunting challenges confronting the department. The leaked memo, with its stark assessment and warnings of security risks, court-ordered queue jumps and hindrances to skilled overseas applicants, adds an additional layer of concern. While the accuracy of the figure of a backlog of 95,000

visa applications remains uncertain, the undeniable substantial backlog demands immediate attention.

The leaked internal document, dated November 2023, reveals the dire situation within the department. It emphasises the escalating litigation and legal costs due to the department's struggle to promptly adjudicate permits, underscoring the prevalence of class action cases and mandamus applications that put pressure on all involved parties. Criticising rushed adjudication processes, the memo references a delay case initiated by DSD Attorneys (in collaboration with Visa One) that, following an appeal, emerged victorious in the Supreme Court of Appeal in 2017.

The leaked document rightly highlights persistent issues since the judgment, underscoring the strain on the department. However, it suggests three misguided points: questioning applicants' locus standi (resolved in 2017), implying lawyers push litigation for queue-jumping (not our approach), and advocating departmental opposition to class actions (questionable).

The memo also claims that individuals without financial means can't litigate, deeming it unfair. Contrary to this, we actively engage in pro bono, reduced fee or capped fee matters, assisting those with limited resources in pursuing their legal outcomes. Frustration arises not from the need for immediate action but from the lack of any response. The focus should shift to a constructive response, acknowledging the impact on disrupted lives. It's time for the department to take responsibility, address internal challenges and avoid blame-shifting, guiding its actions accordingly.

Recognising the nuanced dynamics within this challenging landscape is vital. The memo portrays foreigners as seemingly "jumping the queue," contributing to the backlog. It's essential to emphasise that individuals enforcing their rights through legal action aren't merely "jumping the queue" but compelling the department to adhere to its own rules.

While imposing stringent rules on foreigners, the department appears to struggle with compliance, leading to the backlog and numerous high court cases. This underscores the urgency to clear the backlog and reinstate the fulfilment of duties and laws. These dynamics mirror the expectations placed on foreigners, who often face perceived harshness and apparent relentlessness.

The surge in litigation is a manifestation of the desperation felt by applicants who, with little recourse, resort to legal avenues. Litigation is emotionally and financially draining, time-consuming and often yields noncompliance from the department. Yet the prevalence of legal actions highlights the gravity of the situation and the lengths people are forced to go to secure their rights.

In light of these challenges it is imperative to shift the focus from condemning those enforcing their rights to addressing the root cause — the department's struggle to adhere to its own rules and comply with court orders. The excessive litigation should serve as a stark reminder of the urgent need for systemic reform within the department.

Looking ahead, it is our earnest hope that the department will take a decisive step in getting its ducks in a row. Beyond addressing the backlog, we advocate for a more collaborative approach, actively engaging with stakeholders and fostering open

communication. Let 2024 mark a shift from blame to action, where the department works hand-in-hand with all involved parties, including legal practitioners, to streamline immigration processes.

Our vision extends beyond mere clearance of backlogs; we hope for a year of positive transformation marked by increased responsiveness, engagement and openness. It is essential for the department to shed defensiveness and embrace a collaborative spirit, understanding that immigration lawyers share the same objective — to ensure that deserving individuals can live lawfully in SA. This shared goal is not only for their benefit but also for the greater good of the SA people and its economy.

Let 2024 be a year of progress and inclusivity for all, where the department actively collaborates with stakeholders, responds to challenges with agility, and operates with transparency. The promise of positive change lies not only in clearing the backlog but in creating a more efficient, welcoming and just immigration system that aligns with the aspirations of the department and benefits the nation as a whole.

Source: Stefanie De Saude Darbandi – Business Day

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