



**IN THE HIGH COURT OF SOUTH AFRICA,
FREE STATE DIVISION, BLOEMFONTEIN**

Case No: 785/2022

REPORTABLE: YES/NO

OF INTEREST TO OTHER JUDGES: YES/NO

CIRCULATE TO MAGISTRATES: YES/NO

In the matter between:

MBUYISELO SANI

Applicant

and

**MEC: DEPARTMENT OF ECONOMIC,
SMALL BUSINESS DEVELOPMENT,
TOURISM AND ENVIRONMENTAL AFFAIRS,
FREE STATE PROVINCE**

1st Respondent

**HOD: DEPARTMENT OF ECONOMIC,
SMALL BUSINESS DEVELOPMENT,
TOURISM AND ENVIRONMENTAL AFFAIRS,
FREE STATE PROVINCE**

2nd Respondent

THE PUBLIC SERVICE COMMISSION

3rd Respondent

HEARD ON: 13 FEBRUARY 2023

CORAM: NAIDOO J *et* BOMELA, AJ

JUDGMENT BY: NAIDOO J

DELIVERED ON: 03 JULY 2023

[1] The applicant comes before us in terms of Uniform Rule 53, seeking to review and set aside the decision of the second respondent who refused his application for examination leave. The first and second respondents filed a Notice of Intention to Oppose the application. They, however, failed to file an Answering Affidavit. The third respondent filed a Notice to Abide by the decision of the court. The applicant sought no relief against the third respondent and cited it in this case, as it may have a substantial interest in these proceedings. For convenience I will refer to the first respondent as “the MEC” or “the first respondent” and the second respondent as “the HOD” or “the second respondent”. Adv P Chaka represented the applicant. There was no appearance on behalf of the first and second respondents. The applicant sought an order in the following terms:

“1. That the decision of the Second Respondent, dated 31 January 2020 to refuse the leave request duly submitted by the Applicant for the period of 5 February 2020 until 17 February 2020 on the basis that it does not fall within the ambit of paragraph 6.1.2 (“Examination leave”) of the Special Leave Policy is reviewed, corrected and/or set aside.

2 It is declared that the Applicant’s field of Study (Theology) is in the interest of the Public Service as stipulated in the provision of paragraph 6.1.2 of the Special Leave Policy.

3. In so far as may be necessary, the period of one hundred and eighty (180) days referred to in Section 7(1) of the Promotion of Administrative Justice Act (“PAJA”) is extended to the date of the launch of this application.

4. The cost of this application be paid by the First and Second Respondent jointly and severally, in the event of opposition.”

[2] The applicant, who is currently retired, was prior to such retirement, employed in the department of the second respondent as a Chief Director for Strategic Planning and Research. On or about 31 January 2020, the applicant submitted a written request to the second respondent for special leave for the period 5 February to 17 February 2020, being nine (9) days, to enable him to write and complete his examination for a qualification in Theology. The HOD refused the request, and addressed a letter to the applicant and stated in paragraph 2 thereof:

“Kindly take note that your application for leave for examination for the period 5 February 2020 until 17 February 2020 is not approved as per paragraph 6.1.2 of the Special Leave Policy. However you can use your normal leave days for this purpose”

[3] The Special Leave Policy for the Department of Economic, Small Business Development, Tourism and Environmental Affairs (DESTEA), was attached to the papers and referred to by the applicant in oral argument and in his Heads of Argument. The applicant relies on paragraph 6.1.2 thereof, headed “*Examination Leave*”, as the basis for the relief he seeks. It reads:

“(a) One working day special leave with full pay may be granted to an employee for each day on which he/she sits for a final examination which, in the opinion of the Head of Department,

(i) has the objective to better equip the person concerned for a career in the public service, irrespective of whether it relates to his/her immediate field of work or not, or

(ii) is in a field of study, which is in full or in part in the interest of the public service.

(b) The examination referred to above may include ordinary School subjects up to Grade 12.

(c) If the special leave above granted precedes and follows a day of rest, such day(s) of rest must be disregarded when calculating the number of special leave days to be granted to an employee.

(d) Two working days special leave with full pay may be granted to an employee for preparation in connection with his/her final examination.

(e) This provision may be applied **only once** in respect of a re-examination or an examination which an employee failed and which he/she has to repeat.

(f) One day's special leave may be granted to employees for **supplementary examinations**. This provision may (sic) be applied only **once** to the same subject and if the employee repeats the subject and is subject to supplementary examination, vacation leave may be utilised,

(g) Special leave may only be granted for bona fide final examinations. Final examination include (sic) all examination that lead to the conclusion of a subject (including semester courses)".

[4] The applicant met with and discussed the matter with the second respondent's Labour Relations Representative who merely advised him that the HOD has the discretion to grant or decline the leave. He escalated the matter for consideration by the first respondent, who did not respond. The applicant then lodged a grievance with the third respondent, who called for reasons from the HOD for refusing to grant the applicant special leave. The reasons were furnished to the third respondent, based upon which, it found that the applicant's allegations in

respect of the HOD's the non-approval of his examination leave to be unsubstantiated. He thereafter launched the current application.

[5] The applicant alleges that while he was studying Theology, it enabled him to perform certain services, which included officiating at marriages, providing pastoral counselling at certain government departments as part of the employee wellness programme and providing spiritual services as a chaplain at various Correctional Services Centres, Department of Health and Department of Social Development. I note that he did not indicate whether these services were undertaken in the course of his employment or in his private capacity

[6] The applicant does not dispute that the HOD has the discretion to approve or refuse an application for examination leave. He hinges his challenge on the fact that the examination leave policy does not specify or define what studies are in the public interest or better equip a person for a career in the public service. The HOD had not indicated what factors he took into account in refusing the request for examination leave, and in the absence of such reasons, the applicant argues that it was evident the decision to refuse examination leave was taken in bad faith and/or arbitrarily and/or capriciously. The applicant further alleges that the provisions of the Leave Policy are irrational as they entitle the HOD to take any decision he sees fit with the result that an affected employee will have no right of recourse, as the HOD has exercised his discretion with impunity.

[7] The applicant argues that the decision of the HOD in this matter is materially flawed and cannot be considered justifiable in terms of section 6(2)(e)(v) of the Promotion of Administrative Justice Act 3 of 2000 (PAJA). He therefore relies on the following grounds in his quest for the review and setting aside the impugned decision of the HOD:

7.1 The discretionary power conferred on the HOD is manifestly arbitrary;

7.2 The policy does not define what constitutes "*interest of the public service*";

7.3 The policy does not define the career that is considered to better equip an employee in the public service.

[8] DESTEA furnished the record relevant to this matter and the reasons for the HOD's decision, upon request by the applicant. The decision to refuse the application for examination leave was communicated to the applicant in a letter dated 31 January 2020. DESTEA was requested by the third respondent, in a letter dated 18 August 2020, to furnish reasons for the non-approval of the applicant's application for examination leave. Their response, dated 27 August 2020, was, *inter alia*, that in view of the fact that the applicant's "*application for examination leave was to pursue course (sic) in Theology, the Department is of the opinion that the field of study is not in the interest of the department or the public service in general*". The third respondent on 25 November 2020, addressed a letter to the applicant communicating its decision that his claim was unsubstantiated. The additional reasons furnished by DESTEA/the HOD in its Record and Reasons furnished to the applicant are:

"1 Paragraph 6.1.2 of the Special Leave Policy

2 Special leave is granted by the discretion of the HOD or his delegate and it is not a right.

3 The Applicant, Mr Sani, was already leaving the Public Service as he went on pension during November 2020, thus he was not going to serve the interest of the public.

4 The Applicant ended up filling the annual leave form as mentioned in the letter dated 31 January 2020"

[9] The applicant did not take issue with the reasons or the record furnished by DESTEA. It is apparent from the record that, following upon the decision of the HOD, communicated to him on 31 January 2020, the applicant did indeed apply, on 4 February 2020, for annual leave in respect of the very period which was not approved as special leave by the HOD. The applicant alleges that he was not paid

for the period of leave that he applied for, but provided no proof of this. He has in addition not alleged or proved that he has suffered any prejudice. When this was pointed out to Mr Chaka and he was asked what would be the purpose and effect of an order made three years after the event, he replied that the applicant is entitled to be paid for the 9 days leave, for which he received no payment. It therefore appears that the primary objective of the applicant is to secure payment for the 9 days' leave that he utilised in 2020. Mr Chaka also conceded that the initial application for special leave by the applicant, did not, in any event, comply with the provisions of 6.1.2 (a) or (d), which the applicant relies on.

[10] It is trite that the onus rests on the applicant to make out a case for the relief he seeks. In this matter, the applicant did not even deal with the fact that he applied for annual leave, and that he was not paid for such leave, nor did he dispute or challenge the validity of the reasons advanced by the HOD, namely that the applicant had applied for annual leave, that he was due to retire a few months later, in November 2020, and in fact did so, and that in the opinion of the HOD, Theology was not a course of study that would be in the interests of the public service. As I indicated earlier, it is unclear whether the pastoral and religious services that the applicant rendered to certain government departments was a private service or at the behest of his employer, or any other government source, in his official capacity

[11] The applicant applied for the extension of the period of 180 days stipulated in section 7(1) of PAJA, within which to bring an application to court for the review of an administrative action. The applicant relies on the provisions of section 6(2) (v) and (vi) of PAJA in that he alleges in Founding that the decision taken by the HOD, absent any reasons therefor, was taken in bad faith and/or arbitrarily and/or capriciously. After such reasons were furnished, the applicant did not apply for leave to file a Supplementary Affidavit to deal with such reasons, so that this court must accept the applicant's acquiescence in the validity of such reasons. In view thereof, it becomes unnecessary to deal with the relief sought in terms of PAJA, I accordingly refrain from doing so. Even if the applicant did counter the reasons furnished by the HOD, he has not adequately explained or justified the delay in bringing these proceedings to court.

[12] With regard to costs, the applicant sought costs only in the event that the respondents opposed the application. Although the M EC and HOD filed a Notice to Oppose, they took the matter no further and the hearing proceeded on an unopposed basis. I am of the view that no costs order is necessary in this matter

[13] In the circumstances, the following order is made:

The application is dismissed, with no order as to costs

NAIDOO. J

I concur

L BOMELA AJ

On behalf of the applicant: Adv P Chaka
Instructed by: Matlho Attorneys
2nd Floor, Metropolitan Building
96 Henry Street
Bloemfontein
(Ref: NM Masalla/SAN1/0001)