

**IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CAPE LOCAL DIVISION, BHISHO)**

CASE NO: 298/2014

In the matter between:

JONGILANGA CLEMENT KALIMASHE

Applicant

And

**HEAD OF THE DEPARTMENT OF
SOCIAL DEVELOPMENT & SPECIAL
PROGRAMMES, EASTERN CAPE**

First Respondent

**MEMBER OF THE EXECUTIVE COUNCIL,
DEPARTMENT OF SOCIAL DEVELOPMENT
AND SPECIAL PROGRAMMES, EASTERN CAPE**

Second Respondent

JUDGMENT

MBENENGE J:

[1] At all times relevant to this application, the applicant was in the employ of the Department of Social Development and Social Programmes in the Eastern Cape Provincial Government (The Department).

[2] The applicant's terms and conditions of service were governed by the Public Service Act (Proclamation 103 of 1994), the Regulations made thereunder and Circulars and Policy Documents issued from time to time by the relevant functionaries of the Government in terms of the applicable regulatory framework.

[3] It is not in dispute that some officials of the Department who had been placed at Bhisho got to be deployed in East London and were transported between Bhisho and East London (and back) on a daily basis, at the expense of the Department. It is common cause that the applicant utilized his private motor vehicle to commute between his home at Pakamisa, a Township located in the outskirts of King

Williamstown, and East London for the period spanning 23 August 2004 and 31 March 2006.

[4] By Memorandum dated February 2012 penned by the Senior Manager: Human Resource Administration of the Department approval was sought from the Head of the Department for payment of, *inter alia*, an outstanding claim lodged by the applicant on the basis that he had incurred travelling expenses resulting from his deployment from Bhisho to East London. The recommendation received the support of the top management of the Department, including the Head of the Department, but was made subject to the applicant (and of course other affected officials referred to in the Memorandum) furnishing the relevant documents in support of their claims. No specificity was, however, given at that stage regarding the nature of these documents.

[5] The use of privately owned motor vehicles by officials in the Department undertaking official trips is regulated by the Government Motor Transport Operational Plan (the Transport Policy). In terms of the Transport Policy the Head of the Department may authorise the use of privately owned motor transport on official duty, where it is cost effective to do so. The distance allowance payable is, according to the Transport Policy, as determined by the National Department of Transport and approved by the relevant Treasury components.

[6] The applicant's quest to be paid a travelling allowance for the trips undertaken as aforesaid yielded naught. The instant application, which is a sequel to correspondence whereby the applicant was urged to furnish the Department with the outstanding supporting documents to no avail, was launched in May 2014. The applicant seeks an order compelling the respondents "*to pay monies due to [him] in the sum of R89 051.26 for travelling allowances during the period between 23 August 2004 and until 31 March 2006.*"

[7] In his founding affidavit, by which he must stand or fall, the applicant relies on the Memorandum (referred to in paragraph [4] above) which, in so far as relevant hereto, states:

“In 2004 some officials of the Department were relocate to east London Back- Office and the Department was proving those officials with transport between Bhisho and East London on daily bases. This was necessitated by the fact that it was employer’s arrangement for the officials to work in East London instead Bhisho.

Mr Kalimashe was utilizing his own vehicle between Pakamisa where he reside and East London Back –Office whereas other officials were provided with transport, and this communication breakdown resulted to the official being incurring travel expenses amounting to **R 89,051.26**”. Sic.

[8] The applicant does, however, acknowledge, in his application papers, that it has always been incumbent on him to submit documents in support of the claim, but contends that retrieving or tracing these documents has become an impossible task, as he can’t find the documents, due to the passage of time. The applicant does not dispute that the use of his private motor vehicle to commute between Pakamisa and East London did not receive the prior approval of the Head of the Department. He contends, however, that he had been misled into believing that he could use his private motor vehicle without the Head of Department’s prior approval.

[9] No other dispensation is pointed to by the applicant in support of the application, save the contention that the use of his private motor vehicle to commute to East London where he had been deployed had been agreed to and sanctioned by the Department, and the Department had undertaken to pay him for the trips undertaken. Because the papers are not clear as to precisely what the applicant’s cause of action is, during the hearing of the matter I was advised from the Bar, after expressing my disquiet regarding the state of the papers and the manner in which the papers had been drafted, that the applicant was in fact seeking to enforce an agreement previously made to pay him for official trips undertaken by him using his private motor vehicle.

[10] The application is being opposed principally on the ground that the applicant did not seek and obtain the approval of the Head of the Department before his utilisation of his private motor vehicle for any purpose whatsoever. At another level, the respondents deny that the applicant had, in the first place, been deployed from Bhisho to East London. Their claim, motivated by relevant documentation, is that East London was, at the outset, his placement station. Nothing, for present purposes, however, hinges on whether East London was his placement station or his deployment

station. The real issue is whether, on the applicant's own showing, he has, in any event, made out a case for the relief he is seeking.

[11] It is trite law that public servants may not contract themselves out of the provisions of the regulatory instruments in terms of which they have been employed. In *University of the Western Cape v MEC For Health and Social Services* 1998(3) SA 124 (CPD) at 134E-F, Hlophe J (as he then was) said the following concerning the fulfilment of promises not sanctioned by statute:

“In my view it is in the interests of good administration that a public body should act fairly and should implement whatever promise it may have made so long as the implementation thereof does not interfere with its statutory duty. *In casu* the first respondent is under a duty in terms of s 11 of the Act to make appointments to the public service. Therefore any promise or undertaking which conflicts with its statutory duty to make appointments cannot be enforced by the courts. The contrary is clearly untenable. It would lead to an absurd situation whereby public bodies could simply ignore their statutory duty by making promises which conflict with them. Surely it would be unfair to enforce promises which fly in the face of statutory duties.”

[12] It is also trite law that public authorities possess only so much power as is lawfully authorized, and every administrative act must be justified by reference to some lawful authority for that act.¹ In other words, a valid exercise of administrative power requires both a lawful authorization for the act concerned and the exercise of that power by the proper of lawful authority.

[13] The applicant has not discharged the onus resting on him to show that the Transport Policy entitles him being paid travelling allowances. The Head of the Department has a discretion to either approve or not the use of a privately owned motor vehicles to undertake official trips at Government expense. That discretion has not been exercised, and no proceedings have been launched to compel him to exercise the discretion. The applicant is in effect seeking enforcement of a promise or undertaking which flies in the face of the Transport Policy. The Department has also not been shown to have waived the requirement that the Head of Department must be approached for his approval before an official uses a privately owned motor vehicle

¹ Baxter, *Administrative Law*, JUTA (1984) at 384.

for undertaking official trips at the Department's expense. Whether or not the applicant was aware of the requirement is not relevant to the enquiry.

[14] In all these circumstances, the application must fail.

[15] Only the question of costs remains. In my view, there is no reason why costs should not follow the result. Even though initially the documents that the applicant was called upon to furnish in pursuit of his claim to be paid a travelling allowance were not specified, he was informed by letter dated 08 March 2013 that “[n]o HOD [a]pproval to use own vehicle or condonement” had been sought and obtained. In his response letter penned on 14 March 2014 the applicant merely requested that the issue relating to the lack of prior approval of the trip “*be considered when reviewing this claim*”. Resorting to this application in pursuit of his quest to be paid the travelling allowance was in those circumstances an ill-conceived step.

[16] Therefore, the application is dismissed with costs.

S M MBENENGE

JUDGE OF THE HIGH COURT

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Date heard

22 September 2016

Date Delivered

27 September 2016