

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Not reportable

CASE NO: J 1656/19

In the matter between:

EMALAHLENI LOCAL MUNICIPALITY

First Applicant

MUNICIPAL MANAGER: EMALAHLENI

LOCAL MUNICIPALITY

Second Applicant

And

NTSHWARE RAPOLAE

Respondent

In re

NTSHWARE RAPOLAE

Applicant

And

EMALAHLENI LOCAL MUNICIPALITY

First Respondent

MUNICIPAL MANAGER: EMALAHLENI

Second Respondent

Heard: 15 August 2019

Judgment delivered: 16 August 2019

JUDGMENT

VAN NIEKERK J

- [1] This is an application to rescind an order granted by this court on 31 July 2019 when the applicants in the present proceedings were interdicted from proceeding with a disciplinary hearing against the respondent.
- [2] I accept that the matter is urgent. The disciplinary hearing against the respondent is set to continue next week. These proceedings have been protracted, to say the least. Indeed, the charge sheet was issued exactly three years ago, on 16 August 2016. Ever since then, the respondent has sought by every means to delay the proceedings, mainly through the filing of various interlocutory applications. If this matter were to be heard in the normal course, it is unlikely given the present state of the opposed motion roll that the matter would be enrolled for hearing before the second term of 2020. It is in both parties' interest that there be some conclusion to the disciplinary hearing as soon as possible, and any relief that the applicant might obtain in the ordinary course will not satisfy this purpose. The fact that the respondent has been on paid suspension since August 2016 is nothing less than scandalous and represents wasteful and fruitless expenditure of a significant scale. The LRA contemplates that disciplinary hearings are informal and expeditious.

- [3] The applicant states that it did not receive notice of the application, and that the copy of an email produced in these proceedings purportedly as proof of service relates to a prior application brought by the respondent on under J 1625/19 on 22 July 2019, set down for hearing on 25 July 2019. That application was dismissed. It appears from the papers that the application which is the subject of the present proceedings was served by email, which is not a mode of service recognised by the Rules of this court. However, there is no affidavit to confirm that the email was in fact sent, or that it was received by the intended recipient. To the extent that the respondent's attorney states in a service affidavit deposed to on 31 July 2019 that the email address is that of the municipal manager and that he called and spoke to the municipal manager on 26 July 2019 at 11h40 on 013 690 6911 to confirm receipt of the notice of motion, affidavit and annexures, the municipal manager avers that on that date he was out of the office, at a meeting in Nelspruit. He has annexed proof of his invitation to the meeting and the attendance register, in which his attendance is recorded. This version is not seriously disputed. The response to the averment is 'allegations herein are denied and reserve arguments' (sic). In short, I find that the application set down for 31 July was not properly served, and that the applicant in the present proceedings had no notice of it. Indeed, it would appear that the respondent's representative went so far as to mislead the court on the issue of service.
- [4] The present application is brought in terms of Rule 16A, which provides that this court may rescind a judgment erroneously sought or erroneously granted in the absence of any party affected by that judgment or order. It is not necessary for an applicant in these circumstances to establish good or sufficient cause – it is sufficient that the judgment was made erroneously in the absence of the party seeking rescission.
- [5] It is clear that had the learned Judge been aware of the fact that the application had not been served on the applicant, she would never have granted the order she did. The order granted on 31 July 2019 thus stands to be rescinded.

[6] In as far as costs are concerned, the court has a broad discretion to make orders for costs according to the requirements of the law and fairness. I must necessarily take into account that the applicant has succeeded in the present application. However, it is further necessary for the court to express its concern and displeasure at the conduct of the respondent and his attorney and the manner in which the order that is the subject of these proceedings was obtained. The courts rely on the integrity of a party and parties' representatives. When that integrity is called into question, it should be expected that a costs order on a punitive scale is appropriate.

I make the following order:

1. The order granted on 31 July 2019 is rescinded.
2. The respondent is to pay the costs of the application on the scale as between attorney and client.

André van Niekerk
Judge

REPRESENTATION

For the applicant: Adv. Phehane instructed by De Swardt Myambo Attorneys

For the respondent: Adv. Maleka, instructed by MH Mkhabela.