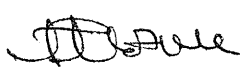


"A"



IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

DELETE WHICHEVER IS NOT APPLICABLE	
(1) REPORTABLE: YES / NO.	
(2) OF INTEREST TO OTHER JUDGES: YES / NO.	
(3) REVISED.	
21/5/15 DATE	 SIGNATURE

CASE NO: 36600/2011

In the matter between:

GERMISTON MUNICIPAL RETIREMENT FUND

Plaintiff

and

EKURHULENI METROPOLITAN MUNICIPALITY

Defendant

Date of Hearing: 23 to 26 February 2015

Date of Judgment: 22 May 2015

JUDGMENT

MOTHLE J

Introduction

- [1.] The plaintiff, Germiston Municipal Retirement Fund (*"the Fund"*) instituted an action against the defendant, Ekurhuleni Metropolitan Municipality (*"the Municipality"*) for payment of a total amount of R78,138,124.15 plus interest per annum, being the Municipality's portion of contribution to the shortfall from 5.5% in the Fund's interest earned on investment, in accordance with the rules of the Fund.

Background

- [2.] The Fund was established in 1924 and is duly registered in terms of Section 4 of the Pension Fund's Act, No. 24 of 1956 (*"the Act"*). The Municipality is a Local Government, established in terms of Section 12 of the Local Government: Municipal Structures Act, No. 117 of 1998.
- [3.] The Fund administers the pension scheme for its members who are the employees of the Municipality.. The rules of the Fund, which were agreed to between the Municipality and members of

the Fund, were approved and registered on 1 May 1994, by the Registrar of Pensions Funds in terms of Section 12 of the Act.

- [4.] In terms of Rule 1.5 of the rules of the Fund, where reference is made to "*the council*" and to "*employer*", it means the Municipality. The Municipality is bound in terms of Section 13(a) of the Act to pay all contributions due in terms of the rules of the Fund.
- [5.] As an employer, the Municipality pays pension contributions on behalf of its employees, to the Fund. The Fund then invests such contributions to maximize returns on the investments, in order to offer better pension payouts to the members on their retirement.
- [6.] Rule 10.8.1 of the rules of the Fund states thus:

"If the rate of interest earned on the total monies (including any uninvested monies) of the Fund during any financial year should be lower than five and one-half per cent (5.5%) the council shall contribute to the Fund such a sum as would increase, on being added to the interest actually earned, the rate of interest to five and one-half per cent (5.5%) during such financial year."

- [7.] Rule 10.8.1 in simple terms means that if the interest rate earned on the total monies of the Fund during any financial year is lower than 5.5%, the Municipality shall make its required contribution to the Fund, such portion of the amount as would increase, on being added to the interest actually earned, the rate of interest to 5.5% during that financial year. The contribution is also made by other municipalities as participating employers to the Fund and on behalf of their employees.

The Claim

- [8.] The Fund alleges that for the financial years 2008 and 2009 there was a shortfall on the interest earned in each of these financial years, to make up the threshold of 5.5%. In the financial year of 1 July 2007 to 30 June 2008, the Fund earned a rate of interest of 3,89% on its total moneys and for the financial years 1 July 2008 to 30 June 2009, an interest rate of 0,40% on its total moneys. In terms of Rule 10.8.1 of the rules as stated above, the Municipality is liable to contribute its portion that will result in the shortfall on the interest earned reaching the threshold of 5.5%. The cause of action is based on a claim by the Fund that the

Municipality must make good its portion of the shortfall below the threshold of 5.5% in the rate of interest earned for the financial years 2008 and 2009. The total shortfall in this instance is stated as R78 138 124,15.

[9.] Before dealing with the defences raised by the Municipality against this action, it is apposite to state that there is a history of litigation between the two parties, where an action was instituted as a result of failure by the Municipality to pay its portion of the contribution in terms of the same rule.

[10.] On the 10th August 2004 the Fund issued summons against the Municipality for payment of a shortfall on the rate of interest earned during the financial year 1 July 2002 to 30 June 2003.¹ The matter came before Mr. Justice Claassen in the High Court, Gauteng Local Division, Johannesburg (*“the Local Division”*). The Municipality raised a number of defences in that case. These included a dispute on the correct interpretation of Rule 10.8.1.

¹ Case number 17692/2004, High Court, Gauteng Local Division, Johannesburg.

[11.] The learned Judge quotes a summary of the defences from the heads of argument filed by Counsel for the Defendant, in particular with reference to Rule 10.8.1 as follows:

"4. The defendant denies that it is liable to the plaintiff. It relies for this purpose on essentially the following defences which are alternative to each other:

4.1 The first defence relates to the determination of the rate of interest which should be earned by the Fund before the rule is triggered into play;

4.2 The defendant has alleged that the rule contemplates that it will only be obliged to make such a contribution, "if the monies that flow into the Fund over a financial year, being a return on the money it has invested, were less than 5.5%." In other words, the defendant alleges that one must look at what was actually laid out by the plaintiff in order to determine its "total moneys (including any uninvested moneys)". This is the book value approach.

5. Alternative to the above but closely linked to it is that the defendant, if bound by this rule, is obliged to pay only: "...if the yield achieved on the actuarial value of the assets, determined using a discounted cash flow approach, was less than 5.5% per annum compound";

6. Alternative to the above defences, the defendant has alleged that the municipality had no authority to agree to be bound by such a rule and the said rule was inconsistent with the interim Constitution and the final Constitution."

[12.] After examining the various canons of interpretation as well as authorities, the Local Division dismissed the Municipality's contentions on the interpretation of Rule 10.8.1, including the other defences it raised and ordered payment of the shortfall due. With leave of the Local Division, the Municipality took the

matter on appeal to the Supreme Court of Appeal (*“the SCA”*). The appeal in the SCA was confined to the interpretation of Rule 10.8.1. After consideration of submissions from both parties as well as other authorities, the SCA² upheld the decision of the Local Division on its interpretation of Rule 10.8.1, which decision went against what the Municipality contended was the correct interpretation.

The Municipality’s defence in this action

[13.] The Municipality in this action has, in essence, pleaded three main defenses. These are:

- (i) a plea to this Court to reconsider the interpretation of Rule 10.8.1, in light of some historical background facts which it concedes were not placed before the Local Division as well as on appeal in the SCA during the previous action;
- (ii) A plea that the Fund, in terms of the Act, owes it a fiduciary duty to accommodate its interests in selecting its investments; and

² The decision of the SCA is reported in *Ekurhuleni Municipality v Germiston Retirement Fund* 2010 (2) SA 498 (SCA).

(iii) A further plea, with reference to section 50 of the Municipal Finance Management Act 56 Of 2003,³ ("MFMA") that Rule 10.8.1 offends public policy and is unlawful and unenforceable. Consequently the Municipality considers itself not bound by that rule, in that the shortfall contended for could be used for other more compelling need for delivery of municipal service to deserving communities within their area of jurisdiction.

[14.] In response, the Fund raised a replication of *res judicata* and estoppel to the Municipality's plea which was followed by the Municipality's rejoinder to the Fund's replication. I deal with the replication and rejoinder in detail hereunder.

Issues for determination by this Court

[15.] The issues for determination in this action are that the Court should :

- (i) reconsider the interpretation of Rule 10.8.1 as decided by the Local Division and confirmed by the SCA on appeal, in light of certain historical facts which were then not known to

³ Section 50 of the MFMA provides that a municipality "may not issue any guarantee for any commitment or debt of any organ of state or person, except on the following conditions"... The conditions are listed in the sub-section.

it and as such, not placed before the two Courts in the previous action;

- (ii) Decide whether Rule 10.8.1 is against public policy and should therefore not be enforced, for reasons different to those raised in the previous action and dismissed by the Local Division, which however were not raised on appeal in the SCA;
- (iii) Decide whether the Fund should be barred from claiming from the Municipality because when it made its investments, it did not consider the interests of the Municipality and thus failed to act in good faith, as provided for by the Act. In terms of the Act, the Fund owes a fiduciary duty to the Municipality to act in its interest and in good faith;
- (iv) Decide on the objections of *res judicata* and estoppel as raised in the Fund's replication

The alleged new evidence on the "history of the rule"

[16.] It is contended by the Municipality that the SCA decision on interpretation of this rule, was taken without the Court being alerted to the history of the rule. This would include the

accounting practice of the Fund over the period. The period contended would be the time since the introduction of the rule into the rules of the preceding scheme, through to the point at which the rules of the Fund in its current form were registered in 1994.

[17.] By way of exploring the historical development of the rule, the Municipality contends that the rule never existed until 1973 when the new rules of the Fund were promulgated in the administrator's notice 1643 of 11 October 1973. This was Rule 43(1) which was taken from the provisions of Section 8(3) of the Local Government Superannuation Ordinance 16 of 1958 (Transvaal).

[18.] One important difference between the provisions of Section 8(2) of the 1958 Ordinance and Rule 43(1) as it then was, is that in Section 8(3) of the 1958 Ordinance there is an additional clause which prescribes how the calculation of the interest should be made. The provision contains clauses A and B. Ordinance 23 of 1969 has a similar clause which also prescribes how the calculation should be made.

[19.] The Municipality further contends that the accounting history of the Fund shows that when the rule refers to "*the rate of interest earned on the total monies (including any uninvested monies) of the Fund*"

and to "*interest actually earned*". The statutes contemplated a distinction between interest, on the one hand, and capital gains and losses on the other⁴. It could not have contemplated that these phrases would include unrealized capital gains. It contends further that unrealized capital gain or losses over a particular financial year are the difference between the market values of assets at the commencement and completion of that financial year. It will therefore be necessary to state the assets at market value.

[20.] However, the Municipality further submits that when Rule 43(1) was introduced into the rules of the Fund in 1973, the assets of the Fund were valued only at book value and the market value of the Fund asset was not reflected in the financial statements of the Fund at all. This practice according to the Municipality continued until 2001. In the financials of 2001, six years after the new rule was agreed to by the parties and registered in 1994, the accounts changed to value assets at market value on the balance sheet with the inclusion of adjustments to fair value of investments on the revenue account. These changes became features of the financial statements of the Fund from 2002 onwards.

⁴ Paragraphs 5.6 to 5, 9 of the Municipality's plea.

- [21.] Relying on the decision in **Natal Joint Municipal Pension Fund v Endumeni Municipality**⁵ the Municipality contends that the new interpretation must take into account *“the language used in light of the ordinary rules of grammar and syntax; the context in which the provision appears; the apparent purpose to which it is directed and the material known to those responsible for its production. The inevitable point of departure is the language of the provision itself, read in context and having regard to purpose of the provision and the background to the preparation and production of the document.”*
- [22] With this brief background history of the evolution of the rule, the Municipality contends that the present interpretation of the rule should be based, amongst others, on how the parties would ordinarily have understood the rule when it was first introduced into the rules of the predecessor Fund.

The replication and rejoinder

- [23.] In its replication to the Municipality's plea, The Fund contends that two of the defences raised by the Municipality, i.e the interpretation of rule 10.8.1 as well as the defence that the rule is unconstitutional, invalid and unenforceable on the grounds of public policy, should be disposed of on the basis that they are

⁵ 2012 (4) SA 593 (SCA) at paragraph 18

res judicata and that the Municipality should be estopped, in that both these defences have been rejected by the Local Division and the one on interpretation of Rule 10.8.1, also by the SCA.

[24.] It is the Fund's further contention that the Municipality's attempt to reintroduce consideration of these two defences, by suggesting that new evidence has been uncovered which would lead to a different interpretation, should be rejected. Finally, it is contended that even if this Court considers these defences in light of the so-called new evidence, there is nothing in that evidence which justifies a departure from the interpretation and decision of the SCA.

[25.] In the rejoinder, the Municipality contends that it has new evidence which if considered by this Court will lead to a different interpretation of rule 10.8.1 from that decided by the Local Division and the SCA on appeal. It further contends that the public policy defence arises out the provision of the MFMA, which was not in force at the time the Local Division heard the action in 2003.

[26.] The Municipality presented the oral evidence of Jeremy Peter Andrew, in support of the interpretation of the Rule in light of its historical development. This witness has also testified in the

previous 2004 Local Division trial. He was the only witness to testify in this trial.

The legal principles of res judicata and estoppel

[27.] *Res judicata* is a defence that is raised on the basis that the matter has already been adjudicated upon in the previous action between the parties. For a party to succeed on the defence of *res judicata*, it must show that the new claim is between the same parties, on the same cause of action and for the same thing. See in this regard **Royal Sechaba Holdings v Coote and Another⁶ⁱ** and **Smith v Porritt and Others⁷**.

[28.] In **Evins v Shield Insurance Company Ltd⁸** the Court stated the purpose of the doctrine of *res judicata* as being to prevent the repetition of law suits between the same parties, the harassment of a party by a multiplicity of actions and the possibility of conflict in decisions by different Courts on the same issue.

[29.] The requirements of this doctrine has been extended and relaxed to make way for a party to raise estoppel as a defence between the same parties in subsequent proceedings where either “same

⁶ 2014 (5) SA 562 (SCA)

⁷ 2008 (6) SA 303 (SCA)

⁸ 1980 (2) SA 815 (A) at 835 G.

cause of action" or the "*same thing*" requirement is not strictly speaking met, but where the same issue is raised. See in this regard **Smith v Porritt**, *supra*, paragraph 10.

[30.] The defense of estoppel is thus limited in scope in that a party can rely upon it if it can prove that the parties are the same and that the issues between them which led to the judgment will arise in the subsequent case. Prior to the decision in the **Smith v Porritt** case, the Appellate Division in **African Farms and Townships Limited v Cape Town Municipality**⁹ at page 563 C and D, held that a litigant was not permitted "*to obtain a reversal of the decision of the same question by advancing different reasons*". Further, "*different reasons leading to a different conclusions cannot affect the identify of the question to be decided*".

[31.] The Municipality concedes that in the current action before this Court, the parties are the same and the cause of action is the same. However, the Municipality contends that the thing claimed is not the same in that the previous action sought to recover the shortfall to the interest earned in the financial year of

⁹ 1963 (2) SA 555 (A).

2003 while the current action seeks to claim shortfall on the interest earned in 2008 and 2009 financial years, also the amounts claimed being different in both instances. Consequently, according to the Municipality, the *res judicata* defence cannot be good in law in that the thing claimed is not the same. However, the Municipality does not attack the defence of estoppel which is much narrower in its requirements than the *res judicata*.

- [32.] The objection raised by the Fund is similar to the one that was raised in the matter of **Pratt v First Rand Bank Limited**¹⁰. The facts in this matter were briefly that a party to a loan agreement first brought a claim to have the agreement declared null and void on a number of grounds that were ultimately dismissed. The validity of the agreement was upheld by the High Court and also on appeal. When a subsequent claim was brought under the same agreement against the party who sought the declarator, the invalidity of the agreement was once again raised in defence, although now on different grounds. The High Court held, which decision was subsequently confirmed by the SCA, that the issue of invalidity of the agreement had been finally decided.

¹⁰ (696/13) [2014] ZASCA 119 (11 September 2014) at paragraph 20.

[33.] *In casu*, the defense in law raised by the Municipality and challenging the interpretation and validity of the rule, have been raised in the Local Division and further on appeal in the SCA and were rejected in both Courts.

[34.] It is trite, as stated in **African Farms and Townships v Cape Town Municipality** *supra*, that the important consideration in a plea of *res judicata* is that there must have been a judgment. The Court in that matter held thus at page 564 C - D:

"Because of the authority with which, in the public interest, judicial decisions are invested, effect must be given to a final judgment, even if it is erroneous. In regard to res judicata the enquiry is not whether the judgment is right or wrong, but simply whether there is a judgment."

"It is quite clear, therefore, that a Defendant is entitled to rely upon res judicata notwithstanding that the judgment is wrong."

[35.] It is thus clear, as contended by the Fund that the defence of interpretation on the validity of Rule 10.8.1 has been raised and

rejected by the Local Division and on appeal, also by the SCA. Similarly, the defence on the question of public policy considerations has been raised in the Local Division and rejected by that Court. The Municipality has in both cases not raised any further appeal.

[36.] It is apposite to state that the attempt by the Municipality to have this Court reconsider the interpretation of Rule 10.8.1 is fraught with difficulties. Firstly, the Municipality concedes that the “*new evidence*” which it purports to raise in this Court was available prior to the proceedings that led to the Local Division judgment. That evidence was not presented during the trial in the Local Division. In paragraph 43 of his judgment, Mr Justice Claassen stated thus:

“43. *Mr Andrew speculated that the term “monies” might mean book value (that is the purchase price of the asset) because “this would be consistent with actuarial practice to value assets at book value (bearing in mind the Fund was established in 1924).”*

“But there is no evidence when the rule was introduced, nor whether, what actuaries was accustomed to

“historically”, had any connection with the drafting of the rule. If Defendant wanted to rely on this interpretation it would have been necessary to plead a technical meaning of the rule in a actuarial sense. No such technical or special meaning was pleaded nor was it proved. The Defendant’s contentions on this score fall to be rejected.”

[37.] Being aware of the remarks of Mr Justice Claassen in his judgment as quoted above, in particular the absence of averments relating to the historical practice that preceded the drafting of the Rule, the Municipality went on to appeal his decision and still failed to present the evidence of the historical development of Rule 10.8.1 before the SCA. **Section 22(a) of the Supreme Court Act 59 of 1959 before its repeal, and presently substituted by Section 19 of the Superior Court’s Act, Act 10 of 2013** provides that a Court of Appeal has the power to receive further evidence under this section. See also: **S v Swanepoel**¹¹ and **Dormehl Properties 282 CC v Renasa Insurance Company Limited and Others NNO**¹²

¹¹ 1983 (1) SA 434 (A).

¹² [2011] 1 All SA 557 (SCA).

[38.] The Municipality failed to seek leave of the SCA to present this evidence in terms of Section 22(a). It now wants to present the evidence before this Court. No explanation or reason is provided for this failure except that in launching its defence in this action before this Court, the Municipality pleads in the rejoinder that it was not aware of the evidence of the historical background to the development of Rule 10.8.1 at the time of the previous action. As already stated, this rule is a replacement of rule 43.1 in the previous scheme and is a product of the negotiations and agreement with the Fund. Thus the plea that the Municipality was not aware of the history of this rule cannot be sustained.

[39.] There are guiding principles for the Court to determine whether or not to receive further evidence in any proceedings and these include, amongst others:

- (i) An acceptance that there should be finality to proceedings and a litigant should not, except in exceptional circumstances, be allowed to adduce further evidence.

See: O'shea NO v Van Zyl NNO¹³

¹³ 2012 (1) SA 90 (SCA)

- (ii) The Applicant must show that the failure to adduce the evidence was not due to his negligence and must satisfy the Court that he could not have obtained the evidence if he had used reasonable diligence.

See: Douglas v Douglas¹⁴

- (iii) There must, accordingly, be an explanation why the evidence was not led earlier

See: Jeebhai & Others v Minister of Home Affairs and Another¹⁵

[40.] The Fund submits, correctly so, that both in the SCA and this Court, the Municipality has not provided an explanation that the failure to adduce evidence which it now intends to present, was not due to its negligence and that such evidence could not have been obtained with reasonable diligence. This evidence of historical development of Rule 10.8.1 was, or should have been at all material times available to the Municipality. Under the circumstances, the plea to this Court that the interpretation already decided by the SCA should be revisited cannot be accepted.

¹⁴ [1996] 2 All SA 1 (A)

¹⁵ 2009 (5) SA 54 (SCA)

[41.] Even if I am wrong on this point, there is nothing of substance in the history and development of the rule that would in my view, lead to a different interpretation to the one already determined by the SCA. There are two reasons for this. Firstly, when the SCA considered the previous action between the parties, it was mindful of the history of the predecessor to the rule 10.8.1, which is rule 43.1 and the fact that the pension scheme changed from a defined benefit to a defined contribution fund.¹⁶ Further that the rules governing the pension Fund scheme are a result of a negotiation process between representatives of the employees on the one side and the municipalities as employers on the other.

[42.] Thus the question whether the Rule existed before and how it was practiced should have been known to the Municipality at the time of the negotiations After all *“(T)he Rule in issue was carried over from the old rules (where it was rule 43.1) to the new, where it is rule 10.8.1”*¹⁷.

[43.] Secondly, there is no ambiguity in the manner in which the Rule has been expressed, which ambiguity would then justify a revisit

¹⁶ SCA judgment 2010 (2) SA 498 at 500 paragraph 6

¹⁷ SCA judgment, 2010 (2) SA 498, at 499 paragraph 1.

of how it operated if ever, before its adoption in 1994. The SCA, in paragraph 33 of its judgment, held thus:

“[33] Having regard to the context of the rules – the nature of the Fund, the general practice of pension funds, and, most importantly, the purpose and effect of the Rule – the only sensible commercial meaning to be given to it is that argued for by the Fund and accepted by the High Court. The municipalities are accordingly obliged to pay to the Fund the amount claimed.”

[44.] The Local Division and the SCA considered the arguments on the disputed interpretation concerning the meaning of the “interest actually earned.”¹⁸ Both Courts took into account the manner in which it was applied and accepted by both parties. It seems to me that the Municipality did not object to the implementation of the Rule during the financial years where the Fund registered interest above 5.5% on its investment.

[45.] Having regard to the above, I am of the view that the objection of *res judicata* incorporating estoppel as raised by the Fund and the fact that no explanation was provided as to why the

¹⁸ Local Division Judgment, paragraph 41 *et seq*; SCA judgment, 2010 (2) SA 498 at 504 paragraph 23 *et seq*.

Municipality did not present “*the new evidence*” to the Local Division and the SCA as it now wants to, the Municipality’s new evidence cannot be accepted and it stands to be rejected.

[46.] I now turn to deal with the public policy defense.

Public Policy defence

[47.] The Municipality contends that the public policy defence which was dealt with by the Local Division Johannesburg is not the same as the one that has now been raised in the current action proceedings. Therefore, the *res judicata* does not apply in this instance. It is common cause that in the 2007 judgment of the Local Division Johannesburg, the argument on public policy defence was dealt with and dismissed by the Court. The Local Division correctly in my view identified the principle inherent in the public policy defence in paragraph 66 of its judgment. This it does with reference to the matter of **Brisley v Drotsky**¹⁹ where the Court “*stated that there may be circumstances in which an agreement, unobjectionable in itself, will not be enforced because the object it seeks to achieve is contrary to public policy. In its modern guise, “public policy” is now rooted in our Constitution and the Fundamental values it enshrines include “human dignity, the achievement of equality and the*

¹⁹ 2002 (4) SA 1 (SCA) at pages 34 and 35, paragraph [91].

advancement of human rights and freedoms, non-racialism and non-sexism". The judgment of the Local Division quotes from paragraph 92 of the Brixley case as follows:

"[92] It is not difficult to envisage situations in which contracts that offend these fundamentals of our new social compact will be struck down as offensive to public policy. They will be struck down because the Constitution requires it, and the values it enshrines will guide the Courts in doing so. The decisions of this Court that proclaim that the limits of contractual sanctity lie at the borders of public policy will therefore receive enhanced force and clarity in light of the Constitution and the values embodied in the Bill of Rights."

[48.] Against the background of the meaning of public policy as defined in the Brisley case, Mr. Chaskalson, for the Municipality, argued that:

- a. Section 50 of the MFMA precludes municipalities from extending their financial commitments by way of guarantees in order to control its financial resources. This Act was only promulgated in 2003 and could

thus not form part of the defences raised in the 2003 action proceedings;

- b. That the Municipality would remain true to its constitutional and statutory obligations by directing its resources to the development of the communities in the form of providing housing, water and sanitation instead of directing such funds to the pension fund scheme under circumstances which would amount to a gratuity on the pension due to its employees.

[49.] Counsel conceded, when asked by the Court that Section 50 of the PFMA does not have retrospective effect and cannot therefore nullify agreements and guarantees that were made before its enactment. In particular in this case, the agreement between the Fund, acting on behalf of the employees of the Municipality on the one side and the Municipality itself, is expressed in the form of rules of the Fund which have been registered by the Registrar of Pension Funds in terms of the Act. Their enforcement is provided for and protected by the Act. It is thus an agreement that has full recognition, support and protection of a statute. As Mr Justice Claassen, in the Local Division stated:

"It should be remembered that the present rule also involves administrative acts by an officer of the executive

arm of government. The involvement of the Registrar in the validation of the rules, the administrative nature of the act of their registration, the necessary joinder of members to an action which would result in the striking down of any rule, and the unraveling effect of such an order on the rules in their entirety, will complicate the striking down of the rule as being against public policy. In view of these complicating factors, it cannot simply be "struck down" as one may do in the case of a contract between two parties."

[50.] The Learned Judge continues in paragraph 68 to state as follows:

"In any event I can find no basis in fact or in law to conclude that the bargain painstakingly approved by several role players including the Registrar, contravenes public policy. For these reasons the argument based on a contravention of public policy falls to be rejected as well."

[51.] I agree with the views expressed by the Local Division. Insofar as the argument on the need by the Municipality to divert pension contributions to address delivery of its mandate in the form of

housing, sanitation and other services, it should be remembered that these services will be made possible by the very employees of municipalities, members of the Fund, to whom a promise has been made that they will be provided their pension on retirement. The Municipality can thus not be heard to say that it is at liberty to ignore its undertakings which have been reduced to contractual and statutory obligations, by simply diverting funds intended for their employees to address other municipal obligations. The defence of public policy can therefore not succeed. On consideration of the whole matter, it seems to me that there is nothing new that has been introduced on this defence to rescue it from the *res judicata* objection. It is the same defence with a different slant on the argument. Either way it falls to be rejected in this case.

The “good faith” defence

[52.] The Municipality contends that in terms of Sections 7C and 7D of the Act, the board of the Fund owes a duty to act in good faith to its participating employers including the Municipality. Consequently, the board of the Fund should, in selecting investments, take account of the risk carried by the Municipality under the provisions of Rule 10.8.1. Failure to do so will result in a duty to act in good faith been breached and the Municipality can thus not be held liable

to make good the guarantee in respect of that particular financial year. Section 7C of the Act provides thus:

"7C. Objects of the board.-(1) The objects of the board shall be to direct, control and oversee the operations of a fund in accordance with the applicable laws and the rules of the fund.

(2) In pursuing its objects the board shall-

(a) take all reasonable steps to ensure that the interests of members in terms of the rules of the fund and the provisions of this Act are protected at all times, especially in the event of an amalgamation or transfer of any business contemplated in section 14, splitting of a fund, termination or reduction of contributions to a fund by the employer, increase of contributions of members and withdrawal of an employer who participates in a fund.

(b) act with due care, diligence and good faith;

(c) avoid conflicts of interest;

(d) act with impartiality in respect of all members and beneficiaries;

(e) act independently;

(f) have a fiduciary duty to members and beneficiaries in respect of accrued benefits or any amount accrued to provide a benefit, as well as a fiduciary duty to the fund, to ensure that the fund is financially sound and is responsibly managed and governed in accordance with the rules and this Act; and

(g) comply with any other prescribed requirements."

[53.] The Fund admits in the pleadings that the board owes a duty to act in good faith to the Municipality, in minimizing the risk inherent in Rule 10.8.1. However, the Fund pleads that its primary mandate is to act in the interest of its members, who are the employees of the

municipalities which participate in the scheme. In the event of a conflict between the interest of the municipalities and those of the members of the Fund, the latter's interest would prevail. This contention by the Fund is also referred to in paragraph 22 of the SCA judgment.²⁰

[54.] During argument I raised with counsel for the Municipality whether there is any particular evidence, based on objective facts which shows that in the years 2008 and 2009 or any other year for that matter, there was anything untoward which the board of the Fund did to demonstrate that it did not act in good faith as provided for in terms of the Act. Such evidence was not presented before me. It seems the Municipality assumes that because the investments made by the Fund in 2008 and 2009 did not yield returns above the threshold of 5.5%, therefore the board in its selection of the investment failed to act in good faith.

[55.] Consequently, it cannot be argued that in the years in which the Fund obtained return on their investments above the 5.5% threshold they are said to have acted in good faith and in the financial years where there is a shortfall, it is an indication that they did not act in good faith. (It should be noted that the Municipality

²⁰ 2010 (2) SA 498 (SCA) at 504.

formulated its attack carefully to avoid raising an allegation that the board of the Fund acted in "*bad faith*").

[56.] I am thus unable to find, in the absence of factual evidence supporting this allegation, that in selecting investments in 2008 and 2009, the board of the Fund failed to act in good faith. This defence must also fail.

Quantum

[57.] Apart from an amount of approximately R7 million which has been identified by the Municipality as an amount it disputes, the parties are generally agreed on the *quantum*. The Municipality claims that an amount of R7,456,371.54 has been incorrectly included in the *quantum* of R78,138,124.15 because the R7 million plus amount is in respect of an alleged shortfall attributable to the Liberty and Old Mutual Annuities, where the Fund's liabilities to pensioners have been outsourced. I agree that this amount of R7 million plus cannot be included in the *quantum* claimed against the Municipality.

[58.] In the premises, it is my view that the Fund's action should succeed and I accordingly make the following order:

1. The action instituted by the Fund against the Municipality succeeds;
2. The Municipality is ordered to pay the Fund an amount of R70,681,752.61 as the shortfall due in terms of Rule 10.8.1 of the Fund's rules plus interest thereon at 15,5% per year from 9 June 2010; and
3. The Municipality is ordered to pay the costs of this action including costs of two counsel.



S P MOTHLE
Judge of the High Court
Gauteng Division, Pretoria

For the Plaintiff: Adv. C D A Loxton SC

Assisted by: Adv. N Fourie
Sandton Chambers
Johannesburg

Instructed by: Len Dekker Attorneys
Pretoria

For the Defendant: Adv. A E Franklin SC

Assisted by: Adv. M Chaskalson SC
Johannesburg Chambers

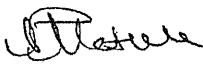
Instructed by : Bowman Gilfillan Inc
Sandton

"B"



IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

DELETE WHICHEVER IS NOT APPLICABLE	
(1) REPORTABLE: YES / NO.	
(2) OF INTEREST TO OTHER JUDGES: YES / NO.	
(3) REVISED.	
DATE 30/7/15	 SIGNATURE

CASE NO: 36600/2011

In the matter between:

EKURHULENI METROPOLITAN MUNICIPALITY

Applicant

and

GERMISTON MUNICIPAL RETIREMENT FUND

Respondent

JUDGMENT

MOTHLE J

1. This is an application for leave to appeal the whole of the judgment and order granted by this Court on 22 May 2015,

including the order as to costs, but excluding paragraph 57 of the judgment.

2. I will refer to the parties as named in the main judgment. The Municipality is the applicant in this application and the Fund is the respondent.
3. Before dealing with this application, I need to place on record that I was requested by the Fund, by way of an application which the Municipality did not oppose, to correct item 2 of the orders I made in the main judgment. In granting the order for payment of the amount claimed, I had omitted reference to the interest payable on that amount. This interest is specifically prayed for in the particulars of claim. At the commencement of the hearing of the application for leave to appeal, I made the order in terms of Rule 42 of the Uniform Rules of Court, correcting this error in the main judgment, that the following words "... *plus interest thereon at 15.5% per annum from 9 June 2010*" be added to Item 2 of the judgment orders. I now attach hereto a copy of the corrected version of that order, which is reflected in a replacement page of page 32 of the written judgment.

4. I now turn to deal with the Municipality's application for leave to appeal.
5. The fund instituted action against the municipality for payment of a total amount of R78,138,124.15 plus interest per annum, being the municipality's portion of contribution to the shortfall from 5.5% in the Fund's interest on investment, in accordance with rule 10.8.1 of the rules of the Fund.
6. In a written judgment delivered on 22 May 2015, this Court decided the matter in favour of the Fund and ordered the Municipality to make payment as claimed by the Fund.
7. The Municipality now seeks leave to appeal the whole of the judgment and orders of the Court, referred to in the preceding paragraph.
8. It is trite that in terms of **Section 17 of the Superior Courts Act 10 of 2013**, leave to appeal may be granted if the Judge is of the opinion that the appeal would have a reasonable prospect of success. There are further other grounds outlined in Sections 17(1) (a)(ii), (b) and (c) of that Act, which I am of the view they do not apply in this instance.

9. It is common cause between the parties that there was a previous action before them which came before the High Court, Gauteng Local Division, Johannesburg where the Fund was also successful. As it seeks to do in this case, the Municipality took that matter on appeal to the Supreme Court of Appeal ("SCA"). The SCA upheld the decision of the High Court, also ruling for the Fund.
10. This court found, on the evidence, that apart from the amount claimed in this case and the period in which the debt arose, the cause of action and the legal principles raised in the previous action are the same as those in the action in this court. Also the defences raised in this case were dealt with by the Gauteng Local Division, Johannesburg and in part by the SCA in the previous case. The appeal in the SCA concerned the interpretation of rule 10.8.1 of the Fund rules, which is also the case in this instance.
11. In this court, the Municipality in its defence, again launched an attack on the interpretation of the same rule, on the ground that new evidence on the history of the rule has been uncovered, which would lead to a different interpretation to that of the SCA.

12. This Court found, having considered the defences raised by the Municipality, amongst others, that:
- 12.1 the new evidence alleged by the Municipality concerning the interpretation of rule 10.8.1 will not lead to a different conclusion to that already reached by the SCA;
- 12.2 no explanation has been provided by the Municipality as to why the so-called new evidence was not presented before the High Court and the SCA even though it was reasonably available at that time; and
- 12.3 the whole defence of the Municipality is essentially a rehash of the same defence that was placed before the Gauteng Local Division, Johannesburg, when the parties were involved in the previous action. The only difference appear to be a different approach to the argument the Municipality had raised in the previous action
- 12 I agree with counsel for the Fund that it would not be proper for this Court to simply burden the SCA with a matter dealing with a

legal principle on which it has already considered and pronounced.

13 I am thus not persuaded that of there would be any reasonable prospects of success in the intended appeal. Consequently, I make the following order:

The application for leave to appeal is hereby dismissed with costs including costs of senior counsel.



S P MOTHLE
Judge of the High Court
Gauteng Division
Pretoria

For the Applicant: Adv. A E Franklin SC

Assisted by: Adv. M Chaskalson SC
Johannesburg Chambers

Instructed by : Bowman Gilfillan Inc
Sandton

For the Respondent: Adv. C D A Loxton SC
Sandton Chambers
Johannesburg

Instructed by: Len Dekker & Associates Attorneys
Plaintiff's Attorneys
Pretoria



CASE NO: 36600/2011

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

PRETORIA 30 July 2015

BEFORE THE HONOURABLE MR JUSTICE MOTHLE

In the matter between:

EKURHULENI METROPOLITAN MUNICIPALITY

APPLICANT

AND

GERMISTON MUNICIPAL RETIREMENT FUND

RESPONDENT

HAVING HEARD counsel for the parties and having read the application for leave to appeal against the judgment of the Honourable Justice MOTHLE delivered on 22 JULY 2015.

IT IS ORDERED THAT:

JUDGMENT:

The application for leave to appeal is hereby dismissed with costs including costs of senior counsel.

Gesertifiseer 'n ware afskrif van die oorspronklike dokument.
Certified a true copy of the original document. There is no indi-
Daar is geen aanduiding dat die oorspronklike dokument deur
cation that the original document has been amended by unauth-
ongemagtigde persone gevysig is nie.
crised persons

GRIFFIER VAN DIE HOOGGEREGSHOF
REGISTRAR OF THE SUPREME COURT

BY THE COURT
REGISTRAR
MM

Attorney:

REGISTRAR OF THE HIGH COURT OF
SOUTH AFRICA GAUTENG DIVISION, PRETORIA
PRIVATE BAG/PRIVAATSAK X67
PRETORIA 0001
2015 -08- 27
S. BHANA
REGISTRAR
GRIFFIER VAN DIE HOOGGEREGSHOF VAN
SUID AFRIKA GAUTENG AFDDELING, PRETORIA