



CONSTITUTIONAL COURT OF SOUTH AFRICA

Ekurhuleni Metropolitan Municipality v Germiston Municipal Retirement Fund

CCT 226/15

Date of hearing: 16 August 2016

MEDIA SUMMARY

The following explanatory note is provided to assist the media in reporting this case and is not binding on the Constitutional Court or any member of the Court.

On 16 August 2016 at 10h00 the Constitutional Court will hear an application for leave to appeal against the order of the High Court, Gauteng Division, Pretoria concerning the interpretation of a rule in the Rules of the Germiston Municipal Retirement Fund.

The Fund administers the pension scheme for employees of the Ekurhuleni Metropolitan Municipality. The Fund and the Municipality are bound by the Rules of the Fund that were registered in terms of the Pensions Fund Act. Rule 10.8.1 secures a minimum annual rate of return on the Fund's investments. In terms of this rule, if the interest rate earned on the total monies of the Fund during any financial year is lower than 5.5%, the Municipality is obligated to make-up the difference. During the 2007/8 and 2008/9 financial years, the Fund earned interest rates lower than 5.5% and as a consequence it claimed the shortfall from the Municipality. The Municipality refused to pay the shortfall which resulted in the Fund issuing summons against the Municipality in June 2011.

This is not the first time that an issue of this kind has arisen between the parties. In the 2002/3 financial year, the Fund claimed payment of a short-fall on the rate of interest earned and the Municipality refused to pay. The Fund sued the Municipality and the matter was heard before the High Court, with a subsequent appeal to the Supreme Court of Appeal. The Supreme Court of Appeal upheld the decision of the High Court, and said that the correct interpretation of rule 10.8.1 imposes an obligation on the Municipality to pay the Fund the amount claimed (*Ekurhuleni 1*).

In the present litigation, the High Court was asked to: revisit the interpretation of Rule 10.8.1 in light of new evidence; find that the Fund must make investments in

consultation with the Municipality as the employer; and find that rule 10.8.1 offends public policy. The High Court concluded that these submissions had already been raised and rejected in *Ekurhuleni 1*. The High Court rejected the invitation to revisit the interpretation of the rule. It said that nothing in the history and development of the rule would lead it to come to a different interpretation. The High Court stated that the Municipality was not at liberty to ignore its undertakings which have been reduced to contractual and statutory obligations, by simply diverting funds intended for its employees to address other municipal obligations. The Municipality unsuccessfully filed for leave to appeal in the High Court and Supreme Court of Appeal.

Before the Constitutional Court, the Municipality resists the claim of the Fund. It raises three defences. First, it relies on new evidence of the accounting records of the Fund. In this regard it says that the approach in *Ekurhuleni 1* will frustrate the discharge of its constitutional and statutory obligations to provide services. Second, it argues that the enforcement of the rule would be contrary to public policy and third, it says that the Fund did not act in good faith when it made investment decisions without regard to the potential and open-ended risk carried by the Municipality.

The Fund opposes the application on the grounds that it would not be in the interests of justice to grant leave to appeal because the same issues by the same parties have previously been determined (*res judicata*) in *Ekurhuleni 1*. The Fund argues that even if that determination is not a bar because this matter relates to a different amount arising in a different year – the claim would be precluded on the basis of the doctrine of estoppel. The Fund further says that the appeal is without merit as the interpretation of the rule that the Municipality seeks is not supported by evidence and that there is no reason to unsettle the decision in *Ekurhuleni 1*. It argues that there is no basis for contending for non-enforcement of the claim on public policy grounds because, in fact, public policy requires the Municipality to keep its promises to its employees. The Fund denies breach of any duty.

In response to the Fund's grounds of opposition, the Municipality says that: it would be inequitable if it were to be perpetually bound to an incorrect interpretation of the rule and consequential risk of payment. It contends that the payment under the rule involves a drain on the public purse and a diversion of resources away from the many of its other pressing needs.