CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 226/15

In the matter between:

EKURHULENI METROPOLITAN MUNICIPALITY Applicant

and

GERMISTON MUNICIPAL RETIREMENT FUND Respondent

Neutral citation:	*Ekurhuleni Metropolitan Municipality v Germiston Municipal Retirement Fund* [2017] ZACC 1
Coram:	Mogoeng CJ, Nkabinde ADCJ, Cameron J, Froneman J, Jafta J, Khampepe J, Madlanga J, Mbha AJ, Musi AJ and Zondo J
Judgments:	Nkabinde ADCJ (majority): [1] to [46] Jafta J (minority): [47] to [72]
Heard on:	16 August 2016
Decided on:	17 January 2017
Summary:	**Pension** — Pension fund rule — Jurisdiction — Reconsideration of interpretation of the pension fund rule based on "new" evidence — Can a municipality's constitutional obligations override its liability in terms of the rule — Enforcement of the rule — Whether it offends public policy — Whether a Pension Fund Board has a duty of good faith toward the Municipality (employer) — No rigid adherence to the requirements of *res iudicata*

ORDER

On appeal from the High Court of South Africa Gauteng Division, Pretoria:

1. Leave to appeal is granted.
2. The appeal is dismissed with costs including costs of two counsel.

JUDGMENT

NKABINDE ADCJ (Mogoeng CJ, Cameron J, Froneman J, Khampepe J, Madlanga J, Mbha AJ, Musi AJ and Zondo J concurring):

Introduction

[1] This case concerns a claim by the respondent for payment by the applicant of a certain sum of money plus interest on the basis that the money is owed in terms of a guarantee under the Pension Fund Rules (Fund Rules), when that guarantee applied to the 2007-2008 and 2008-2009 financial years. At their core the issues to be determined are: first, whether this Court should, in light of the "new" evidence sought to be tendered, reconsider the interpretation of rule 10.8.1 of the Fund Rules (rule) when the previous claim on the same cause of action has already been pronounced upon in previous litigation between the parties; second, if the applicant should avoid liability because of its constitutional obligations, whether the respondent owed the applicant a duty of good faith when making investment decisions and whether the enforcement of the rule regarding the 2007-2008 and 2008-2009 financial years would be contrary to public policy; and third, whether the High Court erred in holding that

the applicant is barred by the doctrine of issue estoppel in relation to the defences raised, especially concerning payment of public funds by an organ of state.

[2] The applicant seeks leave to appeal the decision of the High Court of South Africa, Gauteng Division, Pretoria (High Court)[1] allowing, with costs, an action by the respondent arising from the parties' contract in terms of the Fund Rules. The rule in question contains an investment guarantee that is triggered when the respondent achieves less than 5.5% return on its investment.[2] The Supreme Court of Appeal (SCA) refused leave to appeal, hence this application. The respondent opposes the application and asks that it be dismissed with costs.

Parties

[3] The applicant, Ekurhuleni Metropolitan Municipality (Municipality), is established in terms of section 12 of the Local Government: Municipal Structures Act.[3] It is an employer as defined in the Fund Rules.[4] The respondent, Germiston Municipal Retirement Fund (Fund), is a pension fund registered in terms of the Pension Fund Act (Act).[5]

Background facts

[4] The Fund was established in 1924 and was registered in terms of section 4 of the Act. It administers the pension scheme for its members – employees of the Municipality. The Municipality pays pension contributions to the Fund on behalf of its employees and the Fund invests the contributions to maximise returns on the investments for payment of a better pension pay-out to the members when they retire.

---

[1] *Ekurhuleni Metropolitan Municipality v Germiston Municipality Retirement Fund* [2015] ZAGPPHC 1143, delivered on 22 May 2015, per Mothle J (High Court judgment).

[2] The rule is set out in full later in this judgment at [5].

[3] 117 of 1998. It is the successor in title to the Transition Local Council of the Greater Germiston and Eastern Gauteng Services Council in terms of section 24 of the Local Government: Municipal Structures Act.

[4] Rule 1.5 of the Fund Rules defines "the council" and "employer" as referring to the Municipality.

[5] 24 of 1956.

[5] The guarantee in rule 10.8.1 reads as follows:

> "If the rate of interest earned on the total moneys (including any uninvested moneys) 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."

The guarantee is triggered whenever the Fund achieves less than a 5.5% return on its investments in any financial year. Its purpose is to ensure the well-being of the Fund and to provide a safety net for the members of the Fund.

[6] It bears mentioning that for the financial year 2003-2004 the Fund instituted an action in the High Court of South Africa, Gauteng Local Division, Johannesburg (Local Division),[6] for payment of the guaranteed contribution. The Local Division and SCA[7] interpreted the rule in favour of the Fund and ordered the Municipality to pay. In those proceedings the Municipality denied liability. It challenged the interpretation of the rule. To this end it relied on various defences that were also pleaded in the alternatives. One related to the determination of the interest rate that ought to be earned by the Fund before the rule is triggered. The Municipality argued that one must look at what was actually laid out by the Fund in order to determine its total moneys (book value approach). Alternatively, if it is bound by the rule, it would pay only if the yield achieved on the actual value of the assets determined using a discounted cash flow approach was less than 5.5% per annum compounded. Further alternatively, that it was not bound because the rule is inconsistent with the Constitution.

[6] *Germiston Municipal Retirement Fund v Ekurhuleni Metropolitan Municipality*, unreported judgment of the High Court of South Africa, Gauteng Local Division, Johannesburg, Case No 17692/2004 (3 May 2007) (Local Division judgment).

[7] *Ekurhuleni Metro Municipality v Germiston Municipal Retirement Fund* [2009] ZASCA 154; 2010 (2) SA 498 (SCA) (*Ekurhuleni I*).

[7] After *Ekurhuleni I*, rule 10.8.1 was not triggered by the Fund until the 2007-2008 and 2008-2009 financial years, when the Fund achieved less than 5.5% return on its investments. The litigation in the High Court is a sequel to that shortfall.

High Court litigation

[8] When the guarantee was triggered for the 2007-2008 and 2008-2009 financial years,[8] the Fund called on the participating employers, including the Municipality, to pay the required guarantee in terms of the bargain under the rule. There were no submissions before this Court to suggest that any other participating Municipality took issue with the investment guarantee or objected to satisfying the short-fall amount. The Fund then instituted an action in the High Court for the payment of over R70 million. The Municipality defended the action and denied liability. It raised several defences, which are alternative to each other.

[9] The Municipality challenged the interpretation of the rule and asked the High Court to reconsider the interpretation in *Ekurhuleni I*[9] on the ground that "new" evidence, on the history of the rule and the financial accounting records of the Fund over the years, had been uncovered. It argued that the evidence would result in a different interpretation to that adopted in *Ekurhuleni I*. In its pleadings, the Municipality asserted that the interpretation contended for by the Fund violated section 152(1) of the Constitution[10] – to provide democratic and accountable

[8] For the financial year of 1 July 2007 to 30 June 2008, the Fund earned a rate of interest of 3.89% translating to R19 571 034.37 of which R303 095.22 represented the liability of other participating employers. For the succeeding financial year of 1 July 2008 to June 2009 it earned a rate of interest of 0.40% translating to R59 748 601.00, of which R878 416.00 represented the liability of other participating employers. In total, the Municipality had to pay a sum of R78 138 124.15.

[9] In *Ekurhuleni I* the Municipality refused to pay the shortfall on the rate of interest earned during the 2002-2003 financial year. This dispute came before the Local Division, where the issue of the correct interpretation of the rule was raised by the Municipality. The Local Division rejected the construction contended for by the Municipality and ordered it to pay the shortfall. The Municipality appealed to the Supreme Court of Appeal, which dismissed the appeal and upheld the Local Division's interpretation of the rule. It ordered the Municipality to pay the shortfall as, in its terms, the rule provided a "safety net" for the members of the Fund.

[10] Section 152(1) provides:

> "The objects of local government are—
>
> (a) to provide democratic and accountable government for local communities;
>
> (b) to ensure the provision of services to communities in a suitable manner;

government, ensure provision of service delivery for local communities in a sustainable manner and promote social and economic development.

[10] It contended further that the interpretation violates section 153 of the Constitution[11] because, in years where the guarantee is activated, the Municipality cannot structure its budgeting processes to give priority to the basic needs of the community. According to the Municipality the construction of the rule, as contended for by the Fund, has the effect of depriving the Municipality of some R70 million plus interest which amount would otherwise have been spent on the basic needs of the community.

[11] Alternatively, so the argument went, if the interpretive defence is rejected, then in light of section 50 of the Local Government: Municipal Finance Management Act[12]

(c) to promote social and economic development;

(d) to promote a safe and healthy environment; and

(e) to encourage the involvement of communities and community organisations in the matters of local government."

[11] Section 153 provides:

"A municipality must—

(a) structure and manage its administration and budgeting and planning processes to give priority to the basic needs of the community, and to promote the social and economic development of the community; and

(b) participate in national and provincial development programmes."

[12] 56 of 2003. Section 50 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:

(a) The guarantee must be within limits specified in the municipality's approved budget;

(b) a municipality may guarantee the debt of a municipal entity under its sole control only if the guarantee is authorised by the council in the same manner and subject to the same conditions applicable to a municipality in terms of this Chapter if it incurs debt;

(c) a municipality may guarantee the debt of a municipal entity under its shared control or of any other person, but only with the approval of the National Treasury, and then only if—

(i) the municipality creates, and maintains for the duration of the guarantee, a cash-backed reserve equal to its total potential financial exposure as a result of such guarantee; or

(ii) the municipality purchases and maintains in effect for the duration of the guarantee, a policy of insurance issued by a registered insurer,

(MFMA) read with sections 230A,[13] 193(1)(b), 152(1) and 153 of the Constitution, the rule is unconstitutional and invalid but this constitutional challenge was not persisted with. Alternatively, the Municipality argued that it is contrary to public policy and, in the further alternative that it is unenforceable, particularly given the market volatility since the start of the 2003 financial year – when the annual rate of increase of the total assets of the Fund reduced below 5.5%. The Municipality went so far as speculating that at that time, also due to market volatility, it is likely that the annual rate of increase of the total assets of the Fund would again be less than 5.5% in the 2010 financial year.

[12] In a further alternative argument, the Municipality pleaded that by virtue of sections 7C and 7D of the Act – read with the Fund Rules – the Board of the Fund owes a duty of good faith to all the participating employers when investment of assets are made, having regard to the risk carried in terms of the rule. In the event of breach of the duty, in a manner material to the Municipality's funding obligations in any particular financial year, the Municipality is not liable under the rule.

[13] In its replication the Fund raised *res iudicata* and issue estoppel to which the Municipality filed a rejoinder. The Fund contended that attempts to reintroduce the defences by raising evidence for the different interpretation should be rejected. It argued that the defences that the rule is unconstitutional and unenforceable, on the ground of public policy, should be disposed of on the basis of the doctrine of *res iudicata*. Therefore, the Municipality should be estopped from raising the

---

> which covers the full amount of the municipality's potential financial exposure as a result of such guarantee."

[13] Section 230A provides:

> "(1) A Municipal Council may, in accordance with national legislation—
>
> (a) raise loans for capital or current expenditure for the municipality, but loans for current expenditure may be raised only when necessary for bridging purposes during a fiscal year; and
>
> (b) bind itself and a future Council in the exercise of its legislative and executive authority to secure loans or investments for the municipality.
>
> (2) National legislation referred to in subsection (1) may be enacted only after any recommendations of the Financial and Fiscal Commission have been considered."

defences because they were rejected in the 2003 proceedings in *Ekurhuleni I*. In its rejoinder the Municipality said that the public policy defence arose from the MFMA, which was not in force when the Local Division considered the first action in 2003. It later conceded that the MFMA cannot have retrospective effect to nullify agreements and guarantees made before its enactment.[14]

[14] The High Court held that the Municipality's argument for reconsideration of the interpretation of the rule was fraught with difficulties. The evidence was available before the institution of the 2003 proceedings and yet the Municipality failed to seek the leave of the SCA to introduce it,[15] despite the Local Division having remarked about the absence of the evidence.[16] The Court refused to admit the evidence on the basis that the Municipality failed to meet the established test for admission of further evidence.[17] It concluded that, even if it was wrong on that point, there was nothing of substance in the history and development of the rule that would lead to a different interpretation to the one in *Ekurhuleni I*. The Court held that in *Ekurhuleni I* the SCA was mindful of the history of the rule and its predecessor (rule 43.1)[18] and the fact that the scheme changed from a defined benefit fund to a defined contribution fund.[19]

[14] High Court judgment above n 1 at para 49.

[15] Id at para 38.

[16] Id at para 37. In para 43 the Local Division above n 6 remarked:

> "Mr Andrew speculated that the term 'moneys' 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 were accustomed to 'historically', had any connection with the drafting of the rule. If [the Municipality] wanted to rely on this interpretation it would have been necessary to plead a technical meaning of the rule in an actuarial sense. No such technical or special meaning was pleaded nor was it proved. The [Municipality's] contentions on this score fall to be rejected."

[17] High Court judgment above n 1 at paras 39-40.

[18] Rule 43.1 provided the following:

> "If the rate of interest earned on the total moneys (including any uninvested moneys) of the Fund during any financial year should be lower than five and one-half percent (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."

[19] High Court judgment above n 1 at para 41 referring to the SCA's remarks in *Ekurhuleni I* at para 7.

Referencing the remarks by the Local Division, the High Court rejected the public policy defence[20] and the fiduciary duty defence.

[15] The Municipality was ordered to pay the amount claimed – over R70 million plus interest at 15.5% per annum from 9 June 2010 plus costs of two counsel. Subsequently, the High Court refused leave to appeal. The SCA also dismissed the Municipality's petition with costs.

In this Court

[16] The Municipality seeks leave to appeal the decision of the High Court.[21] It raises the arguments that were raised *a quo* and asks this Court to uphold the appeal and replace the High Court's order with the one dismissing the action with costs. The Fund opposes the application. It seeks an order dismissing the application with costs, including costs of two counsel.

Leave to appeal

[17] In its quest for a reconsideration of *Ekurhuleni I*, the Municipality invokes constitutional obligations in sections 152, 153, 195(1)(b) and 230A of the Constitution. It submits that the interpretation in *Ekurhuleni I*, if not revisited, would result in it expending money in contravention of the various provisions in the Constitution. The objects of the Municipality as set out in section 152 have constitutional force: in terms of section 2 of the Constitution "obligations imposed by [the Constitution]" itself, including those mentioned in sections 152 and 153, "must be fulfilled". Consequently, to the extent that the Municipality contends that the

[20] High Court judgment above n 1 at paras 49-50 referring to the Local Division judgment above n 6 at paras 66-8.

[21] The High Court order reads:

> "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."

Ekurhuleni I interpretation will preclude it from fulfilling its constitutional obligations, the matter does raise a constitutional issue.[22]

[18] It is correct that an issue does not become a constitutional matter simply because an applicant calls it one. However, as this Court remarked in *Fraser*[23]—

> "the other side of the coin is, however, that an applicant could raise a constitutional matter, even though the argument advanced as to why an issue is a constitutional matter, or what the constitutional implications of the issues are, may be flawed".[24]

This is so because an "acknowledgement by this Court that an issue is a constitutional matter . . . does not have to result in a finding on the merits of the matter in favour of the applicant who raised it".[25] In *Gcaba*[26] this Court affirmed that "[j]urisdiction is determined on the basis of pleadings . . . and not the substantive merits of the case".[27]

[19] The fact that the matter raises constitutional issues does not automatically result in leave to appeal being granted.[28] The interests of justice dictate whether leave to appeal should be granted. A determination of where the interests of justice reside calls for a careful consideration of numerous factors, including prospects of success which is important but not decisive.[29] As here, there may be instances where public interest considerations[30] despite lack of prospects of success, warrant consideration of the issues.[31] Indeed, pension fund guarantees may have huge implications on the

[22] Section 167(7) of the Constitution provides that "[a] constitutional matter includes any issue involving the interpretation, protection or enforcement of the Constitution".

[23] *Fraser v ABSA Bank Limited* [2006] ZACC 24; 2007 (3) SA 484 (CC); 2007 (3) BCLR 219 (CC).

[24] Id at para 40.

[25] Id.

[26] *Gcaba v Minister for Safety and Security* [2009] ZACC 26; 2010 (1) SA 238 (CC); 2010 (1) BCLR 35 (CC).

[27] Id at para 75.

[28] *Paulsen v Slip Knot Investments 777 (Pty) Limited* [2015] ZACC 5; 2015 (3) SA 479 (CC); 2015 (5) BCLR 509 (CC).

[29] *S v Boesak* [2000] ZACC 25; 2001 (1) SA 912 (CC); 2001 (1) BCLR (CC) 36 at paras 10-2.

[30] *Paulsen* above n 28 at para 29.

[31] *De Lange v Presiding Bishop of the Methodist Church* [2015] ZACC 35; 2016 (2) SA 1 (CC); 2016 (1) BCLR 1 (CC) at para 29.

constitutional responsibilities of municipalities. The guarantees may be structured in a way that impact on the economic development of the local communities thereby resulting in mismanagement of municipal budgeting, contrary to what the Constitution envisages in sections 152(1),[32] 153,[33] 195(1)(b).[34] The issues regarding the interpretation and enforcement of the rule, having regard to the said constitutional obligations, were not the focal point of the Court in *Ekurhuleni I*.[35]

[20] In *Ekurhuleni I* the SCA was concerned with the interpretation of the rule having regard to the context; nature of the Fund; purpose of the rule; and the rule's general practice and effect in order to give it its commercially sensible meaning. But here the issues raised, regarding the effect of the interpretation of the rule – having regard to the said constitutional principles and public policy considerations, were squarely pleaded and argued *a quo*. However, the High Court paid no attention to them. Those issues transcend the narrow interests of the parties because they may impact on the mentioned obligations and may implicate the interests of local communities.[36] Therefore, the issues ought to be considered by this Court. Different to the view held by Jafta J in the second judgment that leave to appeal should be refused, I conclude that the interests of justice warrant granting leave to appeal.

[32] See section 152(1) above n 10.

[33] See section 153 above n 11.

[34] Section 195(1)(b) provides:

> "Public administration must be governed by the democratic values and principles enshrined in the Constitution, including the following principles:
>
> . . .
>
> (b) Efficient, economic and effective use of resources must be promoted".

[35] As this Court held in *Allpay Consolidated Investment Holdings (Pty) Ltd v Chief Executive Officer of the South African Social Security Agency (No 2)* [2014] ZACC 12; 2014 (4) SA 179 (CC); 2014 (6) BCLR 641 (CC) at para 49, "[o]rgans of state have obligations that extend beyond the merely contractual". If the interpretation in *Ekurhuleni I* is to bring the Municipality at odds with its constitutional obligations, the enforcement of the contract may result in unconstitutional conduct which may be rendered invalid.

[36] *Paulsen* above n 28 at para 26.

Defences

[21] The Municipality resists the claim on the basis of three independent defences which, it argues, were not considered in *Ekurhuleni I*. These are: a defence on the reconsideration of the interpretation in *Ekurhuleni I* based on the "new" evidence of the accounting records of the Fund and the history of the rule; a public policy defence; and the breach of duty of good faith defence. Additionally, the Municipality challenges the High Court's exercise of discretion regarding the doctrine of issue estoppel. The Fund objects to the Municipality's defences and raises the doctrine of *res iudicata* and issue estoppel. These doctrines will be dealt with later in this judgment.

Reconsideration of Ekurhuleni I based on "new" evidence

[22] The Municipality argues that *Ekurhuleni I* must be overturned because the SCA's interpretation presupposes that the rule contemplates market value as opposed to book value and treats unrealised capital gains or losses as part of the interest actually earned on the assets of the Fund. Relying on the "new" evidence – of the history of the rule and of the Fund's financial accounts when the rule was introduced – to show that it had been valued at book value and not at market value, the Municipality submits that the SCA's interpretation is wrong and must be rejected.

[23] The high-water mark of the Municipality's case for reconsideration is the evidence of the actuary, Mr Andrew. The Municipality argues that it is unfair not to allow the "new" evidence because its failure to raise it in the previous litigation will result in the rule being used against it in perpetuity while there is untested evidence that could render it liability free. Before rejecting the "new" evidence, certain factors need to be considered to assess unfairness.[37]

[37] See in this regard *Zondi v MEC for Traditional and Local Government Affairs* [2004] ZACC 19; 2005 (3) SA 589 (CC); 2005 (4) BCLR 347 (CC) at paras 22-3.

[24] The sufficiency of the explanation given for not adducing the evidence that was available when th*e first claim w*as instituted is a weighty consideration. Also, the potential prejudice, not only to the Fund but also to the employees who are protected by the investment guarantee is another factor that cannot be overlooked. More importantly, finality in litigation should be preserved rather than being eroded.[38] Finally, regard must be had to the fact that the parties negotiated and agreed to the amended rules of the pension fund, which resulted in the Fund's conversion in 1994.

[25] The so called "new" evidence of the calculations of the past performances is not relevant to the interpretation of the rule. Before 1990, the Fund was structured as a predominantly defined benefit fund[39] rather than a defined contribution fund.[40] The turning point occurred in 1994, where the benefits and obligations were changed so as to convert it to a predominantly defined contribution fund. It is in 1994 that rule 10.8.1, as it stands today, was incorporated into the Fund's rules. The history and financial records during this time are useful for the determination of the payment of a guaranteed investment for future financial years. It is therefore essential to consider the changes in the Fund that occurred in 1994 in interpreting the Fund's rules as they apply today.

[26] The evidence presented by Mr Andrew bears no relevance to the interpretation of the rule insofar as he fails to account for the implications of the Fund's conversion in 1994. The available evidence shows that, for the financial years ending June 1992 and June 1994, respectively, shares were valued at both cost and market values. The evidence presented by Mr Andrew is inconclusive, at best. Besides, the "new"

[38] *Royal Sechaba Holdings (Pty) Ltd v Coote* [2014] ZASCA 85; 2014 (5) SA 562 (SCA) at para 21 (*Royal Sechaba).* See also *Rail Commuters Action Group v Transnet Ltd t/a Metrorail* [2004] ZACC 20; 2005 (2) SA 359 (CC); 2005 (4) BCLR 301 (CC) at para 41.

[39] This is where every member of the Fund is promised a pension fund benefit that is calculated as a percentage of the members' salary on retirement. So, the contribution of the Municipality, as an employer, was calculated to meet the promise of a particular benefit.

[40] This is where the Fund Rules define the contribution to be paid by both members and the employer. There is no guarantee of any particular benefit by a member and equally, where there is a surplus or loss by the Fund the employer does not get the benefit of a contribution nor does it have to pay where there is a loss. The conversion by way of an amendment of the rule was discussed with all concerned: The Fund, members and the Municipality.

evidence sought to be relied on surfaced during conversation about this case in August 2011. It was based on speculation that the term "money" meant book value consistent with actuarial practice to value assets at book value, bearing in mind that the Fund was established in 1924. During argument the Municipality accepted that the "new" evidence was always available, and that no cogent explanation was advanced as to why it was not relied upon earlier. It conceded that the test for introducing the evidence was not met and that the reason for such admission was weak. I consider that the evidence, including the evidence of the history of the Fund which remains undisputed, fortifies the interpretation in *Ekurhuleni I*.

[27] What's more, that evidence shows that in the three financial years preceding the year ending June 2003, the average rate of interest on the total moneys of the Fund far exceeded 5.5%. For example, for the financial years ending June 2001 and 2002, the average annual rate of interest on the total money of the Fund (not only cash) was 15.7% and 12.5%, respectively. These percentages were calculated on the interpretation contended for by the Fund. If this interpretation was used to the benefit of the Municipality, to the extent that it resulted in a finding that the yield was more than 5.5% and the Municipality thus needed not to pay any shortfall, then it should in equal measure be used to the benefit of the Fund when there is a shortfall in terms of the rule.

[28] The High Court did not misdirect itself in rejecting the "new" evidence. The admission of the "new" evidence must be refused and on this ground alone, the interpretive defence should fail. It follows that the interpretation of the rule in *Ekurhuleni I,* which was never overturned on appeal, remains binding. The issue of *res iudicata* thus arises.

Res iudicata

[29] The Fund submits that the matter is *res iudicata*.[41] This doctrine is founded on public policy which requires that litigation should not be endless[42], especially when the demand for payment of money is based on the same ground. And, as the law regarding this doctrine remains settled, the enquiry is not whether the decision is right or wrong, but simply that there is a decision.[43] This must not be understood to suggest that *Ekurhuleni I* was incorrect. The construction of the rule in that case is unassailable: the SCA had regard to, among other things, the language used; the context of the contract as a whole in giving it a commercially sensible meaning; the purpose of the rule; the general practice in the pension fund industry; and the impact of the rule on the members of the Fund. Also, the Court took into account the nature of the Fund when it was established in 1924 – as a predominantly defined benefit fund, on the one hand, and its nature after the conversion in 1994 - as a predominantly defined contribution fund, on the other. Nonetheless, it is the *res iudicata* issue – and not the correctness of the *Ekurhuleni I* interpretation – that should take centre stage in the debate.

[30] The Municipality argues that *res iudicata* does not apply because of the absence of sameness in the cause of action and relief sought. The Fund maintains that the plea of *res iudicata* applies. It argues that even if it did not apply, the

[41] The doctrine is established when a matter has already been adjudicated upon in previous litigation. A party seeking reliance on it must show that the claim is between the same parties (*eadem persona*); on the same cause of action (e*adem causam petendi*); and for the same thing (*eadem res*). See in this regard *Molaudzi v S* [2015] ZACC 20; 2015 (2) SACR 341 (CC); 2015 (8) BCLR 904 (CC) at para16; *Prinsloo NO v Goldex 15 (Pty) Ltd* [2012] ZASCA 28; 2014 (5) SA 297 (SCA) on the requirements of the doctrine (*Prinsloo*). See also *Hyprop Investments Ltd v NSC Carriers and Forwarding CC* [2013] ZASCA 169; 2014 (5) SA 406 (SCA) (*Hyprop*). Such requirements were previously referred to as: same subject matter, same grounds, same parties. See *Midford's Executor v Ebden's Executors* 1917 AD 682 at 686.

[42] *Yellow Star Properties 1020 (Pty) Ltd v Department of Development Planning and Local Government (Gauteng)* [2009] ZASCA 25; 2009 (3) SA 577 (SCA) at para 21; *Evins v Shield Insurance Co Ltd* 1980 (2) SA 815 (A) at 835G.

[43] *Pratt v Firstrand Bank Ltd* [2014] ZASCA 110 at para 8; *African Farms & Townships Ltd v Cape Town Municipality* 1963 (2) SA 555 (A) at 564C-G.

Municipality would be precluded from bringing the defence on the basis of issue estoppel.[44]

[31] It is correct that the claim for payment is for different financial years and amounts. The submission that *res iudicata* does not apply because of the lack of sameness in the cause of action is misconceived. Sameness is determined by the identity of the question previously set in motion.[45] The ground for demanding payment is similar to the one in the previous litigation between the same parties; on the same cause of action and for the same thing. The fact that the claim is for different financial years and amounts, is no licence for the Municipality to raise the same interpretive defence. If that is allowed it will, impermissibly, prevent the Fund from relying on *Ekurhuleni I*.

Reliance on the Constitution

[32] The Municipality argues that the correct interpretation must be consistent with the public duties of municipalities in terms of sections 152(1)(a), 153, 195(1)(b) and 230A of the Constitution. It argues that an open-ended guarantee in the rule would unreasonably give primacy to the interests of the members of the Fund over any needs of the community. That, it is argued, is at odds with the Constitution and section 50 of the MFMA.[46]

[33] It is correct that the constitutional provisions relied upon provide general obligations on the Municipality to ensure that public funds are used in an economic

[44] The strict requirements of the doctrine of *res iudicata* have been relaxed by South African courts and extended through the doctrine of issue estoppel. The application of issue estoppel as part of our law was accepted in the case of *Boshoff v Union Government* 1932 TPD 345 and *Kommissaris van Binnelandse Inkomste v Absa Bank Bpk* [1994] ZASCA 144; 1995 (1) SA 653 (A). The SCA has recently confirmed the application of issue estoppel in *Hyprop* above n 41 at para 14. Essentially, issue estoppel is an extended defence that can be raised by a defendant, where a court is vested with the discretion to relax the requirement of the "same thing". Put differently, issue estoppel finds application where the plea of *res iudicata* is raised in the absence of commonality of cause of action and relief claimed. However, relevant case authorities require a court to exercise this relaxation with caution on a case-by-case basis, considering the question of equity and fairness not only for the litigating parties, but also others, in this regard see *Prinsloo* above n 41 at para 26 and *Hyprop* above n 41 at para 20.

[45] See *African Farms* above n 43 at 562.

[46] See section 50 quoted above n 12.

and effective manner. However, there is simply no evidence to support any suggestion that the Municipality is, because of the unlimited nature of the exposure through the guarantee, unable to meet its constitutional obligations. Despite being invited during the hearing, to demonstrate that the discharge of its constitutional obligations have been impeded by its liability in terms of the rule, the Municipality failed to do so. Therefore, there is no merit in the Municipality's argument that the rule has a continuing oppressive consequence.

[34] The interpretative defence based on the constitutional principles should also fail.

Public policy defence

[35] The Municipality argues that though the rule is not inherently unlawful it should not be enforced because its enforcement, for the 2007 - 2008 and 2008 - 2009 financial years, would offend public policy and provide members with a gratuitous windfall whilst public funds are utilised for "no legitimate public purpose". The defence is basically that the Municipality uses public funds to pay the guarantee in terms of the rule when these funds could otherwise be used to fulfil its constitutional duties.[47] It is contended that the enforcement is contrary to public policy particularly given the market volatility since the start of the 2002 - 2003 financial year. The annual rate of increase of the total assets of the Fund, it is argued, fell below 5.5% in respect of the 2003, 2008 and 2009 financial years. As it did in the High Court, the Municipality went so far as speculating that also due to market volatility, it is likely that the annual rate of increase of the total assets of the Fund will again be less than 5.5% in the 2010 financial year.

[36] It is now trite that all law, including contract law, derives its force from the Constitution. Generally, as this Court remarked in *Barkhuizen*, public policy

[47] The Municipality jettisoned its alternative defence about the unconstitutionality and unlawfulness of the claim by the Fund.

represents the legal convictions of the community.[48] It requires parties to a bargain to comply with their contractual obligations that have been "freely and voluntarily undertaken".[49] The principle "gives effect to the central constitutional values of freedom and dignity".[50]

[37] It needs to be stressed that the guarantee in terms of the rule was negotiated by all concerned and agreed upon by the parties. To that end, the consequences of enforcing the rule were foreseen by the parties. Therefore, given the interpretation in *Ekurhuleni I*, which I accept as binding on the parties, the enforcement of the guarantee cannot, in the circumstances, be contrary to public policy. This is because the bargain was freely undertaken for a legitimate purpose for which it was intended – to stand as a framework to safeguard the interests' of the employees of the Municipality.

[38] To allow the Municipality to escape liability by extricating itself from the bargain, when it has failed to establish the threatened rights or even advance cogent reasons for its failure to comply with its contractual obligation, would constitute an injustice for the Fund.[51] It would frustrate the principle of *pacta sunt servanda* and the very purpose the rule was intended to achieve. This is so, because when the Municipality agreed to the bargain, it did so as a contributing employer for the benefit of its employees in a bargaining process that is at the very heart of the employment relationship.

[39] There may well be circumstances in which the unlimited exposure of the Municipality through the investment guarantee may make it impossible for it to perform its constitutional duties. This is not the case here. This Court's power should therefore not be used to nullify that which has been freely and voluntarily agreed upon

[48] *Barkhuizen v Napier* [2007] ZACC 5; 2007 (5) SA 323 (CC); 2007 (7) BCLR 691 (CC) at paras 28-9.

[49] Id at para 57. This consideration is expressed in the maxim *pacta sunt servanda.*

[50] Id.

[51] See *Barkhuizen* above n 48 at para 73.

by the parties. As was the position in 1993 – 1994 when the rule was amended, it is open to the parties and the members of the Fund to renegotiate the amendment of the rule.[52] On the issue of the amendment of the rule, the Municipality argues that it is powerless to amend the rule because the members of the Fund have a veto over any amendments to the Fund Rules as an amendment requires support from a two - thirds' majority of members. I disagree. To suggest that the amendment was or is not attainable because of the said amendment procedure and thus seek relief from the Court that essentially avoids the process is simply to reverse the sensible order of things.

[40] I conclude that this defence is conceptually unsound. It must fail.

Duty of good faith defence

[41] The Municipality's further defence is that the Board of the Fund owes it a duty of good faith because the Fund has an obligation, when investing assets, to take proper account of the risk it carries. The Municipality relied on section 7C[53] of the Act. But

[52] Clause 11.5 of the Fund Rules requires the following for an amendment:

> "(1) Subject to the approval of the Council and a two thirds majority vote by the members who respond in writing to a request to vote on the matter, the Committee may at anytime amend the Rules, provided that:
>
> (a) the value of the Member's Share prior to such amendment shall not be reduced;
>
> (b) the amendment is not inconsistent with the provisions of the Act or of the Income Tax Act, 1962;
>
> (c) the pensioners will be entitled to vote on amendments to the rules which will affect their benefits;
>
> provided further that the limitations in (a) above shall not apply to amendments required to ensure that the Fund will be able to meet its obligations in terms of a certificate issued by the Actuary; and provided further that any amendment to the Rules affecting the financial basis of the Fund shall be referred to the Actuary before being adopted.
>
> 2) The Committee shall submit any amendment to the Rules to the Registrar and the Commissioner in writing, for their approval."

[53] Section 7C provides the following:

> "(1) The object of a board shall be to direct, control and oversee the operations of a fund in accordance with the applicable laws and rules of the fund.
>
> (2) In pursuing its object the board shall—

the reliance on this section is incorrect. The section tells us what the objects of the Board are, in relation to the Fund. The primary duty of good faith by the Board is owed to the Fund and its members – the employees of the Municipality.[54] The Fund argues, rightly so, that a reference to the Board owing a duty of good faith is not a duty owed to the Municipality. It is a duty of good faith the Board owes to the Fund and its members. Hence the reference to section 7C by the Municipality to plead duty of good faith owed to it is misplaced.

[42] The Act recognises that the Board of the Fund has responsibility to take all reasonable steps to ensure that the interests of members are protected at all times, in terms of the Fund Rules.[55] But nothing is said about protecting the interests of employers. But, even on the assumption that the Municipality – as an employer and contracting party – is owed the duty, there should at least be evidence of actual breach. For one to succeed in an action for breach of a duty of good faith, the duty should be well pleaded. The breach should also be pleaded and the proof of such breach stated with precision. This is so because breach is a matter of evidence. It has to be established and proved.[56] None is established here. The evidence of Mr Andrew

---

> (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 an 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."

[54] High Court judgment above n 1 at para 53.

[55] See section 7C(2)(f) of the Act above n 53.

[56] *South African Local Authorities Pension Fund v Msunduzi Municipality* [2015] ZASCA 172; 2016 (4) SA 403 (SCA) at paras 31-3.

in this regard too favours the case of the Fund that there is no duty of good faith to the Municipality. To this end, this defence must similarly fail.

Improper exercise of discretion

[43] The Municipality argues that the High Court misdirected itself in relation to issue estoppel. It is argued that the Court erred in failing to have regard to any of the considerations of equity and fairness advanced by the Municipality as reasons not to extend the defence of *res iudicata* through issue estoppel. The High Court erred in holding that the Municipality did not attack the defence of issue estoppel. It did not consider the rejoinder that was filed by the Municipality in which the defence was raised. However, the misdirection is not fatal to the Fund's case.

[44] I have already determined that the doctrine of *res iudicata* finds application in relation to the interpretive defence. It was thus not necessary to extend *res iudicata* through issue estoppel. Even if I am wrong in this regard, there should be no rigid adherence to the requirements of *res iudicata*. In *Royal Sechaba*[57] the SCA held that the expression "issue estoppel" is a convenient description of instances where a party may succeed despite the fact that the classic requirements for *res iudicata* have not been complied with.

Conclusion

[45] I would grant leave to appeal, dismiss the appeal and order the Municipality to pay costs including costs of two counsel. The effect of this order would be upholding the order of the High Court.

Order

[46] The following order is made:

1. Leave to appeal is granted.
2. The appeal is dismissed with costs including costs of two counsel.

[57] *Royal Sechaba* above n 38 at para 12.

JAFTA J:

[47] I have had the opportunity to read the judgment prepared by my colleague Nkabinde ADCJ (first judgment). Regrettably, I am unable to agree with the outcome it proposes and the route it follows. The first judgment grants leave to appeal but dismisses the appeal. I hold that leave must be refused.

[48] Although the Germiston Municipal Retirement Fund (Fund) was established in 1924 and its rules were duly registered, the version of the rules we are concerned with originates from an agreement reached between Ekurhuleni Metropolitan Municipality (Municipality) and members of the Fund. The Registrar of Pension Funds approved and registered those rules on 1 May 1994.

[49] Rule 10.8.1 provides:

> "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."

[50] This rule, as it plainly appears from its text, obliges the Municipality to contribute to the Fund whenever interest earned on total monies in any financial year falls below 5.5%. The contribution made by the Municipality must raise the interest to 5.5%. The Municipality's obligation under the rule arises from the fact that it is the employer of members of the Fund.

[51] During the financial year that commenced on 1 July 2007 and ended on 30 June 2008, the Fund earned interest at the rate of 3.8%. The Fund called upon the Municipality to make good the shortfall below 5.5%. In pursuing its claim, the Fund

relied on the interpretation placed on the same rule by the Supreme Court of Appeal in *Ekurhuleni I*.[58] In that case the Supreme Court of Appeal construed the rule to mean that the Municipality was obliged to make good the difference between the value of all assets and the 5.5% appreciation in value in any given financial year.

[52] The Supreme Court of Appeal rejected the argument advanced by the Municipality to the effect that, if a financial year end coincided with a temporary fall in the stock market and soon afterwards the market improved, the Fund would have a windfall unrelated to earnings generated on its investments. The Court rejected this argument on the ground that in the context of the rule and its purpose, the argument rendered the rule commercially unsound. Lewis JA said:

> "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 [H]igh court. The Municipality is accordingly obliged to pay to the Fund the amount claimed."[59]

[53] Following the interpretation assigned by the Supreme Court of Appeal in *Ekurhuleni I*, the High Court here held that the Municipality was obliged to make good the shortfall and ordered it to pay the sum of R70 456 371 to the Fund with interest at the rate of 15.5% per year. This is the order against which the Municipality now seeks leave to appeal.

[54] For an application for leave to appeal like the present to succeed, it must meet two requirements. First, the matter must fall within this Court's jurisdiction. Second, it must be in the interests of justice that leave be granted. Both these requirements can be traced to the Constitution which is our supreme law. Section 167(6) of the Constitution makes it plain that matters may be brought to this Court only with its

[58] *Ekurhuleni Metropolitan Municipality* above n 7.

[59] Id at para 33.

leave and that a litigant may be permitted to have access to it if it is in the interests of justice.[60]

[55] Section 167(3), as amended by the Seventeenth Amendment, delineates this Court's jurisdiction. In this context jurisdiction means the power vested in this Court to hear and decide cases. It specifies matters which this Court may decide. This section provides:

> "The Constitutional Court-
>
> (a) is the highest court of the Republic; and
>
> (b) may decide-
>
> (i) constitutional matters; and
>
> (ii) any other matter, if the Constitutional Court grants leave to appeal on the grounds that the matter raises an arguable point of law of general public importance which ought to be considered by that Court; and
>
> (c) makes the final decision whether a matter is within its jurisdiction."

[56] Plainly the text shows that matters over which the Court has jurisdiction fall into two categories. The first is of constitutional matters and the other is of matters that raise an arguable point of law of general public importance which must be considered by this Court. But for present purposes we are not concerned with the second category and nothing more will be said about it.

[57] Notably, section 167(3)(c) proclaims that this Court "makes a final decision whether a matter is within its jurisdiction". This demonstrates that it does not follow automatically from allegations made by a litigant to the effect that a matter falls within

[60] Section 167(6) provides:

> "National legislation or the rules of the Constitutional Court must allow a person, when it is in the interests of justice and with leave of the Constitutional Court-
>
> (a) to bring a matter directly to the Constitutional Court; or
>
> (b) to appeal directly to the Constitutional Court from any other court."

those categories. The Court itself must be satisfied that the matter falls within its jurisdiction. This was underscored in *Paulsen*.[61] There Madlanga J said:

> "Where, in an application for leave to appeal founded on a constitutional matter, this Court holds that there is indeed a constitutional issue, that does not automatically lead to the grant of leave."[62]

[58] It is the duty of the applicant for leave to place before the Court facts showing that the matter falls within its jurisdiction. And it is for this Court to determine if indeed that is so. Here the Municipality in order to show jurisdiction makes these averments:

> "5 This case raises constitutional issues of importance relating to:
>
> 5.1 The proper interpretation of a rule in a municipal pension fund having regard to sections 152(1)(a), 153, 195(1)(b) and 230A of the Constitution and section 50 of the Municipal Finance Management Act 56 of 2003 ("the MFMA");
>
> 5.2 The enforcement of a rule of a pension fund in circumstances where, having regard to the particular facts of the present case, such enforcement would be contrary to public policy because it would require public funds to be utilised for no legitimate public purpose;
>
> 5.3 The duty of good faith owed by a public sector pension fund to make investment decisions that do not unreasonably expose a public sector employer to the risk of having to use public funds to underwrite the investment performance of that fund in any particular financial year; and
>
> 5.4 The exercise of judicial discretion in relation to the doctrine of issue estoppel in cases concerning payment of public funds under instruments which impose indefinite ongoing obligations on organs of state."

[59] Having considered this statement, the first judgment holds:

---

[61] See *Paulsen* above n 28.

[62] Id at para 29.

> "Consequently, to the extent that the Municipality contends that the *Ekurhuleni I* interpretation will preclude it from fulfilling its constitutional obligations, the matter does raise a constitutional issue."[63]

[60] But having reached this conclusion, the first judgment continues to hold:

> "It is correct that the constitutional provisions relied upon provide general obligations on the Municipality to ensure that public funds are used in an economic and effective manner. However, there is simply no evidence to support any suggestion that the Municipality is, because of the unlimited nature of the exposure through the guarantee, unable to meet its constitutional obligations. Despite being invited during the oral hearing, to demonstrate that the discharge of its constitutional obligations have been impeded by its liability in terms of the rule, the Municipality failed to do so. Therefore, there is no merit in the Municipality's argument that the rule has a continuing oppressive consequence."[64]

[61] It is quite plain from this conclusion that the consequences of the impugned interpretation of the relevant rule of the Fund contended for by the Municipality were devoid of any merit. But over and above that the interpretative approach advanced here has no basis in law. There is no rule of interpretation that obliges a court, when interpreting a rule in a municipal pension fund, to have "regard to sections 152(1)(a), 153, 195(1)(b) and 230A of the Constitution and section 50 of the Municipal Finance Management Act."

[62] Without any obligation or principle requiring that the interpretive process be informed by those provisions and in the absence of facts showing that the enforcement of the relevant rule would impede the Municipality from discharging its constitutional obligations, there is simply no constitutional issue raised here. None is identified in the first judgment except repeating the mere say so of the Municipality. The fact that

[63] First judgment at [17].

[64] First judgment at [33].

the High Court failed to have regard to what was pleaded wrongly by the Municipality does not create a constitutional issue where none exists.

[63] Therefore, it cannot be said that the Supreme Court of Appeal too was wrong in *Ekurhuleni I* when it interpreted the relevant rule of the Fund without paying any attention to provisions in the Constitution and the Act. Nor can it be said that these provisions have any role to play in the interpretation of the relevant rule. Apart from the provisions of the Bill of Rights, the Constitution plays no role in the interpretation of documents,[65] except that a meaning of legislation that is consistent with the Constitution is to be preferred over a meaning that leads to inconsistency.

[64] But even the role of the Bill of Rights is limited to the interpretation of legislation and not rules of a pension fund that constitute a contract between the affected parties. Consequently, the interpretation of the relevant rule does not raise a constitutional issue only because the Municipality says so. In *Fraser* van der Westhuizen J said:

> "Moreover, this Court will not assume jurisdiction over a non-constitutional matter only because an application for leave to appeal is couched in constitutional terms. It is incumbent upon an applicant to demonstrate the existence of a *bona fide* constitutional question. *An issue does not become a constitutional matter merely because an applicant calls it one*."[66]

[65] This is so because the existence of a constitutional issue does not depend on what litigants say. A determination of this issue depends on the proper application of the Constitution itself on the facts of a particular case. If a litigant relies on a provision that is not applicable to its case, it can hardly be argued that the litigant has raised a bona fide constitutional question. This Court's jurisdiction may only be

[65] Section 39(2) of the Constitution provides:

> "When interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights."

[66] *Fraser* above n 23 at para 40.

invoked for adjudication of genuine issues that warrant consideration by it. Bogus matters fall outside the scope of this Court's jurisdiction. And unmeritorious cases do not justify the granting of leave because it is not in the interests of justice to waste judicial resources on such matters.

[66] However, it is true that in *Fraser* this Court stressed the fact that the other side of the coin is that the applicant is not, in order to raise a constitutional issue, required to advance a flawless argument. This does not mean any argument, no matter how spurious it is, will sufficiently raise a constitutional issue. On the contrary, by this statement the Court meant that, although not flawless, the argument must raise a genuine or authentic constitutional issue which carries with it prospects of being upheld. In other words, while an applicant may not raise a fake issue, he or she is not required to show that his or her argument will eventually succeed. The bottom line is that the applicant must raise a bona fide constitutional issue.

[67] The High Court in this matter was bound by the interpretation assigned to the relevant rule by the Supreme Court of Appeal in *Ekurhuleni I*. In *Robin Consolidated Industries* that Court held:

> "[O]nce the meaning of the words of a section in an Act of Parliament have been authoritatively determined by this Court, that meaning must be given to them, even by this Court, unless it is clear to it that it has erred. Particularly it is important to observe *stare decisis* when a decision has been acted on for a number of years in such a manner that rights have grown up under it."[67]

[68] The first judgment affirms that the interpretation in *Ekurhuleni I* was binding. It concludes:

> "Therefore, *given the interpretation in Ekurhuleni I which I accept as binding on the parties, the enforcement of the guarantee cannot, in the circumstances, be contrary to public policy*. This is because the bargain was freely undertaken for a legitimate

[67] *Robin Consolidated Industries Ltd. v Commissioner for Inland Revenue* 1997 (3) SA 654 (SCA) at 666F-G.

> purpose for which it was intended – to stand as a framework to safeguard the interests of the employees of the Municipality."[68]

[69] The conclusions reached in the first judgment do not only demonstrate the absence of a bona fide constitutional issue but also show lack of prospects of success. The central plank on which the Municipality grounded the assertion that the construction in *Ekurhuleni I* must be overturned was that that interpretation was reached without taking into account the background evidence which the Municipality sought to place before this Court. The Municipality did not contend that the Supreme Court of Appeal's interpretation was unsound if no reference was made to the new evidence. On the contrary it accepted that the interpretation was sound but it asserted that if the evidence had been taken into account, a different meaning could have been given to the rule in question.

[70] Accordingly for the interpretation in *Ekurhuleni I* to be rejected, the admission of the new evidence is crucial. For the meaning of the rule advanced by the Municipality may only arise if the rule is construed in the context of that evidence. This is because the construction in *Ekurhuleni I* accords with the text of the rule. Since no case has been made out for the admission of the new evidence, I agree with the first judgment that the request for its admission must be rejected. This removes the only feature on which the Municipality attempted to distinguish this matter from *Ekurhuleni I.*

[71] Although the first judgment holds that the High Court's failure to apply constitutional principles to the interpretation of the relevant rule justify the granting of leave, it does not apply those principles to construe the rule afresh.[69] Instead the High Court's interpretation of the rule in question is endorsed as correct. This underscores the point that it is not in the interests of justice to grant leave.

[68] First judgment at [37].

[69] Id at [20].

[72] It follows that the application for leave must be dismissed.

For the Applicant:	A E Franklin SC and M Chaskalson SC instructed by Bowman Gilfillan Inc
For the Respondent:	C D A Loxton SC and N Fourie instructed by Len Dekker & Associates