

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

CASE NO.: 31013/2018

(1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED: NO

Date: 22 April 2025 E van der Schyff

In the matter between:

THE BODY CORPORATE OF FEDERAL INDUSTRIAL PARK Plaintiff

and

PEC METERING (PTY) LTD Defendant

JUDGMENT

Van der Schyff J

Introduction

[1] During the period 2009 to 2014, the Defendant, PEC Metering (Pty) Ltd ("PEC") was employed by the Plaintiff, the Body Corporate of Federal Industrial Park ("the body

corporate"). PEC was employed to collect money due in respect of the consumption of electricity, water, and other services from the various consumers occupying the body corporate's premises on behalf of the body corporate. PEC was to pay over the required amounts to the City of Johannesburg ("CoJ") on behalf of the body corporate.

- [2] During PEC's employment, a dispute arose between the body corporate, represented by PEC, and the CoJ regarding amounts due to the CoJ. An agreement was reached between the body corporate and PEC that, pending the resolution of the dispute between the body corporate and CoJ, an amount of R2 325 338.07 would be invested by PEC in an interest-bearing trust account at JJR Incorporated Attorneys.

- [3] The sum of R2 325 338.07 was deposited with JJR Incorporated Attorneys during February 2014. The dispute between the body corporate and CoJ was resolved. On 19 February 2018, JJR Incorporated Attorneys released the amount of R2 325 338.07 and interest accrued to PEC. PEC retained the amount, together with interest, despite the body corporate demanding payment thereof.

- [4] The body corporate claims that the parties agreed in February 2014 that the amount of R2 325 338.07 would be paid in trust with JJR Incorporated Attorneys pending the resolution of the dispute between itself and the CoJ, whereafter the money would be paid to it together with the accrued interest. PEC retains the money in breach of this agreement without a legal basis to do so.

- [5] PEC pleaded that it was contractually obliged to collect money due in respect of the consumption of electricity, water, and other services from the various consumers occupying the body corporate's premises on behalf of the body corporate and pay it over to the CoJ. It was, however, entitled to keep for itself the difference between the value of the money collected from consumers and the amount that had to be paid over to the CoJ. In accordance with this agreement, PEC avers that the parties agreed in February 2014 that, should the dispute be resolved between the body corporate and CoJ to the effect that no amount was due by the body corporate to

CoJ for the period for which PEC was contracted, the full amount invested together with accrued interest would be refunded to PEC.

- [6] The evidence of three witnesses was presented to the court. By agreement between the parties, the evidence in chief of these three witnesses was, for the most part, contained in sworn witness statements filed prior to the hearing.

Evidence presented by the plaintiff

- [7] The body corporate presented the evidence of two witnesses, Messrs. D. Paine and B. Jacobs, respectively.
- [8] In his evidence in chief, Mr. Paine, a representative of Collins Property Projects, the initial property developer and manager, explained that PEC was appointed as the body corporate's utility manager on 1 December 2009. PEC's services were terminated on 10 June 2014, with effect from 1 July 2014. The reason for the termination was an ongoing dispute between the body corporate and PEC regarding funds collected from the owners and members of the body corporate, and funds actually paid over to CoJ. When the agreement was terminated, PEC had already collected an amount in excess of R6 million but failed to pay over 'some of the funds' to the CoJ.
- [9] Mr. Paine testified that he negotiated an agreement with Mr. Van den Berg of PEC that the funds not paid over to CoJ would be paid into the trust account of PEC's attorneys' account to the benefit of the body corporate with the interest accruing to the benefit of the body corporate, until the finalisation of the dispute with the CoJ. This agreement was confirmed in writing in an email sent on 24 February 2014. Mr. Paine explained that the parties agreed that once the dispute with CoJ was resolved, the funds would either be paid over to CoJ or refunded to the body corporate. Should any fee be due to PEC this would also be paid to them by the body corporate from these funds.

- [10] I pause to reflect on the content of the email dated 24 February 2014 and the ensuing emails. The email dated 24 February 2014 reflects that Mr. Paine confirmed that the funds may be held by PEC's attorney in trust:

‘as long as they are held on behalf of the body corporate and not PEC. Interest to accrue for body corporate benefit and released to either PEC or the body corporate, or pro rata, once both the body corporate and PEC agree on the allocation of the funds in writing.’

- [11] The list of emails indicates that Mr. van den Berg of PEC replied to this email that the transfer of the funds would take place early in March 2014. He confirmed again on 12 March 2014 that the payment to the attorney's trust account has been scheduled for 21 March 2014. On 30 April 2014, and only in answer to a further enquiry directed by Mr. Paine, Mr. Van den Berg said payment of the funds was postponed and would be effected to the attorney's trust account on 2 May 2014. On 5 May 2014, Mr. Van den Berg emailed proof of payment of the funds to the attorney's trust account to Mr. Paine.
- [12] In a further email dated 10 June 2014, directed to PEC, Mr. Paine informed PEC that a decision had been taken to release PEC from managing the utilities for the body corporate. PEC was, among others, requested to arrange the transfer of the funds held in PEC's attorneys' trust account to the body corporate's account. The funds were not transferred.
- [13] On 18 May 2015, Mr. Van den Berg sent an email to Mr. Paine wherein he confirmed, among others, that the funds were kept in trust in favour of the body corporate. Mr. Paine stated that it was never agreed that all the funds would be taken by PEC as its fee or for any other reason. An impasse was reached between Mr. Paine and Mr. Van den Berg regarding PEC's alleged entitlement to fees, and at this point, Mr. Paine was unable to finally resolve the dispute between the body corporate and the CoJ.
- [14] Mr. Jacobs, the chairperson of the body corporate, was the plaintiff's second and final witness. He confirmed that the funds in question were to be held in trust in

favour of the body corporate pending the resolution of the dispute with the CoJ. Once the dispute with CoJ was resolved, the funds would be used to pay CoJ. A second reason for the oral agreement was that PEC insisted that its own account be paid. Mr. Jacobs' evidence was that the body corporate is not in possession of an explanation of PEC's fee demand for work allegedly performed by it and thus is not in a position to respond thereto.

- [15] Mr. Jacobs was involved in settling the dispute with the CoJ. In terms of the settlement reached with CoJ, the body corporate received a credit and was ultimately indebted to the CoJ in the amount of R3 026 364.46.

- [16] The body corporate informed PEC's attorneys of record in a letter dated 4 December 2017 that it reached a final settlement with CoJ and is now obliged to pay CoJ. The settlement agreement with CoJ was, however, only concluded in February 2018. Despite requesting that the funds held in trust be paid out to the body corporate to pay CoJ, no funds were received. On the contrary, PEC's attorneys of record advised the body corporate's attorney that the funds would be released to PEC if the body corporate did not institute action against PEC within 30 days. Since the parties were involved in substantial without prejudice discussions without the involvement of their respective attorneys, the body corporate could not issue summons within the stipulated thirty days.

- [17] The body corporate was not provided with sufficient information to calculate the accuracy of what PEC claims it is entitled to for its services, but disputes that it could amount to R2 325 338.07. PEC collected R6 054 244.70 from the body corporate's tenant and paid over R3 728 906.63 to the CoJ. It retained 38% of the total amount claimed as remuneration for its services.

- [18] The body corporate's witnesses were extensively cross-examined. The evidence rendered during cross-examination did not differ in material respect from the evidence in chief set out in the affidavits. I find both Mr. Paine and Mr. Jacobs reliable witnesses. They did not exaggerate to bolster the body corporate's case but set out the facts they were privy to in a clear manner. They did not contradict themselves. Mr. Paine's evidence regarding the oral agreement concluded that led to the funds

being paid into JJR Incorporated Attorney's trust account is substantiated by the trail of emails preceding and following the payment of the funds into trust.

Evidence presented by the defendant

- [19] Mr. G van den Berg testified on behalf of PEC. Mr. Van den Berg denies that he agreed orally that the amount in trust would be paid out to the body corporate after successfully resolving the dispute with CoJ. He claims that the funds were destined to be PEC's money in order to compensate PEC for the services rendered on a project.

- [20] Mr. Van den Berg incorporated the explanation he provided in the affidavit filed in resisting summary judgment, in his evidence in chief. In this affidavit he disputes that an agreement was reached that the money held in trust, together with accrued interest, would be released to the body corporate if the dispute with the CoJ was resolved.

- [21] He explained that the remuneration PEC would be entitled to for managing the body corporate's utilities would come from what is generally referred to as 'over recovery'. This amount is derived by calculating the difference between, on the one hand, the tariff for electricity paid by consumers compared to the bulk service charges which the local authority is entitled to charge for such units consumed.

- [22] Mr. Van den Berg said what was envisaged by the agreement of February 2014 is that money would be held in the trust account of PEC's attorneys pending the determination of the dispute with CoJ. In the event that the dispute was resolved against the body corporate, the money would be made available to pay the body corporate's debt to the CoJ. If, however the dispute was resolved in the body corporate's favour, PEC is entitled to the money. Mr. Van den Berg avers the dispute with CoJ was settled in favour of the body corporate.

- [23] During cross-examination Mr. Van den Berg claimed that CoJ's claim against the body corporate has prescribed, resulting in PEC becoming entitled to the money collected by it. The record reflects the following in this regard:

Mr. Carstens: ... Is it your version that you sat with this 2.3 million rand in your account, the claim of the council prescribed, and therefore you were entitled to keep the 2.3?

Mr. Van den Berg: After that period, yes.

Mr. Carstens: So that is the ... that is how you earned your fee?

Mr. Van den Berg: That is what happened by default, because of the prescribed charges.'

[24] When the body corporate's council put it to Mr. Van den Berg that his evidence under cross-examination as to why PEC is entitled to the amount claimed differs fundamentally from his evidence in chief and from the pleaded case. Mr. Van der Berg indicated that he does not think that there is a difference. It was put to him that he testified that the basis of the remuneration, according to his evidence in chief, was the difference between two sets of tariffs. When asked to explain how the fact that CoJ's bylaws determine that the claim has expired entitles PEC to remuneration when the remuneration is based on the different sets of tariffs, he answered, 'That is just how we see it'.

[25] Mr. van den Berg's evidence in chief, together with the evidence elicited under cross-examination, indicates that PEC was of the view that it was entitled to the amount paid into their attorneys' trust account on the following premises: In terms of PEC's service agreement with the body corporate PEC collected the fees for electricity and utilities from the respective occupants and members of the body corporate. The accounts were sent to the members of the body corporate in accordance with the fees normally charged to utility users of the CoJ. Because electricity and utilities were delivered in bulk to the body corporate, CoJ charged a reduced bulk fee for utilities and services to the body corporate. PEC was only obliged to pay over this lesser bulk fee to CoJ. Its remuneration or profit was the difference between what it collected from the users and what it paid over to CoJ. The funds in question were

paid into PEC's attorney's trust account for purposes of indemnifying the body corporate for any backdate or debit from CoJ in respect of the period for which PEC was contracted. However, the electricity bylaws of the CoJ determine that the municipality is not entitled to correct or debit electricity accounts after 38 months from the date on which the relevant issue with the account has been reported. Because CoJ's claim prescribed according to PEC, PEC was entitled to the full amount held in trust.

- [26] The evidence presented by Mr. van den Berg that PEC was entitled to the impugned funds because CoJ's claim against the body corporate prescribed is fundamentally different from the pleaded case and his evidence in chief.

Discussion

- [27] This action is not rooted in the service agreement concluded between the parties in 2009. The services rendered by PEC to the body corporate merely constitute the backdrop to the dispute.
- [28] The relevant facts on which the action is based are that the parties agreed in February 2014 that a certain amount would be paid into the trust account of JJR Incorporated Attorneys after a dispute arose between the body corporate and CoJ regarding amounts due to CoJ. Based on PEC's own evidence, this amount was paid to indemnify the body corporate against any backdated claim or debit that CoJ would invoice for the period that PEC was contractually obliged to render the utility collection service to the body corporate. These funds were, however, released to PEC, and PEC is said to retain the funds without any legal basis to do so.
- [29] PEC's counsel submitted that the court has to determine whether the parties entered into a valid oral agreement as claimed in the particulars of claim. I find that the evidence proves on a balance of probabilities that such an agreement was concluded. Mr. Paine's evidence is supported by emails exchanged between the parties before and after the funds under consideration were paid into JJR Incorporated Attorney's trust account.

- [30] PEC initially averred that the legal basis for retaining the funds was that its remuneration for services was based on the difference between funds collected from members of the body corporate and the body corporate's liability towards CoJ. PEC later claimed it was entitled to keep the funds because the CoJ's claim to the funds had prescribed.
- [31] However, the body corporate's evidence is that the dispute with CoJ was resolved, but that the body corporate remained liable for the amount of R3 728 906.63, which it paid over to CoJ.
- [32] The arrangement reached between Mr. Paine and Mr. Van der Berg is clear. An amount of R2 325 338.07 would be paid into an interest-bearing trust account of an attorney to the benefit of the body corporate. All interest would accrue to the body corporate.
- [33] By specifically consenting to the money being paid into trust to its benefit, the body corporate did not renounce any claim to the funds. The fact that JJR Incorporated Attorneys is also representing PEC is of no significance. What is significant is that the parties agreed that the money should be paid into trust for the body corporate's benefit. The only way in which PEC could have secured a claim to the funds in the absence of the matter being settled *inter partes* would have been to institute a claim against the body corporate successfully.
- [34] On PEC's own evidence, the money was held in trust to indemnify the body corporate against backdated claims or debits from the CoJ. In the event that the dispute was resolved against the body corporate, the money would be made available to pay the body corporate's debt to the CoJ. The matter with CoJ was resolved, and the body corporate's account was significantly reduced. A substantial amount, however, remained payable and was indeed paid to CoJ.
- [35] In any event, PEC failed to provide any evidence that the amount was calculated on the basis of 'over recovery' as explained in PEC's affidavit resisting summary judgment. There is a fundamental difference between remuneration calculated on

the difference between the tariff paid for electricity by consumers, compared to the bulk service charges which the local authority is entitled to charge for such units consumed, and keeping payments made by consumers towards claims that subsequently 'expire' or become prescribed. Because the latter aspect of the expiry or prescription of the claim was not pleaded, the body corporate could not answer thereto, or present any evidence in this regard.

- [36] The claim thus stands to succeed. As for costs, the principle applies that costs follow success. No case was made out for costs to be granted on a punitive scale. Having regard to the complexity of the matter, it is just that costs be awarded on Scale B.

ORDER

In the result, the following order is granted:

- 1. The Defendant is to pay the amount of R2 325 338.07 together with interest on the aforesaid amount at a rate of 10.25% per annum from 2 May 2014 to date of payment to the Plaintiff.**
- 2. The Defendant is to pay the costs of the action, which costs are to be calculated on Scale B.**



E van der Schyff
Judge of the High Court

Delivered: This judgment is handed down electronically by uploading it to the electronic file of this matter on CaseLines.

For the Plaintiff:

Instructed by:

For the Defendant:

Instructed by:

Adv. W.C. Carstens

Otto Krause Incorporated

Adv. W.M. Dreyer

Jarvis Jacobs Raubenheimer Incorporated

Date of the hearing:

10, 11 & 26 March 2025

Date of judgment:

22 April 2025