

**IN THE HIGH COURT OF SOUTH AFRICA
KWAZULU-NATAL LOCAL DIVISION, DURBAN**

CASE NO.: D4774/2019

In the matter between:

**TBP BUILDING & CIVILS (PTY) LTD
(IN LIQUIDATION)**

Applicant

and

**SHAMLA CHETTY
T/A NATIONWIDE ELECTRICAL**

First Respondent

EUGENE NEL N.O.

Second Respondent

FIRST NATIONAL BANK SOUTH AFRICA

Third Respondent

SHERIFF OF THE HIGH COURT

Fourth Respondent

JUDGMENT

Olsen J:

[1] The applicant in this matter is TBP Building & Civils (Pty) Ltd (in liquidation). It was placed in winding up on 16th November 2012. Its current liquidators are Mr K R Vengadesan and Mr T W van Heever. The applicant has some money in a bank account which it holds with the third respondent, First National Bank of South Africa. The first respondent, Ms Shamla Chetty (trading as Nationwide Electrical), attached the applicant's claim to the money in its bank account. The principal relief sought in these proceedings by the applicant is an order setting aside the warrant of execution on the authority of which the attachment was made, and the attachment itself.

[2] Many years ago, and before it was wound up, the applicant, which traded as a building contractor, engaged the services of the first respondent to perform subcontract work in the electrical field. It appears that the contract was concluded around 2008 and cancelled in October 2010 in circumstances over which the parties

were in dispute. Their disputes were referred to an arbitrator who delivered his award in October 2012. There were two monetary awards in favour of the first respondent and two in favour of the applicant. On the application of the first respondent the awards in favour of the applicant were reviewed and set aside by this court in January 2018. An application to this court for leave to appeal against that order was refused, as was a petition for leave to appeal to the Supreme Court of Appeal. (The petition was submitted in July 2018 and the order refusing leave to appeal was made by the SCA in January 2019.) As a result of this litigation costs orders were made in favour of the first respondent. This gave rise to two bills of the first respondent's costs, both of which were taxed on 10th September 2018. One was for R867 212.75 and the other for R98 333.61. I will refer to these as the "first respondent's bills". (There is a further order sought in these proceedings that the taxation of the larger of the first respondent's bills should be set aside. It is not clear to me why the other bill, taxed in the amount of some R98 000.00 was also not sought to be set aside.)

[3] An earlier piece of litigation was generated by the arbitration. The first respondent's initial challenge to the award was based upon the proposition that the arbitration had been completed at a time when the applicant was already in business rescue (i.e. before it was wound up), and that as a consequence of the operation of s 133 of the Companies Act, 2008, the award was a nullity. That matter ended in the Supreme Court of Appeal. (See *Chetty t/a Nationwide Electrical v Hart & Ano NNO* 2015 (6) SA 424 (SCA)). Two bills of the applicant's costs were generated by those proceedings. One of them was for a sum of R66 398.73. In the end that bill did not have to be taxed because it was agreed. But the date upon which that agreement was reached cannot be ascertained on the papers. The other was taxed on or about 22nd February 2016. It was for R194 963.26. I shall call these the "applicant's bills".

[4] This court ordered in the later proceedings that the costs now reflected in the first respondent's bills would form part of the costs of administration in the winding up of the applicant. As those costs were not paid the first respondent proceeded with the attachment which the applicant seeks to have set aside in these proceedings. The capital amount sought to be recovered under the attachment was the sum of the first respondent's bills.

[5] I will deal with each of the grounds upon which the applicant seeks its relief in the order in which they emerge in the applicant's founding affidavit.

Who trades as Nationwide Electrical?

[6] In his founding affidavit the liquidator Mr Vengadesan refers to the heading of an order of this court made on 9th October 2013 by which Mr Eugene Nel was appointed as a curator bonis in terms of a restraint order granted under s 26 of the Prevention of Organised Crime Act, 121 of 1998. In that heading one sees that the third respondent in those proceedings was Namasethu Electrical (Pty) Ltd trading as Nationwide Electrical. The submission made on behalf of the applicant by Mr Vengadesan is that until what he calls "this confusion" as to who trades as Nationwide Electrical is clarified the writ issued in favour of Ms Shamlia Chetty should be set aside.

[7] In her answering affidavit Ms Chetty records that she is the person who trades as Nationwide Electrical and that she is neither a director nor shareholder of Namasethu Electrical (Pty) Ltd which does not trade as Nationwide Electrical. That aside, there is in my view no merit whatsoever in the applicants contention. Ms Chetty has been the litigant in the disputes arising from the Port Shepstone Hospital contract from the outset. She, trading as Nationwide Electrical, was the relevant party in the arbitration and in both sets of litigation over the outcome of that arbitration to which I referred earlier. The cost orders upon which she seeks to execute are cost orders granted in her favour. They followed on decisions on the merits made in her favour. That is the end of the matter. Any challenge to her *locus standi* with respect to the claims she made in that litigation had to be raised in that litigation, or not at all.

The taxation of bills whilst an appeal is pending.

[8] The applicant complains that the first respondent's bills were taxed whilst the applicants petition was before the Supreme Court of Appeal awaiting a decision. That was said to be illegitimate. Counsel who appeared for the applicant conceded at the outset that a bill may be taxed whilst either an application for leave to appeal or an appeal is pending. (See *Beinash t/a Beinash & Company and another v Reynolds N.O. & others* 1999 (1) SA 1094 (W).) This point was raised in support of the claim to have the taxations, or at least the greater of them, set aside.

The applicant has been “under curatorship” since 9th October 2013

[9] The argument raised in the founding affidavit appears to be that Ms Chetty herself was placed under curatorship in the sense in which that happens when a curator bonis is appointed under Rule 57 to take care of the affairs of someone who is incapable of managing their own affairs. That is not the case. The order granted on 12th November 2013 in terms of s 26 of the Prevention of Organised Crime Act, 1998 was in what appears to be a fairly normal form. It was a restraint order prohibiting the respondents (which included Ms Chetty) from dealing in any manner with property described in the order. It was very widely stated, as is customary. Mr Nel, the second respondent, was appointed as curator under s 28 of that Act. In terms of s 28(1)(a)(iv) of the Act a court may authorise a curator bonis appointed under the Act to carry on the business of a respondent where the property “is a business or undertaking”. That power was not afforded to Mr Nel in terms of the order concerned.

[10] In terms of the order Mr Nel would have a discretion to release any property back into the custody of the person who held such property under such conditions as the curator bonis might deem appropriate. A list of property especially to be restrained is an annexure to the court order. Under the heading “business interest” the annexure lists Ms Chetty’s shares in a company and her 100 percent interest in a close corporation. Nothing is said about her personal business interests.

[11] Mr Nel delivered a full report to the court as required by the court order. In it he listed the property which he had placed under restraint. With regard to Ms Chetty Mr Nel listed her interests in certain immovable property, the money in her bank accounts, a number of motor vehicles and her movable household assets. The total value of all the assets of the five respondents who featured in that application, which were placed under restraint and the control of the curator, came to R18,9 million.

[12] In his report Mr Nel recommended that “the assets and businesses be left in the hands of the respondents, save for the foreign exchange uplifted”. One does not know what “businesses” Mr Nel was referring to because the list of assets placed

under his control does not include any businesses, save perhaps for shares in companies.

[13] A restraint order such as that under which Mr Nel was appointed as curator does not deprive the respondents of their property. Deprivation of property takes place when a confiscation order is granted. Ms Chetty explains in her answering affidavit that she only featured in the proceedings under the Prevention of Organised Crime Act because she was married in community of property to her husband Ravan Chetty. Her husband was convicted and on 10th June 2014 an order was made by the trial court that he should pay some R380 000.00 to the state as a consequence of his conviction. It seems that the restraint ought to have been lifted at that stage. A supplementary affidavit delivered by Ms Chetty well after these proceedings had been instituted reveals that the restraint order was set aside only on 5th September 2022 on the application of the National Director of Public Prosecutions. The papers reveal no explanation for why the restraint was allowed to subsist for so long after the confiscation or forfeiture order was made in 2014.

[14] I am satisfied on the evidence disclosed in the papers before me that, save perhaps for a short period between the grant of a restraint order and the making of the decisions by Mr Nel which are recorded in his report to court, there was at no time in place an order depriving Ms Chetty of the capacity to enforce the contractual rights she acquired in her capacity as proprietor of Nationwide Electrical.

Set-off

[15] Finally, in the founding affidavit the applicant complains that “at the very least, set-off stands to operate.” The complaint is that the writ of execution related to the full amount of the first respondent’s bills. It appears to be that set-off ought to have been allowed to the extent of the applicant’s bills, as a result of which the writ would have been for a lower amount.

[16] In making this claim the liquidators did not disclose to the court that this is precisely what the first respondent tendered to do before the writ was issued. The offer received no response from the liquidators as a result of which the writ was issued for

the full amount. In my view the liquidators had no right to complain at this. They claimed that the first respondent's bills were unlawfully taxed, and that she had no power to enforce them. If that had been the case set-off would not have operated, which is presumably why the liquidators did not accept the offer made on behalf of the first respondent to allow set-off to take place. Even the claim to set-off contained in the applicant's founding papers does not avail the applicant because, read in context, it constitutes a conditional claim dependent upon the applicant's other contentions being rejected by this court.

[17] However somewhat late in the day counsel who appeared for the applicant was authorised to make, and did make, an open tender in court, to concede that the first respondent had a claim for the balance of the amounts of its bills still payable after set-off of the applicant's claims on its bills, subject to interest being allowed on each bill. However, the tender was coupled with a stipulation that each party should pay its own costs. That was not acceptable to the first respondent, as a result of which this judgment has become necessary. Nevertheless, in my view, a plea of set-off has been raised, and an order must follow that the attachment made is good for the remainder of the first respondent's bills after set-off has been applied.

[18] It was not disputed in argument that, if not earlier, once it is claimed set-off operates from the date upon which there was mutuality of indebtedness. (Because these bills were either taxed or agreed no question arises as to when the amounts were due, owing and payable.) Unfortunately, because I do not know when agreement was reached on the quantum of the applicant's lesser bill, and because interest must be brought to account, I am unable to calculate the amount due by the applicant to the first respondent after the operation of set-off.

[19] I propose to grant an order modifying the extent to which the attachment of the applicant's claim against its bank is operative. However I do not take the view that making such an order reflects or implies any success in this application on the part of the applicant.

A New Argument

[20] I should mention an argument raised on the behalf of the applicant which was not dealt with in the founding papers, or for that matter in the heads of argument

delivered on behalf of the applicant. I was referred to paragraph 75 of the judgment of a full court in *MEC, Department of Public Works & Others v Ikamva Architects & Others* 2022 (6) SA 275 (ECB), and a statement there that, with regard to writs of execution generally, a judgment debtor should not be deprived of the opportunity to point out sufficient moveable property to satisfy the writ. I must confess to experiencing considerable difficulty in understanding counsel's reference to paragraph 75 of the judgment when read in conjunction with Rule 45(12) which was employed in the present case. These points ought nevertheless be made. (In dealing with this argument I make no finding that it was permissible to raise it. If it had been canvassed in the founding affidavit the relevant facts may well have been clarified by the first and fourth respondents.)

- (a) *Ikamva* concerned execution against the Province by attaching its money, or claim to its money, lodged in its bank account. The provisions of the State Liability Act somewhat muddy the waters when Rule 45 is read in that context.
- (b) The attachment had ceased to operate in *Ikamva* prior to judgment. The issue of the validity of the attachment had become moot because, notwithstanding the attachment that had been made, the bank account in question had been closed because the Provincial Government changed bankers. This was explained in paragraph 69 of the judgment, where it was recorded that what followed was "comment". I see no need to reproduce the detailed analysis which followed paragraph 69 of the judgment. The facts are quite different here.
- (c) It seems to me that the position is as explained in *South African Congo Oil Company (Pty) Ltd v Identiguard International (Pty) Ltd* [2012] ZASCA 91 (31 May 2012) at paragraphs 23 and 24. The claim against the bank must be attached. That, coupled with service of the garnishee notice, prohibits the bank from parting with or dealing with the debt pending payment to the Sheriff, or pending garnishee proceedings if the bank does not act in accordance with the garnishee notice. However the required attachment cannot be effected without service not only on the bank, but also on the judgment debtor.
- (d) In this case the Sheriff served a notice attaching the applicant's claim against the third respondent on its bank account up to an amount of

R965 545.76 together with interest thereon and costs. The notice of the attachment was served on each of the liquidators after it had been served on the bank. The notice of attachment ended with a statement that the monies were to be paid to the Sheriff. The attachment was made according to law.

Conclusion

[21] I will make an order declaring the extent of the validity of the attachment of the applicant's claim against the bank in the form of a formula. This is necessary inter alia because the papers do not disclose the date upon which agreement was reached on the applicant's bill in the sum of R66 398.73. The validity and extent of the garnishee order follows as a matter of law. I trust that my confidence in the ability of the attorneys to reach agreement on the missing date is not misplaced.

[22] The first respondent has asked that the liquidators be ordered to pay the costs of this application. I am somewhat less than impressed with their conduct of these proceedings. Nevertheless, these proceedings are a single event in a long and arduously pursued dispute, and I am reluctant to judge them in isolation. I think that the costs should be paid by the company in liquidation. Of course the liquidators should bear in mind that their powers to litigate do not extend to pursuing hopeless causes, as has in my view been done in this case.

Order:

1. The attachment made by the Sheriff of the applicant's claim against the third respondent is declared to be good for an amount calculated as follows:

(a) R965 545.76

- (i) minus the sum of R194 963.26 plus interest thereon from 22 February 2016 calculated up to 10 September 2018 at the mora rate applicable on 22 February 2016;

- (ii) and minus the further sum of R66 398.73 plus interest thereon from the date of agreement on the bill in that amount calculated up to 10 September 2018 at the rate of mora interest applicable on the date of agreement on the bill in that amount;
- (b) plus interest at the rate of mora interest applicable on 10 September 2018 on the amount derived from the formula in paragraph (a) above from 10 September 2018 to date of payment.
2. The costs of this application shall be paid by the applicant. Such costs shall form part of the costs of administration in the winding up of TBP Building & Civils (Pty) Ltd, as do the costs of the process of execution which has given rise to these proceedings. Counsel's fees may be taxed on scale C.



Olsen J

Case Information:

Date of Argument:

5 & 6 June 2025

Date of Judgment:

17 July 2025

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