

SOUTH AFRICA / JUDGMENT

## Esau v Debtsafe and Others; Shingange v Mare t.a Debt Rescue and Others (85651/2017; 85650/2017) [2018] ZAGPPHC 741 (10 April 2018) [2018] ZAGPPHC 741

### COURT

North Gauteng High Court, Pretoria

### BEFORE

Haupt L.C

### CASE / FILE NUMBER

85651/2017; 85650/2017

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### Source record

REPUBLIC  
OF SOUTH AFRICA  
IN THE  
HIGH COURT OF SOUTH AFRICA  
GAUTENG  
DIVISION, PRETORIA  
(1)  
REPORTABLE  
(2)  
OF INTEREST TO OTHER  
JUDGES  
(3)  
REVISED

DATE: 10/4/2018  
CASE NO: 85651/2017  
CASE NO: 85650/2017  
In

the applications to be  
declared not over-  
indebted of: CASE  
NO: 85651/2017  
In

the matter between:

LIKOPO  
KARABELO  
ESEU  
Applicant  
And  
DEBTSAFE  
1st Respondent  
CONSUMER  
FRIEND  
2nd  
Respondent  
BLUE  
OCEAN COLLECTION SERVICES (PTY) LTD  
3rd Respondent  
LANDAU  
ATTORNEYS c/o WONGA FINANCE  
4th Respondent  
THANDIWE SHINGANGE  
Applicant  
DANIE  
MARE (NCRDC 2020) t/a DEBT RESCUE  
1st  
Respondent  
CAPITEC  
BANK  
LIMITED  
2nd Respondent  
AFRICAN BANK LIMITED  
3rd Respondent  
HOMECHOICE (PTY)  
LTD  
4th  
Respondent  
FINCHOICE (PTY)  
LTD  
5th  
Respondent

## JUDGMENT

### INTRODUCTION:

1. In the unopposed Motion Court of 26 and 28 March 2018 four matters were placed before me by the same attorney of record in case number 84519/2017, 84257/2017, 85651/2017 and 856509/2017. The matters are similar in the following regard:

- 1.1. All the applicants are under debt review;

1.2. Subsequent to being placed under debt review. All the applicants have proceeded to settle some of their accounts due to their financial situation improving;

1.3. The applicants wish to terminate the debt review process and to pay the creditors directly as they are financially able to afford an increase in the total monthly amounts payable to the remaining creditors;

1.4. Relief is sought for a declarator that they are no longer over indebted and under debt review, that the credit bureau remove the debt review status from

their credit records and that their respective debt counsellors provide the form 17.W confirming that the applicants have been

declared no longer over indebted;

1.5. From each notice of motion it is apparent that the applicant's attorney will accept all processes in the proceedings at the address of their correspondents, JVR Attorneys, whose offices are situated in Moreleta Park;

1.6. Each notice of motion indicates that service on the respondents (creditors) have been effected by email. Under the name of each

respondent the following appears: "Consented to service by email";

1.7. A service affidavit from the practice manager of the attorney of record, Mr A Mabase was filed confirming that the applications were forwarded via email to each and every respondent listed in the notice of motion. Proof of email service is attached to the service affidavit and it is stated that the respondent consented to service by email with references to print-outs from the various creditors on random dates, reaching as far back as 18 March 2014;

1.8. None of the creditor's letters refer specifically to the particular applicants. Most of the creditor's letters are addressed to "whom it may concern" and refer to debt counselling and documentation and applications relating to debt counselling and/or debt review. Some of the attached "consent" documents are nothing more than printouts or screenshots of, for example ABSA's website which provides contact details relating to clients who are under debt review.

2. In the Eseu-matter (case number SS651/2017) the applicant was declared over-indebted and placed under debt review in accordance with the provisions of section 88 of the National Credit Act, 34 of 2015 during March 2015. The notice to all credit providers and credit bureaus of the applicant, being placed under debt review, is dated 28 April 2015. However, in the service affidavit attached to the application, a letter dated 28 March 2014 is attached and is purportedly the third respondent's consent to receiving service by email. This cannot be as the letter is dated 12 months prior to the applicant being placed under debt review. In any event the letter of the third respondent is addressed to debt counsellors and administrators and clearly refers to debt review proceedings. The purported letter from the first respondent, attached as proof of consent to service by email, is dated 15 August 2017 and clearly states that the provisions of Rule 9 of the Magistrate's Court Act, 32 of 1944 on

consent is waived. It is clear that this letter refers to the debt review processes as provided for by the Magistrate's Court Act and Rules.

3. In the Shingange matter {case number 85650/2017) a letter from Capitec Bank, the second respondent, dated 1 June 2015 addressed to Campbell Attorneys (the attorneys acting on behalf of the applicant) with no reference to the particular applicant involved (Ms. Shingange). is attached as proof of consent. It merely indicates a general consent to service of documents, including Court orders and notice of motions. A letter from African Bank, the third respondent, dated 3 June 2015 is attached which clearly indicates that "the bank reserves the right to appoint an attorney to appear on record on its behalf, in which circumstances, any or all further letters, documents, notices and/or application related to the specific consumer(s), should subsequently be served at the appointed

attorney's nominated address,,. The heading of the third respondent's letter indicates that the "consent" only relates to court applications for debt review;

#### COMPLIANCE WITH RULE 4(1) AND THE PRACTICE DIRECTIVES:

4. In all of the matters I raised the concern that there was not proper service in accordance with the Rules of Court with specific reference to Rule 4(1)(a). Rule 4(1) provides for the service of an application or action to commence by way of service by Sheriff.
5. It is trite law that one of the corner stones of our legal system is that a party is entitled to proper notice of legal proceedings against him/her, alternatively which affects him/her.[1] Without due notice subsequent proceedings are null and void and may be disregarded or set aside at the option of the other party.[2]
6. It has been held in numerous reported and unreported judgments that proceedings initiated without due notice to a respondent/defendant

are null and void and that any judgment is of no force and effect and may be disregarded without the necessity of a formal order setting it aside.

7. Our Practice Directives do not address service by way of email. The Practice Manual of this division only provides for the filing of the original return of service which establishes service in the court file and that where service is effected at the registered address of a company or close corporation, the sheriff must state in the return that he/she ascertained that there was a board at the address where service was effected indicating that the address was indeed the registered office of the company or Close corporation. In the absence of such a statement in the return of service, the registered address must be proved by the filing of an official document proving the registered address.[3] None of the applications comply with the provisions of the Practice Manual.
8. Rule 4(1)(a) clearly provides that service of any process of court directed to the sheriff and subject to the provisions of paragraph

(aA) any document initiating application proceedings .shall be effected by the sheriff in one of the manners as set out in sub.rule

1(a)(i) to (be). Sub-rule 4(1)(aA) provides for service of a document initiating application proceedings where a party is already represented by an attorney of record. The sub-rules provide that such a document may be served on the attorney by the party initiating such proceedings.

9. The authorities are clear that the reference in sub-rule (1) to any document initiating application proceedings refer to notices of motion issued under the provisions of Rule 6 and Rule 6 of the Rules of the Supreme Court of Appeal.[4]

10. Sub-rule

(10) confirms the court's unfettered discretion pertaining to all forms of service. Should the circumstances of the matter demanded, the Court may order such further steps to be taken to bring the matter to the notice of the other party.

#### APPLICABILITY OF RULE 4A:

11. Rule 4A is headed "Delivery of documents and notices". The Rule clearly states in sub-rule (1) as follows:

"4A(1) Service of all subsequent documents and, notices .not falling under Rule 4(1)(a), in any proceedings on any other party to the litigation may be effected by one or more of the following manners to the address or addresses provided by that party under Rules 6(5)(b), 6(S)(b)(i), 17(3), 19(3) or 34(8), by-

....

(c) facsimile or electronic mail to the respective addresses provided."

(own emphases added)

12. Harms comments that this Rule appears to have been replaced by Section 44 of the Superior Court Act, 10 of 2013[5] , and notwithstanding Section 44, service initiating proceedings should be effected as contemplated by Rule 4:[6]

"Given the known fallibility of these forms of 'electronic means' including faxes, it is not sensible to commence proceedings in this fashion. In the past, Judges have rejected fax service even where the sender had proof of transmission. It is simple, anything can get lost in the matrix."

13. In the present applications it is evident that the applicants have elected by way of their attorney in the notice of motion, to receive any further processes at the physical address of the correspondent in Pretoria. It is clear that the applicants have themselves not elected to receive further service of processes in the matter, by way of electronic service.

Furthermore: as already stated above, it is clear that the creditors who are the respondents in the present applications. did not specifically consent to service by email relating to the present applications and the documents attached to the service affidavit by the practise

manager, does not support the argument of proper service.

14. Heads of argument on behalf of the applicants were submitted to my registrar on 9 April 2018. Reference is made to an unreported

judgment by Jansen J under case number 10918/2014 and a copy of the order is attached to the Heads.

15. I have considered the applicants heads. The question is not whether service of the applications were "valid", but whether the service satisfied the court given the facts of the particular matter. Given the facts of the present applications, I am not satisfied with service by email. Taking procedural shortcuts and expecting the court to rubber stamp such an approach is not in the interests of justice.
16. Therefore, in the exercise of my discretion in accordance with Rule4 (10), I am not satisfied that proper service has been effected on the respondents.

17 Despite the fact that proper service has not been effected, it would result in an injustice if the Court did not assist the applicants as they have made out a proper case for the relief sought. All the applicants have indicated that they wish to repay their creditors as fast as possible so that they can put their debt behind them. I therefore intend granting a Rule nisi calling upon the respondents to indicate why a final order should not be granted.

18. It is trite law that it is the duty of every legal practitioner to acquaint him/herself with the Court's Rules[7]. By implication this also places a duty on legal practitioners to be acquainted with the relevant case law and

Practise Directives relating to the Rules. It is not the fault of the applicants that proper service was not effected as they

instructed the attorney to act on their behalf. As costs remain in the discretion of the Court, I intend to make an order that the attorney of record may not charge any fees for the service of the applications and the Rule nisi and the confirmation of the order on the return date.

ORDER:

19. I therefore make the following order in case number 85851/2017, matter number 14 on the unopposed roll of 28 March 2018 and in case number 85650/2017, matter number 15 on the unopposed roll of 28 March 2018:

1. A Rule nisi is issued, calling upon the respondents to put forward reasons, if any, on 24 July 2018 at 10h00 or as soon thereafter as the matter may heard, why the following order should not be granted:

1.1 That the applicant is declared to be no longer over-indebted and no longer in debt review;

1.2 That the credit bureau remove the debt review status from the applicant's credit reports; and

1.3 That the debt counsellor provides the Form 17.W confirming that the applicant is being declared to be no longer over-indebted.

2. The Rule nisi order, together with a copy of the application must be served, by Sheriff, on each and every respondent in accordance with the provisions of Rule 4(1).
3. The applicants' attorney may not charge any fees for the service of the order and the application on the respondents or for the re-enrolling and moving of the application for the granting of a final order.
4. No costs are allowed for the preparation and email service with reference to the service affidavit by Mr. A Mabase, the Practise

Manager of Campbell Attorneys. Insofar as the attorney has received fees from the applicants in this regard, such portion of the fees relating to the service affidavit, is to be repaid to the applicants.

HAUPT L.C

ACTING MADAM JUDGE OF THE HIGH COURT

Counsel on behalf of applicants: Adv.

J de Swart

Attorneys on behalf of applicants: Campbell

Attorneys

Mullins House, 1 Mullins Road, Bedfordview

c/o JVR Attomeys

641 Rubenstein Road, Moreleta Park,

Pretoria

- [1] Erasmus, Superior Court Practice, Vol. 2 (Juta) at 01-29 and the authorities cited in foot note 1.and 01 - 30, footnote 1 and 2; Harms, Civil Procedure in the Superior Courts, (LexisNexis) at 8-1 , paragraph 84.1; Herbsteln & van Winsen, The Civil Practice of the High Courts of South Africa (5th edition) (Juta), Vol. 1 at 342
- [2] LAWSA: Vol. 3(1) (LexisNexis) at 50, paragraph 87 ; Harms, Civil Procedure in the Superior Courts at B-12 and the authorities cited in footnote 5
- [3] Gauteng: Pretoria Practice Manual, Chapter 13.18
- [4] Erasmus, Superior Court Practice, Vol. 2 at 01-31 and the authorities cited in footnote 2· LAWSA, Vol. 3(1) at 67-68, paragraph 125
- [5] See also: Erasmus, Superior Court Practice at D1-30

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- [6] Civil Procedure in the Superior Courts, at B,28(3) at paragraph B4.53
- [7] LAWSA, Vol. 3(2)r at 12, paragraph 21 and the authorities cited in 13 in footnote 1
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