

Editorial note: Certain information has been redacted from this judgment in compliance with the law.



Reportable:	YES / NO
Circulate to Judges:	YES / NO
Circulate to Magistrates:	YES / NO
Circulate to Regional Magistrates:	YES / NO

**IN THE HIGH COURT OF SOUTH AFRICA
NORTHERN CAPE DIVISION, KIMBERLEY**

**Case No: 658/2022
Decided on the papers
Delivered: 21/07/2023**

In the matter between:

**THE LAND AND AGRICULTURAL DEVELOPMENT
BANK OF SOUTH AFRICA**

Applicant

and

**PRAIA ROCHA 122 INVESTMENTS (PTY) LTD
(Registration No: 2007/008499/07)**

First Respondent

**GLENN GILMOUR MURDOCH
(Identity No: [...])**

Second Respondent

**GIDEON JACOBUS KOEGELENBERG
(Identity No: [...])**

Third Respondent

JUDGMENT

MAMOSEBO J

[1] The applicant, Land and Agricultural Development Bank of South Africa, instituted proceedings against the first respondent, Praia Rocha 122 Investments (Pty) Ltd, second respondent, Glen Gilmore Maddock and the third respondent, Gideon Jacobus Koegelenberg, for judgment against the respondents jointly and severally the one paying the other to be absolved for the sum of R10 342 167.04 together with compound interest at 8.50% per annum, calculated daily and capitalized monthly from 31 October 2021 to date of payment. The parties argued the matter in an opposed motion on 10 February 2023 and judgment was first reserved but was subsequently delivered on 26 May 2023 in favour of the applicant. Costs followed the result.

[2] Unbeknown to the Court and on 05 April 2023 the third respondent delivered a Notice of Offer of Settlement in terms of Rule 34(1) of the Uniform Rules of Court which stipulates:

“(1) In any action in which a sum of money is claimed, either alone or with any other relief, the defendant may at any time unconditionally or without prejudice make a written offer to settle the plaintiff’s claim. Such offer shall be signed either by the defendant himself or by his attorney if the latter has been authorised thereto in writing.”

[3] Rule 34(12) stipulates:

“If the court has given judgment on the question of costs in ignorance of the offer or tender and it is brought to the notice of the registrar, in writing, within five days after the date of judgment, the question of costs shall be considered afresh in the light of the offer or tender: Provided that nothing in this subrule contained shall affect the court’s discretion to an award of costs.”

[4] The third respondent therefore requests the court to reconsider the question of costs afresh in light of its offer made unconditionally and with prejudice of rights to the applicant and the first respondent in the following terms:

- “1. Subject to contract and finance, to purchase from the first respondent the properties either personally or through an entity controlled by him or through a nominee for R18 000 000.00 (Eighteen Million Rand).
2. To secure the guaranteeing of payment against transfer of the properties to himself or his nominee to the applicant of the first respondent's indebtedness to the applicant and its taxed party and party costs incurred in launching these proceedings.
3. To secure the set off of the first respondent's remaining indebtedness to the Anmilan Trust of the balance of the purchase price due to it against transfer of the properties to himself or an entity controlled by him or his nominee.
4. This offer or tender is being made to and will be served on both the applicant and the first and second respondents. A party upon whom this Notice is served may accept this offer or tender within 15 (fifteen) days of service of this Notice upon such party.”

[5] The third respondent, Mr Gideon Jacobus Koegelenberg, has in his answering affidavit and more specifically at paras 8.17.1 and 8.17.2 in response to paras 15.1, 15.2 and 15.3 of the founding affidavit stated the following which was considered at para 9 of the judgment:

“8.17.1 The contents of these paragraphs is denied and the applicant is put [to] the proof thereof. In a different capacity, I am one of the Trustees for the time being of the Anmilan Trust, Registration Number IT306/2002 which sold the properties to the first respondent in 2014 and which holds a Second Bond registered over same. In this capacity I became privy to an **Offer to Purchase dated 23 May 2022**, a copy of which is annexed marked “C” in terms of which the property is being sold for the sum of R25 000 000,00 (Twenty Five Million Rand) plus VAT [if applicable].

8.17.2 This amount if it is realized would I submit settle both the applicant's claim and that of Anmilan Trust which was determined to be R7,620,223,00 (Seven Million Six Hundred and Twenty Thousand Two Hundred and Twenty Three Rand) plus interest at prime from 12 April 2021.” (Own emphasis)

[6] At paras 7 and 8 of the offer to settle in terms of Rule 34 Mr Koegelenberg states the following:

“7. The first respondent sold the properties to a company known as Barui Integrated Circle (Pty) Ltd, Registration Number 2018/400329/07 on 23 May 2022 for R25 000 000.00 (Twenty Five Million) subject to finance.

8. Barui made application to the Land and Agricultural Development Bank of South Africa for a facility (part loan and part land reform grant) to enable it to purchase same for this amount and the Bank declined the loan because of the current state of the property.”

[7] Mr Koegelenberg therefore prays, at para 10 of the offer, that it would be in the interests of all parties to this litigation if the matter were settled by way of *transactio* or compromise.

[8] On 05 April 2023 the third respondent brought to the notice of the Registrar, in writing, the notice of the offer to settle necessitating the question of costs to be considered afresh in light of the offer or tender. Despite the offer to settle having been served on Leahy Attorneys, instructing attorneys for the applicant, and its correspondent attorneys, Van de Wall Inc, as well as on the first and second respondents', (Praia Rocha 122 Investments (Pty) Ltd and Glenn Gilmour Murdoch) attorneys, PGMO Attorneys Inc; neither the applicant nor the first and second respondents responded or commented on the offer within 15 days of service of the notice as stipulated.

[9] Of significance is the omission by Mr Koegelenberg to mention the date when the application for a loan by Barui was declined by the Land Bank. This is a material piece of information that ought to have been divulged. As stated earlier the application for a loan of R25 million was made on **23 May 2022** and argument was heard on **10 February 2023**. The notice of the offer to settle was served and filed on **05 April 2023**. Enough time had lapsed for the parties to have had an indication of where the bank stood with the Barui

application. The date is important because it was part of the third respondent's defence in opposing the Bank's application.

[10] Of further significance is that this offer to settle is also made subject to the following terms and conditions which seem more favourable to Koegelenberg than to the Bank:

- "A. **Subject to contract and finance**, to purchase from the first respondent the properties either personally or through an entity controlled by him or through a nominee for R18 000 000.00 (Eighteen Million Rand).
- B. To secure the guaranteeing of payment against transfer of the properties to himself or his nominee to the applicant of the first respondent's indebtedness to the applicant and its taxed party and party costs incurred in launching these proceedings.
- C. To secure the set off of the first respondent's remaining indebtedness to the Anmilan Trust of the balance of the purchase price due to it against transfer of the properties to himself or an entity controlled by him or his nominee."

[11] In *Naylor and Another v Jansen* 2007 (1) SA 16 (SCA) at 12 Cloete JA, writing for a unanimous Court, made the following pronouncements:

"[12] *Where a plaintiff in an action sounding in money has not succeeded in obtaining an award that exceeds an offer made without prejudice, there are two important considerations to be borne in mind by the Judge exercising the discretion. The first is the purpose behind the Rule. The second is that the Rule in no way fetters the judicial exercise of the discretion.*"

[12] The purpose of the Rule is clear. It serves the public good not just the defendant(s) or respondent(s). When considering the offer a Court needs to take into account whether the offer made to the plaintiff was generous and yet was refused. If that is the case, a Judge would then order the defendant/respondent to pay the plaintiff's/applicant's costs up to the date of the order and the plaintiff to pay the defendant's/ respondent's costs thereafter.

[13] Regard being had to the fact that this Court retains a discretion in the strict or narrow sense and Rule 34 in no way fetters the judicial exercise of that discretion, I am of the view that even if the offer to settle was placed before me before the judgment was handed down, my judgment and order would not have been different. There is no merit in penalising the applicant in regard to costs for not accepting this offer. I did not perceive any good ground in the present reconsideration request because the tender made does not beat the amount awarded and is a compromise as acknowledged by Mr Koegelenberg.

[14] In the circumstances the order as to costs which formed part of the judgment as initially given is reinstated.

1. Judgment is granted against the respondents, jointly and severally, for payment in the amount of R10 342 167.04 together with compounded interest at a rate of 8.50% per annum, such interest to be calculated daily and capitalised monthly from 31 October 2021 to date of payment.
2. The immovable properties registered in the name of the first respondent are hereby declared specially executable in favour of the applicant:
 - 2.1 Premises 55 (a portion of Premises 1) of Vaalhartsnederstelling B Agricultural Holding, Barkley West District, Northern Cape Province.
 - 2.2 Premises 56 (a portion of Premises 1) of Vaalhartsnederstelling B Agricultural Holding, Barkley West District, Northern Cape Province.
 - 2.3 Remaining Extent of Premises 494 of Vaalhartsnederstelling B Agricultural Holding, Barkley West District, Northern Cape Province.

- 2.4 Premises 495 (a portion of Premises 1) of Vaalhartsnederstelling B Agricultural Holding, Barkley West District, Northern Cape Province.
3. That the properties referred to in paragraph 2 (2.1 – 2.4) above be sold by the applicant or its appointed agent in conjunction with the sheriff of Court by public auction or private treaty.
4. Costs of suit on a scale as between attorney and client.

MAMOSEBO J
NORTHERN CAPE DIVISION

For the Applicant
Instructed by:

Adv MP Van der Merwe SC
Leahy Attorneys Inc
c/o Van de Wall Inc.

For 1st & 2nd Respondents:
Instructed by:

Adv. AD Olivier
BJ Liebenberg & Associates
c/o PGMO Attorneys Inc

For 3rd Respondent:
Instructed by:

Adv. J Harmse
Adrian B Horwitz & Associates