



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

(1)	REPORTABLE: NO
(2)	OF INTEREST TO OTHER JUDGES: NO
(3)	REVISED: YES
<u>5 September 2025</u>	
DATE	SIGNATURE

Case No: 25598/2017

In the matter between:

WALENG MATOPA STANLEY

Plaintiff

and

PASSENGER RAIL AGENCY OF SOUTH AFRICA

Defendant

NEUKIRCHER J:

1] On 15 July 2025 I handed down judgment in the action between Mr Waleng (as plaintiff) and PRASA (as defendant)¹. The issues to be decided were the quantum of

¹ The parties are referred to in this judgment as they are cited in the action

damages in relation of future medical expenses and the amount of general damages to be awarded to Mr Waleng. Prior to the trial proceeding, the parties settled:

- a) the merits: PRASA conceded liability *in toto*;
- b) future loss of earning in respect of which PRASA would pay Mr Waleng R585 000.

2] After hearing the evidence of Mr Waleng and several other experts, the following quantum was awarded in addition to the settled amount of R585 000:

- a) general damages: R80 000
- b) future medical expenses: R57 667

3] As he had been successful, PRASA was ordered to pay Mr Waleng's costs of suit, which were to be taxed in accordance with Scale B.

4] On 22 July 2025² PRASA uploaded to CaseLines a Notice in terms of Rule 34 (11) and (12) (the reconsideration application). The basis upon which it seeks a reconsideration of the costs order is the following:

- a) on 19 May 2025, PRASA made a without prejudice offer³ to Waleng in the sum of 1,2 million plus party and party costs;
- b) the offer was rejected by Mr Waleng on 20 May 2025, by way of a formal notice to that effect;

² The notice is dated 21 May 2025 but that is clearly a mistake as judgment was only handed down on 15 July 2025

³ “34(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.

- c) on 21 May 2025 PRASA again made a without prejudice offer. This time the offer was in the amount of R 1,4 million plus party and party costs;
- d) on the same date, a formal notice of rejection of this offer was filed.

5] Thus, it is clear from the facts that both of PRASA'S tenders exceeded the quantum eventually granted. The question thus is whether the court should grant the reconsideration application. That application was set down for hearing on 8 August 2025. At the hearing I raised the following issue: does the fact that PRASA made a third settlement offer on the first date of trial, which led to settlement of a head of damages, mean that the offer of 21 May 2025 lapsed?

6] As neither counsel had had the opportunity to consider this, I afforded them each time to file further heads of argument on this issue. Those have been filed.

7] As stated supra, the issue is whether, by settling the plaintiff's future loss of earnings on 2 June 2025, PRASA's offer of 1,4 million lapsed.

8] In *Mdlalose v Road Accident Fund*⁴ (Madlose) the court stated:

"I am of the view that it is correct that, if a defendant makes a second offer of settlement, whether it is higher or lower than the first offer, the first offer falls away in the sense that it is no longer open to acceptance by the plaintiff, save with the consent of the parties or possibly pursuant to an order of court in terms of Rule 34(6). Obviously the plaintiff would have no interest in the first offer if the second offer was higher. It could never have been the intention of a defendant, if the second offer was lower, to keep the first offer open for acceptance by the plaintiff."

⁴ 2000 (4) SA 876 (N) at 882 A - C

9] But the issue here is that the offer made on the first day of trial was not in settlement of the total quantum - it settled but one of the three heads of damages. Also at issue is the fact that the court was not told how the amount of R585 000 was calculated and what facts and factors informed the offer and the acceptance.

Did the offer of R 1,4 million lapse?

10] Rules 34 (10), (11) and (12) state:

“(10) No offer or tender in terms of this rule made without prejudice shall be disclosed to the court at any time before judgment has been given. No reference to such offer or tender shall appear on any file in the office of the registrar containing the papers in the said case.

(11) The fact that an offer or tender referred to in this rule has been made may be brought to the notice of the court after judgment has been given as being relevant to the question of costs.

(12) 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 as to an award of costs.”

11] In *Naylor and Another v Jansen*⁵ the purpose of Rule 34 was stated as follows
“[13] The purpose behind the rule is clear. It is designed to enable a defendant to avoid further litigation and failing that to avoid liability for the costs of such litigation. The rule is there not only to benefit a particular defendant, but for the public good generally as Denning LJ made clear in *Findlay v Railway Executive*:-

⁵ 2007 (1) SA 16 (SCA) paras 13 and 14

'The hardship on the plaintiff in the instant case has to be weighed against the disadvantages which would ensue if plaintiffs generally who have been offered reasonable compensation were allowed to go to trial and run up costs with impunity. The public good is better secured by allowing plaintiffs to go on to trial at their own risk generally as to costs'

12] It is also clear that the general approach to a reconsideration of costs is that, if the plaintiff's award is less at the end of a trial than the offer of settlement, he or she would be entitled to costs up to date of the offer plus a reasonable period in relation to a *spatium deliberendi*. After that period expired, the plaintiff would be liable for the defendant's costs.

13] Rule 34(6) provides that a plaintiff or any party to an action may within 15 days after the receipt of the offer "or thereafter with the written consent of the defendant or third party or order of court, on such considerations as may be considered to be fair, accept any offer or tender".

14] Thus, Rule 34(6) provides for a *spatium deliberendi* period of 15 days. Of course, where a tender is made less than 15 days before trial, that *spatium deliberendi* period will be reduced or it renders the purpose thereof nugatory. In my view, *spatium deliberendi* period will then be influenced by the type of claim, the evidence obtained, who the plaintiff would need to consult in order to make an informed decision⁶ and the interests of all parties involved.

⁶ Eg in a claim for damages, it may be prudent to consult the experts especially an actuary to recalculate damages based on different scenarios

15] In *Griffiths v Mutual and Federal Insurance Co Ltd*⁷ (Griffiths) the plaintiff's claim for damages stemmed from injuries suffered as a result of a motor vehicle accident. By commencement of trial, the parties had settled general damages and past hospital and related expenses⁸. The trial proceeded on the issue of loss of income. Approximately two days before the trial, the defendant made an offer of settlement. As it turned out, the offer substantially exceeded the sum eventually awarded to the plaintiff.

16] In the main judgment of the court *a quo*, no order for costs was made. It was subsequently brought to the trial Court's notice that two days before trial commenced, the defendant had made an offer to settle the plaintiff's claim in an amount substantially in excess of the sum awarded and that the offer was not accepted by the plaintiff. After hearing argument on costs, the court *a quo* ordered the defendant to pay the plaintiff's costs up to a period which allowed a *spatium deliberendi* of seven court days and ordered plaintiff to pay defendant's costs thereafter.

17] The SCA on appeal, the court followed the decision in *Omega African Plastics (Pty) Ltd v Swisstool Manufacturing (Pty)Ltd*⁹ in which Trollip JA stated:

"Rule 34 (7), in so far as it is relevant here, comprises two elements: (a) it affords the plaintiff 10 days after receiving the notice of the defendant's payment into Court within which to decide whether or not to accept it in settlement of his claim; and (b), if he does accept it within that period, it obliges the Registrar to pay the money out to him. If he does not accept it within that period, he cannot thereafter accept it and uplift the money without the consent of the defendant or a Judge. Contrary to the contention for Omega

⁷ 1994 (1) SA 535 (A)

⁸ It is not stated in the judgment precisely how long before trial this settlement occurred

⁹ 1978 (4) SA 675 (A) at 678F - 679E

I think that element (a) does clearly embody a *spatium deliberandi* in the sense referred to in the above-quoted extract from the judgment...It would indeed be remarkable if the Rule did not afford some time or opportunity to enable a plaintiff, faced with a payment into Court, to decide whether or not to accept it in settlement of his claim. In regard to its effect on costs, the *spatium deliberandi* is, of course, subject to the overriding discretion of the Court under the Rule on costs. No problem arises where, after the payment into Court, no further costs are incurred during the *spatium deliberandi*. In such cases the ordinary rule of apportioning the costs between the parties as at the date of the payment into Court will usually be applied. The problem arises where, as here, the plaintiff incurs further costs during that period. That not infrequently happens where a payment into Court is made just before or at the commencement of the trial and the plaintiff has to continue with his preparations or with the trial itself while he considers the offer in settlement. In that situation it may be inequitable to apportion the costs as at the date of the payment into Court. On the other hand, it does not follow that the Court, in apportioning the costs, must necessarily accord the benefit of the full period of the *spatium deliberandi* to the plaintiff. The extent to which it should be taken into account depends upon the particular circumstances of each case, especially the stage of the proceedings when the money is paid into Court and the reasonableness of the plaintiff's conduct thereafter and of any delay in making his decision in accepting or rejecting the offer of settlement. But that the *spatium deliberandi* must be taken into consideration in appropriate circumstances admits of no doubt in my view..."¹⁰

18] PRASA argues that whilst the facts are similar in *Griffiths, in casu* Mr Waleng rejected the offer on the day it was made and therefore the *spatium deliberandi* issue does not arise. It argues that as a result, PRASA should be liable for Mr Waleng's

¹⁰ Case references excluded

taxed costs up to and including the date of service of the Rule 34 tender (ie 21 May 2025) and that he should be liable for PRASA's costs from 22 May 2025 to date of finalization of the matter.

19] But in my view there are three glaring differences between the *Griffiths* case and this one:

- a) in *Griffiths* it appears that the settlement of some of the issues took place prior to the Rule 34 tender. *In casu*, that was not the case: here the Rule 34 tender was made and rejected 3 days prior to trial and on the first day of trial the parties settled loss of earnings;
- b) furthermore, the Rule 34 tender was made in a globular amount – it does not separate the heads of damages and the offer in relation to each as was the case in *Griffiths*;
- c) *Griffiths* proceeded on one issue only – here two heads of damages fall to be decided.

20] Mr Hlongwane argues that the settlement of loss of earnings is a *novus actus interveniens*, but I am not persuaded that this is the correct approach. A *novus actus interveniens* is defined as “an independent, unconnected and extraneous factor which is not foreseeable to the occurrence of harm after the defendant's original conduct has occurred.”¹¹

21] This is not that: this is an offer that is wholly connected to the action and issues to be decided and that is intended to place plaintiff a risk for the pursuance of his cause of action and in relation of the costs of the action.

¹¹ The law of Delict in South Africa par 7.5 pg 134

22] Having considered the matter, I am in respectful agreement with *Mdlalose*: applying that the present case it means that when PRASA made an offer on the first day of trial, it caused its globular offer of 21 May 2025 to lapse.

23] This being so, the application to reconsider costs must fail and costs must follow the result.

ORDER

Thus, it is ordered that:

1. The application for reconsideration of costs is dismissed with costs, which costs are to be taxed in accordance with Scale B.



B NEUKIRCHER
JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA

This judgment was prepared and authored by the judge whose name is reflected, and is handed down electronically by circulation to the parties/their legal representatives by email and by uploading it to the electronic file of this matter on CaseLines. The date for hand-down is deemed to be 5 September 2025.

For the plaintiff	:	Adv J Hlongwane
Instructed by	:	Nkuna Rose Attorneys
For the defendant	:	Adv FF Opperman
Instructed by	:	Norton Rose Fulbright Attorneys
Matter heard on	:	08 August 2025
Heads of argument provided	:	18 August 2025 and 25 August 2025
Judgment date	:	5 September 2025