REPORTABLE

IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE HIGH COURT, CAPE TOWN)

CASE NO: 20466/2009

In the matter between:

PIERRE CRONJE (PTY) LTD Plaintiff

and

DESIREE CHERYL ADONIS Defendant

JUDGMENT DELIVERED ON 2nd DECEMBER 2009

SHOLTO-DOUGLAS, AJ

[1] This is an application for summary judgment. It concerns the computation of days referred to in a deed of settlement made an order of court.

[2] Between 19 June 2002 and February 2007 the defendant was employed by

the plaintiff as a bookkeeper. It is alleged in the particulars of claim that between December 2002 and January 2007 the defendant misappropriated R1 183 950,70 from the plaintiff. Relying on this indebtedness, the plaintiff commenced sequestration proceedings against the defendant and her husband. These proceedings were settled and the parties concluded a written settlement agreement, which was dated 18 April 2007.

[3] In terms of the settlement agreement the plaintiff agreed to accept payment of the sum of R600 000,00 in full and final settlement of its claim against the defendant on the basis, however, that in the event that the defendant breached the settlement agreement in any respect, the plaintiff would be entitled to recover all funds allegedly misappropriated by the defendant over and above the R600 000,00 referred to in the settlement agreement. Although no mention was made of this in the particulars of claim, it is apparent from the affidavit filed opposing the summary judgment sought by the plaintiff that the settlement agreement was made an order of court. This was accepted as common cause before me and the matter proceeded on that basis. The settlement agreement recorded that the parties intended to have their agreement made an order of court.

[4] In its particulars of claim the plaintiff alleges that the defendant has breached the settlement agreement and, in particular, clauses 3.2 and 3.3 thereof. In essence, these clauses provide for the defendant and her husband to instruct conveyancers to issue a guarantee in respect of the money payable and to allow a named firm of attorneys to proceed with the transfer of certain immovable property. Clause 3.4 required certain undertakings and a power of attorney to be furnished *"within seven days of signature hereof"*.

[5] As I have said, the date of signature was 18 April 2007. It is common cause that the undertaking referred to was furnished on 26 April 2007. This was more than seven calendar days after signature of the settlement agreement, but less than seven court days thereafter.

[6] What is to be determined in this matter is the method of computation of days that is appropriate in the circumstances. The defendant, who resisted the granting of summary judgment, contended that as the settlement agreement had been made an order of court, the time had to be computed in accordance with the rules of court. The plaintiff contended that the settlement agreement should be interpreted as referring to calendar days.

[7] Rule 1 of the Uniform Rules of Court defines "*court day*" to mean "*any day other than a Saturday, Sunday or Public Holiday*", and provides that "*only court days shall be included in the computation of any time expressed in days prescribed by these rules or fixed by any order of court*". The defendant's argument was that the time expressed in days in the settlement agreement had been "*fixed by an order of court*" once that settlement agreement had been made an order of court.

[8] I was referred to in the course of argument to two reported decisions. The first is Bosveld Hotel (Pty) Ltd v Nissen and Another 1979 (2) SA 746 (T). In that matter the parties had settled a case between them in terms of which the respondent had agreed to institute action "*within a period of 30 days*", failing which a guarantee issued would lapse. As in the present case, the parties had made provision for the settlement agreement being made an order of court and an order was then made in terms thereof.

[9] In holding that the reference to the period of thirty days was a reference to calendar days, the court held as follows:

> *"It is to be noted that the Court order in the present case is that the agreement is made an order of Court. The view I take of the matter is that the period of 30 days was not 'fixed' by the order of court but agreed upon by the parties on 3 May 1978. The Court did no more than make that which the parties had agreed upon an order of Court. At common law the words 'within the period of 30 days' mean 30 calendar days. This meaning is also prescribed by s4 of the Interpretation Act 33 of 1957..."*.

[10] The court found that the time period referred to could reasonably mean either thirty court days or thirty calendar days. The provision was accordingly regarded as ambiguous and the matter referred for the hearing of evidence.

[11] In Ex Parte Venter and Spain NNO: Fordom Factoring Ltd and Others Intervening 1982 (2) SA 94 (D), the court had made an order by consent in terms of which one of the parties was *"directed to issue summons within thirty days of the date of this order"*.

[12] The court expressed itself as follows (at 100A-C):

> *"In any event, I have no doubt whatsoever that the period of 30 days referred to in para 1 of the Mostert order means, in the circumstances of this case, 30 Court days. The Rule, as I have already mentioned, provides that the computation shall be Court days where any time is expressed in days which is prescribed by the Rules or fixed by any order of Court. The question is, therefore, whether the period of 30 days was fixed by any order of Court. Paragraph 1 of the Mostert order directs the parties referred to therein to issue summons 'within 30 days of the date of this order'. It is not suggested that there was some prior written agreement entered into without reference to the Court proceedings which the Court was, as it were, merely asked to*

stamp with its imprimatur; nor is it a situation where the Court made an order that a period of 30 days, as stipulated in a certain agreement, was to be the period within which something was to be done."

[12] The court was referred to the Bosveld Hotel case *supra* and made reference thereto in the following context at 101B-E:

"Be that as it may, the court before making such an order would have to be satisfied that the order was, at the least, comprehensible, and satisfied that it was a competent and proper order to make in the circumstances. It seems to me that, once it is contemplated, as it clearly was here, that there was to be an order of court, it must be interpreted as an order of court, and the fact that the parties may have agreed as to those terms is neither here nor there. Once the order has been made by the court in these terms, then the time that was fixed was fixed by an order of court. If on the facts this matter is not distinguishable from the facts in the Bosveld Hotel case, then I must respectfully disagree with it."

[13] In my respectful view, the approach in *Ex Parte* Venter is to be preferred over that taken in the Bosveld Hotel case. Where parties enter into a settlement agreement an express term of which is that it will be made an order of court, then any order subsequently granted in terms of that agreement must in the ordinary course, where reference is made to the computation of time expressed in days, be interpreted in accordance with the rules to mean *"court days"* as defined in rule 1. I cannot see why an agreement reached between litigants and reflected in a court order should be treated differently from a settlement agreement made an order of court when it comes to computing time periods expressed in days. In the first case there could be no suggestion that "days" are to be computed other than as provided for in the rules. I see no logical reason why it should be otherwise in relation to the second case.

[14] Professor Dale Hutchison, *The Legal Nature and Effect of a Judgment by Consent* in Kahn (ed) The Quest for Justice: Essays in Honour of MM Corbett, pp255-6, has expressed the view that the approach in Bosveld Hotel is to be preferred over that taken *Ex Parte* Venter for these reasons:

> *"Given its essentially contractual nature and origins, and the fact that its provisions derive not from the will of the court but from the common intention of the parties, a judgment by consent should logically and sensibly be interpreted as a contract rather than as a judgment".*

[15] In addition to referring to English and American law in support of this approach, the learned author argues that *"a close reading of the cases reveals that it is also the approach implicitly adopted by our own courts"*. He refers to a number of South African cases in this context, none of which, as he says, deal explicitly with the computation of time expressed in days.

[16] I would not quibble with the general proposition that the interpretation of settlement agreements should be undertaken on the basis that they are, after all, agreements. In my view, however, when computing a period of time expressed in days either in a consent order or in a settlement agreement which has, by agreement between the parties, been made an order of court, it is neither illogical nor lacking in common sense to apply the definition of court day in rule 1 to that computation. Indeed, I find it difficult to escape the conclusion that that is precisely what the court rule requires. While it is obviously correct to say that the parties have agreed to the terms of their settlement agreement, once it becomes an order of court, the definition of court days, where applicable, is imported into their agreement absent a contrary expression.

[17] It follows that I hold the view that the defendant has clearly established a *bona fide* defence to the plaintiff's claim.

[18] In the circumstances I order that the application for summary judgment is refused, costs to stand over for later determination.

SHOLTO-DOUGLAS, AJ