115/92

Case No 67/91

IN THE SUPREME COURT OF SOUTH AFRICA
(APPELLATE DIVISION)

In the appeal of:

WILLIAM MARSAY..... Appellant

and

LEO HARRY DILLEY..... Respondent

CORAM: Corbett CJ, Botha, Van den Heever JJA, Howie et Van Coller AJJA.

DATE OF APPEAL 8 May 1992

DATE OF JUDGMENT 3 JUNE 1992

J U D G M E N T

CORBETT CJ: ...../

CORBETT CJ:

On 27 February 1984 and at St James, Cape, appellant ("Marsay") and respondent ("Dilley") entered into a written agreement concerning a "luxury sport fishing craft" named "NKWAZA" ("the craft"). The preamble to the agreement records that Dilley is the registered owner of the craft, which is presently lying at Simonstown, Cape; that Marsay is desirous of acquiring a half share in the craft; and that the parties to the agreement

> "... intend to use the said craft jointly and/or severally to inter alia develop and promote Marlin and Broadbill fishing in the waters off the Cape of Good Hope".

The body of the agreement consists in the main of clauses dealing with the sale to Marsay of a half share in the craft for R100 000; the management of the craft and how

standing expenses are to be allocated as between the co-owners; the use of the craft and the disposal of the proceeds of fish caught on fishing trips; the disposal by either party of his share in the craft; and arbitration to settle disputes arising in connection with the interpretation and fulfilment of the agreement.

In March 1989 the parties' co-ownership of the craft was terminated by the sale of the craft by public auction for a gross amount of R252 000. The net proceeds were shared equally by the parties. At about the same time disputes arose as to an alleged failure on the part of Dilley to account to Marsay in various respects relating to the management and use of the craft. In April 1989 Marsay instituted action against Dilley in the Cape of Good Hope Provincial Division ("the CPD"), claiming inter alia an order that Dilley account to Marsay, a debate of account and an order for payment of the amount found to be due.

To understand the claims relating to an accounting it is necessary to refer to clauses 3 and 4 of the agreement, which I quote in full:

"3. MANAGEMENT OF CRAFT AND STANDING EXPENSES

3.1 The management of the said craft shall at all times be undertaken by the said DILLEY, who, it is recorded will inter alia be responsible for providing the craft with a Skipper and at least one crew member from Monday to Friday inclusive, and will also undertake to arrange for the regular slipping and painting of the craft, such minor repair work and servicing as may from time to time become necessary and the maintenance of the craft generally.

3.2 It is anticipated by the parties that the standing expenses and charges pertaining to the craft in respect of wages for skipper and crew, insurances, mooring fees, slipping and painting, mooring inspections, minor repairs and general on-going maintenance will be in the order of R24 000,00 (TWENTY-FOUR THOUSAND RAND) per

annum. This cost is to be borne equally by the parties and will be funded as to:

3.2.1 A monthly cash contribution from the said MARSAY of R1 000,00 (ONE THOUSAND RAND) payable half-yearly in advance as and from effective date.

3.2.2 Services and disbursements to the value of R1 000,00 (ONE THOUSAND RAND) per month to be provided by the said DILLEY in his personal capacity.

4. USE OF CRAFT

4.1 In the nature of things, the parties accept that their joint and/or several use of the craft will be a matter for prior discussion and agreement. The following guidelines are however hereby accepted by the parties, viz:

4.1.1 Save and except when the said DILLEY is on board, the craft will not put to sea without a skipper and at least one crew member appointed by the said DILLEY (see paragraph 3.1 above).

4.1.2 The proceeds of the sale of any fish caught during any particu-

lar trip will be appropriated towards the cost of fuel and engine oil consumed during such trip.

In the event of such proceeds being insufficient to cover such cost the balance shall be met by the party concerned save that where both parties are on board during any particular trip the balance of such cost shall be borne in equal shares.

The above arrangement will also apply in respect of additional wages payable to the skipper and crew member when employed over a weekend or on a Public Holiday such wages being agreed by the parties at R70-00 (SEVENTY RAND) per day. In the event of there being a surplus from the proceeds of the sale of fish caught during any particular trip such surplus shall be divided equally between the parties as provided for in clause 6.2 hereof.

4.1.3 These guidelines are to be reviewed annually.

4.2 In the event of a conflict arising in regard to the right to use the craft on any particular day, the parties shall have an individual preference in this regard on a rotating basis. In the event of a

> disagreement arising as to whether the craft should in fact put to sea on a particular day, it is accepted that by reason of his knowledge and experience of local conditions, the said DILLEY's decision in the matter will prevail."

In his original particulars of claim (dated 27 April 1989) Marsay characterized the erstwhile relationship between the parties as one of partnership and alleged that this had been dissolved and the craft sold. He alleged further that pursuant to the agreement Dilley had controlled the day-to-day administration of the partnership, including the management of the craft, had attended to all necessary purchases and sales on behalf of the partnership and had kept the partnership books of account; and that during the subsistence of the partnership and in breach of the agreement Dilley had utilised partnership assets for his own account. Despite demand, so it was averred, Dilley had failed to

render an account to Marsay in respect of their partnership affairs: hence the orders claimed.

Dilley's plea, filed on 26 June 1989, denied that the agreement gave rise to a partnership between the parties, tendered to account for proceeds received by him and falling under clause 4.1.2 of the agreement and for his management of the craft as envisaged in clause 3.1 of the agreement, but otherwise denied a failure to account. Dilley also filed a counterclaim for damages, but it is not necessary to refer to this or to Marsay's plea to the counterclaim, filed on 28 June 1989. On the same date Marsay filed a replication putting in issue the adequacy of Dilley's tender. Par 1.3 of this replication reads as follows:

> "1.3 Plaintiff repeats the allegation contained in paragraph 7.1 of his Particulars of Claim and in amplification thereof avers that Defendant utilised partnership assets for his own account on, inter alia, the following occasions:

(a) To transport passengers and goods to tankers in False Bay;
(b) For salvage purposes;
(c) For hire by film-makers;
(d) For use on moorings work in Simonstown; and
(e) For use in False Bay for CSIR survey.

In addition, Defendant overcharged Plaintiff for diesel and oil used and conversely undercharged for diesel used when he was on board."

In May 1990 and evidently shortly before the matter was due to come to trial Marsay amended his particulars of claim. This led to an amended plea (dated 9 May 1990) and an amended replication thereto (dated 15 May 1990). The main features of the amended particulars of claim, which also claim an accounting, are that it is now alleged (i) that the parties carried on business in partnership or co-ownership; (ii) that, upon a number of (specified) alternative legal grounds, Dilley was obliged to render account, duly supported by vouchers, to Marsay in respect of :-

"(a) his management, staffing, servicing and maintenance of the craft as contemplated in Clause 3 of the agreement; and
(b) the proceeds of fish caught in pursuance of the use of the craft as referred to in Clause 4.1.2 of the agreement;" (par 4.1)

and (iii) that during the course of 1987 the parties agreed that the contributions payable by the parties in terms of clauses 3.2.1 and 3.2.2 of the agreement would be increased by R1 500 per annum.

The new plea admits that the contribution of the parties in terms of clause 3.2 of the agreement was increased in 1987 in each case to R13 500 per year; admits also that it was an implied term of the agreement that the parties were obliged to account to each other reciprocally in respect of the proceeds of fish caught in terms of clause 4.1.2, but alleges that Dilley has discharged his obligation in this respect to Marsay; and denies any further obligation to account and, therefore, the validity of Marsay's claim.

The new replication admits that Dilley has "purported to account" to Marsay in respect of his obligations, not only under clause 4.1.2 of the agreement, but also as envisaged in clause 3 thereof, but avers that such accounting is "insufficient" for the reasons set forth in par 1.3 of the first replication (which sub-paragraph is quoted above) and also for the reasons set forth in the report of a chartered accountant (Mr G Shev) dated 11 May 1990 and filed of record.

This was the state of the pleadings when the matter came to trial in the CPD before Berman J. The learned Judge also had before him a notice of application filed by Dilley and reading as follows:

> "TAKE NOTICE THAT the Defendant will apply at the hearing of the above matter for an order declaring that before any issue of debatement can be considered or ordered, the issues of the relationship between the parties (partnership or co-ownership) and whether an accounting is due by the Defendant to the Plaintiff, must first be determined."

In response to this notice Marsay filed an affidavit opposing the application and asking that it be dismissed with costs. This affidavit to some extent canvasses the issues referred to in Dilley's notice of application and advances reasons based upon convenience why there should not be a separate consideration of these issues. To this Dilley filed a short replying affidavit, simply joining issue.

The application was obviously intended to be one in terms of Rule 33(4) of the Uniform Rules of Court and this is how the learned Judge **a quo** treated it. The relevant portion of this rule, as amended, provides as follows:

> "(4) If it appears to the Court **mero motu** or on the application of any party that there is, in any pending action, a question of law or fact which may conveniently be decided either before any evidence is led or separately from any other question, the court may make an order directing the trial of such question in such manner as it may deem fit, and may order that all

> further proceedings be stayed until such question has been disposed of:...."

Berman J, having considered the pleadings, the relevant terms of the agreement, the minute of a pre-trial conference held by the parties and the application and affidavits filed in connection therewith, proceeded to pose the question whether the issues referred to in the notice of application could "conveniently" be dealt with separately from the other issues arising in the case and concluded as follows:

> "It seems to me that a case such as the present, where the right to receive an account is contested by the parties, it being contended on behalf of Marsay that he has such a right and it being contended on Dilley's behalf that no obligation rests on him to provide Marsay with an account, is a suitable case as is contemplated in the passage from the case quoted above. Certainly if Marsay is not entitled to receive an account from Dilley and Dilley is under no obligation to deliver one, any question of debatement falls away and the scope, expense and duration of this action will be materially (and happily) curtailed."

Ordinarily, one would have expected the learned Judge, having reached this conclusion, to grant the application and give the consequential directions required by the Rule.

The judgment, however, continues:

> "It accordingly becomes necessary to consider Mr Jacobs's contention that it is irrelevant to determine the relationship between Marsay and Dilley in that the former is entitled to receive an account from the latter, irrespective of whether they had been partners or had been co-owners of the 'Nkwaza', as the obligation to provide an account rests both upon a partner and a co-owner. The question may thus be posed - did (and does) Marsay have a right to claim an account from Dilley?"

Thereafter the learned Judge proceeded to consider this very question; to interpret the agreement; to decide that the relevant terms of the agreement were clear and certain and that no extrinsic evidence was called for or

admissible to elucidate them; to hold that the relationship between the parties was one of co-ownership and not partnership; to hold that in terms of the agreement there was no obligation imposed on Dilley to account for his (Dilley's) management, staffing, servicing and maintenance of their jointly owned craft, but that there was an obligation imposed on both of them to account to one another in respect of the proceeds of fish caught and sold by either of them. As regards the alleged use of the craft by Dilley for his own account as set forth and particularized in par 1.3 of the original replication (which was incorporated by reference in the new replication) the learned Judge held that no cause of action had been made out for an account in respect of these transactions in the pleadings.

Having decided that in law Dilley was obliged to account to Marsay only in respect of fish caught by him when using the craft, Berman J proceeded to make an

order for the further conduct of the proceedings, which would be concerned with the factual question as to whether such an accounting was due by Dilley or whether he had in fact already discharged this duty. In brief this order involved (a) directions as to the holding of a conference "on the lines envisaged in Rule 37" at which Marsay would present to Dilley "an itemised list" of the instances or respects in which Dilley's accounts were alleged to be inadequate and Dilley would provide explanations or responses thereto, all of this to be incorporated in a written minute to be delivered to the presiding Judge; (b) an instruction that in the event of Marsay persisting, after the conclusion of the conference, in contending that the accounting was inadequate, this issue together with any debatement thereof would be determined at a further hearing, the date for which had already been fixed; and (c) an order that liability for

the costs of the application stand over for argument at the conclusion of the further hearing.

Marsay applied to the Judge a quo for leave to appeal. This was refused on the grounds that the order was not appealable and that the application for leave to appeal was premature. Leave to appeal was, however, granted by this Court on application to it.

In their heads of argument counsel for both parties fully canvassed the issues decided in the Court a quo. In addition, counsel for appellant addressed the question of appealability. The latter point was not canvassed in the heads of argument of respondent's counsel, but Mr Kirk-Cohen (who represented Dilley but did not appear in the Court a quo or draw the heads of argument) informed us that it was his submission that the order of the Court a quo was not appealable and he adduced argument in support of this submission. This question must be decided ante omnia.

The law relating to the appealability of decisions of a court of a provincial or local division was re-examined relatively recently by this Court in the case of Van Streepen & Germs (Pty) Ltd v Transvaal Provincial Division 1987 (4) SA 569 (A). As this judgment shows, this Court has over the years adopted an increasingly flexible approach to the question of appealability. The general principle which, I think, may be extracted from the judgment is the following: where a trial Court has under some competent procedure (such as an application under Rule 33(4)) made an order which has the effect of being a final decision (i e one which cannot be corrected or altered or set aside by the trial Judge at a later stage of the trial) and the decision is definitive of the rights of the parties and has the effect of disposing of a substantial portion of the relief claimed by the plaintiff in the main action, then this order is a judgment (as understood in sec 20(1)

of the Supreme Court Act 59 of 1959) and is appealable, despite the fact that the main action has not been concluded. (See also in this connection a recent and as yet unreported judgment of this Court in the matter of SA Eagle Versekeringsmaatskappy Beperk v Harford, 27.3.92.)

There is no doubt that the Court a quo pronounced finally upon the legal relationship between the parties and upon the extent of the obligation on the part of Dilley to account to Marsay. The effect of this pronouncement was to limit to a substantial extent the relief claimable by Marsay, in the sense that the Court held that there was no duty to account in respect of the matters regulated by clause 3 of the agreement and the user of the craft by Dilley for his own account, as alleged in the replication. Mr Kirk-Cohen conceded the finality of Berman J's decision, but argued that it did

not dispose of a substantial portion of the relief claimed. I cannot agree. It is not possible, for obvious reasons, to place a figure or value on the relief denied Marsay, but clearly it is a substantial portion of his claim. In all the circumstances, I am satisfied that the decision of the Judge **a quo** is appealable and I so hold.

Turning to the merits of the appeal, what immediately strikes one is that the decision of the trial Judge goes far beyond what he was asked to decide. There was before him an application by Dilley (which was opposed by Marsay) that he grant an order (presumably in terms of Rule 33(4)) declaring that before any issue of debatement could be considered or ordered the issues of the relationship between the parties (i e whether it was partnership or merely co-ownership) and whether an accounting was due by Dilley to Marsay, first be determined. In other words, the trial Judge was at that

stage merely asked to rule whether or not these issues were to be determined prior to and separately from the other issues in the case. In the event of his deciding that they should, then in terms of Rule 33 (4) he was required to make an order directing the trial of these issues and staying all further proceedings until such issues had been disposed of. What the learned Judge in fact did was to rule that these issues should be determined separately and then, immediately and without more ado, to proceed to determine the issues. To what extent he was encouraged to do so by counsel then appearing for the parties we do not know, for the advocates who appeared before us did not act in the Court a quo and consequently were not able to enlighten us as to exactly what happened in the Court a quo.

It was undoubtedly procedurally incorrect for the trial Judge to have thus telescoped the proceedings and this irregularity held potential prejudice for

Marsay. For example, the learned Judge held that the issues of the relationship between the parties and the extent of the duty to account could be decided on the papers (principally the agreement itself) and without hearing any evidence. Because of the procedure adopted Marsay did not have the opportunity to formally tender evidence on these issues as he would have, had the Court a quo simply made an order that these issues be decided separately and made arrangements for the trial to proceed on these issues only.

As far as the interpretation of the agreement is concerned the trial Judge held that the meaning thereof was clear and certain and that no extrinsic evidence was admissible. The question as to whether and when extrinsic evidence (and what kind of evidence) is admissible in order to assist in the construction of a written contract is a controversial one (see for example the discussion thereof in Kerr, The Principles of the

Law of Contract, 4 ed, at 305-13 and Christie, The Law of Contract in South Africa, 2 ed, at 237-47) and it may well be that the last word has not been said on the subject. This, however, is not the occasion to attempt to do so.

For reasons stated, and to be stated, I am of the view that the matter should be remitted to the CPD in order that the proper procedure should be followed and in the circumstances it is for that Court, in the first instance, to decide questions relating to the admissibility of evidence as and when they arise. I might add that I am inclined to disagree, with respect, with the conclusion reached by the Court a quo that no obligation to account exists in regard to the moneys handled by Dilley in his management of the craft in terms of clause 3 of the agreement, but again this is a matter to be decided in the first instance by the trial Court on the remittal of the matter to it.

Furthermore, there is the claim by Marsay that Dilley give account in respect of his user of the craft for the purposes detailed in par 1.3 of Marsay's original replication (and incorporated in the new replication). In his affidavit opposing the application under Rule 33(4) Marsay made further reference to profits which had been made by Dilley from the use of the craft in those respects without his (Marsay's) prior knowledge or consent and for which Dilley was under a duty to account to Marsay. The trial Judge referred to these matters (which for convenience I shall call "Dilley's unauthorized user") and stated:

> "But these transactions, giving rise to income received by Dilley, do not relate to his management of the craft or - as is stated in paragraph 4.1.(a) of the amended particulars - to "his management, staffing, servicing and maintenance of the craft as contemplated in clause 3 of the agreement", in respect of which Marsay claims a right to an account (and to which I hold - upon a proper construction of that agreement - he is not entitled). No

> cause of action is made out for an account in respect of these transactions in the pleadings."

It is true that Marsay's pleadings in respect of Dilley's unauthorized user are not as clear as they might be. This seems to be mainly due to the amendments which were made to the pleadings. In his original particulars of claim, as I have indicated, Marsay had alleged (in par 7.1) that during the subsistence of the partnership Dilley had in breach of the agreement utilised partnership assets for his own account; and it is this allegation which receives amplification in par 1.3 of the original replication. The amended particulars of claim do not repeat par 7.1 of the original particulars and limit the obligation to account to the matters stated in par 4.1 of the amended particulars, which are quoted above. Par 4.1(a) as the trial Judge rightly observes, speaks of -

> "...his (i e Dilley's) management, staffing, servicing and maintenance of the craft as contemplated in Clause 3 of the agreement."

It was argued by appellant's counsel that Dilley's unauthorized user fell under the word "management" in par 4.1, but the difficulty is that unauthorized user could hardly be user in terms of clause 3 of the agreement. At the same time it is clear from the new replication that Marsay was persisting in his averments and claims for an accounting in respect of Dilley's unauthorized user. Had this problem arisen, as it should, in the course of a hearing pursuant to a proper order in terms of Rule 33(4) I have no doubt that it could, and would, have been cleared up, if necessary, by an appropriate amendment to the pleadings. As matters turned out, Marsay appears to have been denied this opportunity to amend and in this way to have been prevented from pursuing a substantial portion of his claim. I might add that I do not wish to

be understood to say that on the pleadings as they stood the Judge a quo correctly ignored the claim based on Dilley's unauthorized user.

In all the circumstances I am of the view that while no case has been made out for differing from the trial Judge's finding (which was a matter lying within his discretion) that the issues in question should, in terms of Rule 33(4), be dealt with separately, the further findings of the trial Judge in regard to the merits of these issues and his further directions for the hearing of the matter should be set aside; that an appropriate order in terms of Rule 33(4) should be substituted for that of the Court a quo; and that the matter should be remitted to the CPD for the issues in question to be determined in terms of the Rule and the directions contained in the substituted order. In view of the findings which the trial Judge has already made on the issues to be decided it would be appropriate if the

further hearing of this matter takes place before another Judge.

In addition, it is necessary to make various orders as to costs. Marsay, as appellant, will be substantially successful in the appeal in that the above-mentioned findings and orders of the Court a quo, which were adverse to him, will have been set aside. He was also successful in this Court on the appealability issue. Prima facie, therefore, Marsay should get the costs of appeal. There is, however, this complication. It appears from the heads of argument of Dilley's counsel that on 6 March 1991, after the appeal had been noted, Dilley's attorneys wrote to Marsay's attorneys tendering an abandonment of the order made by the trial judge on the following conditions:

> "1. Your client consents to an order in terms of our Notice of Motion dated 10th May 1990.

2. Such consent order is to include an order to pay all our client's costs in respect of the application and its opposition, except for the costs of the application for leave to appeal and the petition for leave to appeal, in respect of which latter costs our client tenders to pay your client's costs as part of its overall tender.

This is an 'open tender': in the event of its rejection, this tender and the fact of its rejection will be placed before the Appeal Court."

In reply to this letter Marsay's attorneys raised a number of queries and asked for clarification. The response of Dilley's attorneys was terse and of the "take it or leave it" variety. I do not think that this tender can affect the costs of appeal. One of the conditions of tender was that Marsay pay all the costs of the application. This is more stringent than the order made by Berman J which was to the effect that the costs stand over for determination at the further hearing; and, as I shall indicate, it is more stringent than the

order which this Court considers appropriate. It is also not clear how the tendered abandonment of the trial Court's order could, as it were, wipe the slate clean and eliminate the findings of the trial Judge on the issues in question. These findings would stand in Marsay's way in future hearings in the case. And finally it is to be noted that when the appeal was argued counsel for Dilley supported all the findings of the Judge **a quo**. For these reasons I am of the view that Marsay is entitled to the costs of appeal.

In refusing leave to appeal the trial Judge made, inter alia, the following orders:

> "2. The trial is postponed pending a decision on a petition for leave to appeal addressed to the Chief Justice.
>
> .....
>
> 4. A decision as to liability for the costs of this application and for the wasted costs incurred as a consequence of the postponement or the hearing of the matter due to take place on 12 November 1990, will stand over until after the petition for leave to appeal has been disposed of,

unless dealt with in the order issued on the petition."

The costs referred to in par 4 were not dealt with in the order issued on the petition to this Court, but the order did direct that the costs of the application to this Court for leave to appeal be reserved for decision by the Court hearing the appeal. In the circumstances this Court will deal only with the costs of the application to this Court; the costs of the application to the CPD having been reserved by Berman J for decision by that Court. A similar reservation should, in my opinion, be made in respect of the costs of the main application in the Court a quo.

It is accordingly ordered as follows:

(1) The appeal is allowed with costs, including the costs of two counsel.

(2) The costs of the application to this Court for leave to appeal are to be paid by the respondent.

(3) The matter is remitted to the Court **a quo** for further hearing in terms of the order substituted in par (4) hereof. Such further hearing is to take place before a Judge other than the one who originally dealt with the application in the Court **a quo**.

(4) The order of the Court **a quo** is set aside and there is substituted therefor the following:

> "It is ordered in terms of Rule 33(4) of the Uniform Rules of Court -
>
> (a) that the action be postponed to a date to be fixed by the Registrar in order that the question of the legal relationship between the parties (whether it is partnership or co-ownership) and the question as to the extent of the legal obligation of the defendant to account to the plaintiff in terms of the written agreement entered into between them on 27 February 1984 and/or by reason of the legal relationship between them be tried and determined separately from the other issues arising in the case;

(b) that all other proceedings in the matter be stayed until the aforesaid questions have been determined and disposed of;

(c) that at the hearing referred to in par (a) above the parties be entitled to tender such evidence as may be admissible and relevant to the issues defined in par (a) above; and

(d) that the costs of the application made in terms of Rule 33(4) stand over for determination by the court which hears and determines the aforesaid issues in terms of paras (a) and (c) hereof."

M M CORBETT

BOTHA JA)
VAN DEN HEEVER JA)
HOWIE AJA) CONCUR
VAN COLLER AJA)