153/85

IN THE SUPREME COURT OF SOUTH AFRICA

APPELLATE DIVISION

IN THE MATTER BETWEEN

FRANK PETER CAIETTA and

PETER WILLIAM BOYES ..... APPELLANTS

and

NORMAN COURTNEY GESS ..... RESPONDENT

CORAM : RABIE, CJ, JANSEN, VAN HEERDEN, HEFER et BOSHOFF, JJA.

HEARD : 14 NOVEMBER 1985.

DELIVERED : 29 NOVEMBER 1985.

J U D G M E N T

HEFER,JA:

Before I deal with the merits of the

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appeal a preliminary point raised by counsel who appeared for the appellant to the effect that this Court has no jurisdiction to hear civil appeals from the Supreme Court of South-West Africa, has to be disposed of. I shall do so briefly. The point arises from the publication on 6 November 1981 in Government Gazette No 7909 of Proclamation 222 in terms of which a Supreme Court was created for South-West Africa. Section 2 of the Proclamation provides that

> "the South-West Africa Division of the Supreme Court of South Africa as it existed immediately prior to the commencement of this Proclamation, shall cease to be such a division, but shall continue to exist as a superior court

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for the territory under the name of the Supreme Court of South-West Africa-------"

Appeals against judgments or orders of the newly constituted Court are provided for in section 14. In terms of sub-section (1)(b) all appeals, apart from appeals in the cases mentioned in sub-section (1)(a), lie to this Court. The present case is not one of those mentioned in sub-section (1) (a).

In Windhoek Munisipäliteit v Ministersraad van S W A (Namibia) 1985(1) S A 287 at p 293 this Court held that"die regsbevoegdheid van hierdie Hof om appèlle te verhoor en te beslis slegs deur wetgewing wat in Suid Afrika geldend is, bepaal kan word",and that "die bepalings van

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die proklamasie nie in Suid Afrika geldend is nie".

This reference to "die bepalings van die proklamasie" must, of course, be read in context. The point in issue in the Windhoek Munisipaliteit case was whether leave to appeal was required in terms of section 20(4) of the Supreme Court Act, No 59 of 1959, and the contention that it was not required in view of the absence of such a requirement in section 14 of the Proclamation, was rejected on the ground that section 14 does not apply in South Africa. It was obviously the provisions of that section that the Court referred to when it said that the provisions of the Proclamation do not apply here.

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In terms of section 39 of the Proclamation sections 37 up to and including 40 do apply in South Africa. In terms of section 37(2) the Supreme Court Act was amended in a number of respects. For present purposes it is sufficient to refer to the amendment of section 1 which excluded South-West Africa from the Republic of South Africa and the South-West Africa Division from the definition of a Provincial Division of the Supreme Court of South Africa, and to the amendment of section 21(1A) to read

> "The appellate division shall have the same jurisdiction to hear and determine an appeal from any decision of the Supreme Court of South-West Africa or of a supreme court or a high court of a

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> state to which independence has been granted by law, as it has in respect of any decision of the court of a provincial or local division, and any provision of this Act or any other law or rule of court applicable in connection with any appeal from a decision of any court of any provincial or local division shall mutatis mutandis apply with reference to any appeal from the decision of the Supreme Court of South-West Africa or of a supreme court or a high court of such a state."

The investment of this Court with jurisdiction to hear an appeal from a decision of the Supreme Court of South-West Africa, could hardly have been accomplished in plainer language. But, so appellant's counsel argued, the State President has no power to amend section 21(1A); that power vests in parliament only. It is accordingly necessary

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to examine the State President's powers in the light of the legislation in terms of which he purported to act in affecting the relevant amendments.

Proclamation 222 was issued in terms of section 38 of the South-West Africa Constitution Act, No 39 of 1968. Section 38(1) reads as follows:

> "The State President may by proclamation in the Gazette make laws for the territory with a view to the eventual attainment of independence by the said territory, the administration of Walvis Bay and the regulation of any other matter and may in any such law -
>
> (a) repeal or amend any legal provision, including this Act, except for the provisions of subsections (6) and (7) of this section, and any other Act of Parliament in so far as it relates to or applies in the territory or is

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connected with the administration thereof or the administration of any matter by any authority therein; and

(b) repeal or amend any Act of Parliament, and make different provision, to regulate any matter which, in his opinion, requires to be regulated in consequence of the repeal or amendment of any Act in terms of paragraph (a)."

From the contraposition of the terms "relates to", "applies in" and "is connected" in sub-section (a), and the general terms in which the power to amend any act of parliament is referred in sub-section (b),it appears clearly that the power to amend by way of proclamation extends to any act of parliament, whether that act applies only in the territory or not; any South African act may thus be amended

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which relates to the territory or is connected with its administration or the administration of any matter by any authority therein. It is a further requirement that the amendment be contained in a law "for the territory". It seems to me clear that the relevant amendments to the Supreme Court Act meet with all the requirements. The Proclamation as a whole is obviously a law for the territory, and the Supreme Court Act which immediately before the Proclamation applied there, equally obviously related to the territory or was at the very least connected with the administration of justice therein. It follows that it could validly be amended by way of a proclamation issued in terms of section 38(1).

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The preliminary point must accordingly fail.

The parties to the appeal are quantity surveyors who formerly practised in partnership under the style of Hudson, Caietta and Gess in Cape Town, Port Elizabeth and Windhoek. I shall refer to the appellants as Caietta and Boyes and to the respondent as Gess. Caietta and Boyes were attached to the firm's office in Cape Town; Gess was stationed in Windhoek.

The appeal relates to the dissolution of the partnership and particularly to the distribution of its assets. Initially the dispute was an entirely different one. Caietta and Boyes who were the plaintiffs in the Court below, alleged in the particulars of their claim that the partnership was still in existence and that Gess had failed to comply with his duty

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in terms of the partnership agreement to furnish them with quarterly reports of the progress and operations of the partnership in Windhoek, and with a balance sheet and accounts relating to the Windhoek office, for the year ending 28 February 1980. Their claim was for an order directing such reports and such a balance sheet and accounts to be furnished (the relevant prayer was later amended to include the financial years ending 28 February 1981, 1982 and 1983), for a debate of the accounts and for payment of whatever may be found to be due to them. In his plea Gess alleged inter alia that it had been agreed during January 1980 that the partnership would be dissolved as at 31 October 1979, that Caietta

and.....13

and Boyes had further agreed during March 1980 to accept a stated amount as their share of the former partnership, and that they were accordingly not entitled to the order which they were seeking.

That is how the matter stood on the pleadings when the parties first went to trial on 27 October 1981. It emerged, however, that no pre-trial conference had been held and that no discovery had been made. The result was that the trial was postponed.

The pre-trial conference which was later held, revealed what had happened in the interim, what had been eliminated from the enquiry and what the remaining issues were. The formulation of the

issues 14

issues is important and I quote the minutes of the conference in full.

" 1.

It was recorded that Defendant had delivered to Plaintiffs:

(a) Unaudited financial statements of the partnership for the period 1st March 1979 to 31st October 1979 (a copy whereof is annexed hereto and marked 'A') and

(b) an account, dated 6th April 1983, of fees received since 1st November 1979 in respect of contracts awarded to the partnership, but not yet finalised by 31st October 1979, and the expenses claimed in respect of completing the said contracts (a true copy whereof is annexed hereto and marked 'B').

2.

ADMISSIONS OF FACT:

Agreement was reached on the following facts, which need not be proved at the trial:

(a) That at a meeting held during January 1980 the parties orally confirmed.

(i) That the partnership subsisting

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between them at Windhoek, Cape Town and Port Elizabeth had been terminated with effect from 31st October 1979;

(ii) That for the purpose of realising the Windhoek partnership, Defendant would arrange for the balance of the work outstanding (i.e.contracts awarded but not yet finalised) to be completed by a new firm and that the fees received in respect thereof after the 31st October 1979, less expenses,would be divided by the partners according to their shares.

(b) That Annexure 'B' correctly reflects the total fees receivable and received by Defendant's new firm since 1st November 1979 in respect of all the contracts reflected thereon, except numbers 154, 196 and 200, in respect of which the final accounts have still to be agreed upon.

(c) That Defendant has paid an amount of R103 144,00

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to Plaintiffs in respect of his indebtedness to them arising out of the dissolution of the partnership, and is further entitled to a credit of R30 381,00 in respect of his share of the Cape Town and Port Elizabeth partnerships.

3.

OUTSTANDING ISSUES:

It was agreed that the following issues must still be decided by the Court :

(a) Whether -

(i) as alleged by Plaintiffs, it was agreed between the parties during January 1980 that the fee payable to the new firm for the completion of the work should be calculated on the basis of the expenditure incurred during the financial year ended 28th February 1979, grossed up for eighteen months, or whether

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(ii) as alleged by Defendant, it was agreed that the fee payable would be a fair and reasonable fee;

(b) whether, as alleged by the Defendant, the amount of R133 525,00 was accepted by them, at a further meeting held on 6th March 1980, as being in full settlement of their shares in the Windhoek partnership.

(c) If the answer to (b) is in the negative,then as to the period up to 31st October 1979 -

(i) whether Annexure 'A' correctly reflects the fees received by the partnership during the period covered thereby, or whether the figure of R198 755,00 should not be increased by the amount received or alternatively, due from the S.W.A. Administration as a refund in respect of King's salary and expenses, and if so, what such amount was;

(ii) whether the following items should not have been deducted from the expenditures

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reflected in Annexure 'A' :

A bonus provision (included in salaries)	R5 456,00
Printing and Stationery:	
Schoeman's Stationery	676,00
Accrued but not delivered	1 041,00
Audit fees	1 000,00

(iii) to what extent the current accounts of the three partners as reflected on Annexure 'A' should be amended in accordance with the above and in order to provide for a proper distribution of the nett income between the three partners.

(d) As to the pericd from 1st November 1979 to the present:

Whether the final account expenses as reflected in Annexure 'B' are correctly stated, and more particularly:

(i) whether the expenses should not have

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been calculated on the basis of the 1979 expenditure, grossed up for eighteen months and whether the salary and travelling expenses paid to Mr King for services rendered in respect of the Keetmanshoop Hospital should be included and taken into account as an expense or alternatively

(ii) if it is found that there was an agreement that the fee should be a reasonable fee, what such fee should be."

The trial resumed in the Court below during May 1983. At its conclusion the Court found in Gess's favour on the issue described in paragraph 3(b) of the pre-trial minutes and granted judgment in his favour with costs. Against that order Caietta and Boyes have now appealed (with leave granted in terms of section 21(3) of the Supreme Court Act).

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In order to understand the reasoning underlying the trial Court's finding it is necessary to refer briefly to the evidence.

Caietta was the only witness on the plaintiff's side; Gess was the principal witness on the defendant's side. From their evidence it appears that the partners were accustomed to convene annually when the balance sheet and financial accounts for the preceding financial year became available, in order to discuss the results of the year and to take the necessary decisions e g in regard to the allocation of the profits. At one such meeting which took place in Cape Town towards the end of October 1979, Gess tendered his resignation from the

partnership.....21

partnership with immediate effect. The partnership agreement provided for the resignation of a partner on six months notice and Caietta was not prepared to agree to Gess' immediate resignation. Thereafter Gess met with Caietta (who also represented Boyes) on three further occasions to discuss the dissolution of the partnership and the distribution of its assets. These meetings took place in Cape Town during November 1979 and January 1980 and in Windhoek on 6 March 1980. At the January 1980 meeting it was confirmed that the partnership would be dissolved as from 31 October 1979. The distribution of the assets constituted a major problem due mainly to the fact that certain work in which the Windhoek office was concerned, was still in progress and would not be completed

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for quite some time. This brought about, firstly, that arrangements had to be made for the performance of the professional duties attaching to the work in progress and, secondly, that the fees which would become payable on completion of each uncompleted project and the expenses which would have to be incurred in earning the fees, could not, for reasons which will presently appear, be accurately determined. The first part of the problem was resolved at the January 1980 meeting when it was agreed that Gess would arrange for the performance of the professional work. (What was agreed about his remuneration for doing so is, however, still in dispute).

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The question of the fees still remained. A quantity surveyor calculates his fees as a percentage of the costs of any building in connection with the erection of which he is professionally engaged. To 75% of his fee he becomes entitled as soon as a bill of quantities has been prepared and a tender has been accepted. At that stage the percentage is calculated on the amount of the tender. To the remaining 25% he only becomes entitled upon settlement of the final account i e after completion of the building. It often happëns that the final costs of the building differ materially from the amount of the tender. This may come about either on account of escalation in the costs e g

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of materials, or on account of variations not tendered for, or both. In such cases the fee is calculated on the actual final costs and an adjustment of the 75% which may have been paid, will then be made when the balance of the fee becomes payable after completion of the building. An exact calculation of the fee at any stage while work is still in progress, can therefore usually not be done; it only becomes possible after completion of the building and settlement of the final account. At that stage it may far exceed a fee calculated on the amount of the tender.

It is common cause that Gess produced certain figures which included a projection of the fees

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which would eventually be earned in respect of the work in progress, at the November 1979 meeting and again at the January 1980 meeting. The figures produced at the first meeting differed from those which were produced at the second meeting. On both occasions Gess offered to pay the amounts which, according to his calculations, would become due to Caietta and Boyes but Caietta was not satisfied with the figures and the offers were rejected.

Then came the final meeting in Windhoek on 6 March 1980. It was attended by Caietta, Gess and one Hemmingway, Caietta's financial adviser. Due to the fact that the trial Court found that Caietta agreed

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at this meeting on his own behalf and on Boyes's behalf, to accept an amount of R133 525,00 in full settlement of their shares in the partnership, I shall deal in some detail with the evidence relating to this meeting.

Caietta testified that his main purpose in going to Windhoek was to arrange for payment by the Windhoek office of his South-West African provisional income tax which had fallen due for payment at the end of February 1980 but had not been paid, and to draw from the partnership funds in Windhoek whatever amount he could, as he testified, lay his hands on. That, according to him, was how it came about that fees which had become payable since the last available balance sheet (February

1979).....27

1979) and fees which would in future still become due in respect of work in progress, again came up for discussion. Fees which had already become due, presented no problem and he was able to reach agreement with Gess on a figure in respect thereof. Fees in respect of work in progress they were only able to calculate on the amounts of the tenders. It was nevertheless arranged that Gess would pay to Caietta and Boyes an amount of R103 144 which represented their share of net fees which had already become due and of future fees calculated on the amounts of the tenders (R133 525 in total), less an agreed amount which was due to Gess from the Cape Town office. This payment

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would, however, only be a payment on account and would in no way derogate from Gess's obligation to pay to Caietta and Boyes their share of future fees eventually calculated on actual costs.

Caietta further testified that Hemmingway made notes of what transpired at the meeting. The document containing the notes reads as follows:

"1. Above schedules agreed.

2. The Cape Town current and capital accounts of NCG shall be credited to the current accounts of FPC and PWB in such ratio as the latter shall feel fit and adjusted in the S.W.A. accounts.

3. The balance of the current and capital

accounts.....29

accounts of FPC and PWB after the adjustment in 2 above shall be liquidated as follows:-

Immediately	9 780
By the 31 August '80	62 000
By the 31 October '80	31 364
	103 144

Any default in payment shall carry interest at 10% on the outstanding amount.

4. That as from the 1st November 1979 all uncompleted work of Hudson, Caietta and Gess shall be finalised by a firm of Quantity Surveyors who shall be appointed by NCG.

5. NCG undertakes the responsibility to ensure the completion of all existing contracts and to notify all clients to this effect."

(I shall henceforth refer to this document as document A32 which is how it was referred to in the trial Court.

The abbreviations NCG, FPC and PWB refer to Gess, Caietta

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and Boyes respectively).

Gess, so Caietta testified, was not prepared to sign document A32 without first consulting his attorney. That same evening Hemmingway at Caietta's insistence added the following three clauses:

> "6 All income and expenses for the account of the S.W.A. partnership which shall be subject to audit will continue to be reflected in the books of account.
>
> 7. On the 28th February 1981 the S.W.A. partnership will be dissolved.
>
> 8. The Cape Town partnership will be dissolved as from the 31st October 1979."

Gess received these additions the next day but refused to adopt them.

Much of Caietta's evidence relating to

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the Windhoek meeting turned out to be common cause when Gess later testified. But what he strenuously disputed, was Caietta's assertion that the payment already referred to, would be on account only. His version was that the amount of R133 525,00 was agreed upon as an amount which would be accepted in full and final settlement of Caietta's and Boyes's shares of all fees which had accrued and which would still accrue to the partnership. That is why he refused the day after the meeting to consent to the incorporation in document A32 of the three further terms which Caietta desired.

The trial Court preferred Gess's version. Its resultant finding that a final agreement of settle-

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ment was reached at the Windhoek meeting was the first target in the attack in this Court upon the judgment.

It is important to note that the trial Court's acceptance of Gess's evidence in preference to Caietta's was not based on their demeanour nor on the Court's impression of either of them as witnesses, but on general probabilities and on the construction of document A32. My own impression from reading the evidence is that neither Caietta nor Gess was a good witness and that Gess was a demonstrably dishonest one. In view, however, of the conclusion at which I have arrived on this part of the case, it is unnecessary to deal with the question of credibility or with the probabilities or with the

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construction of document A32. I may say that if an agreement were concluded on 6 March 1980 the probabilities and the construction of document A32 do favour the view that it was a final agreement of settlement. But, as I shall now proceed to show , an agreement was in fact not concluded.

It is common cause that the discussions between Caietta, Gess and Hemmingway commenced during the morning of the day in question. After lunch the parties again convened in Gess's office where they were joined by Swart, the auditor of the erstwhile partnership. Hemmingway had made his notes during the morning session. After lunch he explained to Swart the figures

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in the schedules to which the notes refer and asked Gess to sign the notes. Gess testified that he was "undecided", that he "dithered" at the time. He then turned to Swart for advice and when the latter told him that he (Swart) would not sign any document without consulting an attorney, Gess refused to sign, saying that he first wanted to consult his attorney. The latter's office was telephoned but he could not be found. Hemmingway then said that he would take the notes to Cape Town, have them typed and post them to Gess for signature. To that suggestion Gess agreed and the meeting broke up. As mentioned earlier that same evening Hemmingway made certain additions to his notes in the form

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of additional terms which Caietta wanted to be incorporated into the agreement; the next day Gess rejected the proposed additional terms.

On these facts it seems to me quite clear that an agreement was not concluded. I am prepared to assume that what the parties negotiated on the day in question, was an agreement of settlement. In the course of their negotiations, I will further assume, they reached agreement on the various points listed in document A32 as each of them came up for discussion. But when the final stage came and Gess was invited to signify his assent to the terms as a whole, he became undecided and refused to do so. It is important in

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this regard that he did not simply refuse to have the terms of an already concluded oral agreement reduced to writing; in his own words, he was requested to sign what Hemmingway had recorded, "as being agreed". His refusal to do so plainly signified that he was not prepared to enter into an agreement in terms of document A32 without taking legal advice. In his own mind he was undecided whether he should bind himself to the terms of the document; he conveyed his uncertainty to Caietta and, while that uncertainty remained, there obviously was no agreement. That was the state of affairs when additional terms were proposed that evening and, when Gess summarily rejected the new proposals the next day,

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the settlement negotiations became finally frustrated.

At one stage Gess testified that when Hemmingway offered to have the notes typed in Cape Town, he changed his mind and decided that he would sign the typed version upon its arrival without consulting his attorney. However, assuming that there was this change of heart (which I doubt), it was not conveyed to Caietta or to Hemmingway and is completely irrelevant.

The Court a quo did not approach the question of the alleged agreement of settlement in the way that I have just approached it. As mentioned earlier, the finding that such an agreement had been established, was based mainly on the probabilities and on the construc-

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tion of document A32, which, on my view of the matter, are of no assistance. Gess's refusal to sign Hemmingway's notes was apparently regarded as insignificant. After referring thereto and to Gess's evidence relating to his alleged change of mind when Hemmingway offered to have his notes typed and returned to Gess for signature, the learned judge merely remarked that Gess "says he made his acceptance clear to Caietta and Hemmingway". But the only acceptance that there was, was an accep - tance of Caietta's offer to have the document typed and returned to Gess; an acceptance of the terms of the document never occurred. The finding that an agreement of settlement was entered into can accordingly not be supported.

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The result of that finding was that the other issues between the parties were never decided. Counsel who appeared in the appeal for Caietta and Boyes requested us not to remit the matter to the Court a quo for the purpose of a decision on the remaining issues, and to resolve them ourselves. In the absence of any real opposition to this request on the part of Gess's counsel, I propose to do so, since this Court is in as good a position to deal with the matter as the Court a quo would be if it were to be remitted.

Reference may at this stage again be made to paragraph 1 of the minutes of the pre-trial conference. Annexure "A" to the minutes was a balance

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sheet and financial statements relating to the partnership as at 31 October 1979(which, in terms of paragraph 2(a) (i) of the minutes was taken to be the date on which the partnership was dissolved). Annexure "B" was a statement in respect of work uncompleted on 31 October 1979 reflecting separately a) fees due to the partnership but unpaid as at that date, and b) fees not due on that date but which had since become due and which had been paid up to 6 April 1983 - the date of the statement. In respect of b) it was explained to the Court a quo at the commencement of the trial that all but three of the projects in which the partnership had been professionaly engaged and which were uncompleted on 31 October 1979,

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had since been completed; fees in respect of the completed projects had been finally calculated and paid and reflected in annexure "B"; fees in respect of the three remaining projects were also reflected therein but the Court was requested not to take them into consideration.

Annexure "B" further reflected in a separate column under the heading "F/A Expenses" (i e final account expenses, a term which I shall adopt) the expenses allegedly incurred in completing the uncompleted work. I say allegedly because most of the issues listed in the minutes of the pre-trial conference relate to these expenses. In order to understand

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why the final account expenses column in annexure "B" came to be so fiercely contested, it is necessary to discuss briefly the nature of the expenses reflected therein. For that purpose I revert to the meeting between Caietta and Gess during January 1980. I mentioned earlier that it was agreed at the meeting that Gess would arrange for the completion of the work. Unbeknown to Caietta and Boyes, Gess had before that meeting already formed a new partnership with members of the staff of the old one and it is common cause that the new partnership completed the work. Gess testified about an agreement with his new partners in terms of which the uncompleted work of the old

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partnership would be done and charged for at the rate of R40 per hour. What, according to Gess, then happened, was that as and when each project was completed, the new firm would submit an account to Gess for fees in respect of the project in question, calculated on an hourly basis at the rate of R40 per hour., which were paid from the banking account of the old partnership These accounts eventually found their way into the final account expenses column in annexure "B". That gave rise to issues 3(a) and 3(d) in the minutes of the pre-trial conference.

Resolving the issues in paragraph 3(a) presents no difficulty. Caietta testified that it

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was agreed at the meeting during January 1980 that Gess would be paid an amount of R90 000 for doing the uncompleted work. That amount was calculated as set out in paragraph 3(a) (i). Gess admitted that he indicated at the meeting that R90 000 would satisfy him. His case is that he was only prepared to accept R90 000 as part of an overall settlement, and that such a settlement did not eventuate at the meeting in question. (At the Windhoek meeting the amount of R90 000 was again used in calculating the amount which Gess was to pay to Caietta and Boyes. But I have already found that an overall settlement was not arrived at at that meeting either). Now, although I am convinced on the evidence

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that Gess did not indicate to Caietta the basis on which he was prepared to accept the R90 000, I am equally convinced that the basis of his preparedness must have been the one for which he contends , and that Caietta must have understood it in that way too. It is common cause that a settlement was discussed at the meeting; in that context the question of the uncompleted work and the figure of R90 000 were mentioned - in much the same way,one would imagine, as these matters were raised and discussed at the subsequent meeting in Windhoek - and, judging by the evidence as a whole, it is more than probable that Gess, to Caietta's knowledge, would not have accepted the amount in question otherwise than as part of an over-

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all settlement. Caietta's contention that annexure "B" should have reflected an amount of R90 000 as the final account expenses accordingly falls to be rejected.

This finding does not, however, lead to the acceptance as correct of the computation of the final account expenses in annexure "B" which is based partly on Gess's alleged agreement with his new partners and partly on what he says the agreement was which he reached with Caietta at the meeting during January 1980. As appears from paragraph 3(a) (ii) of the minutes of the pre-trial conference Gess's case is that it was agreed with Caietta that the new firm would be paid a fair and reasonable fee for completing the work. That was Gess's

evidence.....47

evidence too. But his evidence particularly in that regard and as regards his alleged agreement with his new partners is so utterly and obviously unreliable, that it cannot support a finding either that he agreed with Caietta that the new firm would be paid a fair and reasonable fee or that he agreed with the new partners that the fee would be calculated on an hourly basis at R40 per hour. I do not intend going into the details of his unreliability and of his plain untruthfulness on several aspects clearly demonstrated in the record. Suffice it to say that his own counsel candidly conceded in this Court that Gess cannot be believed - at least not in regard to his evidence relating to the agreement with his new

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partners. That concession is amply borne out by the record; only it does not go far enough for on the question of the agreement with Caietta, Gess was equally unworthy of credence. It follows that whereas issue 3(a) (i) cannot be resolved in favour of Caietta, issue 3(a) (ii) cannot be resolved in favour of Gess. Regarding the latter I am prepared to go the length not only of saying that the agreement with Caietta on which Gess relied, has not been established, but of making the positive finding that such an agreement was never concluded.

On the question of the final account expenses there then remains the issues formulated in paragrapg 3(d) of the minutes of the pre-trial conference.

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While the matters stated in sub-paragraphs(i) and (ii) may be construed as specific grounds on which it may be found that the expenses were not correctly stated in annexure "B" , they do not detract from the generality of the main issue with which the paragraph commences viz "whether the final account expenses reflected in annexure "B" are correctly stated". The way in which this general issue is to be resolved is obvious.

I have already found that an agreement with Caietta in terms of which the new firm would be entitled to a fair and reasonable fee for completing the uncompleted work was never concluded. I also mentioned that even Gess's own counsel in this Court was not prepared to support

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his evidence relating to his alleged agreement with his new partners. There was thus no basis on which the new firm became entitled to payment of the amounts reflected in the accounts which were submitted to and allegedly paid by Gess. There are strong grounds for suspecting that this whole system of the submission of accounts was merely a ruse which was employed for the purpose of syphoning off to the new firm (in which Gess had a 70% interest) as much as possible of the old partnership's funds. Be that as it may, it is quite clear that the expenses reflected in annexure "B" , deriving as they do solely from accounts to the payment of which the new firm was not entitled , should not have been

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reflected therein.

The question then is : What are the expenses which should have been reflected? It appears from the evidence (though not from the minutes of the pre-trial conference) that the dispute about the expenses is confined to the amount which is to be deducted from the gross earnings on account of the fact that the uncompleted work was, by agreement between the parties, completed by Gess's new firm. That a deduction must be made, is common cause; the dispute merely relates to the amount which is to be deducted. In formulating the relevant issue in paragraph 3(d) (ii) of the minutes of the pre-trial conference, the parties related it to an agreement "that the fee should

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be a reasonable fee". But I have already found that no such agreement was ever reached and, approaching the matter realistically, it may further safely be said that there is no possibility of agreement ever being reached.

From this apparent impasse there is, in my view, only one escape, which is for the Court to use the discretionary powers which it has in all matters relating to the dissolution of a partnership in order to ensure a just and equitable division of its assets (as to which see Robson v Theron 1978(1) S A 841 (A D) at pp 855-858). I have no doubt that these powers are sufficiently wide to cover a case like the instant one; it is just and equitable that a reasonable amount be allowed by way of a deduction from the partnership's gross earnings after

dissolution , before a distribution of assets among the erstwhile partners takes place. That is in effect what the parties have asked us to do and it can best be achieved by suitably adjusting the amounts in the expenses column in annexure "B". What remains then is to determine what a reasonable deduction will be.

Many hours were devoted to that question at the trial. Unfortunately little of what was said in evidence there is of assistance. I will merely state the following salient points which have emerged, bearing in mind that what is really at stake is reasonable compensation for the completion of the work which the partnership had already begun:

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1. A distinction is in such a case to be drawn between a quantity surveyor who has already been engaged in the work, and one who has not. The reasons for this distinction are obvious; I will not dwell on them. Gess and his new associates had all been engaged in the work before the partnership was dissolved and merely carried on with what they had been doing.

2. The amount of work which a quantity surveyor has to do up to the stage when a bill of quantities is prepared and a tender accepted, is not necessarily commensurate with

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the 75% of the fee to which he becomes entitled at that stage; nor is the amount of work which he has to do thereafter necessarily commensurate with the remaining 25% of the fee.

3. Minimum fees which quantity surveyors are obliged to charge are from time to time prescribed by law. These fees are usually to be charged according to a sliding scale as a percentage of the total final costs of the building, but there is provision for cases where "the work is of such a nature that other provisions------are inapplicable.....56

plicable". In such cases the fee is a so-called time charge at a prescribed rate per hour.

Caietta suggested in evidence that Gess's new firm would be reasonably compensated by allowing it the 25% of the total fees which would become payable upon completion of each project. But, taking into account particularly the fact that there were a number of variations in some of the projects which obviously entailed a larger amount of work than would otherwise have been the case, there is no way of knowing that 25% of the fees will be commensurate with the amount of work involved. The amount of work involved is, in my view, the most important

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factor to be taken into account in order to ensure that the compensation is reasonable, and the only way of ensuring that, is to calculate it on an hourly basis. At least, no other way has been suggested. Counsel who appeared for Caietta and Gess suggested that a lump sum be awarded; the amount of R90 000 which the parties used in their negotiations for a settlement, he argued, is a reliable indication of what they themselves considered to be reasonable, and that is the amount which should be awarded. There is much to commend counsel's suggestion but I am not prepared to accept it because it appears from the evidence that it was calculated somewhat arbitrarily on the cost figures of the whole practice during

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the year preceding the dissolution of the partnership. Moreover, being an amount which satisfied the parties for purposes of a settlement, it cannot, in my view, serve as a useful guide when a fair fee is to be determined objectively.

Having come to the conclusion that compensation is to be calculated on an hourly basis, the rate per hour still remains to be determined. From 1 February 1980 (which coincided almost exactly with the commencement of the work done by the new firm) the minimum rate was apparently R30 per hour. Gess and his witness Hemmes were both of the view that a rate of R40 per hour would be reasonable. Their obscure reasons for

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this departure from the minimum prescribed rate are totally unconvincing and I have the impression that Hemmes lost sight of the fact that Gess and his new partners merely carried on with work which they had been doing all along. I am unable to find any reasons for such a departure. The expenses in the relevant column of annexure "B" should accordingly be calculated on an hourly basis at the prescribed minimum rate which applied from time to time. (It goes without saying, of course, that whatever Gess might have agreed with his new partners about the basis on which the uncompleted work would be charged for, does not concern us; it is entirely a matter between him and the new partners).

Two further matters remain to be mentioned

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on which counsel were agreed. They relate to King's salary (referred to in paragraph 3(c) (i) of the minutes) and to audit fees (referred to in paragraph 3(c) (ii)). Because counsel were agreed on the way in which annexure "A" is to be amended in respect of these two items, no discussion is required. I shall merely deal with them in the order that I shall presently make.

The order contains rather elaborate directives as to the future course of the matter. In view of the course which it took in the past, I deem such directives strictly necessary. I have assumed, moreover, that the three projects which were still uncompleted at the time of the trial more than two years ago have now been

completed..'....61

completed. I have accordingly not dealt with them separately. In any event, the terms of the order are sufficiently wide to provide for the contingency of their still being uncompleted.

Lastly there is the question of the costs in the Court below. This Court has not been asked to make any special order in that regard and I know of no reason why they should not be awarded to the plaintiffs.

The order that I make is that -

1. The appeal succeeds with costs.

2. The order of the Court a quo is set aside and for it is substituted the following:

"A. It is declared that -

(1).....62

(1) the income statement for the period 1 March 1979 to 31 October 1979 forming part of annexure 'A' to the minutes of the pre-trial conference, is incorrect in that -

(a) the amount of R198 755 reflected therein as income should be R202 931 (due to the ommission from the income of an amount of R4 176 in respect of a refund during the accounting period of King's salary);

(b) the amount of R1 300 reflected therein as audit and accounting fees, should be reduced by an amount of R1 000 to R300 ;

(c) the amounts of R69 030 and R129 725 reflected therein as the total expenses and net income respectively should be R68 030 and R134 901 respectively;

(d) the amounts transferred therein to partners' accounts are not based on a net income figure of R134 901;

(2) 63

(2) the statement annexure 'B' to the minutes of the pre-trial conference is incorrect in that -

(a) all the figures appearing in the column under the heading 'F/A expenses' are incorrect; the final account expenses should have been calculated on the basis that the fees and the time charges for time spent in travelling for principals, partners and salaried staff of the firm Norman Gess and Partners, should be the minimum hourly fees and charges which were from time to time prescribed by law.

(b) 64

(b) all the figures appearing in the last column under the heading 'Profit on F/A' are based on the figures in the 'F/A expenses' column which should have been calculated in accordance with sub-paragraph (a).

B. It is ordered :

(1) That the defendant shall deliver to the plaintiff on or before 15 March 1986 -

(a) a balance sheet as at 31 October 1979 and a statement of income and expenditure for the period 1 March 1979 to 31 October 1979 for the partnership known as Hudson, Caietta and Gess - Windhoek, in accordance with the directions in paragraph A(1) hereof;

(b) a statement reflecting, in accordance with the directions in

paragraph 65

paragraph A(2) hereof, in respect of the dissolved partnership Hudson, Caietta and Gess - Windhoek -

(i) all fees outstanding on 31 October 1979,

(ii) all fees received from 1 November 1979 to the date of the statement,

(iii) all expenses incurred from 1 November 1979 to the date of the statement,

(iv) the net profit for the period 1 November 1979 to the date of the statement.

(2) That the defendant shall deliver to the plaintiff within 14 days after receipt of a written request, any voucher in respect of the document referred to in in paragraphs B(1)(a) and (b) that the plaintiff may require.

(3) That the plaintiffs shall on or

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before 30 April 1986 advise the defendant in writing whether they accept the documents delivered by the latter in terms of paragraph B(1) as correct.

(4) That -

(a) in the event of the plaintiffs advising the defendant in terms of paragraph B(3) of their acceptance of the documents as correct, the defendant shall pay to the plaintiffs within 30 days of receipt of their written advice any amount which, in terms thereof, may be due to them;

(b) in the event of the plaintiffs advising the defendant in terms of paragraph B(3) that they do not accept the documents as correct, either party may set the matter down for further hearing in the Supreme Court of South-

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West Africa for the decision of whatever issues may then remain.

(5) That the defendant shall pay the plaintiff's costs, including the costs of two counsel."

J J F HEFER,JA.

RABIE, CJ.)
JANSEN,JA.)
VAN HEERDEN,JA.) CONCUR.
BOSHOFF,JA.)