219/55

G.P.-S.384–1952-3–10.000

U.D.J. 445.

219/55

In the Supreme Court of South Africa
In die Hooggeregshof van Suid-Afrika

(Cape of Good Hope DIVISION).
AFDELING).

APPEAL IN CRIMINAL CASE.
APPEL IN KRIMINELE SAAKI.

B.J.H. du Preez
Appellant.

versus

The Queen
Respondent.

Appellant's Attorney *Prokureur van Appellant*	*Respondent's Attorney* *Prokureur van Respondent*
Appellant's Advocate *Advokaat van Appelant*	*Respondent's Advocate* *Advokaat van Respondent*

(on bail)

Set down for hearing on:— Tuesday 28th August 1956.
Op die rol geplaas vir verhoor op:—

(WLD)
1, 2, 5, 7, 8,

— Cape

Jy/56.

IN THE SUPREME COURT OF SOUTH AFRICA.

(APPELLATE DIVISION)

In the matter between :

BENJAMIN JOHANNES HENDRIK DU PREEZ Appellant

&

R E G I N A Respondent

CORAM : Centlivres C.J., Schreiner, Steyn, Reynolds et de Villiers JJ.A.

Heard : 28th August 1956. Delivered : 10 - 9 - 56

J U D G M E N T

CENTLIVRES C.J. :- The appellant was tried by Kuper J. sitting without a jury on 11 counts. He was found guilty on counts 1,6,7,8 and 10 and not guilty on counts 2,3,4,5,9 and 11. He was granted leave to appeal but at the hearing of the appeal his counsel abandoned the appeal against the convictions on counts 7 and 8.

On counts 1 and 2 the appellant was charged with falsitas. Those counts were as follows :-

" COUNT 1: In that upon or about the 24th January, 1950,..... ....., the accused, being a director of BENMAR HOLDINGS LIMITED, a company, hereinafter referred to as "the said Company" did wrongfully, unlawfully, falsely and with intent to defraud, give out and pretend to the said Company through its directors and/or servants, that LOVATT-FRASER TRUST AFRICA LIMITED was able to pay for certain 988,500 ordinary shares

" in the said Company, in full in cash at a price of 5/- per share, and that such payment had been made by the said LOVATT-FRASER TRUST AFRICA LIMITED, and did by means of the said false pretences influence and induce the said Company to allot and deliver the said 988,500 ordinary shares in the said Company to the said LOVATT-FRASER TRUST AFRICA LIMITED, to the loss and prejudice, actual or potential, of the said Company, whereas, in truth and in fact, the accused when he so gave out and pretended as aforesaid, well knew that the said LOVATT-FRASER TRUST AFRICA LIMITED was not able to pay in full in cash for the said shares and that such payment had not been made by the said LOVATT-FRASER TRUST AFRICA LIMITED.

COUNT 2 : In that, upon or about the 21st January, 1950, ..., the accused, being a director of BENMAR HOLDINGS LIMITED, a company, hereinafter referred to as 'the said Company', did wrongfully, unlawfully, falsely and with intent to defraud, give out and pretend to the said Company through its directors and/or servants, that a certain agreement, in terms of which the said Company would enter into a joint venture with LOVATT-FRASER TRUST AFRICA LIMITED and the accused and in terms of which the said Company would pay an amount of £231,879 to LOVATT-FRASER TRUST AFRICA LIMITED to be spent as provided by the said Agreement was a genuine Agreement and that the said LOVATT-FRASER TRUST AFRICA LIMITED was able and willing to carry out its duties and exercise its rights under the agreement and that the said amount of £231,879 would be spent as provided in the said agreement, and did by means of the said false pretences influence and induce the said Company to its loss and prejudice, actual or potential, to enter into the said agreement, to draw a cheque for the amount of £231,789 in favour of LOVATT-FRASER TRUST AFRICA LIMITED

" and to deliver the said cheque to the said LOVATT-FRASER TRUST AFRICA LIMITED, whereas, in truth and in fact, the accused when he so gave out and pretended as aforesaid, well knew that the said agreement was not a genuine agreement, that the said LOVATT-FRASER TRUST AFRICA LIMITED was not able and/or willing to carry out its duties or exercise its rights under the said agreement and that the said amount of £231,879 would not be spent as provided in the said agreement. "

I shall refer to Benmar Holdings Limited as Benmar and to Lovatt-Fraser Trust Africa Limited as Lovatt.

Benmar was registered in 1947 with a share capital of one million pounds, divided into four million shares of five shillings each. Towards the end of 1949 988,500 of these shares remained unissued and Benmar's cash resources were then negligible. The appellant was the managing director of the company and the trial court found, and this was not disputed on appeal, that at all relevant times he played the leading part in the administration of the company and that the other members of the board of directors had complete confidence in the manner in which the appellant administered the affairs of the company.

Lovatt had a registered capital of one thousand pounds divided into £1 shares of which 515 were issued, all of which were held by the appellant or his nominees. There were two directors one of whom was the appellant and it was common cause that the company carried out the directions of the appellant who regarded the company

as a convenient instrument for the transaction of his own affairs. Several withesses stated that the appellant used the company as his "cash box".

On September 5th, 1949, Benmar wrote a letter to a certain Mr. Dembo. This letter was signed by the appellant as managing director and also by the company's secretary. In that letter there is the following passage :-

> Of the Company's registered capital of £1,000,000, divided into 4,000,000 shares of 5/- each, there is a balance of 1,000,000 (one million) shares which have not been issued. However, it has been arranged that the interested parties will subscribe in cash at par value for these shares. This in effect will give the Company a further amount of £250,000 (Two hundred and fifty thousand pounds) Cash at Bank. Transfer of this amount of money will be effected upon Mr. B. de Preez's return from Europe in the early part of October, 1949."

On October 5th, 1949, a meeting of directors of Benmar was held and the appellant stated that he had made tentative arrangements to take up and pay for in full at five shillings each the unissued shares in the company, thus ensuring that the company would have an ample bank balance as working capital.

On November 2nd, 1949, another meeting of directors of Benman was held and the appellant stated that in order to ensure that the company would have an adequate bank balance as working capital he had made arrangements to take up and pay for in full the unissued shares in the company and the meeting thereupon decided to give him an option to purchase the 988,500 unissued shares at five shillings each.

On December 15th, 1949, the appellant told a meeting of Benmar shareholders that arrangements regarding the unissued shares were under discussion and that they would result in approximately £250,000 in cash.

The appellant ceded his option to buy the unissued shares in Benmar to Lovatt which exercised the option on January 21st, 1950, and sent Benmar a cheque for £247,125 which was deposited to the credit of the latter company on the same day. A number of other things happened on January 21st, 1950, to which I must now refer.

A written agreement was entered into between Benmar, / Lovatt and the appellant. The agreement stated that the parties thereto "do hereby enter into a Joint Venture Agreement "for the express purpose of the promotion and advancement of such "business and industrial projects as may be to the mutual benefit

"of all the said parties, subject to the terms and conditions "hereunder." Clause 2 of the agreement stated that Benmar undertook to make payment to Lovatt of the sum of £231,879 as a loan for the purpose of investment. Clause 3 conferred wide powers on Lovatt in respect of that sum and concluded by stating that that company was entitled "to administer and handle the said "monies and to invest the same against suitable security." Under Clause 3 the profits or losses arising from the joint venture were to be received or borne in the followinf proportions :- Benmar 45%, Lovatt 45% and the appellant 10%. Clause 5 provided that Lovatt should pay 5% interest on the capital sum to Benmar. Under Clause 6 proper books of accounts had to be kept of all joint venture transactions and under Clause 7 a banking account had to be kept.

In pursuance of the above agreement and on the same day as that on which the agreement was entered into Benmar made out a cheque in favour of the Lovatt company for £231,879. This cheque was immediately deposited to the credit of the latter company which, prior to the deposit thereof, did not have the funds to meet the cheque for £247,125 which it had given the Benmar company. On the day the respective cheques were given Benmar had a credit balance at its bank of £670. 9. Od and Lovatt a credit balance of £6,087. 12. Od which was increased

by £10,000 on that date by the appellant depositing that sum to the credit of Lovatt. In the result both cheques were honoured by the bank.

On January 23rd, 1950, the appellant asked Drew, who was his personal representative and was engaged mainly in investigating the prospects of exploiting certain base mineral possibilities in East Africa, to endorse two cheques for internal purposes. The cheques were put before him face down and he did not turn them over nor did he know the amounts of the cheques. These two cheques were for the sums of £102,000 and £130,000 respectively and were drawn by Lovatt in favour of Drew. The counterfoils show that the first cheque was for the purpose of the Industrial Rubber Limited - Uganda lease and property and the second for the purpose of Consolidated Minerals Limited. Drew said that neither of these amounts had ever been given to him for the purposes of those two companies. The two cheques were deposited to the credit of Lovatt on January 23rd, 1950. The cheques were drawn when Lovatt had a credit balance of £1091. 12. 0d and they were honoured, if one can use that word, by the bank because they were deposited to Lovatt's credit. There would of course have been a corresponding debit in respect of the amounts of the two

cheques - the nett result being that Lovatt was no worse or better off as a result of this strange transaction.

At a meeting of directors of Benmar on January 24th, 1950, the appellant stated that a "letter of transfer for a "sum of £247,125 was received from Messrs Lovatt-Fraser Trust "Africa Limited in payment for 988,500 shares, which sum had "been deposited and credited to the Company's account with "Volkskas Ltd." The company thereupon allotted 988,500 shares and delivered the scrip to Lovatt.

At a meeting of Benmar shareholders on February 15th, 1950, the appellant referred to the joint venture agreement and said :- "Upon the issue of the balance of the share cap- "ital, your company's immediate cash resources on hand were "far in excess of requirements and could not be permitted to "lie idle and unremunerative. Therefore your Board decided "to invest and exploit to advantageous uses such of its sur- "plus cash resources. "

No books of account were kept as required by the joint venture agreement nor was any banking account opened. It would have been senseless to keep books of account or open a banking account because in fact the Benmar cheque for £231,879 was a mere paper transaction, that cheque having been deposited at the same time as the Lovatt cheque for £247,125 and the

nett result being that the Lovatt company did not receive a farthing in cash. The only part of the joint venture agreement which was carried out was the payment of interest to Benmar in terms of Clause 5.

The facts stated above are undisputed. No evidence was given on behalf of the appellant. The learned trial judge came to the conclusion that the matters referred to in counts 1 and 2 really formed part of one transaction and could not be divided into two offences as alleged. He found the appellant guilty on count 1 and not guilty on count 2 but in arriving at his conclusion he relied on the facts set forth in count 2.

The trial court found that there could be no doubt that the joint venture agreement was, from the point of view of the appellant, an essential feature of the transaction to purchase the shares, for if no such agreement had been entered into the appellant would not have handed over the cheque for £247,125 well knowing that the cheque could not be met. There is ample evidence to support this view of the trial court. The trial court came to the conclusion that the joint venture agreement was not a genuine agreement - a conclusion which is amply supported by the facts proved. I do not consider it necessary to refer to all the facts which show that the agreement could not

have been a genuine agreement. I think that it is sufficient to say that the appellant must have known that Benmar would not be in a position to pay to Lovatt for the purposes of the joint venture the sum of £231,879 or any other sum approximating that amount. He must have known that the Lovatt cheque for £247,125 would be largely cancelled out by the Benmar cheque for £231,879, that the Benmar company would be left with a comparatively small amount of cash on hand and that Lovatt itself was not in a position to finance the joint venture.

There is another matter which ought to be mentioned as going to show that the joint venture agreement was not genuine. Two days after that agreement was entered into the transaction between Lovatt and Drew took place. The details of this transaction have already been stated by me. As regards that transaction I agree with the following remarks of Kuper J.:-

" The only possible explanation of this transaction is that the accused wished to create an impression that he had utilised £232,000 of the money of the joint venture for the purpose of the two companies mentioned, purposes which would accord with the terms of the agreement. If questioned by the directors of Benmar he would be able to flourish two cheques made out to Drew and endorsed by him, the prima facie suggestion being that Drew had received the sums of money disclosed for the purpose of the joint venture. This was clearly a step taken by the accused to

"conceal the fact that monies were not being used for the purpose of the joint venture, a step he would take only because he never intended when the agreement was entered into to implement its terms. It was clearly not a genuine agreement. That this was the purpose of the accused is clearly demonstrated by the following extract from a report of directors of Lovatt-Fraser signed by the accused on the 14th December, 1950 : 'In terms of a joint venture agreement 'entered into with Benmar Holdings Ltd. and Benjamin de Preez, 'your company has advanced to Mr. R. E. Drew a sum of '£232,000: 0. 0. for investment purposes on the Joint Venture 'Account.' This statement was false to the knowledge of the accused and its purpose was to cover up the deceitful conduct of the accused in entering into the agreement. "

The learned trial judge stated his conclusion as follows :-

" I have therefore come to the conclusion beyond a reasonable doubt that the accused entered into the joint venture agreement not with the intention of entering into such an agreement and carrying out its terms but solely to deceive the Benmar company into allotting and delivering the unissued shares to him without payment in return. I have already indicated that the crime committed by the accused could not be split into the two portions as reflected by Counts 1 and 2 of the indictment, and that the offence was that described in Count 1, the pretence in regard to the joint venture agreement in Count 2 being the basis of the pretences alleged in Count 1, namely that Lovatt-Fraser was able to pay in full in cash for the shares and that such payment had been made. I find the accused guilty on Count 1 and not guilty on Count 2. "

The representations relied on in Count 1 were representations made on January 24th, 1950 by the appellant that (1) Lovatt was able to pay for the 988,500 Benmar shares in full in cash and (2) such payment had been made. It is clear from the evidence that as a result of these representations those shares were allotted and delivered to Lovatt. Mr. Rosenberg for the appellant contended that the Crown had failed to establish that either representation was false. Lovatt, so the argument proceeded, was not only able to pay but actually paid by means of its cheque for £247,125. It may be conceded that there was a payment of a kind but it was not a payment which was of the kind which the appellant represented would be made. A representation that a sum of money will be paid in cash is a representation that that sum will be placed in the hands of the payee. At no appreciable point of time did Benmar receive £247,125 in cash, because, when the Lovatt cheque for that amount was deposited, Benmar's cheque - and both cheques were drawn on the same bank - was also deposited. So there was simultaneously a credit entry of £247,125 in favour of Benmar and a debit entry against Benmar of £231,879. There was therefore no payment of £247,125 "in full in cash" as represented by the appellant. That the appellant understood his representation to have the meaning I have ascribed to it is clear

from the statements he made to the Benmar shareholders on December 15th, 1949 and February 15th, 1950 which I have set out above. There is no reason to suppose that the others present understood the representation in any other way.

I come to the conclusion therefore that the Crown succeeded in proving as alleged in Count 1, that the representation that Lovatt had paid for the 988,500 Benmar shares in full in cash was false to the knowledge of the appellant. The Crown also succeeded in proving - and as to this there is no room for dispute - that the representation that Lovatt was able to pay in full in cash for the shares was false to the knowledge of the appellant. For these reasons the conviction of the appellant on Count 1 must stand.

The appellant was also charged with falsitas on Counts 5 and 6. Those counts were as follows :-

" COUNT 5 :- In that, on or about the 19th January, 1950, ..., the accused did wrongfully, unlawfully, falsely and with intent to defraud give out and pretend to HANS REINEKE and ROBERT WILLIAMS, a director and the secretary respectively of SALAMANDER WHALING AND INDUSTRIES LIMITED that he intended to pay certain small charges to VOLKSKAS LIMITED and that he intended to use a certain blank cheque for that purpose, and did by means of the said false pretences influence and induce the said HANS REINEKE and ROBERT WILLIAMS to their loss and prejudice actual or potential, and the loss and prejudice, of SALAMANDER WHALING AND INDUSTRIES LIMITED, to sign the said blank cheque,

" whereas the accused, in truth and in fact, when he so gave out and pretended as aforesaid well knew that he did not intend to pay certain small charges to VOLKSKAS LIMITED, nor to use the said blank cheque for that purpose.

COUNT 6 :- In that, upon or about the 20th January, 1951, ... the accused, being a director or servant of SALAMANDER WHALING AND INDUSTRIES LIMITED, a company, hereinafter referred to as the said company, did wrongfully, unlawfully, falsely and with intent to defraud, give out and pretend to the said company, through its directors or servants, that LOVATT-FRASER TRUST AFRICA LIMITED, a company, had paid in full in cash for certain shares in the said company, and that certain three cheques drawn by LOVATT-FRASER TRUST AFRICA LIMITED in favour of the said company for amounts of £248,405, £78,200 and £471,550 were good and available cheques and represented such /payment to the said company, and did by means of the said false pretences influence and induce the said company to its loss and prejudice, actual or potential,

(i) to deliver to LOVATT-FRASER TRUST AFRICA LIMITED 662,600 shares in the said company which had been allotted to nominees of the said LOVATT-FRASER TRUST AFRICA LIMITED, and

(ii) to allot to HEDAYA MERCANTILE CORPORATION and deliver to LOVATT-FRASER TRUST AFRICA LIMITED, 312,800 shares in the said company, and

(iii) to allot to nominees of the said LOVATT-FRASER TRUST AFRICA LIMITED and to deliver to the said LOVATT-FRASER TRUST AFRICA LIMITED 1,886,200 shares in the said company, whereas, in truth and in fact the accused when he so gave out and pretended as aforesaid, well knew that the said LOVATT-FRASER TRUST AFRICA LIMITED had not paid

" in full in cash for the said shares and that the said three cheques were not good and available cheques nor did they represent such payment. "

I shall refer to Salamander Whaling and Industries Limited as Salamander.

The facts alleged in count 5 were proved in evidence. The blank cheque there referred to was filled in by the appellant for £844,655. That cheque was deposited in the bank to the credit of Lovatt on January 20th, 1951.

The following facts found by the trial court were not challenged on appeal. On January 20th, 1951, four cheques drawn by Lovatt were paid to the credit of the Salamander account with its bankers and honoured. These cheques were for the following amounts :- (1) £248,405 representing the amount to be paid for 662,600 Salamander shares referred to in count 6, (2) £471,550 representing the amount to be paid for the 1,886,200 Salamander shares referred to in that count, (3) £46,500 which purported to be a repayment of that sum which was taken by the appellant from Salamander and which forms the subject matter of count 10 and (4) £78,200 representing the amount to be paid for the 312,800 Salamander shares referred to in count 6. These cheques amounted in all to £844,655 - the exact amount with which the Salamander account at the bank was debited in

respect of the cheque referred to in count 5. The only means by which Lovatt could have hoped that its cheques would be honoured was by the deposit of the Salamander cheque for £884,500. At the time that the cheques were given Lovatt was in credit to the extent of only £2,669. 0. 8d. The trial court was satisfied that what the appellant intended to do was to obtain 2,861,600 Salamander shares without paying for them and that the evidence relating to count 5 revealed that his manoeuvre in regard to the obtaining of the cheque from Salamander was directed to that end and was part of the scheme of the appellant to obtain those shares.

On January 20th, 1951, one of Salamander's directors accompanied the appellant to the bank and saw him deposit to the credit of the Salamander account the four cheques already referred to. The appellant showed another director of Salamander's the deposit slip and said : "We have now a million pounds." It was immediately resolved by Salamander to allot 2,548,800 shares to Lovatt and 312,800 shares to the Hedaya company. It was only when Salamander's secretary received some three or four weeks later from Salamander's accountant a bank statement that it was realised that no money had come into the Salamander account because of the cheque for £844,655

which had been drawn on its account.

The trial court found ~~that~~ the appellant guilty on count 6 and added that as the ~~appellant~~ acts stated in count 5 were intended by the appellant and were in fact preparatory acts for the purpose of the offence alleged in count 6 and were part of the same transaction the appellant was found not guilty on count 5.

As the argument addressed to us on appeal from the conviction on count 6 was the same as the argument in respect of count 1, it is unnecessary to say more than that the argument fails and that the conviction on count 6 must stand.

I should, perhaps, add that it is not necessary for this Court to consider whether the trial court was correct in acquitting the appellant on counts 2 and 5 or to express any opinion whether it would have been proper to have convicted the appellant on both those counts and to have treated counts 1 and 2 as one count and counts 5 and 6 also as one count for the purpose of sentence.

On count 10 the appellant was convicted of stealing £46,500 from Salamander on December 18th, 1950.

Salamander offered to the public 800,000 five shilling shares at 7/6 per share but only 137,000 were applied for

and the company received £51,250. 0. 0. The minimum subscription required in order to proceed to allotment was £200,000. Under Sec. 81(4) of the Companies Act the amount of £51,250 had to be kept as a separate fund and was not available for the purposes of the company or for the satisfaction of its debts.

Later one afternoon, after banking hours, the appellant approached Williams (Salamander's secretary) and told him that he (the appellant) and one Frank, Salamander's broker, were in urgent need of £46,500 in connection with Salamander's business. Williams replied that the company had no money and the appellant asked him about the £51,250 in the special account. Williams told him that the account could not be operated on. The appellant persisted and offered Williams two cheques drawn by Asiatics for the total amount of £46,500 which could be deposited the next day. After the appellant handed Williams the Asiatics' cheques the latter signed a cheque drawn on the Salamander account for £46,500 and handed it to the appellant. This cheque had been signed in blank by a director of Salamander and it only required the appellant's signature to render it negotiable. The appellant used the cheque to enable the bank to transfer the sum of £46,500 to Frank's banking account. The cheque had nothing to do with

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the affairs or business of Salamander. The next morning the appellant asked Williams for the two Asiatic cheques which he said he would deposit immediately to Salamander's credit. Williams thereupon gave the appellant the two cheques and the deposit book of the company. On the appellant returning to the office Williams asked him for the deposit book and was told that it had been left at the bank but that the cheques had been deposited. When Williams received the next bank statement from the bank he saw that the Asiatics' cheques had not been deposited. He and Dr Berger who was one of Salamander's directors immediately interviewed the appellant who said that everything would be all right and that everything was going to be fixed up out of all the money that was coming in. The appellant was a creditor of Salamander in a large amount, which Williams stated was over £100,000. There was no investigation as to when the amount was payable. This could have been deposed to by the appellant, but he did no go into the witness box.

Mr Rosenberg contended that although the appropriation by the appellant of £46,500 from the funds of Salamander was an unauthorised borrowing, no animus furandi on the part of the appellant was proved because the company was indebted to the appellant in an amount in excess of £46,500. The same contention was advanced before the trial court which, in my opinion, rightly rejected it. I agree with the following reasons given by

by the learned trial judge for rejecting that contention :-

(a) At no stage, either when he persuaded Williams to give him the cheque, or when he was confronted by Williams and Berger, did the appellant even mention the fact that he was entitled to the money.

(b) No evidence having been given by the appellant, there is nothing from him to suggest that he might have taken the money on account of Salamander's indebtedness to him.

(c) The fact that he persuaded Williams to give him the cheque by handing Williams the two Asiatics' cheques for deposit the next day is completely inconsistent with any claim of the appellant that he was entitled to take the money.

(d) The fact that he removed the Asiatics' cheques the next day by playing on Williams's confidence in him is also completely inconsistent with such a claim.

(e) Williams told the appellant that the sum of £51,250 could not be drawn on.

(f) When confronted by Williams and Dr. Berger the day after the cheque was made out for £46,500, the appellant promised to "fix the matter up", bu which they both understood that the mon would be repaid.

Even, therefore, if it would have been a defence ha appellant taken the money to reimburse himself - a point wh

is not necessary to decide - such a defence has clearly not been established.

The result is that the appeal fails on all the counts on which the appellant was convicted, and as it was not contended that the sentences imposed were excessive, the appeal is dismissed.

Schreiner J.A.)
Steyn J.A.) concur
Reynolds J.A.)
de Villiers J.A.)