125/1957

123/1959

G.P.-S.4706—1950-1—6,000. U.D.J. 41.

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

( Appellate DIVISION).
AFDELING).

Original record + Unprinted exhibit

APPEAL IN CRIMINAL CASE.
APPÈL IN KRIMINELE SAAK.

ATTORNEY-GEN. (TRANSVAAL)
Appellant.

*versus*

M. MARTENS & ORS.
Respondent.s

*Appellant's Attorney* A/Genl. (Tvl.) *Prokureur van Appellant*
*Respondent's Attorney* W.J. Ackermann & Kie (Ale) *Prokureur van Respondent*

*Appellant's Advocate* G.H. Beale
*Advokaat van Appellant*
*Respondent's Advocate* Lulchi Q.C. & Schreiber
*Advokaat van Respondent*

(T.P.D.) *Set down for hearing on:—* Thursday, 5th November, 1959.
*Op die rol geplaas vir verhoor op:—*

(B)

2 = 3

Coram: Schreiner, de Beer et Ramsbottom

J.A.V

Postea: Monday, 9th November, 1959.

Appeal allowed and the order of the T.P.D. allowing the appeal to it is set aside, the convictions and sentences are reinstated and the matter is remitted to the said T.P.D. to decide the issues which remain undecided.

Registrar

IN THE SUPREME COURT OF SOUTH AFRICA

(Appellate Division)

In the matter between :-

THE ATTORNEY GENERAL (Transvaal) Appellant

and

C. G. MARTENS & ANOTHER Respondent

Coram: Schreiner, de Beer et Ramsbottom JJ.A.

Heard: 5th November, 1959. Delivered: 9 - 11 - 1959

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J U D G M E N T

SCHREINER J.A. :- The respondents, whom I shall refer to as "the accused", are directors of a company, who in their personal capacity, and one of whom in his capacity as director, were in terms of section 381 of Act 56 of 1955 charged in a regional court with the crime of theft on a number of counts. They were convicted on six counts and various sentences were imposed. They appealed to the Transvaal Provincial Division on the ground inter alia that "the "charges disclose no offence inasmuch as there is no allegation "therein that the alleged misappropriation of the monies was "done fraudulently or with an intent to steal." The appeals were upheld on this ground and the convictions and sentences were set aside. The Attorney General of the Transvaal has now appealed to this Court under the provisions of section 105(1) of

Act/.....

Act 32 of 1944 on the ground that the Provincial Division erred in law in holding that the charges disclosed no offence.

With an irrelevant exception all six charges are in the same form. They are in Afrikaans and consist of a number of recitals followed by the conclusion that the accused had therefore committed the crime of theft. The recitals state that the accused had received stated sums of money from the complainants to be applied as part of the purchase price of certain named farms. It was further recited that the purchases were conditional on the grant of loans therefor by the Department of Lands and that, the condition having in each case failed, it was the duty of the accused to repay the sums in question to the complainants, but that they had failed to do so. The last recital, so far as material, reads - "En nademaal,inteendeel, "die genoemde beskuldigdes.....wederregtelik,onwettiglik en "valslik, die bedrae geld.....vir hulle eie doel en voordeel "aangewend het. "

The judgment of the Transvaal Provincial Division, which is reported at 1949(4) S.A.229, incorrectly states that the accused were convicted of theft by false pretences, and not of theft <u>simpliciter</u>, but it does not appear that this slip affected the reasoning. De WET J., who delivered the court's judgment, said that the point taken on appeal was that the charges did not disclose an offence"because "there was no allegation that there was a <u>fraudulent contrec-</u>

"-tatio or an intention to steal."

It is advisable at the outset to clear up an issue raised by a passage in the judgment, where the learned judge said "I must mention in the first place that the "words 'vir hulle eie doel en voordeel aangewend het' do not in "my opinion bear the same meaning as 'converted to their own use' "It seems to me that a possible translation of those words is " 'applied to their own purposes' or 'applied for their own pur- "poses' ". I do not understand the learned judge to have intended in this passage to express doubt as to whether the actus reus was sufficiently alleged. Apparently the Crown had contended that this part of the charge alleged that the ac- cused had converted the monies to their own use and that this allegation was of importance in deciding whether the intention to steal was sufficiently set forth in the charge taken as a whole. It was, it seems, in order to meet this contention that the learned judge expressed the view that the words "vir hulle "eie doel en voordeel aangewend het" were not the equivalent of "converted to their own use". I am unable to agree with the learned judge's view as to the meaning of the phrase. In Van Zyl en Beyers' Engels - Afrikaanse Regswoordeboek "convert "money to one's own use" is translated "geld (onwettiglik) vir "eie voordeel aanwend." Hiemstra and Coertze's Afrikaans-Engels Legal/.....

Legal Dictionary gives the same translation, in addition to "geld toeëien." In Rex v. Pretorius (1950 (4) S.A. 269) the charge is set out at page 270 and it uses the expression "tot sy eie doeleindes aangewend het", clearly, I think, as the equivalent of "converted to his own use." Though the charge in that case was the subject of careful examination and criticism in the judgment, it does not appear from the report that this particular phrase was thought to call for comment. It was treated as alleging "toeëiening" i.e. appropriation. It seems to me that the words in the present charge do indeed mean "converted to their own purpose and benefit" or, as it is more commonly stated, "converted to their own use."

Accordingly, if one disregards for the moment the word "valslik", the charge, after reciting the receipt of the monies and the failure of the accused, in breach of their duty, to repay them, proceeds in the last recital to allege that, "inteendeel" i.e. on the contrary, emphasising the breach of duty, the accused wrongfully and unlawfully converted the monies to their own use. It was not contended on behalf of the Crown that these allegations, read with the particulars in the earlier recitals but without the addition of the word "valslik", would in the language of section 315 of Act 56 of

1955/.....

1955 have "set forth the offence.....in such manner and with "such particulars.....as may be reasonably sufficient to inform "the accused of the nature of the charge." It is unnecessary therefofe to express any opinion on the correctness of the decision in Rex v. Pretorius (supra), which proceeded on the basis that it was insufficient on a theft charge to allege that the accused received money belonging to the South African Railways and Harbours and wrongfully and unlawfully converted it to his use.

In the present case the charge added, after the words "wederregtelik" and "onwettiglik" the word "valslik", and the Crown's contention is that in the context this word must have conveyed to the accused, if they could otherwise have been in doubt, that the Crown was alleging that when they converted the monies to their own use they had the intention to steal.

We were referred to Rex v. Moletsane (1941 O.P.D. 88 at page 96). and Malefane v. Rex (1945 O. P.D. 171 at page 176), where Van den HEEVER J. expressed the view that an ambiguous charge is not dealt with in favorem libertatis as is an ambiguous penal statute. Ambiguous in this connection means, I apprehend, that the charge on one meaning fairly attributable to it discloses an offence, while on another meaning also fairly attributable to it no offence is -

disclosed/.....

disclosed. It is, however, in my view unnecessary to decide whether the opinion of Van den HEEVER J., for which in Malefane's case he found support in Rex v. Stevens and Agnew (102 E.R.1063 at page 1068), was correct. At least it seems to me to be clear that a charge may disclose an offence although it requires some interpretation to fix its meaning.

In the present case it is contended on behalf of the accused that the word "valslik" introduces a measure of uncertainty which has the result that the charge discloses no offence. On one or more acceptable meanings of "valslik" the charge is consistent, so it was argued, with a contention on the part of the Crown that the accused were guilty of theft, even though they withheld repayment of the sums of money because they honestly thought that they were entitled to do so or at least that it was not dishonest for them to do so. I do not agree with this contention. It is true that the word "valslik", like its English counterpart "falsely", may mean several things. For instance as applied to the making of statements or representations it may mean "untruly" in the objective sense of "incorrectly", while it may also mean "untruthfully". In the present context, however, those meanings can find no place. No question of veracity or mendacity can directly arise on a question whether the retention of money

was/.....

was theftuous or not. There may of coufse be associated repre-
sentations, objectively inaccurate or consciously fabricated,
but no such representations are alleged in the charges in ques-
tion.

But there are other meanings of "vals"
and "valslik" from among which a more appropriate one can be
readily selected. It is unnecessary to refer to the various
dictionary meanings of these and allied words - Afrikaans,
Nederlands, English and Latin - which the industry of counsel
and my brethren have brought to light. Counsel for the accused
contended that to show that an intent to steal was being alleged
the word "bedrieglik" should have been used, instead of "vals-
lik". But Schoonees's Woordeboek van die Afrikaans Taal gives
as the first meaning of "bedrieglik" the word "vals". In its
adverbial form this would be "valslik". It is unnecessary to
affirm that "valslik" was the most satisfactory word to use in
order to convey the allegation of an intent to steal. I assume that it was not, It is
sufficient, however, to say that in the context its meaning was clear and
could not have been doubted by the accused. The requirements of
section 315 were therefore fully satisfied and the Transvaal
Provincial Division should not have held that the charge dis-
closed no cause of action.

The appeal is allowed and in -

accordance/.....

accordance with Attorney General (Transvaal) v. Steenkamp (1954 (1) S.A. 351 at page 357) and Attorney General (Transvaal) v. Moore's S.A. (Pty) Ltd (1957 (1) S.A. 190 at pages 197/8) the order of the Transvaal Provincial Division allowing the appeal to it is set aside, the convictions and sentences are reinstated and the matter is remitted to the said Provincial Division to decide the issues which remain undecided.

O.W. Schreiner
7.11.59

De Beer, J.A. } Concur
Ramsbottom, J.A. }