Judgment 31-8-70 183/69

G.P.-S. J. 445.

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

(Appellate DIVISION).
AFDELING).

APPEAL IN CRIMINAL CASE.
APPÈL IN STRAFSAAK.

JAMES SMITH
Appellant.

versus/teen

THE STATE
Respondent.

Appellant's Attorney _____ *Respondent's Attorney* _____
Prokureur van Appellant *Prokureur van Respondent*

Appellant's Advocate _____ *Respondent's Advocate* _____
Advokaat van Appellant *Advokaat van Respondent*

Set down for hearing on 21-8-70
Op die rol geplaas vir verhoor op

27.10

(C.P.D.)

31.8.70. Per Muller AJA APPEAL DISMISSED.

REGISTRAR.
31.8.1970

Note: On Bail

IN THE SUPREME COURT OF SOUTH AFRICA

(APPELLATE DIVISION)

In the matter between:

JAMES SMITH ..... APPELLANT

and

THE STATE ..... RESPONDENT

CORAM: OGILVIE THOMPSON, JANSEN, JJA., et MULLER, A.J.A.

Heard on: 21 August 1970. Judgment on: 31 AUGUST 1970.

J U D G M E N T

MULLER, A.J.A.:

The appellant was charged in the Regional Court, Cape Town, with fraud, alternatively theft. There were 30 counts in all both on the main and alternative charge. All the counts related to property transactions in which the appellant had been involved while practising as an estate agent in Cape Town over the years 1964 to 1967 and in respect of which transactions he was alleged to have received various sums of money from purchasers or prospective

purchasers 2/

purchasers.

The gist of the fraud charge was that the appellant had falsely represented to the several complainants mentioned in the charge that he was willing and had authority to sell certain houses or vacant stands and/or to receive ~~money~~ MONIES in respect thereof, and had thereby induced the said complainants, to their loss and prejudice, to pay certain monies to him; whereas, in truth and in fact, the appellant well knew that he was not willing and had no authority to sell the said properties and/or to receive monies in respect thereof.

The alternative charge was that the appellant had stolen the monies so received from the various complainants.

The appellant pleaded not guilty to all the counts but was convicted by the Regional Magistrate on 6 counts of fraud (counts 1, 3, 4, 6, 17 and 18) and on 7 counts of theft (counts 14, 15, 20, 21, 22, 25 and 27.)

An appeal to the Cape Provincial Division

was 3/

was partly successful; the Court of appeal setting aside the convictions of theft on counts 14, 15, 20, 21, 22 and 27 and changing the convictions on counts 1, 3, 4 and 6 from fraud to theft.

The appellant, therefore, now stands convicted on 2 counts of fraud (counts 17 and 18) and 5 counts of theft (counts 1, 3, 4, 6 and 25); and it is with these 7 remaining counts that this Court is now concerned on appeal.

The circumstances are such that, in stating the facts of the case, certain counts can conveniently be dealt with together; and I shall accordingly deal with the remaining 7 counts in the following order: first counts 1, 3, 4 and 6, then counts 17 and 18, and, finally, count 25.

Counts 1, 3, 4 and 6 relate to separate transactions entered into by the appellant over the period January to April 1966 with four different persons, each as the prospective purchaser of the same property, namely, a house in 6th Street, Kensington, which belonged to a

company 4/

company, Salber (Pty.) Limited.

According to Mr. Salber, a director of the company, appellant had approached him during October 1965 with the object of purchasing the property in question. The house on the property was then vacant and appellant was informed that he could purchase the property at a stated price but that a deed of sale could be executed only after the company had settled certain issues with the person who had until then occupied the house and had entered into an agreement with the company to purchase the property.

Appellant made a deposit of R200 towards the purchase price and was informed by Mr. Salber that he could take occupation immediately provided he paid a rental of R34 per month, which would be taken in reduction of the purchase price. Whether any such monthly payments were ever made does not appear from the record, but appellant did in fact later pay a further deposit of R200, making the total amount deposited towards the purchase price R400.

Appellant 5/

Appellant did not occupy the property but instructed a building contractor to effect certain alterations to the dwelling on the property. While the building operations were being carried out appellant advertised the property for sale. This advertisement was placed in the name S.K. Estate Agencies under which name appellant conducted his business. In response to the advertisement several prospective purchasers, including the four complainants in respect of counts 1, 3, 4 and 6, approached appellant. Each of the complainants viewed the property and was told by appellant that it was for sale at a certain price. According to the complainants the price mentioned by appellant varied. Thus Mr. Williams (count 1) said he was informed that the price was R3,400, while in the case of Mr. Hendriks (count 3) and also in the case of Mr. Paulsen (count 4) it was R4,000, and in the case of Mr. Linquist (count 6) R4,800. In any event, each of these complainants made certain deposits towards the purchase price of this particular property, the amounts

paid 6/

paid by them being as follows:

Mr. Williams (count 1): 2 payments totalling R150 plus a further sum of R104.65 as a "fee paid towards raising of bond."

Mr. Hendriks (count 3): 3 payments totalling R900 plus a further sum of R50.20 "being administration fee for raising a bond."

Mr. PaulseN(count 4): 4 payments totalling R320.

Mr. Linquist (count 6): 2 payments totalling R600.

All these payments were made over the period January to November 1966.

In respect of each payment made appellant issued a receipt in the name of S.K. Estate Agencies; and in every one of these receipts, save those issued To Mr. Williams and Mr. Hendriks in respect of monies received as a "fee towards (or for) raising a bond", the amount paid is described as a "deposit" or "part deposit" or "further deposit" on "certain immovable property situated at no. 63, 6th Street, Kensington." Some of the receipts also bear the inscription "pending further negotiations and raising of bond" or merely "pending raising

of 7/

of bond."

What happened to the monies so received by appellant will be dealt with later. At this stage it is necessary, however, to state what appellant's explanation was with regard to the transactions entered into by him for the acquisition and disposal of this property. According to the appellant he, having agreed with Mr. Salber to purchase the property at a stated price; having paid R400 as a deposit towards the price and having taken possession of the property, believed that he was lawfully entitled to sell the same despite the fact that he had not yet obtained transfer thereof. In this regard it may be stated that it was also Mr. Salber's view that, as far as his company was concerned, appellant had bought the property and that appellant would have been quite right in assuming that he would eventually become the owner thereof. Asked to explain his conduct in negotiating with several prospective purchasers and in accepting deposits from all of them, appellant stated

that 8/

that he had informed each of them, including the aforementioned complainants, that he was renovating the dwelling; that there were several persons interested in the property and that the one paying in the largest sum as a deposit towards the purchase price would be the eventual purchaser while the deposits paid by the others would be refunded. To use his own words "none of them bought, they were only people that were lined up, that is a common thing amongst estate agents to line people up."

Turning now to counts 17 and 18, the evidence is that, in response to an advertisement in a local newspaper, one Aaron Frederick Adams approached appellant and made enquiries regarding the possibility of purchasing vacant land in Bellville South. Appellant's agency had no land for sale in Bellville South but appellant asked Mr. Adams whether he knew of any vacant residential stands in that area. Mr. Adams replied in the affirmative and it was then arranged that Mr. Adams would accompany appellant and point out such vacant land; which Mr. Adams did. Appellant identified the land shown to him on a plan of

Bellville and promised to find out who the owner was; whether the land was for sale and at what price. In due course appellant informed Mr. Adams that he had the land for sale and that the ~~owner~~ SELLER wanted R800 for a plot. A few days later appellant again contacted Mr. Adams and stated that the ~~owner~~ SELLER had reduced the price to R750. Mr. Adams was prepared to pay that sum and, after being asked by appellant to make a deposit towards the purchase price, Mr. Adams over the period February to May 1966 made two payments to appellant totalling R100 as a deposit and two further payments totalling R57.90 as "an administration fee towards raising of bond."

At or about the same time appellant told one Martin John Adams that he had the adjoining plot for sale, also at R750, and the latter agreed to purchase this plot, paying R100 as a deposit as well as a further sum of R57.90 "towards administration for raising of bond." In both cases receipts were issued by appellant in the name of S.K. Estate Agencies, and these receipts, other than those issued in respect of administration fees, describe the

monies 10/

monies received as a "deposit", "part deposit" or "further deposit" on "certain immovable property situated in Bellville South," and added thereto are the words "pending further negotiations with owner."

According to the evidence of one Talep Baderoom, he had purchased these two vacant lots in 1953, was still paying instalments on the purchase price and had not yet received transfer. He had no intention of selling the land and had not instructed any person to offer it for sale. He did not know appellant nor the firm S.K. Estate Agencies.

Appellant's explanation in court was that, in the sale of these two vacant lots, he had acted as a sub-agent for one Paulse, who practised as an estate agent in Athlone. The position, so appellant said, was that, after he had seen the property, he approached Mr. Paulse, with whom he had had business dealings before, and asked Mr. Paulse to find out who the owner was. In due course Mr. Paulse informed him that he had contacted the owner who had given him a mandate to sell the land. Without

disclosing 11/

disclosing the name of the owner Mr. Paulse told him that he, appellant, could act as a sub-agent in the sale of the land and would as such be entitled to a commission of R50 per plot. It was in these circumstances, appellant said, that he had negotiated with the two complainants and had accepted deposits from them.

Mr. Paulse's involvement in appellant's business transactions is a matter to which I shall return later.

I come to deal next with count 25, which relates to the sale of a vacant lot in 8th Avenue, Kraaifontein, to one Ernest Bonze. This complainant testified that he contacted appellant as a result of a newspaper advertisement and was shown a vacant erf in Kraaifontein which he agreed to purchase, and in respect of which he paid to appellant various sums totalling R260 over the period December 1965 to February 1966. Four receipts were issued by appellant in the name of S.K. Estate Agencies describing each payment as a "part deposit on certain immovable property situated at 8th Avenue, Kraaifontein" and added thereto are the words

"pending 12/

"pending further negotiations with the owner."

The State's case on this count was that appellant had negotiated with Mr. Bonze for the sale of lot no. 1765 in 8th Avenue, Kraaifontein, a property in respect of which appellant had no authority to act. It appears from the evidence that there were at the time a number of vacant erven in 8th Avenue. Appellant did have authority to offer for sale one of such erven (not erf no. 1765) belonging to a Mr. Fortuin and, according to appellant, that was the erf which he had shown the complainant Bonze. Appellant explained that he could only conclude that Mr. Bonze had mistakenly pointed out to the police another erf in 8th Avenue, namely lot no. 1765, in respect of which appellant admittedly had no authority.

In any event, appellant received from Mr. Bonze, as he had from the other complainants aforementioned, the deposits which I have stated; and one of the questions at the trial, and indeed a very material question, was what appellant had done with the monies so received. On this aspect

appellant's 13/

appellant's testimony was to the following effect. Over the years 1964 to 1966 he had business dealings with one Paulse, an estate agent practising in Athlone. This Mr. Paulse was the same person referred to earlier in this judgment in relation to counts 17 and 18. According to appellant, Mr. Paulse's activities were not only those of an estate agent but he was also a builder and, through a company known as the League of Advancement, purchased land and undertook building assignments on a large scale. Indeed, so appellant said, the Stellenbosch Municipality had even approached Mr. Paulse to construct the houses for a whole Coloured township in the Stellenbosch area.

Appellant was, he said, so impressed with Mr. Paulse's business activities that he invested all the monies paid to him by the aforementioned complainants, as well as monies paid by other clients, with Mr. Paulse's company, the League of Advancement. His modus operandi, he said, was to bank every deposit received and then to draw it out in cash for payment over to Mr. Paulse in person.

Under 14/

Under cross-examination appellant had difficulties in explaining the precise nature of these socalled investments, namely, whether they were loans which would earn interest or investments which would qualify for dividend returns. Nothing definite appears to have been arranged with Mr. Paulse although appellant's expectation was, so he said, that at some stage Mr. Paulse would apportion some percentage of the company's profit to the investments made. Appellant also had to concede that over the years 1964 to 1967 he had made no enquiries as to the profitability of Mr. Paulse's ventures or as to the possibility of any return on the investments made with Mr. Paulse. And indeed nothing was ever received from Mr. Paulse or his company by way of repayment of capital, interest or dividends.

During or about October 1966 appellant's estate was provisionally sequestrated, a final order of sequestration being granted on 15 December 1966, and that brought an end to the existence of the firm S.K. Estate Agencies.

When appellant was arrested in March 1967

none 15/

none of the complainants aforementioned had received possession or title of the properties in respect of which they had made deposits nor had any refunds been made by appellant of monies deposited by them, save that in the case of Mr. Aaron Frederick Adams (count 17) a refund of R30 had been obtained. According to appellant, Mr. Paulse had by then disappeared and all efforts to trace him had proved unsuccessful. Moreover, appellant had no funds out of which reimbursement could be made to the complainants.

Here I may state that, for reasons fully set out in his judgment, the Regional Magistrate rejected appellant's story regarding his alleged investments with Mr. Paulse and found that the only inference which could be drawn from the evidence as a whole was that appellant had for his own purposes misappropriated the monies deposited with him. The Provincial Division agreed with this finding.

In dealing with the particular counts, the Regional Magistrate found that, in respect of counts 1, 3, 4 and 6, relating to the appellant's transactions with

four 16/

four different complainants for the sale of the same property in Kensington, the appellant was guilty of fraud. This finding was upset on appeal to the Provincial Division, and, in my view, correctly so. The appellant could have been found guilty on the main charge only on proof that his representations to the four complainants were false in the particular respects charged, namely, that he was not willing and had no authority to sell the property in question. And in neither respect was it proved that he had made a false representation. He had agreed to purchase the property in question from the company Salber (Pty.) Limited; had paid a deposit of R400, had taken possession thereof and had started to renovate the house thereon. On the evidence as a whole he was quite entitled to assume that he would in due course become the owner of the property, and was entitled to negotiate for the sale thereof even though he had not yet obtained transfer. It cannot, therefore, be said that he had no authority to sell.

Nor can his willingness to sell be questioned by reason of the fact that he took deposits from at least

four 17/

four prospective purchasers, however reprehensible his conduct may have been in that regard. On his evidence he did not enter into an agreement of sale with any of these prospective purchasers but merely took deposits from them, having explained, as he testified, that the one who would eventually be found to have accumulated the largest deposit would be the purchaser. The Regional Magistrate did not reject appellant's evidence in this regard. And it is clear from the evidence of the respective complainants that indeed no agreements of sale were concluded with any of them, and at least one of them, Mr. Hendriks (count 3), testified that it was explained to him that there were other persons interested in the property and that the one making the largest deposit would be the purchaser.

Although appellant's motives in negotiating with several prospective purchasers for the sale of the same property may not be above suspicion, on the evidence relative to counts 1, 3, 4 and 6 appellant should not have been found guilty of the crime of fraud as charged.

The 18/

The Provincial Division found, however, that in respect of these counts the appellant was guilty of theft of the monies paid to him as deposits and altered the convictions on these four counts to guilty of theft.

With regard to counts 17 and 18 the Regional Magistrate, for reasons stated in his judgment, disbelieved and rejected appellant's explanation that he was authorised by Mr. Paulse to act as a sub-agent for the sale of the two vacant lots in Bellville South. He was accordingly convicted of fraud on these counts, and these convictions were confirmed on appeal to the Provincial Division.

On count 25 the Regional Magistrate accepted the evidence of appellant and Mr. Fortuin that appellant had authority to negotiate for the sale of Mr. Fortuin's property in 8th Avenue, Kraaifontein, and found that there was a possibility that the complainant Bonze had been mistaken as to the property shown to him by appellant and in respect of which a deposit was paid to appellant. On this count the appellant was convicted of theft of the monies deposited, and this conviction was

confirmed 19/

confirmed by the Provincial Division.

It is against the convictions so altered or confirmed by the Provincial Division that appellant appeals to this Court.

Mr. Bamford, who appeared for the appellant on appeal, contended that the appellant had wrongly been convicted on the main charge of fraud and on the alternative charge of theft. His submission with regard to the main charge was that, in respect of counts 17 and 18, the State had failed to establish that appellant had no authority to contract for the sale of the two plots in Bellville South. His argument in this regard was that on the evidence, including the evidence of certain State witnesses, there was an estate agent by the name of Paulse practising in Athlone with whom appellant had business dealings, and that there was nothing to contravert appellant's evidence that Mr. Paulse had given him a sub-agency to sell the two plots. And, according to Mr. Bamford, the fact that the owner, Baderoom, had not given Mr. Paulse authority to offer

the 20/

the plots for sale, ~~does~~ did not make appellant guilty of fraud if appellant honestly believed that Mr. Paulse had a mandate from the owner. That he did so believe, said Mr. Bamford, is evidenced by his conduct in acting openly in his dealings with the two complainants and in issuing to them full and accurate receipts recording that he had received the monies paid as deposits "pending further negotiations with the owner."

In the course of his argument, Mr. Bamford also submitted that the Provincial Division, in upholding the convictions of fraud, had erred in applying the provisions of Section 280 bis of the Criminal Procedure Act, No. 56 of 1955, as amended, to the circumstances of this case, thereby erroneously dealing with the matter as if the onus had been on appellant to prove, on a balance of probabilities, that he did not know that his representations were false when he made them. In making this submission, Mr. Bamford referred to the judgment of Trollip, J., as he then was, in S. vs. Heller and Another (2) 1964 (1) S.A.

524 (W) at page 536.

I cannot agree with Mr. Bamford's submission. In the Heller case the learned Judge held that Section 280 bis of the Code was of no practical assistance to the State in the circumstances of that particular case, namely, where the representation relied upon in the charge was one concerning the belief of the accused in a matter or state of affairs. See also in this regard S. vs. Burger 1969 (4) S.A. 292 (S.W.A.) at pp. 295-298.

The position is, however, different in the present case in that the representation charged is not one concerning the belief of appellant but a representation by ~~the~~ appellant that he in fact had authority to sell.

In any event, in the circumstances of this case I do not think that it is at all necessary to call in aid the provisions of Section 280 bis of the Code. I say so because the appellant sought to ~~find~~ FOUND his authority, and therefore also his belief that he had authority, on an alleged sub-mandate given to him by Mr. Paulse. His

evidence 22/

evidence in this regard was rejected by the trial Court and, if such rejection was justified, then it follows, in my view, as a necessary inference from the fact that appellant had to fabricate a story as to the source of his authority that indeed he neither had authority nor believed that he had.

Mr. Bamford submitted, however, that, although the trial Court was fully justified in rejecting appellant's evidence concerning his alleged investments with Mr. Paulse, there was no justification for also rejecting his evidence regarding the alleged sub-agency given to him by Mr. Paulse.

In particular Mr. Bamford drew attention to a passage in the judgment of the Regional Magistrate, and contended that it clearly showed a misdirection on the part of the trial Court in its evaluation of appellant's evidence concerning his alleged sub-agency. This passage in the judgment reads as follows:

> "He (appellant) does not say that this Paulse suggests that he had authority to sell, nor does he say that he contacted Paulse after

having 23/

having been interviewed by the Adams brothers and this Paulse."

On the evidence it is clear that the trial Court erred in this respect inasmuch as appellant did say in evidence that Mr. Paulse had told him that he (Paulse) had a mandate to sell, and appellant did testify that he had business dealings with Mr. Paulse after his transactions with the two complainants. But, despite such misdirection, I am satisfied that the trial Court was entirely justified in its rejection of appellant's evidence on this aspect of the case. Not only had appellant proved to be a most unreliable witness in other material respects - e.g. his fabrication concerning his investments with Mr. Paulse - but his whole conduct after having contracted with the two complainants, is irreconcilable with a sub-agency obtained from Mr. Paulse. Without going into too much detail I mention the following:

(a) According to his evidence he was entitled as a sub-agent to a commission of R50 per plot. He at no time, however, approached Mr. Paulse for his commission,

nor 24/

nor did he account to Mr. Paulse for the monies received from the complainants. Indeed he wanted the Court to believe that he had "invested" all the monies received from the complainants with Mr. Paulse.

(b) Although the receipts issued by him to the two complainants were marked "pending further negotiations with the owner", he made no effort to bring these transactions to finality; and that despite having at an early stage collected from each of the complainants a sum of R57.90 as a fee for the raising of a bond.

(c) Of his own accord, and without consulting Mr. Paulse, he made promises to the complainant Aaron Frederick Adams (count 17) that the monies deposited by the latter would be refunded and indeed a certain sum was refunded. All this happened before Mr. Paulse was alleged to have disappeared.

In the premises I have no doubt that his whole story concerning a sub-agency having been obtained from Mr. Paulse was a complete fabrication and was correctly

rejected 25/

rejected. And, as I have stated, his need to resort to fabrication in this regard, inevitably leads to the conclusion that he indeed had no authority to offer the two plots for sale and could not have believed that he had such authority.

It follows, in my judgment, that he was correctly convicted of fraud on counts 17 and 18.

With regard to the convictions on the alternative charge of theft (counts 1, 3, 4, 6 and 25), Mr. Bamford contended that such convictions were wrong and made the following submissions:

(i) that a finding that appellant was guilty of theft, could have been arrived at only on the basis of a general deficiency in his bank account, and that a conviction on several separate counts of theft was, therefore, not competent;

(ii) that, as to the dates on which the offences were alleged to have been committed, there was a material difference between the charge sheet and the evidence, which circumstance was prejudicial to

the 26/

the appellant in his defence;

(iii) that a finding that the appellant was guilty of theft by conversion of monies, was not justified on the evidence.

In arguing the first of these points ((i) above), Mr. Bamford relied on the decision in S. vs. Verwey 1968 (4) S.A. (A) 682 and submitted that the circumstances of the present case were the same as those in Verwey's case inasmuch as appellant, on his evidence, had from time to time over a period of months deposited the monies received from the different complainants, as well as other monies, into his bank account and had from time to time drawn monies from the account which he converted to his own use. Therefore, said Mr. Bamford, the money received from each of the complainants had lost its identity by confusio and could not be identified with any particular withdrawal from the account, so that a charge of theft could only be established on the basis of a general deficiency in the account.

In my view, however, the circumstances of this case are not identical with those of Verwey's case.

Otherwise 27/

Otherwise than in Verwey's case, the present appellant entered the witness box and explained his modus operandi and intentions. (See in this regard the judgment in Verwey's case p. 686 para. A, and p. 688 paras. E - F.) His explanation was that, without exception, he invested all monies received on deposit from prospective purchasers with Mr. Paulse. His practice in every case, so he said, was to pay the sum of money received into his bank account, thereafter withdraw it and pay it over in cash to Mr. Paulse.

As already stated, his whole story of investing monies with Mr. Paulse was rejected by the Regional Magistrate, who came to the conclusion that appellant had misappropriated and converted such monies to his own use; a conclusion which Mr. Bamford conceded to be fully justified.

The different sums received by appellant from the various complainants cannot be identified with the credit items in his bank account, and, bearing in mind appellant's intentions with regard to such monies, it seems doubtful that he would have resorted to the seemingly

unnecessary 28/

unnecessary procedure, as he explained, of depositing every amount received from the complainants, merely for the purpose of withdrawing it again in cash. In this regard it must be stated that the bank account of S.K. Estate Agencies was closed on [redacted] 24 March 1966. Of the total amount of R2,384.85 received by appellant from the five complainants in question (counts 1, 3, 4, 6 and 25) R410 was received before and R1,974.85 after 24 March 1966, as from which date appellant operated on the bank account of another firm, in which he had an interest, Three Stage Development and Construction Company (Pty.) Limited, but, according to the evidence of the witness Pietersen which was not controverted, only to the extent of cashing cheques. As Mr. Pietersen explained, appellant would deposit a cheque and withdraw the money either the same or the next day.

The position therefore is that, as from March 1966, appellant did not operate on a bank account in such a manner that confusio could have resulted. But,

be 29/

be that as it may, the inference seem to be clear that appellant acted throughout with the fixed intention of converting all monies received from these complainants to his own use. That being so, it can, in my view, make no difference if some of the monies passed through his bank account.

The State did not in the present case charge a general deficiency, but theft of particular sums of money from the different complainants and, in my view, that charge was established.

Mr. Bamford's second point (para. (ii) above) has in my judgment no merit. It is quite correct that the charge sheet mentioned certain dates on which the thefts were alleged to have been committed - in the case of each complainant the date on which he made his first payment to appellant - whereas in fact, as the evidence showed, part of the monies alleged to have been stolen, were paid to appellant after those dates, and could therefore have been misappropriated by him only after the respective

dates 30/

dates mentioned in the charge.

It seems to me, however, that appellant could not at the trial have been in any doubt as to the case that he had to meet and, as time was not of the essence of the offences charged, I cannot see how appellant could, by reason of this particular misstatement in the charge sheet, have been prejudiced in his defence. (Section 176 (2) of the Criminal Procedure Act, No. 56 of 1955, as amended.)

Mr. Bamford's argument in respect of his third submission (para. (iii) above) was that, in the circumstances of this case, the contractual relationship between the various complainants and appellant was such that no more than a debtor and creditor relationship was established, giving rise to a belief in the mind of the appellant that, until such time as he would become obliged to account civilly for such monies, he was entitled to use the same for his own purposes. And, therefore, so the argument went, there could have been no animus furandi on

the 31/

the part of the appellant.

In propounding this argument Mr. Bamford submitted, with reference to a number of decided cases in which ~~the crime of~~ theft by conversion was dealt with by our courts, that, on the basis of certain criteria, all of such cases in which convictions were obtained, can be arranged in defined categories, and he invited this Court to find that the present case did not fall within any of those categories and that it was purely and simply a case of a debtor and creditor relationship in which the appellant could not have regarded himself as more than civilly liable to the complainants.

As each case must be decided on its particular circumstances, and as the circumstances differ from case to case, I do not think that any useful purpose can be served in attempting to sort the decided cases into defined categories on the basis of selected criteria.

I prefer to deal with the instant case on its own particular merits in the light of what must be

regarded 32/

regarded as accepted legal principles.

With regard to counts 1, 3, 4 and 6, the position is that appellant received from each of the complainants a sum of money in respect of the same property; all the said complainants being prospective purchasers thereof. In no case was an agreement of sale concluded, appellant having, as he testified, explained to the complainants that their payments would be received as deposits and that the one eventually found to have accumulated the largest sum, would be the purchaser.

On appellant's own evidence, therefore, the monies were handed to him for a particular purpose, namely, as deposits to be held pending a decision as to who would be the eventual purchaser.

Also in his transaction with Mr. Bonze (count 25), no contract of sale was concluded and the monies in question were paid and received as deposits or part deposits "pending further negotiations with the owner."

Having regard, therefore, (a) to the fact that all the monies in question were, in the understanding of

the 33/

the parties, earmarked for a particular purpose and (b) the finding of the trial Court, with which I am in entire agreement , that appellant acted throughout with the fixed intention of applying such monies, not to the purpose for which the same ~~was~~ were intended, but to his own purposes well knowing that he had no funds out of which the complainants could be reimbursed, there can only ~~be~~ be one conclusion, namely, that he fraudulently misappropriated the monies entrusted to him. Indeed his false explanation that he had "invested" such monies on behalf of the complainants, bears out his awareness that he was not entitled to use the same for his own purposes.

This was, therefore, clearly a case where the appellant acted with the necessary animus furandi and, in my view, he was rightly convicted of theft. See S. vs. Kotze 1965 (1) S.A. 118 and cases therein cited.

In my judgment the appeal fails and is dismissed.

MULLER, A.J.A.

OGILVIE THOMPSON, J.A.)
JANSEN, J.A.) Concur.