

REPUBLIC OF NAMIBIA

REPORTABLE



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

SENTENCE

CASE NO: CC 41/2009

In the matter between:

THE STATE

vs

ESMEREEL CERELDA HOMSES

ACCUSED

Neutral citation: *The State v Homses* (CC 41/2009) [2013] NAHCMD 15
(28 January 2013)

Coram: SIBOLEKA J

Heard on: 14 January 2013

Delivered on: 28 January 2013

Flynote: Sentence: Accused was convicted on 12 counts of fraud occasioning Santam, Namibia a total loss of N\$465 243.51. The crimes were committed by paying company monies into other people's accounts to avoid detection. Some of the account holders were paid N\$500 for agreeing to avail their bank accounts.

Held: The accused, a first offender at the age of 35, has an 8 year old school going child, whose father has deserted the household. The pension (amount unknown) money of the accused has been withheld in terms of Santam policy. The process of recovering the loss will only be started after the accused has finally been sentenced.

Held: Accused did not testify in mitigation of sentence, but instead called a witness Franciscus Benedictus Basson, a lecturer of the Bible School at The Pentecostal Church, who testified that the accused has joined their church and has spiritually changed from the past bad experiences and has come closer to God.

ORDER

In the result the accused is sentenced as follows:

All 12 counts are taken together for purposes of sentence:

Six (6) years' imprisonment of which three years' are suspended for five years' on condition that the accused is not convicted of fraud, committed during the period of suspension.

SENTENCE

SIBOLEKA J:

[1] Ms Esmereel Cerelda Homses, I have convicted you on 12 counts of fraud. It is now my task to consider an appropriate sentence for you, a difficult endeavor requiring weighing up of all factors relevant to sentencing. In the process one factor is likely to be overemphasized than the other. These are the personal circumstances of the accused, the crime, and the interests of society.

During the weighing up process referred to above, the court is also alive to and will consider the element of mercy. At the same time the court reminds itself about the objectives of punishment namely: prevention, deterrence, reformation and retribution. A balance must be struck between the interests of the accused, society, and the crime in relation to the objectives of punishment. Consistency in sentencing is largely influenced by the facts of each case as well as the different circumstances of the accused resulting in similar offences sentenced differently.

[2] The accused's personal circumstances were placed on record by her counsel directly from the bar.

[2.1] She is currently 35 years old, and was 30 at the time of the commission of the offence. She obtained B. Juris and LLB degree at the University of Namibia. She successfully did her Legal Practitioners course and during 2002/2003 she was attached to the law firm Nate Ndauendapo & Associates as well as Murorua Associates. She almost completed part of the requirement to be admitted as a legal practitioner of the High Court. She worked as a Prosecutor for a relatively very short period of time. She was also employed at Santam where the offences were committed. She has an 8 year old child schooling at Pioniers Park Primary School, Windhoek. In 2004 she got married to an Angolan national who has deserted her during 2008/2009 and does not know his whereabouts. In 2010 she sold her only house to realize legal costs for her case. She also used the income she got through ad hoc researching for private companies and consultancy. This, she was able to do before the withdrawal of her bail after she was convicted. In keeping with the respect she has for the court and its findings she unreservedly regretted the commission of the offence. She is therefore remorseful and begs for the court's mercy.

[2.2] After losing her work at Santam during the difficult time she was going through since 2008, she is now a changed person who has surrendered her fate in the hands of God. It is in this respect that she called Franciscus Benedictus

Basson of the Pentecostal Church, Hochland Park, Windhoek to testify in respect of her mitigation. Under oath, Basson testified that he is a third year Bible School lecturer of would be future pastors, and Evangelists. The accused came to his church, which is also a healing centre in 2008. The healing process entails laying hands on the sick while praying for them. Physical healing of diseases as well as spiritual healing are also done at their church. The accused was receiving counseling of the hurts and bad experiences she had in the past. In 2010 she came and enrolled at the Bible School as a student and eventually completed a three year Diploma consisting of five ministry subjects. She was initially reserved and latter she started to open up to him. She told him a few things about her past that were unhappy and went wrong in her life. It was apparent to this witness that the accused went into life without spiritual protection. As time went on he started to have personal contacts with her, he came to know her as a lawyer, an open minded person who could speak out for herself. The accused told him it was unfortunate that she came to know the Lord only after things had already happened to her. There were previous occasions when he met the accused with her child and could observe a strong bond between them. After the accused's bail was withdrawn, she was locked up, and he never had an opportunity to meet her.

[2.3] Basson believes that the child is missing her mother very much. He said sending the accused to gaol will be a waste of human energy, because she has the potential to turn into a productive person, especially in the Legal field. He asked the court to consider a suspended sentence. The witness expressed a view that if the accused completed her fourth year she could go for further studies to obtain a degree and work at the Church's Bible School.

[2.4] In cross-examination Basson testified that he has been trained as a pastor but not yet ordained in that regard. He however does pastoral work such as counseling drug addicted people and those with marital problems, but cannot divulge what the accused spiritually told him.

[2.5] On behalf of his client Mr Namandje submitted that there was no principle in law saying the court should not show mercy to an accused because she did not plead guilty. Pleading guilty is a mitigating factor which is sometimes viewed as 'the accused had no other option' because of the solidness of the State's case. He submitted that constitutionally, the State was under an obligation to prove an accused's guilty beyond reasonable doubt. He stated that a not guilty plea cannot be adversely used as an aggravating factor against the accused. He said the evidence from both sides enabled the court to assess the matter and out of 29 counts the accused was only found guilty on 12. The accused is a first offender, a legal practitioner who just shortly after finishing her course as a young lawyer, never got to practice for a substantial period as a legal practitioner. She is a person who invested her time and energy in studying to pursue a career, and, in conjunction with her personal circumstances the court should consider that she is not a hardened criminal with a record of criminal inclination. She has no single conviction of any kind. At the age of 35 the accused erred as a human being, she fell into temptation. The accused has changed and she now has a positive outlook after the regrettable period in her life. He argued that freedom of worship is identified and recognized in our constitution and therefore he urged the court not to be dismissive of her spiritual regrets of what had happened. That is the route she has chosen in order to change her life. The accused has been in custody at Wanaheda Police Cells since 23 November 2012 to date, it is requested that she should not be sent to prison, as a legal practitioner she could be a productive citizen of this country.

[2.6] Mr Namandje referred to the following case law:

1. *Johannes v S* wherein a police officer, convicted of murder for shooting the deceased who minutes before had tried to break into a house. The conviction was confirmed but the 8 years prison term was substituted with 5 years fully suspended on condition of good behavior. The appeal resulted in the officer not going to prison anymore.

2. *S v Kunene* 2001(1) SACR 199F-H, a conviction on theft and fraud was meted with a sentence of a fine coupled with a suspended sentence.

3. *S v Harold* 1992(2) SACR 195 at 197D to 198B, a suspended sentence was found to have a deterrent effect and does not derogate from the seriousness of the offence. According to Mr Namandje such a sentence would prevent a productive member of society being sent to prison where he would be exposed to the influence of hardened criminals.

4. *S v Pillai* (2) SACR 409 at 413 paragraph 12, courts were reminded of their duty to consider the effect that imprisonment would have on a child looked after by a sole or primary care taker. According to Mr Namandje the accused did not know that her husband will leave her once she found herself in difficult times.

Mr Namandje pointed out that although the State counsel will argue in aggravation urging the court to consider the fact that the accused is a legal practitioner, that is not correct because at the time of her arrest she was not a presiding officer, a Magistrate, or a Prosecutor. He argued that the accused could become a productive member of our society in view of the scarcity of legal practitioners.

[3] In aggravation of sentence on behalf of the prosecution Mr Marondedze called Franco Geoffrey Ferris, the Chief Executive officer of Santam who was previously the Operational officer at the company. He was a state witness during the trial. At the time the accused worked at Santam she directly reported to him. He was called to testify about the remuneration of the accused the time she worked for Santam. The criteria that was used was that an employee normally got a monthly salary. He would then be paid a performance bonus for the previous 12 months. On 01 April 2005 the accused received a salary of N\$18 117. On 15 March 2006 she received the performance bonus for the previous year amounting to N\$52 822. From 1 April 2006 there was an adjustment within a total cost to the company that increased to N\$19 023. From there her income increased and by the time she left Santam she was earning N\$20 259. This

witness testified that his working relationship with the accused was excellent, there were no hassles. They worked as a team and they trusted each other. The accused was dismissed on 21 March 2008 from Santam, as a result of an internal investigation.

[3.1] Ferris testified that there is a zero tolerance for fraud in Santam and as such the company does not accept offers to pay back the loss suffered before the trial had been finalized. He said all fraud matters are recorded permanently and proceeded with criminally. The accused's pension monies has therefore been withheld in terms of Santam policy. After sentence has been passed on the accused in finalization of the matter, Santam will then proceed and start the recovery of the loss it has incurred on this matter.

[4] Mr Maroneddze proceeded and submitted that theft or fraud against the employer are very serious offences. He echoed part of Mr Namandje's submission that although the court has a discretion not to send an accused to gaol, it should be conceded as difficult on this matter for the court not to do so. According to counsel, the starting point is a custodial sentence, then the court will decide on the severity thereof. He said among several aggravating factors on the matter, is that the accused is a very intelligent, registered legal practitioner. This, she had shown in this court beyond all. She prosecuted for roughly 8 months, and may certainly have dealt with fraud cases in that tenure. She knows the consequences of engaging in criminal activities and has been thoroughly schooled on that subject.

[4.1] The modus operandi the accused engaged was able to conceal detection because of her knowledge of the law. The counsel submitted that there was careful planning, thorough pre-meditation. He submitted that Mr Namandje tried to make lighter things out of very serious issues by submitting that the accused was tempted to commit these offences. According to this counsel, there was no temptation because the crimes were repeated over a long period of time. The

accused was the only Manager of the Legal Department, Santam, in the country at the time. She was supposed to safeguard the interests of the company against fraudulent activities, but instead she bit the hand that was feeding her.

[4.2] Mr Maroneddze submitted that the accused earned a good salary and received a lot of money in performance bonuses, therefore the crimes were committed out of greed. The fact that the accused sold her house to pay for legal costs should not draw any sympathy from the court because she should have known that crime does not pay. The accused did not make any offer for restitution while knowing that at law Santam is not allowed to take her withheld pension money. After the disciplinary hearing she offered to pay back the loss on condition that Santam did not proceed criminally with her. This was declined. According to this counsel the accused has throughout exhibited no remorse at all. He suggested 10 years imprisonment, portion of which could be suspended to safeguard her future.

[4.3] Mr Maroneddze referred to some case law in support of his submissions in aggravation; some of these are:

S v Sylvia Condentia Van Wyk SA 94/2011 delivered on 15 November 2011; and *Gerry Wilson Munyama v The State* SA 47/2011 delivered on 9 December 2011.

[5] In *Gerry Wilson Munyama v The State* SA 47/2011 delivered on 09 December 2011 the Supreme Court stated the following regarding crimes of dishonesty and their impact on society:

‘They are serious crimes, the deleterious impact of which upon societies is too obvious to require elaboration. Dishonesty of the kind perpetuated by appellant for no other reason than self enrichment, and entailed gross breaches of trust should be visited with vigorous punishment where necessary.’

[6] In considering an appropriate sentence I carefully looked at the fact that

the accused is a first offender at the age of 35, she has an 8 year old school going child whom she is taking care of, after her husband has deserted her, she has started a spiritual process of changing her bad past experience to come closer to God.

[7] Santam withheld all the accused's pension money in terms of its policy, with a view to start a process of recovering the loss it has suffered after the sentence by this court has been passed.

[8] On the crime the accused has committed I considered the following: she was convicted on 12 counts of fraud occasioning a total loss of N\$465 243.51 to Santam Namibia; that she has violated the trust Santam placed on her shoulders as Head of the Legal Department, to make sure that recipients of claim monies were legally and genuinely entitled thereto. Directly connected to this is the accused's decision to avail her password to her subordinates, directing them to use it contrary to Santam policy. This conduct was a carefully reasoned exercise aimed at causing a lot of dust to cover her tracks of wrongdoing. The crimes were committed over a period of 2 years and 6 months.

[9] In my view a fully suspended sentence would not be appropriate in the circumstances of this matter if regard is had to the fact that these crimes involving substantial amounts of money were perpetrated over a long period of time. Deterrence to the accused and would be offenders will be in order.

[10] In the result the accused is sentenced as follows:

All 12 counts are taken together for purposes of sentence:

Six (6) years' imprisonment of which three years' are suspended for five years' on condition that the accused is not convicted of fraud, committed during the period of suspension.

A M SIBOLEKA
Judge

APPEARANCES:

STATE:

E E MARONDEDZE
OF THE OFFICE OF THE PROSECUTOR-GENERAL

ACCUSED:

S NAMANDJE
OF SISA NAMANDJE & CO. INC.