

**REPUBLIC OF NAMIBIA**

NOT REPORTABLE



**HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK  
APPLICATION FOR LEAVE TO APPEAL JUDGMENT**

CASE NO.: CC 41/2009

In the matter between:

**THE STATE**

**APPLICANT**

and

**ESMEREEL CERELDA HOMSES**

**RESPONDENT**

**Neutral citation:** *S v Homses* (CC 41/2009) [2014] NAHCMD 36 (06 February 2014)

**CORAM:** SIBOLEKA J

**Heard on:** 28 November 2013

**Delivered on:** 06 February 2014

**Flynote:** Criminal Law – In our criminal justice system an accused's guilt must be proved beyond reasonable doubt.

**Summary:** The respondent, a former Head of the Legal Department at Santam, Namibia, was charged with twenty nine counts of fraud; the same number of counts as first alternative counts of theft by false pretenses; and the same number of counts as second alternative counts of theft. She was acquitted on counts 1, 2, 4, 5, 6, 8, 9, 10, 12, 13, 15 16, 17,18, 23, 24 and 28 respectively. The Applicant now applies for an application for leave to appeal the acquittals.

Held: Respondent was correctly acquitted on the aforestated counts as a result of the reasonable doubt that was not displaced by the prosecution witnesses.

Held: Not all the alleged beneficiaries on the various claims testified and neither was there evidence to show that they don't exist and therefore fictitious.

Held: No proof was placed before court to show that payments were made in full and final settlement on the claims related to the acquittals in order to make further payments on them misplaced and therefore fraudulent.

Held: The court's reference to the respondent's fraudulent mindset in its judgment cannot be understood to mean she was guilty as charged on all counts that were preferred against her.

---

**ORDER**

---

The application for leave to appeal is dismissed.

---

---

**JUDGMENT: APPLICATION FOR LEAVE TO APPEAL**

---

SIBOLEKA J

[1] It is important to note that proof as to whom Santam, Namibia was legally obliged to pay compensation had to be mainly in the following ways:

- The production in court of release vouchers whereon the beneficiaries signed acknowledging payment of compensation and thereby releasing Santam Namibia from any further obligations regarding that particular claim.
- Oral evidence by a particular payee (beneficiary) to the fact that he has been paid out in full and final settlement of the particular claim.

[2] The above evidence was not discharged by the prosecution witnesses hence the acquittal of the respondent on counts: 1, 2, 4, 5, 6, 8, 9, 10, 12, 13, 15, 16, 17, 18, 23, 24 and 28. Further reasonable doubt existed on the following areas:

- The prosecution witnesses confirmed the respondent's evidence that all final claim files were summarized, listed, packed and sent to the archives in Cape Town South Africa for safe keeping. This arrangement included the release form (third party payment release forms) quotations, affidavits of non insurance. The third party release affidavit is an important document in this matter that shows the merits of the claim whether for or against Santam, the identity of the beneficiary and the amount received.
- The evidence referred to above was of vital importance to prove that negotiations about the claim in fact took place as per stated amount.

- The evidence that the respondent, by her appointment as Head of the Legal Department at Santam had the authority to change the status of a particular claim from in favour of Santam (a recovery claim) to the one against Santam has not been displaced at all.

[3] The allegation against the respondent is that she wrongfully, unlawfully and falsely defrauded Santam Namibia, by paying monies as compensation or causing the same to be paid to persons whom Santam had no such obligation at law. In view of the above evidence there is no way that the applicant can be said to have reasonable prospects of success on appeal regarding the counts the respondent has been acquitted on.

[4] In our law the prosecution carries the burden to prove its case against a suspect beyond reasonable doubt. This was clearly spelt out by the court in *Rex v Difford* 1937 SA 370 at page 373, as follows:

“It is equally clear that no onus rests on the accused to convince the court of the truth of any explanation he gives. If he gives an explanation, even if that explanation be improbable, the court is not entitled to convict unless it is satisfied, not only that the explanation is improbable, but that beyond any reasonable doubt it is false. If there is any reasonable possibility of his explanation being true, then he is entitled to his acquittal, ...”

[5] As regards sentence the court took account the respondent's personal circumstances such as being a first offender who lost her work, pension benefits, the seriousness of the crime and the interests of society. The court arrived at the conclusion that a sentence of six (6) years of which three (3) years are suspended for five (5) years on the normal conditions of good behavior was appropriate.

[6] In light of the aforestated observations, it is my considered view that the application for leave to appeal has no reasonable prospects of success and should therefore not succeed.

[7] In the result the application is dismissed.

---

**A M SIBOLEKA**  
**Judge**

**APPEARANCES**

**APPLICANT:** **MR E E MARONDEDZE**  
**INSTRUCTED BY:** **OFFICES OF THE PROSECUTOR-GENERAL, WINDHOEK**

**RESPONDENT:** **MR S NAMANDJE**  
**INSTRUCTED BY:** **SISA NAMANDJE & CO. INC.**