REPORTABLE

CASE NO.: SA 12/2014

IN THE SUPREME COURT OF NAMIBIA

In the matter between:

THE STATE **Appellant**

and

ESMEREEL CERELDA HOMSES **Respondent**

Coram: SHIVUTE CJ, MAINGA JA and SMUTS JA

Heard: **11 March 2016**

Delivered: **8 June 2016**

APPEAL JUDGMENT

MAINGA JA (SHIVUTE CJ and SMUTS JA concurring):

[1] This is an appeal by the State in terms of s 316 A(1)(*a*) of the Criminal Procedure Act 51 of 1977 against the acquittal of the respondent on seventeen charges of the twenty-nine charges of fraud and against the sentence of six years imprisonment, of which three years were suspended, imposed on the respondent on the twelve charges by the High Court, Windhoek.

[2] The respondent was arraigned in the High Court, Windhoek on twenty-nine counts of fraud in the amount of N$1 149 666,62 and in the first alternative twenty-nine counts of theft by false pretences and in the second alternative twenty-nine counts of theft. The respondent pleaded not guilty to the main and all alternative counts but, after a protracted trial, she was convicted on 6 December 2012 on twelve counts of fraud in the amount of N$465 243,51 namely, 3, 7, 11, 14, 19, 20, 21, 22, 25, 26, 27 and 29 and she was acquitted on seventeen counts, namely, 1, 2, 4, 5, 6, 8, 9, 10, 12, 13, 15, 16, 17, 18, 23, 24 and 28 and all alternative counts. The respondent was sentenced, on 28 January 2013, all twelve counts taken together for the purposes of sentence, to six years imprisonment of which three years were suspended for five years on good behaviour. The appellant sought leave from the trial court to appeal to this court. That application was filed with the Registrar of the High Court on 7 February 2013. The trial court heard that application on 28 November 2013 and dismissed the same on 6 February 2014.

[3] An application was made to the Chief Justice for leave to appeal against the acquittal and sentence. On 4 March 2014 this court gave an order granting the application. The notice of appeal was only filed almost six months later on 28 August 2014. The record of the proceedings in the High Court was lodged with the Registrar of this court on 20 October 2014 without a condonation application. The explanation proffered of the delay is that the order by this court granting leave to appeal was only received by the Prosecutor-General's office on 25 July 2014. A senior clerk in the office of the Prosecutor-General attested to an affidavit stating that the Prosecutor-General's office has a pigeon hole at the office of the Registrar of the High Court which she checks three times every day from Monday to Friday.

She confirms that she retrieved the court order in question on 24 July 2014 from the pigeon hole and brought it to the attention of counsel for the State who was assigned to this case. That version appears to be accurate as counsel for the respondent also allegedly received the order on the same day which leaves the delay at the doorsteps of the messenger in the office of the Registrar of this court who was approached for an affidavit but declined to attest to one. A further explanation for the delay in lodging the record of the High Court with this court is that, once the leave to appeal was granted, counsel for the appellant who was seized with this matter requested the Registrar of the High Court to provide the record of the proceedings for the purposes of appeal but that office could initially not locate the file. After numerous enquiries orally with the Registrar's office, on 11 August 2014 the Prosecutor-General caused a letter to be addressed to the Registrar of the High Court repeating the request of the record. That written request was attended to on the same day and the record was made available. The record was passed on to the transcription services to prepare, which process was completed on 17 October 2014. By the beginning of May 2015 the appeal had not been set down for hearing. On enquiry by counsel for the appellant, he was informed by the Registrar of this court that the matter had not been set down because the record was not accompanied by an application for condonation for the late filing of the court record. Eventually an application for condonation for the late filing of the appeal record and reinstating the appeal was filed on 9 June 2015. On 10 June 2015 the respondent filed a notice of intention to oppose the application for condonation but thereafter no opposing affidavits in the condonation application were filed.

[4] Counsel for the appellant took the point that the application for condonation was unopposed. He relied for that point on the matter of *Ugab Terrace Lodge CC v Damaraland Builders CC* unreported case of this court delivered on 25 July 2014 per Chomba AJA, Mtambanengwe AJA and O'Regan AJA concurring. In para 8 the following was said, '. . . we saw no justification for allowing Mr Denk to continue addressing us on the condonation issue. This was because it was not enough to merely give a notice to oppose; the reasons for the opposition must be stated in an answering affidavit. The natural result of the failure by the plaintiff to appropriately verify its intent to oppose the defendant's application was that the application was unopposed'.

[5] We allowed counsel for the respondent to address us on the condonation application. His strong point against the explanation for the delay in lodging the appeal record with this court was the failure on the part of the appellant to lodge the application for condonation for the late filing of the appeal record. Regrettably counsel for the appellant was mute on that score. I have stated above how the application for condonation came about to be filed. Had the Registrar of this court not declined to allocate the date for the appeal until the application for condonation was filed, the application would probably not have been filed. What counts favourably for the appellant on that point is the fact that counsel for the appellant made an enquiry as to the non-allocation of the appeal date. The Prosecutor-General owes duties to the public to pursue appeals with reasonable expedition. See *S v Carter* 2007 (2) SACR 415 (SCA) at 422G. 'The application for condonation must thus be lodged without delay, and must provide a "full, detailed and accurate" explanation for it'. See *Arangies t/a Auto Tech v Quick Build* 2014

(1) NR 187 (SC) at 189F-190B. There is no explanation why the condonation application was not filed on time, which could be fatal to the appellant's case. It is un-imaginable that counsel for the appellant was unaware given the date on which leave to appeal was granted, and the time the appeal record was filed that, the application for condonation was necessary.

[6] However, by its nature, fraud is a serious crime, its deleterious impact upon societies is too obvious to require elaboration. See *Gerry Wilson Munyama v S*, Case No SA 47/2011, unreported delivered on 9 December 2011, para 19, *S v Sadler* 2000 (1) SCAR 331 (SCA) at 336A-B. The crime was perpetuated on no less than 29 occasions between 1 June 2005 to 31 January 2008. In para 43(d) the trial court, stated:

> '. . . this was a large scale crime, the accused's *modus operandi* was complicated to detect because she used different payees and bank accounts whose holders could not be traced by the police.'

[7] The respondent's fate arose in this way during the period alleged in the charge sheet (1 June 2005 to 31 January 2008). The respondent was in the employment of Santam Limited, Namibia. She held the title of Manager: Legal Department. Three legal clerks reported to her. The respondent *inter alia* had the mandate to handle third party claims and recoveries, which entailed negotiating payment terms with parties involved in accidents with Santam policy holders. The department led by the respondent was responsible for determining whether it was the third party or Santam's client who was at fault. Procedurally, once it had been determined, for example, that a Santam client was at fault, a payment offer would

be made to the other party. When such an offer is accepted, then payment would be made as per the systems installed by Santam. Firstly, the payment would be requested and this was a manual process. Secondly, the transaction would be entered into the Persetel payment system. Thirdly, payment would be recommended. Fourthly, payment would be authorised. When the payment system was installed, those with the mandate to recommend or authorise payment were required to scan their finger, which would always be used and be recognised by the system whenever payment is recommended or authorised. The system also required that different people do payment requisition, recommendation and authorisation in order for a transaction to go through.

[8] On or about 31 January 2008 the respondent gave Fenny Mulokoshi a file to request for the payment and to do the recommendation. It was a liability claim normally handled by the respondent. Fenny perused the file and she could see that it was trolleys manned by Trolleytech that crashed through Checkers door window but Fenny was requested to make payment to a third party one Joao Pinto. She was given a piece of paper that had J Pinto's name and his banking details. Fenny did as requested but she was uncomfortable with the payment. What raised her suspicion even more was that instead of the respondent authorising the payment as it would be the case, respondent gave the file to Michelle du Plessis for authorisation. Fenny approached a colleague one Barbara Eises to discuss the matter with her. The respondent that day worked only until 13h00. After the respondent had left her office, Fenny and Barbara went to look for the file and found it on respondent's desk, but they could not find the quotation. The quotation was found in torn pieces in the respondent's dustbin. They put the

pieces together and reported the matter to Franco Ferris. The quotation had nothing to do with the claim and there was no release form attached. Ferris contacted Moonsamy Perumal Chetty a Manager of Forensic Services for the Santam Group to conduct an investigation on the irregularities that were picked up on a claim for Trolleytech. Chetty conducted the investigation commencing with the Trolleytech matter and found that Checkers was the party that should have been paid and not Joao Pinto. While he was busy with that claim one Shifengula called, complaining that Santam increased his premium on his insurance policy. Chetty investigated that complaint and he found that the increment was as a result of a third party claim that was lodged against his policy. Chetty also noticed that a third party payment made to Manuel was also made against Shifengula's policy. Shifengula informed Chetty that he directly paid the third party, and that Santam had no reason to have made a payment to a third party on his claim. Chetty interviewed Fenny Mulokoshi on the Trolleytech claim who revealed that she was instructed by the respondent to make the payment to Joao Pinto. Chetty confronted the respondent who admitted that she knew both Pinto and Manuel and that in the Manuel payment she received N$10 000 and that it was a mistake she had made and that she was suffering from financial pressure. Respondent was charged and a disciplinary hearing was held against her. She pleaded guilty and subsequently dismissed from the employ of Santam. But before the respondent was dismissed, Chetty extended the investigation and did an audit on all the claims that were requested by the respondent. The list of these claims was presented to the respondent. On a further investigation on these claims, he found that the parties that were not entitled to any payments received payments and in all the payments the respondent had made the requests. They were twenty-eight

such claims. The respondent accepted the responsibility and she was prepared to pay back the moneys on condition that Santam did not proceed with criminal charges against her, which condition Santam declined. The respondent was criminally charged and eventually convicted on twelve counts and acquitted on seventeen counts which acquittals including the sentence imposed are the subject matter of this appeal.

[9] Counsel for the appellant contended that the trial court had misdirected itself. The argument took this form. Notwithstanding the fact that the trial court found all twenty-nine claims to have been fraudulent and that it rejected any possible explanation for the payment by the respondent, it nevertheless still acquitted the respondent on the seventeen counts. The trial court acquitted the respondent even in cases where possible claims by third parties were completely eliminated by evidence and where payments were made when there was still pending litigation between Santam and the claimant. The trial court acquitted the respondent on the seventeen counts without reasons for such acquittals.

[10] To understand counsel for the appellant's contention of misdirection it is necessary to have a clear picture of the crux of evidence led against respondent, and of the trial court's concept of it. Mr Chetty who did the investigation on the twenty-nine claims testified that all claims were fraudulent, in that there were no documents in support of the payments as the payees were not parties to the accidents and that the request for payments were done by the respondent. The *modus operandi* of the fraudulent scheme was ingenious and complicated. When an accident had occurred between a Santam client and a third party, the third party

would institute a claim against Santam if the Santam client was at fault and the third party would either be paid or instructions would be given to repair the third party's vehicle or Santam would give instruction to lawyers to defend the action. If it was the third party at fault, Santam would take steps to redeem their loss from the third party. On each of the twenty-nine claims which formed the counts against the respondent, respondent would create a further third party (fictitious) who would have had nothing to do with the accident and his/her particulars and banking details would be obtained. After the said person has been informed why respondent or her husband needed the use of the person's account, contrary to the company policy as per the testimonies of Barbara Eises and Fenny Mulokoshi (on counts 1, 2 and 29 in particular) respondent would sign the release form, which should be signed by the payee and payment to the fictitious person would be processed. Once the money so paid has been received in the fictitious person's account, the respondent or her husband would request the said person to withdraw the money and the money would be collected from him as were the case in counts 3, 19 and 26.

[11] In relation to count 3, Tuhafeni Fransisco a childhood friend of the respondent, testified that she knew the respondent. Respondent had called Tuhafeni and asked her to give respondent her account number. Money was deposited into Tuhafeni's account. She was called again and asked to withdraw the money and give it to someone whose features and attire respondent had described. Tuhafeni did as she was told and this person gave Tuhafeni N$500 from the money she withdrew. Tuhafeni denied ever being involved in any road traffic accident. She also denied filing a claim with Santam.

[12] Claudio Edgar de Castro Vieira testified in relation to count 19. His testimony was that he knew the respondent through her husband Jose Asis. Respondent's husband called him to ask whether he had a bank account as he was expecting to get some money. He answered in the affirmative and gave Jose his account number. Money was deposited into his account. He and Jose went to withdraw the money and gave it to Jose. He never filed a claim with Santam and he did not own a vehicle. The witness also received N$500 from Jose.

[13] Zaskia Steenkamp testified in relation to count 29. She was a broker at Tessary Hochland Insurance Brokers. She submitted the claim of her client Trolleytech with Santam. After some time she received a statement that showed that Pinto was paid instead of Checkers. She sent the respondent an e-mail to enquire as to who Pinto was and why their client was not paid. The respondent replied to say 'she was having a bad day, at work and at home and she must have made a mistake and she paid the money on to the wrong claim number'. Respondent asked for the statement to be returned to her and that she would try to pay the money into the right account.

[14] Eurico Mateus Dala testified in relation to count 26. He was approached by a friend of his he knew as Franco. He knew him from school. Franco informed Dala that he was expecting money from the United Kingdom and that he did not have an account in Namibia. Franco asked Dala whether he could receive the money through Dala's account. Dala provided his account and cellphone number to Franco. Once the money was deposited into Dala's account he was called and

he, Franco and one Zel went to the bank. He withdrew the money and gave it to Franco. One Pinto later joined them. He denied ever being involved in a road accident or submitting a claim with Santam. It was established that Franco was the husband of the respondent (para 19.1 of the trial court judgment).

[15] Michelle du Plessis and Wilma Juanita van Wyk were respondent's colleagues at work and they did most of the authorisations of the payments requested by the legal department. Their testimonies were to the effect that they trusted the respondent and if a request for payment bore the signature of the respondent, they would authorise the payment without a careful study of the claim presented for authorisation. This evidence is probably true when regard is had to count 29 which claim triggered the investigation against the respondent. The quotation used was of a motor vehicle accident of one Benjamin Shatiwa. The quotation had nothing to do with trolleys that smashed in the glass door of Checkers. The release form was also not attached but Michelle Du Plessis authorised the payment.

[16] The rest of the witnesses called were the genuine parties on whose claims further fictitious third parties were paid. They were called to show that the fictitious third parties were not parties to the accidents they were involved in.

[17] The trial court in its para 6.14 of its judgment stated:

> 'Chetty's evidence that in his investigations he found that it is the accused who requested authorisation for payment on the twenty-nine claim files has

not been challenged and neither has it been disputed at all. This evidence stands solid.'

[18] In para 43(b) the trial court further stated:

'(b) That from the evidence it is clear that the commission of all these crimes were premeditated as follows: In all twenty-nine claim files, the documentation relating to fictitious payees who the prosecution preferred to call "extra third parties" who received money at the instance of the accused had no relationship to the accidents or incidents which caused the original claims are not part of the documentation on the original files in the custody of Santam, Namibia.'

[19] The trial court rejected every possible defence respondent raised, namely, that she relied on the information provided to her by the claimants and her colleagues, that the legal clerks who were her subordinates knew her password at all times and that there were missing documents and that if such documents were made available respondent would prove that all the twenty-nine claims were legitimate. In regard to the allegedly missing documents, the trial court expressed itself as follows:

'. . . the accused is entirely not telling the truth because there are claim files before this court showing De Castro Vieira, Mateus Dala and Francisco Tuhafeni as third parties to otherwise genuine motor vehicle road accidents in which neither they nor their motor vehicles were involved.'

In actual fact De Castro Vieira testified that he did not own a vehicle. On the same defence of missing documents, that court went on to say:

> '. . . the J J Pinto matter successfully and dismally displaces the accused's argument. . . . Why the accused elected to put such an invoice on a file that only dealt with the smashed window of Checkers shop by a Trolleytech employee in my view clearly displays her fraudulent mindset'.

[20] On the defence of the respondent's password the respondent readily provided to her colleagues, the trial court said:

> '. . . from her conduct it is clear that she did everything possible to create fertile ground for the commission of these crimes within her department a serious violation of the confidence that Santam had entrusted on her.'

[21] These findings in my opinion are overwhelmingly against the innocence of the respondent on any of the twenty-nine counts. But that notwithstanding, the trial court acquitted the respondent on the majority of the counts. In fact the trial court acquitted the respondent on count 10 after that court on that count had stated:

> 'in my view the accused had no reason to pay N$21 853,04 to C Cordeiro who was not a party to the accident.'

Besides count 10 which I assume was an erroneous acquittal, the trial court gave reasons for the acquittals in six counts only, namely counts 1, 2, 5, 7, 9 and 12, the rest of the counts the acquittals were without reasons.

[22] The respondent was acquitted on counts 1 and 2 because Barbara Eises testified that the payments according to her were legitimate. But the trial court failed to appreciate that Barbara Eises was a novice, she was hardly three months in the legal department. The two claims were processed on the day the

respondent was teaching Eises on the computer how to gather information and process a claim for payment. Eises testified that the respondent contrary to the company policy signed the release forms in both cases and that since the respondent was her senior she thought the payments were legitimate. In counts 5, 7, 9 and 12 the trial court with greatest respect resorted to conjecture and speculation to acquit the respondent or the trial court failed to appreciate the facts before court. The trial court acquitted on count 5 because the claim form of Petrus Cornelius van Rooyen did not contain the particulars of the third party and in its own words therefore K B August could be a third party (the underlining is mine). Van Rooyen testified that he bumped another vehicle from behind causing minor damages. He paid N$120 in full and final settlement of the repair costs of that vehicle. On these facts K B August could not have been a third party. On count 6 the trial court found that the payment to J Manuel could not be faulted because the evidence did not clearly disclose the name of the third party (owner of the taxi). Brian Dominicus Snewe testified that he drove into a taxi belonging to Victor Isacks. On the facts the trial court could not have acquitted the respondent on that count more so that the name J T Manuel features in count 7, it should have rang a bell as the court convicted on that count. In count 9 three vehicles were involved in an accident, an Econolux bus which was a client of Santam. There were two third parties, J L Pienaar and Kiimba Shigwedha. The third parties sued Santam which instructed Hengari Legal Practitioners to defend the action. It was a pending litigation but A Armando was nevertheless paid. The trial court acquitted because 'A Armando could be that he was one of the third parties'. In count 12 Phillipus Haifela caused the accident when he drove into the vehicle driven by Shivute Shivolo. The trial court acquitted because it could be that Santam on behalf of its

client who caused the accident paid the N$60 274,17 to Q de Morais for the repairs of V N Shivolo, the third party's vehicle.

[23] With greatest respect, the trial court misdirected itself on the facts and the evidence as a whole. The evidence of Chetty was candid and clear, all twenty-nine claims were fraudulent, there were no documents to support the payments in all twenty-nine cases and in all twenty-nine cases the requests for payments were made by the respondent. Chetty was asked during cross-examination by counsel for the respondent what period was covered in the investigation against Fenny Mulokoshi and Barbara Eises which Santam had also instituted and that the investigation should cover the twenty-nine claims to see whether the two also played a role in the claims. Chetty's reply was that, '. . . that is incorrect my lord and I would just like to explain to the court why. In the specific cases where the accused is standing trial there is a pattern that one payment per individual was made. So one third party's account . . . let us call it fraudulent . . ., was made per beneficiary, with the other payment in terms of the investigation that we conducted against Feni Mulokoshi there is a different trend. There is a whole lot of payments made to a beneficiary . . . the patterns are different . . . .'

[24] The position of the evidence as accepted by the trial court is this, undoubtedly Santam was defrauded, the crimes alleged had been committed by the respondent. When the trial court gave the respondent the benefit of a doubt on seventeen counts, it is my respectful opinion that it contradicted its own findings.

[25] ‘An accused’s claim to the benefit of a doubt when it might be said to exist must not be derived from speculation but must rest upon a reasonable and solid foundation created either by positive evidence or gathered from reasonable inferences which are not in conflict with, or outweighed by, the proved facts of the case.’ See *R v Mlambo* 1957 (4) SA 727 (AD) at 738B.

[26] The evidence of Chetty, the direct evidence led on count 29 in which the respondent was literally caught in the act when she instructed Fenny Mulokoshi to pay Joao Pinto without the necessary documentation to effect such a payment, the direct evidence led on count 3, when respondent requested Francisco to provide her banking details and a payment eventually effected in that account, the evidence on counts 19 and 26, wherein the respondent’s husband was involved, the evidence of Barbara Eises in counts 1 and 2 that respondent signed the release forms in both cases, is proof beyond reasonable doubt that she committed the rest of the offences against her. The *modus operandi* as Chetty testified is exactly the same. It must be observed that in counts 3, 19 and 26 the evidence was that once the money was received in the accounts of the recipients, they would be called to go and withdraw the money. In count 3 the respondent called Francisco directly and she admitted she did and in counts 19 and 26 her husband called the two friends. Within Santam, in the legal department, between the respondent, Fenny Mulokoshi, Barbara Eises and Cloete, only the respondent would know that the payments have been made in the accounts of her husband’s friends. Both Fenny Mulokoshi and Barbara Eises denied having met any of the recipients in the twenty-nine counts. It must be observed that the names of the fictitious claimants in column C of schedule 1 to the charge sheet, the majority like

the respondent's husband are of Angolan origin. There can be no doubt that the respondent ran the fraudulent scheme with her husband.

[27] The respondent's defence was a bare denial. She denied having taken responsibility for the offences. She said, 'I took responsibility for whatever is going wrong in my department and nothing more'. Respondent denied instructing Fenny Mulokoshi to pay Joao Pinto, in fact the cross-examination of Mulokoshi was directed at proving that it was Mulokoshi who committed the offence. Respondent's exact words were, 'the fact that this information was placed on this file it was still her duty (Mulokoshi) to make sure that whatever was placed on top is relating to that claim that I gave her'. She even denied taking the file to Michelle du Plessis for authorisation; she denied the evidence of Castro Vierra of not having signed the release form. Vierra must have signed the release form otherwise the payment would not have been made. When asked about the involvement of her husband, she said that she did not speak to her husband about his involvement because they (she and her husband) 'do not know the truth of what Castro Vierra is saying' and in any event she could not be held vicariously liable for every conversation her husband may or may not be having with a friend. When pressed on the issue she said, 'it is absurd for him (Vierra) to even allege that, so it is therefore absurd for me to even dignify that with an answer because it is not true. Similarly my husband is saying what he (Vierra) is saying is absurd'. Respondent similarly denied count 26 wherein her husband was again involved. When pressed on that claim, she retorted, 'well he (husband) is a very social man. . . . I do not know how many people he knows and he cannot be punished for knowing a lot of people'. Respondent was asked why A Armando was paid in count

9 a recovery file which was in her direct control. Three vehicles were involved as previously stated. Pienaar was paid by settlement but Kiimba Shigwedha, the second third party, was paid after a court action, but nevertheless she requisitioned and recommended payment to Armando. Her reply was that the documentation before court were incomplete, she could not say why he was paid. Besides count 9, counts 1, 2, 15 and 24 were also recovery files directly under the custody of the respondent. Count 25 Santam was sued on that file and Hengari Legal Practitioners were instructed to defend the action. The respondent was convicted on counts 14 and 27 which were also recovery files. In count 24, D Liebenberg signed an acknowledgment of debt but still K Gomes was paid on that claim.

[28] It is astounding to the extraordinary that the trial court in its ruling on the appellant's application for leave to appeal to this court in paras 1 and 2 of that ruling states:

> '[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 summarised, 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.' (Own emphasis.)

[29] The above is contradictory, as I have already stated, to the findings of the trial court in its main judgment as I have demonstrated in para [19] above. Chetty testified that the release forms were missing from the documents he investigated. Evidence was led on counts 3, 19 and 26 of fictitious payees who denied submitting claims with Santam or signing release forms to exonerate Santam from any further liability. Evidence was led on count 29 the whistleblower of the rest of the counts, that the necessary documents including the release form necessary to effect payment were missing. The trial court in its ruling in the application for leave to appeal to this court, *inter alia* states that the prosecution did not lead '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'. That I have difficulty in understanding as all the genuine parties in the twenty-nine counts were called and their evidence eliminated the fictitious claimants in column C to Schedule 1 of the charge sheet as parties to the accidents. Whether the genuine beneficiaries were paid in full and final settlement was not the allegation against the respondent and it is irrelevant. The allegation against the respondent is that the persons whose names appear in column C to Schedule 1 of the charge sheet are fictitious beneficiaries who were paid fraudulently by the respondent. That allegation was proved beyond reasonable doubt. That is what the appellant was required to prove and nothing more. It was not in dispute that the respondent had the mandate to change the status of a particular claim but that mandate did not extend to her creating extra or fictitious third parties.

[30] Counsel for the respondent relied on the extract in para [28] above to submit that the acquittals are unassailable. Counsel knows very well and did allude to the extract as contradictory. The argument was clearly without substance, it is disingenuous to have argued that the appellant did not prove that the claims were fraudulent and that the alleged crimes were committed by the respondent. To have resurrected that argument in this court respondent should have filed a cross-appeal against her conviction on the twelve counts. Appellant has served the three years imposed on the twelve counts. I find it unnecessary to entertain the argument any further.

[31] The evidence on the seventeen counts on which respondent was acquitted is overwhelming against the respondent. There is no reason why the trial

court convicted on some and acquitted on others, for example, it convicted on counts 14 and 27 which were recovery files but acquitted on counts 1, 2, 15 and 24 which were also recovery files and 25 which was defended. All twenty-nine counts were proved beyond reasonable doubt that were fraudulent and there could not have been any documentation on them. Count 29 where the respondent was literally caught in the act, when she gave instructions to Mulokoshi to request and recommend payment without the necessary documentation tells it all.

[32] '. . . there is no obligation upon the crown to close every avenue of escape which may be said to be open to an accused. It is sufficient for the crown to produce evidence by means of which such a high degree of probability is raised that the ordinary reasonable man, after mature consideration, comes to the conclusion that there exists no reasonable doubt that an accused has committed the crime charged. He must, in other words, be morally certain of the guilt of the accused'. See *S v Mlambo*, *supra* at 738(A).

[33] As I have already stated, the trial court misdirected itself when it acquitted the respondent.

[34] With this conclusion I find it unnecessary to consider the issue whether the sentence imposed by the trial court was lenient. The personal circumstances of the respondent are on record and this court is in a position just like the trial court to impose a sentence. What counts favourably for the respondent is the fact that she has served the three years that was imposed by the trial court and she has since been discharged. Had the appeal been prosecuted promptly respondent would

have served her sentence at once. The delay in the prosecution of the appeal would cause respondent to serve her sentence piecemeal. Regrettably fraud, like corruption perpetrated by the respondent appear to be raising its ugly head everywhere in our society. See *S v Ganes* 2005 NR 472 (HC) at 481. In this case it was perpetuated for almost three years by a manager of a department who betrayed the trust the employer had in her. Both Michelle du Plessis and Juanita van Wyk testified that they had trust in the respondent that they would authorise payments on the strength of her signature without a careful study of the documents that needed approval. In my view a sentence of ten years, four years suspended should be imposed.

[35] Although the explanation for the late lodging of the record is not sufficient, this conclusion necessitates the granting of the application for condonation and the reinstatement of the appeal.

[36] Consequently I make the following order.

1. The application for condonation and reinstatement of the appeal is granted.

2. The acquittal of the respondent on the seventeen counts is set aside and the respondent is found guilty on the seventeen counts.

3. The sentence of six (6) years imprisonment, of which three (3) years were suspended for five (5) years on good behaviour imposed by the trial court on 28 January 2013 is set aside.

4. The respondent is sentenced, all twenty-nine counts taken together for purposes of sentence, to ten (10) years imprisonment of which four (4) years are suspended for five (5) years on condition that the respondent is not convicted of fraud, committed during the period of suspension.

5. The Commissioner-General of Correctional Service is directed to take into consideration the three (3) years the respondent had already served on this case.

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MAINGA JA

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SHIVUTE CJ

_____
SMUTS JA

APPEARANCES:

Appellant:	E E Marondedze
	For the State
Respondent:	S Namandje
	Instructed by Sisa Namandje & Co Inc