



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

CASE NO: CC 14/2010

In the matter between:

THE STATE

and

DAVID MARTIN BEZUIDENHOUT

ACCUSED ONE

VENECIA ANN KONING

ACCUSED TWO

Neutral citation: *S v Bezuidenhout* (CC 14/2010) [2017] NAHCMD 257 (07 September 2017)

CORAM: SIBOLEKA J

Heard on: 10, 11, 15, 16, 17, 18, 22, 23, 24, 25, 28, 29, 30 November 2011; 25, 26, 27, 28, 29 June 2012; 18, 19, 20, 21, 24, 25 September 2012; 12, 13, 14, 15, 18, 19, 20, 29 November 2013; 13 March 2014; 23 April 2014; 10 August 2015, 01, 05, 06, 09 September 2015; 12, 13, 14, 15, 16 June 2017; 19 July 2017.

Delivered: on: 07 September 2017

Flynote: Criminal law: Fraud, theft from employer. Key witness's failure to acknowledge receipt of money for banking created serious, material shortcomings in the credibility of

her evidence. Her evidence denying receipt of money from accused one for banking created a reasonable doubt in favour of accused one.

Summary: Accused one was a Cash Van driver responsible for delivering cigarettes to the seven day clients using an Ex Car Book. Accused two worked as one of the admin ladies generating invoices at the office of CIC Holdings Ltd trading as Indo Atlantic, Walvis Bay.

Held: Accused one could not credibly be connected to any wrongdoing on the counts preferred against him. Accused two was credibly connected to fraud on certain charges by some witnesses and a software expert whose evidence she said was correct.

VERDICT

In the result the conviction is as follows:

Accused one:

Counts 1 to 12: Not guilty and Discharged.

Accused two:

Counts 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 27, 28, 29, 30, 32, 34, 35 and 36:

Guilty on Fraud.

JUDGMENT

SIBOLEKA J

[1] The two accused are arraigned on the following counts of the indictment:

COUNTS 1 – 9: (as per Schedule 1): Fraud

Alternatively: Theft

COUNTS 10 and 11 (as per Schedule 1): Fraud (only i.r.o. First Accused)

Alternatively: Theft (only i.r.o. First Accused)

COUNTS 12 – 36: (as per Schedule 1): Fraud

First Alternative: Theft by False Pretenses

Second Alternative: Theft

COUNT 37: Theft

Alternatively: Theft through General Deficiency

COUNT 38: Forgery (only i.r.o. First Accused)

COUNT 39: Forgery (only i.r.o. First Accused)

COUNT 40: Theft by False Pretenses

Alternatively: Theft

COUNTS 1 – 9 (AS PER COLUMN 1 OF SCHEDULE 1): FRAUD

Whereas the first accused, David Martin Bezuidenhout was employed by Indo Atlantic at Walvis Bay as a Sales Representative for selling cigarettes and he operated a vehicle with which he transported cigarettes to clients.

The second accused, Venecia Ann Koning was employed by Indo Atlantic, Walvis Bay as an Administrative Clerk whose duties inter alia entailed issuing invoices.

And whereas the first accused and the second accused acted with a common purpose, he/she/they did between the period extending from October 2006 till 20 August 2007 and at or near Walvis Bay in the district of Walvis Bay wrongfully, unlawfully, falsely and with the intent to defraud give out and pretend to Indo Atlantic, Walvis Bay and/or CIC Pty (Ltd) t/a Indo Atlantic and/or CIC Holdings Ltd and/or De Almeida Jose Jorge Teles and/or Andries Jacobus Van Wyk and/or Johannes Frederick Botha Smit that:

- the amounts listed in Column 6 of Schedule 1 were not received by first accused from the customer as listed per Column 5 of Schedule 1 for cigarettes in relation to an Invoice with number (nr) as indicated per Column 4 of Schedule 1, and/or;

- to the Administrative division at Indo Atlantic that he had not received payment for the goods delivered as per Invoice with a nr as listed per Column 4 of Schedule 1 and/or;
- the customers as listed per Column 5 of Schedule 1 was still indebted to Indo Atlantic and/or CIC t/a Indo Atlantic for the amount as listed per Column 6 of Schedule 1 and did then and there by means of the false pretenses induce Indo Atlantic and/or CIC t/a Indo Atlantic and/or CIC Holdings Ltd and/or De Almeida Jose Jorge Teles and/or Andries Jakobus van Wyk and/or Johannes Frederick Botha Smit to the actual or potential loss or prejudice of Indo Atlantic and/or CIC t/a Indo Atlantic and/or CIC Holdings Ltd to:
 - believe the abovementioned misrepresentations and/or any part thereof and/or;
 - believe that the customer as listed per Column 5 of Schedule 1 did not pay in cash to the first accused the amount as listed per Column 6 of Schedule 1 due to Indo Atlantic for the cigarettes delivered by the first accused with the cash van and/or;
 - believe the Invoice from the Administrative division of Indo Atlantic indicating the customer as listed per column 5 of Schedule 1 to be still indebted to them.

Whereas in truth and in fact the accused when they so gave out and pretended as aforesaid well knew that:

- an amount in cash as indicated in Column 6 of Schedule 1 was received by first accused from the customer as listed per Column 5 of Schedule 1 for cigarettes delivered to said customer by the first accused and/or;
- first accused was not entitled to the amounts as listed per Column 6 of Schedule 1 and/or;
- first accused did not have the right and/or authority to use the cash received from customers in Column 5 of Schedule 1 and/or;

- first accused did not have the right and/or authority to pay such cash into accounts of other customers for whom he and/or second accused had created face invoices and to whom cigarettes were never delivered on said invoices,

and thus the accused committed the crime of Fraud.

ALTERNATIVELY TO COUNTS 1 – 9: THEFT

In that between the period extending from the date mentioned in Column 2 of Schedule 1 till 20 August 2007 and at or near Walvis Bay in the district of Walvis Bay said accused wrongfully, unlawfully and with the intent to steal took the amounts set out in Column 6 of Schedule 1, the property of or in the lawful possession of Indo Atlantic and/or CIC t/a Indo Atlantic and/or CIC Holdings Ltd, totaling the amount of N\$175 345,61.

COUNTS 10 AND 11 (AS PER COLUMN 1 OF SCHEDULE 1): FRAUD

(only i.r.o. First Accused)

In that upon or about the date contained in Column 2 of Schedule 1 and at or near Walvis Bay in the district of Walvis Bay the accused did wrongfully, unlawfully, falsely and with the intent to defraud give out and pretend to Indo Atlantic and/or CIC t/a Indo Atlantic and CIC Holding Ltd and/or De Almeida Jose Jorge Teles and/or Andries Jacobus Van Wyk and/or Johannes Frederick Botha Smit and/or the customer listed in Column 5 of Schedule 1 that;

- an amount of cigarettes as indicated per an Ex Car Delivery Nr. listed in Column 2 of Schedule 1 was delivered to the customer and/or;
- the Ex Car Delivery as per nr. listed in Column 3 of Schedule 1 contain the quantity of cigarettes that were in actual fact delivered to the customer;

and did then and there by means of the false pretenses induce Indo Atlantic and/or CIC t/a Indo Atlantic and/or CIC Holdings Ltd and/or the customer listed per Column 5 of Schedule 1, and/or De Almeida Jose Jorge Teles and/or Andries

Jakobus Van Wyk and/or Johannes Frederick Botha Smit to the actual or potential loss or prejudice of Indo Atlantic and/or CIC t/a Indo Atlantic and/or the customer listed per Column 5 of Schedule 1 to;

- believe the abovementioned misrepresentations and/or any part thereof and/or;
- believe that the customer as listed per Column 5 of Schedule 1 did in fact receive the quantity of cigarettes as indicated per Ex Car Delivery with nr as listed per Column 3 of Schedule 1 and therefore went ahead to issue an invoice accordingly and/or;
- believe that the first accused had produced the true Ex Car Delivery Document as listed per nr indicated in Column 3 to the Administrative Division of Indo Atlantic Walvis Bay.

Whereas in truth and in fact the accused when he so gave out and pretended as aforesaid well knew that:

- he had falsified the Ex Car Delivery Document as per nr listed in Column 3 by changing the quantities of cigarettes indicated thereon and/or;
- according to Ex Car Delivery Nr. 203677 he only delivered a quantity of 1000 Benson and Hedges Special Mild while he handed in an Ex Car Delivery whereby Trust Market was invoiced for receiving a quantity of 3000 Benson and Hedges Special Mild cigarettes and/or;
- according to Ex Car Delivery Nr. 203673 he only delivered a quantity of 6000 Dunhill King Size and 4000 Peter Stuyvesant to Walvis Bay Self Service while he handed in an Ex Car Delivery Document on account of which the customer was invoiced for receiving 14 000 Peter Stuyvesant cigarettes and 16 000 Dunhill King Size cigarettes and/or;
- he had appropriated the excess in quantity of cigarettes not delivered to the customers listed as per the fake document listed in Column 3 of Schedule 1 and/or;

- he had sold the excess in quantity of cigarettes, and pocketed the proceeds thereof invoiced as per an Invoice Nr. as per Column 4 of Schedule 1 at an amount as indicated per Column 6 of Schedule 1.

and thus the accused committed the crime of Fraud.

ALTERNATIVELY TO COUNTS 10 AND 11 (AS PER COLUMN 1 OF SCHEDULE 1:

THEFT (only i.r.o. First Accused)

In that upon or about 16 and 17 August 2007 and at or near Walvis Bay in the district of Walvis Bay, the first accused wrongfully, unlawfully and with the intent to steal took goods to wit cigarettes namely 2000 Benson and Hedges Special Mild, 10 000 Dunhill King Size, the property of or in the lawful possession of Indo Atlantic and/or CIC t/a Indo Atlantic and/or CIC Holdings Ltd, totaling the amount of N\$17 476.55.

COUNT 12 – 36 (AS PER COLUMN 1 OF SCHEDULE 1): FRAUD

In that upon or about the date contained in Column 2 of Schedule 1 and at or near Walvis Bay in the district of Walvis Bay, the accused did wrongfully, unlawfully, falsely and with the intent to defraud give out and pretend to Indo Atlantic and/or CIC t/a Indo Atlantic and CIC Holdings Ltd and/or De Almeida Jose Jorge Teles and/or Andries Jacobus Van Wyk and/or Johannes Frederick Botha Smit and/or the customer listed per Column 5 of Schedule 1 that;

- a quantity of cigarettes as indicated per Invoice Nr. listed in Column 4 of Schedule 1 to the value as listed per Column 6 of Schedule 1 were delivered to the customers listed in Column 5 of Schedule 1 and/or;
- the customers as listed per Column 5 are indebted to Indo Atlantic with the amount as listed per Column 6 of Schedule 1;

and did then and there by means of the false pretenses induce Indo Atlantic and/or CIC t/a Indo Atlantic and/or CIC Holdings Ltd and/or the customer listed per Column 5 of Schedule 1 and/or De Almeida Jose Jorge Teles and/or Johannes Frederick Botha Smit to the actual or potential loss or prejudice of Indo

Atlantic and/or CIC t/a Indo Atlantic and/or CIC Holdings Ltd and/or the customer listed per Column 5 and/or their Representatives handling their Finances to;

- believe the abovementioned misrepresentation and/or any part thereof and/or;
- believe that the stock and/or quantity of cigarettes as indicated per Invoice Nr. as listed per Column 4 of Schedule 1 and/or from T11-Warehouse was in fact delivered to the customers as indicated per Column 5 of Schedule 1 and/or;
- believe that the stock and/or quantity of cigarettes as indicated per Invoice with Nr as listed per Column 4 and/or from T11-Warehouse was in fact ordered by the customers as listed per Column 5 of Schedule 1 and/or;
- cause the management or people in supervisory positions of any and/or all of the complainants believe that invoices were issued by the second accused upon orders received for cigarettes from the Ex Car Delivery Invoices and/or from T11-Warehouse and/or upon telephonic orders;

Whereas in truth and in fact the accused when he/she/they so gave out and pretended as aforesaid well knew that:

- the stock and/or quantity of cigarettes as indicated per Invoice nr listed per Column 4 of Schedule 1 and/or from T11-Warehouse was not delivered to the customers as indicated per Column 5 of Schedule 1 and/or;
- the stock and/or quantity of cigarettes was not even ordered by the customers as listed per Column 5 of Schedule 2 as indicated on an Invoice with nr. as listed per Column 4 of Schedule 1 and/or;
- the stock and/or quantity of cigarettes was not even being purchased by the customer listed per Column 4 of Schedule 1 and/or;
- the contents of said Invoice with nr as per Column 4 of Schedule 1, with issuing dates as per Column 2 of Schedule 1 was false and/or;
- in relation to some of said false invoices delivery of the stock was only made upon enquiries being received from the customer and/or their Representative

handling payment on their behalf that they want to see the Proof of Delivery Documents in possession of Indo Atlantic Walvis Bay and/or;

- in relation to some of said false invoices, admin were told to make out a Tax Credit Note

and thus the accused committed the crime of Fraud.

ALTERNATIVELY TO COUNTS 12 – 36 (AS PER COLUMN 1 OF SCHEDULE 1):

THEFT BY FALSE PRETENSES

In that upon or about the date listed in Column 2 of Schedule 1 extending to the date of 23 August 2007 and at or near Walvis Bay in the district of Walvis Bay the accused did wrongfully, unlawfully and with the intent to defraud and steal, misrepresent to Indo Atlantic and/or CIC t/a Indo Atlantic and/or CIC Holdings Ltd that the invoices as listed per Column 4 of Schedule 1 contain stock, being quantities of different brands of cigarettes ordered by a customer as listed by Column 5 of Schedule 1 and did by means of the said misrepresentation took over a period of time from Indo Atlantic and/or CIC t/a Indo Atlantic and/or CIC Holdings Ltd stock, being mostly cigarettes the property of or in the lawful possession of said Indo Atlantic and/or CIC t/a Indo Atlantic and/or CIC Holdings Ltd which said stock the accused did steal, whereas the said accused when he/she/they pretended as aforesaid well knew that the Invoice with nr as listed per Column 4 of Schedule 1 were false and/or merely created by the second accused to hide the shortages in stock first accused had in the T11-Warehouse;

and thus the accused did commit the crime of Theft by False Pretense.

SECOND ALTERNATIVE TO COUNTS 12 – 36 (AS PER COLUMN 1 OF SCHEDULE 1):

THEFT

In that upon or about the period extending from October 2006 up to 23 August 2007 and at or near Walvis Bay in the district of Walvis Bay the said accused wrongly, unlawfully and with intent to steal took goods to wit cigarettes to the value of N\$2 125 023.20, the property of or in the lawful possession of Indo Atlantic and/or CIC t/a Indo Atlantic

and/or CIC Holdings Ltd and/or De Almeida Jose Jorge Teles and/or Andries Jakobus Van Wyk and/or Johannes Frederick Botha Smit.

COUNT 37: THEFT

In that upon or about the period extending from October 2006 up to 23 August 2007 and at or near Walvis Bay in the district of Walvis Bay in the district of Walvis Bay the said accused wrongfully, unlawfully and with intent to steal took stock to wit cigarettes from his Ex Car Delivery Van and/or the T11-Warehouse to the value of N\$689 501.22, the property of or in the lawful possession of Indo Atlantic and/or CIC t/a Indo Atlantic and/or CIC Holdings Ltd and/or De Almeida Jose Jorge Teles and/or Andries Jakobus Van Wyk and/or Johannes Frederick Botha Smit.

ALTERNATIVELY TO COUNT 37: THEFT BY GENERAL DEFICIENCY, READ WITH THE PROVISIONS OF SECTIONS 100 AND 243 OF THE CRIMINAL PROCEDURE ACT 51 OF 1977

In that whereas at all material and relevant times the first accused was employed by Indo Atlantic Walvis Bay and/or CIC Holdings (Pty) Ltd as Sales Representative for cigarettes and the Second Accused was at all material and relevant times employed by Indo Atlantic Walvis Bay and/or CIC Holdings (Pty) Ltd as Admin Clerk and they were as such servants or agents of the said Indo Atlantic Walvis Bay and/or CIC t/a Indo Atlantic and/or CIC Holdings Ltd and were entrusted with the custody and care of stock, mostly cigarettes meant for resale which came into his and/or her possession and/or control and which stock belonged to their said employer. The accused persons did during the period extending from October 2006 to the 23 August 2007 and at or near Walvis Bay in the district of Walvis Bay unlawfully and intentionally stole some of said stock, thereby creating a general deficiency of N\$689 501.22, the property of or in the lawful possession of Indo Atlantic and/or CIC t/a Indo Atlantic and/or CIC Holdings Ltd and/or De Almeida Jose Jorge Teles and/or Andries Jakobus Van Wyk and/or Johannes Frederick Botha Smit.

COUNT 38: FORGERY (only i.r.o. First Accused)

That the accused is guilty of forgery.

In that upon or about 16 August 2007 and at or near Walvis Bay in the district of Walvis Bay, the accused did unlawfully falsely and with the intent to defraud and to the prejudice of Indo Atlantic and/or CIC t/a Indo Atlantic and CIC Holdings Ltd and/or Agostinho Bernardino Dos Reis Sardinha forged and instrument in writing to wit an Ex Car Delivery Tax Invoice Nr. 203673 and/or forge acceptance of the contents thereof by Agostinho Bernardino Dos Reis Sardinha.

COUNT 39: FORGERY (only i.r.o. First Accused)

That the accused is guilty of forgery.

In that upon or about 16 August 2007 and at or near Walvis Bay in the district of Walvis Bay, the accused did unlawfully, falsely and with the intent to defraud and to the prejudice of Indo Atlantic and/or CIC t/a Indo Atlantic and CIC Holdings Ltd and/or Henties Bay Spar and/or Regina Harases forge an instrument in writing to wit an Ex Car Delivery Tax Invoice Nr. 203669 and/or forge acceptance of the contents thereof by Regina Haraseb.

COUNT 40: THEFT BY FALSE PRETENSES

In that upon or about 2 July 2007 and at or near Walvis Bay in the district of Walvis Bay, the said accused wrongfully, unlawfully and with intent to defraud and to steal, misrepresent to Indo Atlantic and/or CIC t/a Indo Atlantic and/or CIC Holdings Ltd that the Ex Car Delivery Invoice Nr. 200782 which was a summary of larger number of Ex Car Deliveries all dated 2 July 2007 for cigarettes ordered and paid to first accused from various customers totaling the amount of N\$58 948.10, whereas the total for all the orders received by first accused in cash was in fact N\$62 971.80 and did by means of the said misrepresentation obtain from Indo Atlantic and/or CIC t/a Indo Atlantic and/or CIC Holdings Ltd and/or De Almeida Jose Jorge Teles and/or Andries Jakobus Van Wyk and/or Johannes Frederick Botha Smit, which amount of money being N\$4 023.70 the accused did steal; whereas the said accused when he and/or she pretended as

aforesaid well knew that on the summary being Ex Car Delivery Nr. 200782 the quantity of Dunhill King Size was changed from 18 800 to 14 200 and thus the accused did commit the crime of Theft by False Pretenses.

ALTERNATIVE TO COUNT 40: THEFT

In that upon or about 2 July 2007 and at or near Walvis Bay in the district of Walvis Bay, the said accused wrongfully, unlawfully and with intent to steal took N\$4 023.70 the property of or in the lawful possession of Indo Atlantic and/or CIC t/a Indo Atlantic and/or CIC Holdings Ltd and/or De Almeida Jose Jorge Teles and/or Andries Jakobus Van Wyk and/or Johannes Frederick Botha Smit.

SCHEDULE 1					
COLUMN 1 Count	COLUMN 2 Date of Invoice	COLUMN 3 Ex Car Delivery Nr.	COLUMN 4 Invoice nr.	COLUMN 5 Customer	COLUMN 6 Amount
1.	03/08/2007	T10 Main	214 0709	Kuiseb Shop 4 Value	3 308.46
2.	13/08/2007	T11 203558	214 5448	Kuiseb Shop 4 Value	6 461.88
3.	03/08/2007	T11 200736	214 0501	Bargoza Wholesalers	23 754.80
4.	02/08/2007	T11 200722	213 9981	Walvis Bay Self Service	23 914.34
5.	09/08/2007	T11 203527	214 4370	Walvis Bay Self Service	17 689.30
6.	02/08/2007	T11 200721	213 9976	Parade Supermarket	31 925.26
7.	13/08/2007	T11 203563	214 5451	Parade Supermarket	19 661.92
8.	30/07/2007	T11 200584	213 6943	Parade Supermarket	24 874.50

9.	17/07/2007	T11 200514	213 2452	Bargoza Wholesalers	23 754 80
					N\$175 345.61
10.	16/08/2007	T11 203677	214 8991	Trust Market	1 629.55
11.	17/08/2007	T11 203673	214 8962	Walvis Bay Self Service	15 847.00
					N\$17 476.55
12.	17/08/2007	T11 203683	214 9066	Bargoza Wholesalers	71 087.25
13.	19/10/2006	T11	197 0315	Metro-Walvis Bay	40 957.86
14.	17/11/2006	T11	198 8916	Metro-Walvis Bay	114 101.45
15.	09/02/2007	T11	203 7758	Metro-Walvis Bay	90 964.66
16.	11/05/2007	T11 196500	208 9919	Metro-Walvis Bay	160 432.15
17.	19/10/2006	T11	197 0304	Metro- Swakopmund	49 998.90
18.	09/11/2006	T11	198 3713	Metro- Swakopmund	90 964.66
19.	17/11/2006	T11	198 8907	Metro- Swakopmund	127 016.44
20.	16/03/2007	T11	205 7941	Metro- Swakopmund	117 930.66
21.	11/05/2007	T11	208 9917	Metro- Swakopmund	174 977.24
22.	11/05/2007	T11	208 9908	Shoprite-U Save	40 368.45
23.	29/06/2007	T11 200897	211 9499	Shoprite-U Save	117 731.25
24.	22/05/2007	T11	208 9923	Shoprite/Checkers Walvis Bay	67 280.75
25.	29/06/2007	T11	211 9521	Shoprite/Checkers Walvis Bay	74 058.97
26.	17/11/2006	T11 190118	198 8911	Sentra Portu- guese Market	62 803.34
27.	25/01/2007	T11	202 8207	Sentra Portu- guese Market	26 826.07

28.	05/04/2007	T11	206 8838	Sentra Portu- guese Market	63 363.86
29.	05/04/2007	T11	206 8833	Sentra Portu- guese Market	17 561.12
30.	11/05/2007	T11	208 9921	Sentra Portu- guese Market	59 580.35
31.	17/08/2007	T11 203669	214 8978	Spar North Rand Henties Bay	121 520.73
32.	20/07-20/08/ 2007	T11	213 2449	Kuiseb Shop 4 Value	86 485.75
33.	29/06/2007	T11 200900	211 9497	Bargoza Wholesalers	118 179.75
34.	29/06/2007	T11	211 9500	Metro- Swakopmund	186 463.76
35.	11/05/2007	T11	208 9867	Shoprite- Swakopmund	44 368.50
36.	29/06/2007	T11	211 9501	Metro-Walvis Bay	197 858.20
					N\$ 322 881.40
					N\$ 515 703.50

**SUMMARY OF SUBSTANTIAL FACTS IN TERMS OF SECTION 144(3)(a) OF THE
CRIMINAL PROCEDURE ACT NO. 51 OF 1977**

During the period of time as set out in the Indictment, David Martin Bezuidenhout, first accused and Venecia Ann Koning, second accused were working at Indo Atlantic,

Walvis Bay. While they were employed by CIC t/a Indo Atlantic, the first accused was at all material and relevant times a Sales Representative whose duties inter alia included manning a Cash Van, referred to as the T11-Warehouse. In this Cash Van was stock of Indo Atlantic mainly different brands of cigarettes.

The Cash van was used by the first accused to transport cigarettes to clients during his visits. Sales by him were done on cash as well as on credit by using an Ex Car Delivery Note Book to book his sales.

The second accused worked as an Administrative Clerk at Indo Atlantic, Walvis Bay. Her duties inter alia entailed generating Invoices on the computer system from the Ex Car Book used by accused one, according to the quantities of cigarettes he indicated in relation to each customer visited.

Different modus operandis was/were employed by the accused to misappropriate and/or steal money and/or stock from CIC t/a Indo Atlantic.

In relation to Counts 1 to 9 the first accused would deliver cigarettes at the stated customers; when paid in cash for the said cigarettes he did not write out a receipt and also did not book the cash in at the administrative division as money received in relation to the corresponding Invoice. From copies of corresponding Invoices in possession of the various customers it is clear that payment in cash was made to the first accused. In response to his actions on these counts the first accused said he paid this cash in to cover up in relation to fake invoices previously generated by the second accused.

In relation to Counts 10 and 11 which pertain only to the first accused the modus operandi employed was to falsify the Ex Car Delivery Documents, by increasing the quantities in relation to stock actually delivered, thereby causing Invoices in both cases to be generated according to the altered Ex Car Delivery Documents. In both of these counts the customers realized upon receiving the Invoice from Indo Atlantic that less cigarettes were received in respect of certain brands.

In relation to Counts 12 to 36 the modus operandi used by the accused to defraud Indo Atlantic and/or CIC Holdings Ltd, was that in respect of certain credit clients who normally order high quantities of cigarettes which get invoiced from the main Warehouse-T10; fake invoices were generated by the second accused. These invoices were made out to conceal the theft and stock losses from the T11-Warehouse. It is alleged that the majority of these fake invoices were made out at stock-take dates. When some of said clients started querying these deliveries by requesting Proof of Delivery for Invoices charged to their accounts, the second accused resigned and gave 24 hours notice.

Count 37 pertains to the stock loss found in relation to the T11-Warehouse upon stock-taking conducted on 22 August 2007.

Counts 38 and 39 pertain to Ex Car Delivery Documents on which appears a signature denied by the said client to be his/hers.

Count 40 entails numerous sales made by first accused on 2 July 2007 and indicated on separate Ex Car Delivery Documents, but on the summary of said Ex Car Deliveries, quantities were altered which resulted in a difference in cash to be received and eventually to be banked.

It is alleged that the accused disregarded outlined procedures of their employer. The accused throughout acted in concert and with a common purpose to enrich themselves at the expense of Indo Atlantic and/or CIC t/a Indo Atlantic and/or CIC Holdings Ltd.

[2] Accused one pleaded not guilty to all charges preferred against him and did not give a plea explanation in this regard. He however made the following formal admissions which on his request and consent were in terms of section 220 of the Criminal Procedure Act 51 of 1977.

'2.1 Accused one admits that he was employed as a sales representative by CIC Propriety Ltd stationed at Indo Atlantic, Walvis Bay until being dismissed on 18

September 2007.

2.2 Accused one admits that during his employment one of his duties was to sell cigarettes to customers on cash or credit basis by visiting them with a van referred to as a "cash van".

2.3 Accused one admitted that the duties of accused two entailed amongst other generating invoices on the computer system at Indo Atlantic.

2.4 He has admitted receiving the following amounts:

N\$3 380.45 in cash from the employee of Walvis Bay Self Service on 20 August 2007.

N\$6 461.88 in cash from the employee of Walvis Bay Self Service on 06 August 2007.

N\$23 754.80 in cash from the employee of Walvis Bay Self Service on 06 August 2007.

N\$17 689 in cash on 20 August 2007 from an employee of Walvis Bay Self Service.

N\$23 754.80 in cash from an employee of Walvis Bay Self Service on 23 July 2007.

In paragraph 2.6 as admitted was Agostinho Bernardino Dos Reis Sardinha the Accused only knows that person as Bernado.

That he received N\$19 661.92 in cash from Parade Supermarket on 20 August 1007.

2.8 The person of Parade Supermarket from whom he received the amount as mentioned was Maria Lobelia Dos Santos.

2.11 He admits that on 16 August 2007 according to the Ex Car Delivery Note Nr 203673 that he completed at Walvis Bay Self Service received 4 000 Peter Stuyvesant 20 feet cigarettes and 6 000 Dunhill King Size 20 feet cigarettes.

2.12 He admits that in respect of the same Ex Car Delivery Nr. 203673 that 10 000 Peter Stuyvesant and 10 000 Dunhill King Size has been added by adding a number 1 in front of each of the quantities 4 000 and 6 000 respectively. He is not admitting that he did it. I want to be very clear on that admission.

2.13 He admits that in respect of Car Delivery Nr. 23673 the signatures at the bottom of the pages of N6A and N9C differ. He only admits that it differs but he does not admit that he made those signatures.

2.15 He admits that the Ex Car Delivery Nr. 2363 and Invoice Nr. 2149066 generated thereupon is fictitious. Accused one makes the following admissions in terms of section 220 of the Criminal Procedure Act 51 of 1977 as amended:

At 21 No Ex Car Delivery Note 203677 is fictitious and that no stock as depicted on the

said Ex Car Delivery Note was delivered to the customer as set out in Column 5 but he had no knowledge of the Invoice Nr. 2149066.

Count 14 Accused one admits that the Ex Car Delivery Nr. 190133 is fictitious and that no stock as depicted on the said Ex Car Note was delivered to the customer as set out in column 5 but he is no knowledge of Invoice Nr. 19889916. Count 16 he admits that Ex Car Delivery Note Nr. 196500 is fictitious and that no stock as depicted on the said Ex Car Delivery Note was delivered to the customer as set out in column 5 but has no knowledge of Invoice 2089919. Count 19 He admits that the Ex Car Delivery Nr. 190116 is fictitious and that no stock as depicted on the said Ex Car Delivery Note was delivered to the customer as set out in column 5 but has no knowledge of Invoice Nr. 1988907.

Count 23 He admits that Ex Car Delivery Nr. 200897 is fictitious and that no stock as depicted on the said Ex Car Delivery Note was delivered to the customer as set out in column 5 but has no knowledge of Invoice Nr. 2119499.

Count 26 He admits that Ex Car Delivery Note 190118 is fictitious and that no stock as depicted on the said Ex Car Delivery Note was delivered to the customer as set out in column 5 but has no knowledge of Invoice Nr. 1988912.

Count 33 He admits that Ex Car Delivery Note Nr. 200900 is fictitious and that no stock as depicted in the said Ex Car Delivery Note was delivered to the customer as set out in column 5, but has no knowledge of Invoice Nr. 2119499. In regard to 2.23 accused one admits in terms of Section 220 of the Criminal Procedure Act that it was accused two who generate the invoice on the computer in respect of cigarette sales.

2.24 He admits that neither himself nor any other employee apart from the accused two generate invoices on the computer in relation of sales by accused one and that accused two alone knew how the system works in order to generate such invoices save for the fact that sometimes a lady called Fatima also make invoices.

2.25 He admits that at the time of generating an invoice for a specific customer the Invoice Nr. is allocated.

2.29 He admits that the report filed in respect of a Disciplinary Hearing held against him.

2.30 He admits the facts contained in the explanation provided by him on 23 of August 2007 at the Disciplinary Hearing.

2.31 He admits that his handwriting appears on what is referred to as PB 311. PB 31. 21, PB 40.25, PB 40.30, PB 40.14, PB 40.15, PB 40.16, PB 40.17 and PB 40.18. Accused nr.one further admits that his handwriting appears on Ex Car Delivery Nr. 200897. He admits that he wrote out Ex Car Delivery Nr. 196500 except for the prices. He admits that on 26 July 2007 he asked Fatima Bezuidenhoudt to make out a credit note for stock invoice to Metro, Walvis Bay Invoice Nr. 2119501 for the amount of N\$197 858.20.'

[3] Accused two also pleaded not guilty to all the charges against her. She did not furnish a plea explanation. She however also made the following formal admissions in terms of section 220 of the Criminal Procedure Act 51 of 1977:

[3.1] She admits that she was an administrative clerk at Indo Atlantic, Walvis Bay until mid July 2007. Further that her duties were among others to generate invoices on the computer at Indo Atlantic Walvis Bay. She admits that the contents of the spreadsheet from Metro Head Office in relation to Metro, Walvis Bay indicating goods received by Metro Walvis Bay and the specific order numbers in relation to the month October and November 2006. She admits the contents per paragraph 2.18 of the spreadsheets from Metro Head Office in relation to Metro Swakopmund indicating goods received by Metro Swakopmund and the specific orders number in relation to the months of November 2006 and March and May, 2007.

2.19 She admits the existence of the Tax Invoices on the computer system of CIC Indo Atlantic, as filed under Annexure 22 up to 25 for Shoprite U-Save and Shoprite/Checkers Walvis Bay in respect of counts 22 to 25.

2.20 She admits that the Tax Invoices on the computer system of CIC or Indo Atlantic as filed under Annexure 26, 27, 29, 30, 31 for Sentra Portuguese Market in respect of counts 26 to 30. 2.22. She admits that customers of Metro Walvis Bay and Metro Swakopmund phoned in their orders for cigarettes whereupon the said stock were taken out from Warehouse-T10 and delivered by an independent contractor for example

Wesbank.

2.25 That it was at the time or that is the time an invoice is generated for a specific customer. She admits that she was asked to train Anna Brinkmann which she did and thus stayed on for another two weeks.

2.31 She admits that it is the first accused's handwriting that appears on N32A, N32D1 in respect of count 31 (PB 31.1, 31.21) and copy Ex Car Deliveries numbered 201333 up to 201240) in respect of count 40 (PB 40.2 up to 40.18).

2.32 That it is the first accused's handwriting that appears on Ex Car Delivery Nr. 200897 filed after N23 (PB 23.1).

2.33 She admits that it is the first accused who wrote Ex Car Nr. 196500 except for the prices in respect of the cigarettes on Annexure 16 (1).

[4] The evidence of the prosecution follows.

[5] Andries Jacobus Van Wyk testified he is the Financial Manager of Commercial Investment Corporation (Pty) Ltd (CIC) trading as Indo Atlantic since 2006. He has been in that post since 1976. He heads the Administration Department and reports to the Financial Director, Mr. Fannie Nel. CIC represents South African Factories in Namibia. They do warehousing, selling, marketing and distribution. CIC buys products from the South African factories and resells them in Namibia at a profit margin. He knows both accused persons. Accused one worked at CIC as a Cash Van driver at the Walvis Bay branch. Accused two was one of the admin clerks at the same branch, Walvis Bay. At Walvis Bay branch, Warehouse-T10 was the code used to refer to the main warehouse whereas Warehouse-T11 was used to refer to the Cash Van, driven and used by accused one.

[5.1] Warehouse-T10 stores cigarettes. Customers visit Warehouse-T10 and buy in

bulk either in cash or on credit then the stock they buy is withdrawn from the main Warehouse-T10. Other customers phone in and order telephonically. Telephonic orders are either delivered by outside contractors or by accused one. An inter-branch transfer from T10 to T11 is done when there is such a need. The cigarettes needed by accused one for his Cash Van according to his list are withdrawn from the main Warehouse-T10 and transferred to his Warehouse-T11.

[5.2] Accused one did not have an invoice book. When customers bought from him it was either in cash or on credit. He completed an ex car delivery note. He handed the top copy to the customer, the middle copy to the admin clerk at the main warehouse and the last copy remained in the Ex Car Delivery Book. At the end of the day accused one comes back with the Cash Van. The stock that was not sold is counted by him. The cash and credit sales are counted in the computer. Accused one would bring his stock count to the admin lady and she would compare his stock count with the computer stock count.

[5.3] On his trip from Windhoek to Walvis Bay, Van Wyk took along another cigarette representative, Esau April. He asked accused one and April to remove all the stock of cigarettes from the Cash Van and put it on a separate area which they did. When a stock in the Cash Van was done the results thereof were filled on a clean pro forma Ex Car Delivery Note printout whereon all different types of cigarettes in stock is printed. The stock taker filled in the number (quantity) of different cigarettes he found in the Cash Van onto the different cigarette lines. Van Wyk then asked accused one to count that stock. Thereafter he directed April to do the second count. Each of these two separate stock takers completed his clean sheet regarding the quantities of different cigarettes he found in the van. He compared the two counts and after double checking and corrections the two counts were found corresponding. At that stage the admin ladies had finished putting the Ex Car Delivery Notes regarding the cash and credit sales into the computer. Van Wyk then printed out the Stock Evaluation Report showing how the same stock count stood in the computer. This was the closing stock in the computer which had to correspond with the stock accused one brought back in his Cash

Van. The result was that the closing stock retrieved from the computer did not correspond with the stock accused one had in the Cash Van (annexure 26) count 37. He then drew up Invoice No. 2152 176 in the name of accused one for the said shortages, totaling to: N\$4 902 400. This amount represents the selling value of the cigarettes. The accused did not pay back that amount to the complainant, and it is the damage the company has suffered. The last step was to transfer of the stock accused one had in his Cash Van that was separately counted by him and April from Warehouse-T11 to the main Warehouse-T10.

[6] Sara Nellie Ahrens testified that she only worked with walk-in customers at Indo Atlantic in Walvis Bay. Her main function was the capturing of orders, invoicing chips, alcohol, and cigarettes for walk-in customers if accused two was off duty. She corroborated the evidence of Van Wyk related to accused one work in the Cash Van, and accused two in the Cash Box invoicing cigarettes. The cash box is where all monies coming in is received. At times when the workload was heavy they asked Fatima Bezuidenhoudt, to help out in the office.

[7] Anna Brinkmann testified she started working for Indo Atlantic in February 1992. She was at Head Office in Windhoek. She held different capacities and at the beginning of March 2007 she took over Sara's duties when she retired at Indo Atlantic t/a CIC at Walvis Bay as Branch Manager. Accused two counted stock with the financial manager in the week of 02 July 2007 and then resigned within 24 hours. She asked her to help teach her what the duties of the cash box entailed, and she took her through the cash box functions. She was in control of the stock in Warehouse-T10 and Warehouse-T11. It was her responsibility to generate invoices.

[7.1] In the Ex Car Delivery Notes accused one wrote in his own handwriting how much stock he needed. He brought this to one of the admin clerks who then transferred the stock needed by accused one from Warehouse-T10 to Warehouse-T11. Sometimes Harry also wrote in the Ex Car Delivery Book. After the admin clerk has given over the stock, accused one counts it and signs it off. After each day's sales accused one

returned with Ex Car Delivery Notes. In his presence Brinkmann counted the money and if it corresponded with the Ex Car Delivery Notes then she issued him a receipt as proof of receipt of the money. The invoice is issued out in accused one's name.

[7.2] Regarding the (invoice numbers: 2140709, 2145448, 2140501, 2139981, 2144370, 2139976, 2145451) handed up as exhibits in court, Brinkmann testified that she did not receive those monies. If she did she would have issued an invoice in the name of accused as a matter of procedure. The absence of such an invoice indicates that she did not receive those amounts from accused one.

[7.3] During cross-examination she testified that all the money she received from accused one was immediately acknowledged and banked accordingly.

[8] Aida Dos Santos testified that she was employed in the accounts department at the Portuguese Market Garden in Walvis Bay during the period 2006/2007. Her evidence relates to count 26. This is a supermarket belonging to the Sentra Group. They buy most of the stuff from Sentra, they then pay Sentra and Sentra in return pays its suppliers.

[8.1] When cigarettes are ordered and delivered, proof of delivery (Ex Car Delivery Note) was given to her, which she ticked off and signed. If there was a difference between the cigarettes they received, the statement and invoice from Sentra, a claim would be written out and submitted to Sentra, who will then sort it out with Indo Atlantic.

[8.2] She requested Proof of Ex Car Delivery Note XK 190118 as she did not have it. The actual invoice relating to this Proof of Delivery is 1988912. Sentra sent it to her. She looked for the date and her signature or that of any of them as that would be proof that she received it, but there was nothing. Any invoice bearing the date and most importantly her signature would automatically reflect on the statement that they received it from Sentra. There was no date or signature, meaning they did not receive it. She further testified that they did not pay for the cigarettes on the following invoices:

2068838, 68833, 2089921. Dos Santos's father and brother are the two managers at the said business.

[8.3] During cross-examination Dos Santos conceded that, she was not personally involved in receiving the stock and does not have personal knowledge whether the stock referred to in those invoices were actually received or not.

[9] Charyl Cloete (Bester) testified in respect of count 22 that she was the branch manager of U-Safe Swakopmund, Mondesa from 2005 to 2009. At Shoprite she used to make orders automatically on the computer. An order bears a branch code 46888 followed by other six numbers generated by the system in the computer itself. An invoice from the supplier must go according to the number that is on the computer and the one on the invoice. She was responsible for receiving the cigarettes. The delivery was done by accused one. She used to order small quantities of cigarettes such as 5 cartons. According to her, Invoice Nr. 2089908 valued at N\$40 364.40 dated 06 February 2008 did not have their order number. She never ordered such a huge quantity of cigarettes. An invoice that does not have an order number cannot even go through their computer system. The following invoices did not have their order numbers which means they did not order the stock reflected on them:

Invoice Nr. 211 499 dated 29 June 2007

Invoice Nr. 200 897 valued at N\$117 000. To confirm the order which was brought by accused one, she looked at her order and the invoice brought with the cigarettes. If these and the quantities were correct, she then signed and date stamped the invoice. She will take the first original page of the invoice.

[10] Quinta Yong testified that he was employed by Trust Market, Walvis Bay as creditor clerk. He knows accused one, but had only made telephonic contacts with him. He does not know accused two. In 2007 he made orders and payments to Indo Atlantic for cigarettes. The driver (accused one) brought the cigarettes on the counter. If everything was correct, accused one would sign for it, and would give them proof of

delivery.

[10.1] Yong did the ordering and the ticking off of the cigarettes they have received. Once the receipt of cigarettes has been acknowledged, they would later receive a tax invoice (customer nr.203677) at the counter for payment. On the said tax invoice he noticed the following discrepancies. Benson and Hedges he received 1 000, the tax invoice reflected 3 000. Peter Stuyvesant he received 6 000, the tax invoice reflected 7 800. Lexington he received 1 000, the tax invoice showed 200. Courtley he received 1 000, the tax invoice reflected nothing. He called Indo Atlantic and spoke to Brinkmann who could not provide an answer for the mix up. The results of the query was that Indo Atlantic sent them a credit note of 2 000 Benson and Hedges that was found short. On the rest it was found that although the invoices appeared in-correct their prices were still the same. That shortage of cigarettes was accordingly invoiced to accused one.

[11] Augustino Sardina testified on count 5 that he is employed by Walvis Bay Self Service and is also the co-owner of that business. He knows the two accused very well. Sardina is the financial manager at this business. Most of the time all payments are done by him or to one of his two brothers only. The invoice indicating N\$23 754.80, was brought to him by accused one. It was incorrectly invoiced to Kuiseb Shop for Value instead of Bargoza Wholesalers, otherwise everything else corresponded with the Ex Car Delivery. He does not know Invoice Nr. 2132449 dated 20 July 2007 valued at N\$86 485.75 made out to his shop. He did not order the goods and neither did he receive them. Ex Car Delivery 200900 and Invoice Nr. 2119497 was made out to Bargoza Wholesale but it had no date. He did not order the stock nor did he receive them.

[12] Valery January testified that during 2006 – 2007 she was employed as an administration manager at Metro Cash and Carry, Walvis Bay. According to her their orders were faxed to Indo Atlantic. Wesbank Transporters were the main agents in the delivery of their stock orders. She testified that she did not receive the goods on the following invoices: Invoice Nr. 1970315 dated 19 October 2006 valued at N\$40 957.86

for cigarettes made to Indo Atlantic to Metro Cash and Carry. According to her they thoroughly went through their goods received vouchers, but they did not find it. She only saw this document for the first time only during the investigations. Other stock not received are as follows:

Invoice Nr. 190113 - She did not receive stock on this invoice hence no order or the goods receive vouchers could be traced therefore.

Invoice Nr. 30983098 dated 17 November 2006 - No stock has been received.

Invoice Nr. 2037758 dated 09 February 2007 valued at N\$90 964.66. There is no goods received voucher for it, nothing, no stock was received.

Invoice Nr. 2089919 dated 11 May 2007 valued at N\$160 432.15 – No stock was received hence no goods received voucher.

[13] Nicolas Chamberlain testified that he is an industrial engineer, specializing in software systems. He became a full time consultant at Indo Atlantic from September 2002 when the Protea System became fully operational. He testified that the reprint history code 101 belong to accused two and she confirmed it, saying the expert was correct.

[14] Magdalena Adriaan Agenbacht testified that she was employed at Spar Henties Bay. She stated that orders are done by way of fax to Indo Atlantic and delivery would be done on an invoice or on Ex Car Delivery if not invoiced. She did not receive Invoice Nr. 203670 valued at N\$3 079.70 dated 17 August 2007 and no stock was received for it.

[15] Fatima Bezuidenhout testified that she was employed at Indo Atlantic, Walvis Bay as a merchandiser, but was later put on 'soft duty' due to her knee injury. She was trained by De Almeida and accused two to work on the computer by punching in orders that came from customers. She testified that exhibit 'L28', was an invoice made out by Walvis Bay Metro brought to her by accused one in order to rectify an error on it. Accused one needed this to be done before Ms. Brinkmann arrived. This endeavor was not successful, because rectifying an invoice was not allowed without authorization.

Accused one tore the invoice from the printer to avoid Ms. Brinkmann having sight of it.

[16] David Martin Bezuidenhout is the first accused on this matter. He testified in his defence, but did not call witnesses to support his case. He testified that he has handed all the monies alleged by the prosecution in counts 1 to 9 to Ms. Brinkmann. He stated that he did not write out receipts to credit clients. His control over all the monies that he received from the seven days credit clients came to an end immediately when he handed such monies to Ms. Brinkmann for banking. What happened to the said monies afterwards he has no idea.

[16.1] On count 10 accused one testified that he accordingly delivered the goods as per his Ex Car which was used to produce the invoice. According to accused one a client only signed if the ordered goods are correctly received.

[16.2] On count 11 accused one testified that he did not understand why the invoice was generated on the basis of various shortcomings.

[16.3] On count 12 accused one testified that nothing indicated that he gave the Ex Car to Ms. Mollendorf or that he received the cigarettes. No witnesses were called to say that he received cigarettes from him.

[17] Venecia Ann Koning is the second accused on this matter. She was employed at CIC stationed at CIC trading as Indo-Atlantic until the middle of July 2007. She worked as an administrative clerk. Her duties entailed generating invoices on the computer system at Indo Atlantic. She was discharged on the following counts in terms of section 174 of the Criminal Procedure Act 51 of 1977 as amended: Counts 1 to 9, 10, 11, 12, 24, 25 and 39. In addition to the above she has been exonerated from the blame on counts 31, 32, 34, 35, 36, 38 and 39. Some of the above counts do not relate to her on this matter.

[18] I will now discuss the prosecution evidence related to accused one on counts 1

to 12:

[18.1] This accused was in control (the driver) of the Cash Van T11. He used to receive monies for the cigarettes he sold to the seven days credit clients. This court must now determine whether he in fact stole the said monies or not, and if he did steal, how did he do it. Anna Brinkmann, an employee of CIC, Walvis Bay branch worked as an admin lady. She used to receive money from accused one for banking. According to her after accused one had sold cigarettes to clients and received monies for the said sales, he would take and hand the same with his Ex Car Delivery Note to her. Brinkmann would then proceed to count the money she has so received in his presence, compare the total with accused one's Ex Car Delivery Note and if they tallied, she would then issue a receipt from her receipt book in the accused one's name acknowledging receipt of that money from him. Accused one would then attach the so issued receipt into his own receipt book.

[18.2] During her evidence in chief, Brinkmann denied that exhibit 'J' dated 30 July to 1 September 2007 related to a scenario where accused one handed the cash he received to the administrative lady at the office, and was issued with a receipt which he had to attach in his book. According to Brinkmann exhibit 'J' was not used for sales related to the seven day credit clients at all. Brinkmann's own evidence that she always issued (wrote out) a receipt for all the monies she received was not credible because it came to surface that she did not issue any receipt for the money she received from the late De

Almeida. She was not able to locate any copy of a receipt from exhibit 'J' that was issued by accused one to credit clients, and no other book was presented in court to substantiate her version on this point. On counts 1 to 9 accused one testified that he in fact handed the money to Ms. Brinkmann. The untrustworthiness that emanated from Ms. Brinkmann's own evidence justifies accused one to be given the benefit of the doubt on these counts. This court has no reason not to believe that he handed the monies relating to counts 1 to 9 to Ms. Brinkmann. From the whole evidence the court is

of the view that Brinkmann may just have been too busy to write out the receipt of the monies accused one gave to her or it slipped out of her mind and she eventually forgot about it.

[18.3] Count 10 relates to exhibits 'L10' and 'L11', the client is Trust Market Invoice Nr. 2148991 dated 17 August 2007 amounting to N\$39 129.73 generated per Ex Car 23 677. Brinkmann's evidence is that Trust Market only received 1 000 cartons of Benson and Hedges Special Mild, but was invoiced for 2 000 cartons. A total of 3 000 appeared on both the Ex Car L10 and L11 invoices. The shortfall of 2 000 cartons was delivered to Trust Market at a later stage by the late De Almeida. Van Wyk directed that the discrepancy be booked against accused one's name, but neither did any of the two persons confront accused one about the shortfall. No witness was called from Trust Market to give evidence about the 2 000 cartons shortfall alleged against accused one. It means no credible wrongdoing could be placed on the shoulders of accused one as the person responsible for the said 2 000 missing cartons beyond reasonable doubt. It was placed on record that Petrus Geldenhuis precisely knew what happened in this regard, but he did not testify. On count 10 the alleged discrepancy is that accused one delivered 1 000 instead of 3 000 cigarettes to Trust Market's Geldenhuis. Geldenhuis had since relocated to South Africa and as such he did not testify. Accused one was still employed by CIC at the time of the discovery of the alleged discrepancy, but no reason has been furnished why he was not confronted about the matter to enable him to furnish an explanation. The prosecution's argument is that there is no hearsay because Ms. Yong instructed Geldenhuis to sign for the 1 000 cigarettes and she directly took it up with Brinkmann. Later 2 000 cigarettes were then delivered. The defence counsel in my view has a valid argument here saying Ms. Yong was not present when Geldenhuis received the cigarettes from accused one. This is the crux of the matter whereon hearsay hinges. The handing over and the receiving of the cigarettes only took place between accused one and Geldenhuis. Since the shortfall in the said cigarettes is placed in dispute, it is only Geldenhuis's evidence that would have rescued the prosecution case. Geldenhuis made the inscription of 1 000 cigarettes, but accused one did not sign for it, and Ms. Yong was unable to testify why.

[18.4] Count 11 relates to Walvis Bay Self Service Invoice Nr. 2148962 dated 17 August 2007 amounting to N\$43 249.96, Ex Car No. 203673. The cigarettes Peter Stuyvesant on Ex Car L14 is 4 000 but the invoice which Brinkmann created reflects 14 000; Dunhill is 6 000 but on the invoice Ex Car L13 it reflects 16 000. Walvis Bay Self Service confirmed receipt of: Peter Stuyvesant 4 000 and Dunhill 6 000 and it effected payment thereon. The unaccounted amount of difference stands at N\$15 847.00. No exhibit was placed before court to prove accused one's wrong doing here. Brinkmann testified that accused one must have given her another Ex Car whereon the quantities of Peter Stuyvesant was 14 000 and Dunhill was 16 000. This unsubstantiated pronouncement alone without producing the alleged Ex Car Document is very weak to pass the test of proof beyond reasonable doubt. Accused one is entitled to the benefit of the doubt here given the fact that accused one's Ex Car Book was completed in such a manner that he left a copy of the Ex Car he issued to the client, two remained in the book. This exercise appears to be transparent, because it enabled the client to compare the Ex Car accused one issued to him with the invoice. Brinkmann, in view of the above observation becomes the victim of her own evidence. As the person who created invoices she must have easily been in a position to show the court, the basis upon which she proceeded to generate a particular invoice from her computer.

[18.5] Count 12 relates to Bargoza Wholesalers invoice 2149066 for the amount of N\$71 087.25 exhibit 'L17' Mollendorf generated this invoice, but she did not come to testify before court. The evidence before court shows that there were three Ex Car Books, one used by accused one, the other used by the picker of Warehouse-T10 and the third book was used by the administrative clerks. This evidence even makes it more pertinent that the prosecution should call witnesses who would indicate what document Brinkmann or Mollendorf has used to generate a particular invoice. I find no foul play or wrongdoing on accused one because the client received the quantities of cigarettes reflected on his Ex Car Documents. The wrongdoing is on the part of Ms. Brinkmann whose failure to explain where she got the quantities on the invoices that she generated was clearly apparent during her evidence. According to her own evidence she is

required to generate invoices based on the particulars reflected on accused one's Ex Car Document which from the evidence she did not do.

Count 12 relates to Bargoza Wholesalers. According to the prosecution evidence, it was safe to conclude that the goods were removed from the Cash Van T11 and that it was only accused one who knows what he did with them. It is legally not permissible to base a conviction on the above evidence, because Ms. Mollendorf did not testify as to who gave her the Ex Car Nr. 203683 on the basis of which she generated an Invoice Nr. 2149066 for the amount of N\$71 087.25. According to the evidence of accused two there were three Ex Car Books at CIC. These were accused one; the picker of T10; as well as the Ex Car of the admin ladies. This state of affairs makes the evidence of who gave Mollendorf the Ex Car to be of crucial importance. There is also no evidence of a person who saw accused one removing goods from the main warehouse T10. Accused one is a Sales Representative of CIC stationed at Indo-Atlantic Walvis Bay. His duties was to sell cigarettes to customers on cash or credit sale. He used to visit customers with a van referred to as a Cash Van – T11.

[19] The discussion of the prosecution evidence on counts 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 26, 27, 28, 29, 30, 33 and 36 preferred against accused two is as follows:

[19.1] Accused two testified that she used a deposit book to bank all monies that she received while she was still in the employment of CIC (Pty) Ltd t/a Indo Atlantic. She did not have access to the inside of the warehouse, the furthest she could get was only up to the office on the front of the warehouse. There is a gate there. She did not have access to the Cash Van driven by accused one. Whenever she created an invoice she took the customer order number reflected on the Ex Car Document. She would then make a copy of the Ex Car Document which she will attach to the copy of the invoice for the file. In relation to the seven day account clients she made a copy from the invoice and faxed it to the client. The client confirmed receipt and if there was a problem the client would come back to her which did not happen. Usually if a person booked out

stock from Warehouse-T10, it means there is no Ex Car Document. Stock from T10-Warehouse do not have an Ex Car. This is because most customers at the office are cash sales. An invoice cannot be created without an Ex Car Document.

[19.2] The only other instance where an invoice can be issued without an Ex Car is where a customer calls in if he has run short of stock. That is how a receipt can be issued without an Ex Car Document. If there is no Ex Car Document, but there is an invoice it means there was an order. All stock related to an order can only come out of T11 the Cash Van. The three admin ladies had access to accused one's Cash Van T11. Count 30 is an example where an invoice was generated without an Ex Car Delivery Note and stock was removed from the Cash Van T11. The reason for easy access of the admin ladies to T11 the Cash Van is because they were able to remove stock there from using their computers.

[19.3] The Cash Van T11 was on the computer of all the admin ladies. Any of them could transfer, or generate an invoice against the Cash Van without the knowledge of accused one. This arrangement is the cause of all the stock loss because any of the admin ladies can on her own computer transfer stock out of the Cash Van without an Ex Car Document nor the knowledge of accused one. This evidence is from the lady who worked at Indo Atlantic as one of the administrative ladies.

[19.4] According to accused two the picker is responsible for the Warehouse-T10 and all the stock stored therein. Accused one being the driver of the Cash Van T11 was not in full control of stock coming in or out of the Cash Van, because the process could be done without his knowledge. According to her when accused one came back to the office he would hand over the cash and the Ex Car Document to one of the admin ladies. The cash would be counted in his presence. When accused one leaves the Ex Car Document, nothing would prevent the admin lady who received the Ex Car Document to make any alterations she may want to do thereon without the knowledge and attention of accused one.

[19.5] In view of the above evidence it means the picker of the Warehouse-T10 and the admin ladies stood a better chance to benefit from removing stock from any of the two Warehouses, because a client will only pay for the stock he has received, and nothing more. Ms. Koning testified during cross-examination by the prosecution counsel that at the material time of this matter, the admin ladies were Ann Brinkmann, the prosecution's key witness Ahrens and Ms Koning herself. They all worked with cigarettes. Ahrens only dealt with walk in customers and she resigned in March 2007. Warehouse-T10 is the physical Store Warehouse, Warehouse-T11 is the Computer Warehouse representing the Cash Van driven by accused one. All of them knew each others password. Sara, Bezuidenhout, and Brinkmann knew her password which was her birthday. This was because they trusted each other. It was not by office that is herself and Brinkmann. She said it may be that it was herself who generated the invoices on counts 13 to 36 excluding counts 24 and 25. The computer expert testified that the reprint history code 101 belonged to accused two and she confirmed it, saying the expert was correct. Accused two admitted responsibility to the exclusion of accused one on counts 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 27, 28, 29, 30, 31, 32, 34 and 35 because there were no Ex Cars on all these counts.

[19.6] On count 13, exhibit 'M1' Invoice Nr. 1970315 dated 19 October 2006, Neil from Metro Walvis Bay, said Order Nr. 51206 belongs to their company, but they didn't order the stock and neither did they receive the cigarettes on that order. Accused two accepted that she generated the invoice, but she insisted that she must have done that from an order. According to her, all the invoices of clients are generated from an order enabling her to see what is indicated thereon. According to the second accused there should have been an order with an Ex Car Document, - enabling her to remove the stock from the Main Warehouse and not from the Cash Van T11. She may only have forgotten to insert it on the order number. She denied she stole stock from T11 in order to facilitate her theft from T10.

[19.7] On count 14, exhibit 'U2' dated 17 November 2006 Invoice Nr. 1988916 Order

Nr. 51658, Neil testified that the order number cited above does not relate to cigarettes, it is for Namibia Dairies, accused two repeated the same answer she gave in count 13 saying that she must have generated the invoice from the order number.

[19.8] All the invoiced clients in counts 13 to 36 did not order, and neither did they receive the goods. Payments that were made in good faith on some of the above counts had to be returned after it was credibly found out that no order had been placed or goods received in that regard. On all counts it surfaced that the quantities reflected on the invoices were not falling within the bulk range that was usually ordered by the various companies invoiced. Also detected was the fact that the Ex Cars' purportedly used in some of the above counts were not signed.

[19.9] Big companies who usually order in large quantities appear to have been supplied from the small Cash Van (T11) instead of the usual Main Warehouse T10. The modus operandi is generally the same and I am satisfied that accused two had the necessary intention to defraud.

[20] In the result the conviction is as follows:

Accused One: Counts 1 to 12 Not Guilty and Discharged.

Accused Two: Counts 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 27, 28, 29, 30, 32, 34, 35 and 36: Guilty on Fraud.

A M SIBOLEKA

Judge

APPEARANCES

STATE : Mr. S. Nduna
Office of the Prosecutor-General, Windhoek

ACCUSED 1 : Mr. B. Isaacks
Instructed by Directorate of Legal Aid

ACCUSED 2 AND 3 : Mr. T. Ipumbu
Instructed by Directorate of Legal Aid