

NOT REPORTABLE

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case No: I 23/2011

In the matter between:

BASSON ENTERPRISES t/a SHOEFIX

PLAINTIFF

and

JENEVE BASSON

FIRST DEFENDANT

MAGDALENA BEUKES

SECOND DEFENDANT

Neutral citation: *Basson Enterprises t/a Shoefix v Basson and another* (I 23-2011) [2013] NAHCMD 70 (13 March 2013)

Coram: VAN NIEKERK J

Heard: 4, 5, 6, 7 October 2011; 4 November 2011

Delivered: 13 March 2013

Flynote: Civil trial – Claim against first defendant based on delict for damages arising from theft from employer – Claim upheld - Claim against second defendant based on contract for undertaking to pay amount stolen by first defendant – Held that no agreement reached as plaintiff did not accept offer to pay, but made a counter-offer, which was not accepted by second defendant – Claim dismissed

ORDER

1. There shall be judgment for the plaintiff against the first defendant for:
 - (a) Payment in the amount of N\$119 500-00.
 - (b) Interest on the aforesaid amount at the rate of 20% per annum from date of judgment to date of payment.
 - (c) Costs of suit.
2. The plaintiff's claim against the second defendant is dismissed with costs.

JUDGMENT

VAN NIEKERK J:

[1] The plaintiff is Basson Enterprises t/a Shoefix, a business owned by Mr Martin Basson and his wife, Mrs Gertruida Basson. The first defendant is Ms Jeneve Basson, an employee of the plaintiff. The second defendant is Mrs Magdalena Beukes, the first defendant's guardian.

[2] In brief, the plaintiff's case is that Mr Basson on 15 October 2010 caught the first defendant stealing money from the plaintiff and that the first defendant admitted stealing N\$1650. On 16 October 2010 the first defendant further admitted orally and in writing that during the period March 2010 to 14 October 2010 she took a total amount of N\$119 500 from the plaintiff without asking permission to do so. Against the second defendant the plaintiff's case is that she offered to repay the amount stolen within a period of 32 days after the plaintiff's acceptance of this offer, which she failed to do. The plaintiff therefore claims against the two defendants jointly and severally, the one paying, the other to be absolved, payment of the amount of N\$119 500, plus interest thereon *a tempore morae* at the prescribed rate of 20% per annum, plus costs.

[3] In her plea the first defendant denies the allegations that she was caught on 15 October 2010 stealing money and that she admitted this. She pleads that she merely accepted responsibility for a shortfall of approximately N\$1 500. She further denies that she stole N\$119 500 from the plaintiff. She admits that she authored a document in which she admitted taking certain amounts of money totalling N\$119 500, but pleads that she did so under duress, alternatively under undue influence, by Mr Basson. She further pleads that the amounts reflected in the document are amounts suggested by Mr Basson. She denies any indebtedness or liability to the plaintiff to repay any sum of money.

[4] The second defendant pleads that she made an offer to repay the money under the mistaken belief that the first defendant was indebted to the plaintiff. The plaintiff did not accept this mistaken offer, but made a counter-offer which was never accepted by the second defendant. The second defendant therefore denies that she is liable to pay any amount to the plaintiff.

Summary of evidence for the plaintiff

Mrs Gertruida Basson

[5] The plaintiff called Mrs Basson who testified that the first defendant was employed in the plaintiff's business as an office assistant from 31 March 2009 to 16 October 2010. The business consists of several branches engaged in shoe repairs. The manager, Mr Regan Saal, had the daily duty to visit each branch to do the daily cash-up, collect the money from the cash tills and to ensure that the cash received corresponds with the till slips. The cash and till rolls from each branch, plus any daily expenses slips, are placed in a sachet and taken to the main office, where the sachets are placed in the safe.

[6] Normally the first defendant did not have access to the safe, as she had no key. However, on every second Saturday, when Mr Saal was off duty, she had the keys as she was responsible for the cash-ups. On these specific days she received the money from the branch supervisors. She counted the money and confirmed that it corresponded to the cash roll received from each branch. The money and cash roll of each branch would be placed in a sachet and locked into the safe. She would also record the amounts on her computer.

[7] As co-owner of the business, Mrs Basson usually went to Mr Saal's office daily or every second day to do the cash reconciliation. When he was on duty, the money would already have been counted by him before he placed it in the safe. She would then recount the money. On days when Mr Saal was off duty, the money would have been counted by the supervisor of each branch and then by the first defendant before being placed into the safe. Thereafter Mrs Basson would recount the money.

[8] She explained the *modus operandi* in detail. First she opens the safe and removes the sachets. She then opens each sachet, counts the money and reconciles it with the total on the cash roll, while also accounting for any daily office expenses as recorded on expense slips. She records the totals in her cash book. She then places all the money on the desk and recounts it. The first defendant would sit next to her on her left and after Mrs Basson has counted the money, the first defendant would sort the money into the different denominations. Once this has been done, the first defendant hands the money in one bundle back to Mrs Basson, who puts the money into a separate bag which closes with a zip. The money is not counted again. She places this bag into her handbag and goes home, where she places the money bag into a safe. She would take some of this cash to make payments for various expenses from time to time. She used to let the daily takings accumulate at home for some time before banking it. Later, after the events that gave rise to this case, she started to bank more regularly.

[9] Mrs Basson testified that at first the first defendant did not help with the cash control, but later, as they began to trust her, she started helping. This was about January – February 2010. At some stage the first defendant began sorting the money into denominations. This later became a regular practice some time before April 2010. The evidence always only mentioned bank notes. Nothing was said about coins.

[10] During about March/ April 2010 Mrs Basson, who was in control of the business finances, began to realize that there was a cash flow problem. She investigated the matter, but she could not determine where the problem lay, as income and expenses remained relatively stable. Mr Basson had to inject money from another business. During May 2010 the Bassons went on leave for part of the month. Mrs Basson instructed Mr Saal to bank all the cash receive during her absence for safety purposes. During June, July and August 2010 there were again cash flow problems. This led to arguments between the Bassons, because Mrs Basson could not find the reason for it or any mistake that was made. During August 2010 she checked the electronic banking transactions in an attempt to

find the problem as Mr Basson again had to pay in money to ease the cash flow, but to no avail.

[11] On Friday, 15 October 2010, Mr Saal was on leave. Mrs Basson could not attend to the cash-up at the office and this was done by Mr Basson. At about 18h00 after he arrived at home, Mr Basson reported to her that when the first defendant handed the money to him after sorting it into denominations, she appeared to be uncomfortable. As this bothered him, he decided to count the money again. There was N\$1 650 short.

[12] Thereupon Mrs Basson phoned the first defendant and informed her that there was money short. Mr Basson took the phone, placed the setting on speaker phone and also spoke to the first defendant, telling her that there was N\$ 1650 short. He asked where the money was. The first defendant denied that there could be anything short. Mr Basson suggested that she should go back to the office to look if the money did not perhaps fall accidentally under the desk.

[13] Mr Basson also immediately left for the office. Later Mr Basson contacted Mrs Basson and informed her that the first defendant had brought back the money and handed it over to him at the office. A meeting was arranged at the office the next morning with all the key staff to discuss the events.

[14] That night Mrs Basson did a full reconciliation of the cash, taking into account expenses paid with same, for the period March 2010 to September 2010 to establish how much money the business was short every month. She recorded the reconciliation on Exh "E". According to her calculations there were the following cash shortfalls:

March 2010:	N\$28 511.24
April 2010:	N\$20 334.52
May 2010:	N\$10 642.67 (Bassons were on leave in May)
June 2010:	N\$21 610.38
July 2010:	N\$ 9 231.07 (First defendant was on leave in July)

August 2010: N\$32 284.95

September 2010 N\$10 415.82

Total N\$133 030.65

[15] She explained that it was only after the theft by the first defendant was discovered that she realized that the cash flow problem was attributable thereto that the first defendant took the money at the stage when the notes were being sorted into denominations, which was after the money had been counted for the last time. She testified that she could never before pinpoint where the problem lay because she trusted the cash handling procedures.

[16] The next morning the meeting was attended by Mr and Mrs Basson, Mr Saal, Mr Sylvester Swart, the assistant manager, and the first defendant. Mrs Basson asked the first defendant whether she 'did it'. She admitted that she took the money the previous day. She also admitted that she had taken some money previously and produced N\$2000 to pay some of it back. During the meeting Mr Basson stated to the first defendant that she was lying and that he knew she took a lot more money than she initially admitted the previous evening. He stated that they had made some calculations and that it must be more than N\$10 000. He said that she should write down how much money she took and to indicate the period during which she took it. They also asked her to indicate what she did with the money.

[17] The first defendant, without being forced by anyone and in their presence, took a piece of paper and started to write down amounts and dates. This document, in the Afrikaans language and a sworn translation thereof, were handed in as Exhibits "A" and "B", respectively. In Exhibit "B" the first defendant states:

'Herewith I, Jeneve Basson, declare about all the money I took from Shoefix. That's from March 2012 until 14 October 2010. Without asking therefore.

March

19,000

April

21,000

In month of May I didn't work. Was on leave.

June

16,000

August

20, 000

[signature]

16/10/2010

September

18,000

(I also always went out with my friend)

October

6,500

Total 119,500

I only bought clothes, always gave money to my mother and to help my mother with my sister's school things. Besides that I just went out [for meals] and went to bioscope.'

[18] Mrs Basson testified that the first defendant was incorrect when she stated in the document that she was on leave during May 2010. It was the Bassons who went one leave during this month, whereas the first defendant was on leave during July 2010. This was later admitted by the first defendant in cross-examination.

[19] The first defendant at some stage orally stated that she bought a cupboard with some of the money.

[20] Thereafter Mr Basson phoned the labour consultant to obtain advice on what should be done. Mr Basson told the first defendant that he was advised to call the City Police to arrest her. He did so and a short while later a police officer

arrived. During this time the first defendant went into the bathroom leading from the office. While her employers were busy with the police, the first defendant emerged from the bathroom with a bleeding wrist. It transpired that the first defendant had cut herself with a sharp object. Mrs Basson ran to call a paramedic to come to assist her.

[21] After the first defendant was treated, Mr Saal and his wife, who are related to the first defendant, came into the office and Mrs Saal confronted the first defendant in a serious manner, asking why she had taken the money. The first defendant apologized to Mrs Basson, saying that she was sorry that she had taken the money. Mrs Basson replied that it was really not enough to just say 'sorry' since it is a criminal offence to steal money. Mr Basson then accompanied the police officer and the first defendant to the police station.

[22] Later on the same day Mr Saal contacted Mr Basson and informed him that the first defendant's grandmother, the second defendant, wanted to meet the Bassons on Sunday, 17 October 2010. They agreed. During the meeting, attended also by the Saal couple, the second defendant offered to pay, on behalf of the first defendant, the money that the first defendant had admitted in writing she took from the business, on condition that Mr Basson withdraws the criminal case against her. The Bassons allegedly agreed, but requested that the offer was confirmed in writing. On the Monday the second defendant sent a letter (Exhibit "D"), via Mr Saal, which reads as follows:

'Dear Mr. & Mrs. Basson

RE: CASE ON G Basson

I would herewith like to ask for your compensation (*sic*) on the above case, as I am willing to pay an amount of N\$120 000.00 in the respective account you would want the money to be deposited in.

The amount will appear on your account 32 days after acceptance of the request and if the waiting time is in order with you.

I understand that the situation is very delicate, but as guardian Geneve (*sic*) I would really like to pay the amount due to you.

Yours truly,

(signed)

Magdalena Beukes'

[23] The Bassons wrote a letter to the second defendant on 18 October 2010 because they wanted to make sure that she actually had the funds to make payment. The letter reads as follows [the omissions are mine]:

'Dear Mrs Magdalena Beukes

RE CASE NUMBER: 506/10/2010

In light of the fact that you are willing to pay back monies (that Miss Basson took from our business) in the amount of N\$120 000.00, we would like to receive the following from you:

Please supply us with a letter from your bank, on the Bank letterhead and stamped, that the above-mentioned monies are available and that it will be deposited into our account (Basson Enterprises, account number) in 32 days' time, by means of electronic transfer.

On receiving of such letter only, we can proceed with withdrawing the case against Miss Basson.

Thank you

(signed)

MARTIN AND GERTY BASSON'.

[24] The Bassons did not receive any further correspondence from the second defendant or her bank. They therefore did not withdraw the case. The second defendant also did not pay them.

Mr Martin Basson

[25] Mr Basson testified that on 15 October 2010 he went to the office to do the cash- up with the first defendant. She was already busy counting the money. After that he counted the money in each sachet and compared it with the till roll.

He handed the money to the first defendant to sort. When she handed the pile of banknotes back to him he noticed that she made a movement on her chair which looked strange and awkward. She also looked uncomfortable. At home he wanted to put the money in the safe, but the incident bothered him and he decided on the spur of the moment to count the money. There was N\$1650 short.

[26] He spoke to the first defendant on the phone who said that the money could not be short. He speculated that it must be on the desk or on the floor and he suggested that she goes to the office to check. Mr Basson never thought that the first defendant would steal money from them. He actually hoped that the money would indeed be lying on the floor. He decided to also go to the office. They arrived together. She was in a rush and hurriedly unlocked the door. There was no money lying anywhere. The first defendant was white in the face and very nervous. After a while she said, 'Sorry, sir, I took it.' She produced bank notes from her trouser pocket and placed it on the table saying again, 'I'm really sorry, sir.' Mr Basson counted the money. It was exactly N\$1650. He was shocked as he never thought it possible that she would do something like this. He then asked her how many times she had done this. She said she could not remember, that she maybe did it twice before and that she was not sure.

[27] Mr Basson then called Mr Saal and said that she should tell Mr Saal himself, as Mr Saal would not believe him. The reason he did this was because Mr Saal was the manager and related to the first defendant. She told Mr Saal that she took the money and that she was very sorry.

[28] Mr Basson again asked her how much and how many times before she had taken money. He asked that she should write it down. She started writing. She seemed embarrassed, guilty and ashamed. She gave him the piece of paper. On it she had written the amount of N\$8500. Mr Basson called his wife and told her that the first defendant had taken the money. They decided to call a meeting for the next day.

[29] Mr Basson testified that he did not call the police then because he did not want the first defendant to be arrested. At that stage he only really wanted to know why she had done this.

[30] The next morning when Mr Saal arrived with the first defendant for the meeting, he reported to Mr Basson that the first defendant admitted to him that she had taken money from the business a few times. Mr Basson later said she is lying if she says she only took money a few times, because she did it many times. The reason he said so was because of the cash flow problems he and his wife had over a long time since the beginning of 2010 and because they could not pinpoint the problem. The first defendant also handed over money to Mr Basson and said that this is some of the money she had taken. He counted it and found that it was N\$2 000. He thought that she did this because he had asked her the previous evening that he wanted the money back. He asked the first defendant how she managed to take the money without them seeing. She said that she just took a few notes at a time when she sorted the money and hid them on the chair under her leg.

[31] Mr Basson said that at some stage he still discussed with Mr Saal the possibility that the first defendant could perhaps pay back the money if it was not too much. However, when he saw what she had written down, he was shocked and did not know what to do. He did not want to call the police as this was her first job. He called the labour consultant for advice. The latter said he should report the matter to the police. When he announced his intention to do so, the first defendant became very upset and begged him not to do it. She then started shivering and was anxious. She went into the bathroom.

[32] Mr Basson's evidence was further substantially to the same effect as that of Mrs Basson. About the meeting with the second defendant he stated that he did not want her to pay for someone else's mistake, or to use her own livelihood, but the second defendant said that she would use money that her late husband had left for the children.

Mr Regan Saal

[33] Mr Saal is the manager of the plaintiff. The first defendant is his wife's niece. On Friday, 15 October 2010 he was on leave. That evening Mr Basson phoned him to say that he had bad news. He said that the first defendant had taken money from the business. Mr Basson gave the phone to the first defendant who said that she was sorry she took the money.

[34] Later that evening the first defendant came to his house where she stayed over. During their discussion about the events she admitted that, apart from the money she took that day, she had also taken money from the business previously. However, she did not say how much or when she took it or how she did it. The next morning on their way to the meeting the first defendant again said that she had taken money from the business. At the office he noticed that the first defendant handed over cash to Mr Basson, but he could not see how much it was. He further confirmed the events at the meeting as testified to by the Bassons. He testified that at one stage Mrs Basson became angry and said to the first defendant that she wanted to slap her, but she did not do so.

[35] After the meeting he left to fetch his wife. Upon his return he was informed that the first defendant had tried to commit suicide by cutting her wrist. His wife was upset and crying and confronted the first defendant about the fact that she had taken money. The police then took the first defendant into custody. He and his wife and the second defendant went twice to the police station to visit the first defendant, but were only allowed to see her on the second occasion.

[36] At the request of the second defendant he arranged a meeting with the Bassons. He confirmed the version of the Bassons about what occurred at the meeting.

[37] The plaintiffs also presented evidence in the form of a visual recording made by security cameras in the office of the events which occurred between Mr Basson and the first defendant on the evening of 15 October, as well as the meeting the next morning. There were no overt signs of duress being applied to the first defendant.

[38] This was the case for the plaintiff.

Summary of evidence by the defendants

The first defendant

[39] She went to school up to Grade 10. She did casual work until she started working at the plaintiff as office assistant. On 15 October 2010 she helped Mr Basson sorting the bank notes. She took some money, she did not know how much, and put it into her pocket while he did not see this. Later she closed the shop and went home. A while later Mrs Basson contacted her by phone to tell her that there was money short. Mr Basson also spoke to her and said that the shortage was N\$1 500. She denied any knowledge of the shortfall. He asked her to go back to the office to see whether the money had not fallen on the floor. She and Mr Basson arrived at the office at the same time. There was no money on the floor. Mr Basson asked her about the money. She took the money from her pocket, gave it to him and said she was sorry. Mr Basson then asked her why, when and how she took the money. He also wanted to know how many times she did this. She said 'only once'. He said that she should not lie. Then she said that she did it once or twice and also stated that she did not know. She confirmed the contents of the conversation with Mr Saal over the phone.

[40] After this Mr Basson requested her to write down how much she took. She took a scrap of paper and wrote down two or three amounts. Mr Basson looked at it and said that these amounts could not be all. She sat and thought about it because she did not know what to write. She just wrote down amounts to give Mr Basson 'something'. He told her to return to the office the next morning. That evening she was walking around, thinking about what to do, as Mr Basson told her to bring back the money. She went to three friends and borrowed some money. That night she went to sleep over at the Saals' house. She admitted to them that she took money from the plaintiff.

[41] The next morning she went into the office and sat down. Mr Basson and Mr Saal were chatting and making jokes. She did not take part in the conversation. Mr Basson then referred to the incident of the previous day and said to Mr Saal, 'You know what the child did'. Mr Basson then asked her again why she took the money. He said that on Friday night they calculated how much was short and it

should be N\$20 000 per month. He asked how she could do something like that, whether Mrs Basson was a bad person or whether she was paid little. She did not know what to say.

[42] At one stage Mrs Basson said that she got up that day with the thought to give her a slap. The first defendant testified that she felt 'very bad' at that moment, but said nothing. Mrs Basson said that her marriage was nearly at an end because of the money losses in the business and that Mr Basson had accused her of being negligent. She added that she nearly went 'crazy' because she could not establish what the problem was.

[43] Mr Basson then requested her to write down how much money she took, when she took it and what she did with it. At first they wanted her to state how much she took per day. There was discussion that this would take very long and about what she should actually write. She said she just ignored them and just started writing down dates and figures as near as possible to N\$20 000 per month. The first amount she wrote down was N\$16 000, but Mr Basson allegedly said that it was impossible that she took so little. She then changed it to N\$19 000. At a certain stage she thought of deleting some figures and writing other figures down, but decided to ignore what Mr Basson was saying. Mrs Basson asked her to write what she had done with all the money. She wrote on the document only what she actually did with her salary. Mr Basson told her to sign the document, which she did. When they said that they should borrow from her because she had lots of money, she did not worry, but decided to ignore them.

[44] She confirmed that she gave Mr Basson N\$2000 that morning.

[45] Under cross-examination she stated that it took her 15-20 minutes to write everything down. It was put to her that not one of the plaintiff's witnesses said anything about the shortfall being N\$20 000 per month; and that Mr Basson did say that the shortfall must be more than N\$10 000, but she stuck to her version.

[46] She testified that after she had written down everything, she did not worry. Mr Basson then asked what they should do. They decided to call the labour consultant, who advised that the police should be called. Then she became

scared and started to look for something with which to hurt herself, but not to kill herself. She cut her wrists, making sure that she did not cut too deep. The reason she did this was because she did not want to go to jail. She wanted to hurt herself just enough to go to hospital.

[47] After her arrest she did not speak to Mr Saal or the second defendant when they came to visit her. She only took a blanket which Mr Saal brought her.

[48] When shown Exh "A" she confirmed that she wrote it because she was asked to do so. She denied taking any money during the months of March, April, June, July, August and September 2010. Although she took money in October, she did not count it. She just wrote the amount of N\$6500 down. She added the amount with a calculator to get the total of N\$119 500. She stated that she was not given time to reflect.

[49] Under cross-examination she confirmed that she hid the money on the chair under her leg or buttock.

The second defendant

[50] The first defendant stays with her in Windhoek. She only became aware on 16 October 2010 that the first defendant had been arrested when one of her sons informed her. They went to the police station, but were not allowed to see the first defendant. She went to Mr Saal's house. He told her that the first defendant had problems at work and was locked up. When they went to the police cells the second time, only Mr Saal was allowed to see the first defendant.

[51] She requested Mr Saal to arrange a meeting with the Bassons. She was informed at the meeting that the first defendant stole N\$120 000 from them. She said she would pay the money back if the first defendant is guilty. The Bassons requested an undertaking in writing, which she provided (Exh "D"). On the Monday the first defendant was granted N\$5 000 bail. During the evening the first defendant told her that she did not take N\$120 000. The second defendant testified that she did not proceed with what she called 'the arrangement' between her and the Bassons because they did not withdraw the case against the first defendant.

Evaluation

The claim against the first defendant

[52] Both Mr and Mrs Basson denied any suggestions by counsel for the first defendant that they placed the first defendant under duress to admit that she stole money from the plaintiff. They could not recall that Mrs Basson uttered words at the meeting on the Saturday morning that she felt like slapping the first defendant. However, Mr Saal testified, as did the first defendant, that Mrs Basson did say this. I accept that she did utter these words, but I do not think that they were uttered in a manner indicating a threat to do violence to the first defendant or to pressurize her to make admissions. Looking at the evidence in context, the understanding I have of this evidence is that Mrs Basson experienced a mixture of frustration, anger, disappointment and relief. She uttered these words in response to the conduct of the first defendant who caused her so much trouble when she tried to find the reason for the cash flow problems. This utterance must also be seen against the background that the Bassons regarded her as still young and felt protective towards her. They also knew that she was a close relative of the Saals and did not just want to call in the police immediately. Mrs Basson testified that another reason for not calling the police at once was that they had a relationship with her, from which I understand that, because there was some connection by virtue of her employment with them and because she was not a stranger, they were reluctant to have her arrested.

[53] Ultimately it is also important to bear in mind that the first defendant's case on the pleadings is that it was Mr Basson who allegedly put her under duress, alternatively undue influence to sign Exh "A". There is no evidence of any undue pressure specifically to sign the document. Even if I take a broad view by also considering the creation of the document as a whole, I am satisfied that there is no evidence of any duress by Mr Basson. Even if Mr Basson urged the first defendant not to lie when she mentioned only one or two instances of theft or small amounts, this does not amount to undue influence.

[54] Much was made of the fact that Mr Basson allegedly told the first defendant that the shortfall was more than N\$20 000 per month and that she just wrote

down amounts close to that just to satisfy him. None of the plaintiff's witnesses mentioned that this was said. The Bassons both said that Mr Basson mentioned that the shortfall was more than N\$10 000. It was not clarified in evidence whether he meant N\$10 000 per month. Mr Zaal was not sure whether he said more than N\$10 000 per month or only N\$10 000. The fact of the matter is that Mrs Basson did the cash reconciliation the night of 15-16 October 2010. By the next morning the Bassons knew what the shortfall was per month. It was indeed about N\$10 000 or more per month. I see no reason why he would have mentioned the figure of N\$20 000. In the circumstances I find that the first defendant's evidence on this issue may safely be rejected as false.

[55] Mr *Ueitele* submitted that the first defendant's evidence that she felt pressurized to admit to previously stealing amounts in line with the alleged shortfall was probable and should be accepted. He emphasized that she was still young, being 20 years old, and that all the other persons at the Saturday morning meeting were persons in authority over her and were adults. He submitted that, in the circumstances and bearing in mind her level of education, which was a Grade 10, it was probable that she just jotted down amounts to satisfy her employers.

[56] However, it seems to me that the first defendant, in spite of her age and education, was no pushover. It was noticeable that she repeatedly testified that at the meeting she was not worried about the situation or about what was being said by the adults and that she ignored what Mr Basson was saying. She clearly only became really scared after she had written Exh "A" and when she realized that the police were being called. Her evidence about how and why she cut her wrists shows that she approached the situation in an imaginative and calculating manner on an attempt to evade being held in the cells, but rather in hospital. The manner in which she took the money and hid it without being seen shows her to be cunning and daring, as she did it in the presence of her employer. On 15 October she took it while she was laughing and joking with Mr Basson. While she was under cross-examination she struck me as being intelligent and not easily intimidated.

[57] What is notable about the first defendant's evidence is that, contrary to her plea, she admitted that on 15 October 2010 she took N\$1500 without permission. She testified that she was desperate for money, that she did not want to borrow from her friend and that she did not think to borrow from Mr Basson. However, she continued to deny that she stole money on other occasions. She offered no explanation for the deviation from her plea. I am satisfied that the amount the first defendant stole on 15 October 2010 was indeed N\$1650. She testified that she did not count the money she took, but that she returned all the money she took that same evening. I accept Mr Basson's evidence that he counted it and found that it was N\$1650.

[58] I furthermore consider it highly improbable that the first defendant would have admitted stealing such large amounts over such a long period of time if it were not true. She could not have been under any illusion that some serious repercussions would not follow. Her evidence that she just wrote down amounts to give Mr Basson 'something' is farfetched and I reject it as false. She had time to reflect from the Friday evening until the Saturday morning. She also admitted to the Saals, who are her relatives, that she previously also took money. If she only took money on one or two occasions I cannot accept that she felt compelled or influenced to falsely state that she did so on all the occasions cumulatively listed in Exh. "A". I also do not accept it as probable that she did not know how much money she took. Even if she did not recall the exact amounts when she compiled Exh. "A", I am convinced that she had a fair idea of how much she took. She took about 15 – 20 minutes to compile this document, which shows that she was not just jotting down random figures as close to N\$20 000 as possible.

[59] Mr *Ueitele* submitted that the reconciliation (Exh. "E") does not assist the plaintiff's case because it is flawed. Even if it could be open to some criticism in some respects, I accept that it does give an indication of the shortfalls. I further accept the Bassons' evidence that there were cash flow problems during the relevant period which were only to be explained by the fact that the first defendant stole money after the last count of the daily takings. It is not necessary to determine the exact shortfall for purposes of this case. Ultimately the plaintiff's case rests upon the admissions made by the first defendant. I cannot ignore that

the admitted amounts show an uncanny correlation with the reconciliation, especially in regard to May and July, the months during part of which either she or the Bassons were on leave. In May when the Bassons went on leave, Mr Saal was instructed to bank more often for safety reasons. She could not take money then because the amount counted had to correspond with the amount banked. The fact that the alleged shortfalls in these months were much less was not divulged by Mr Basson. Clearly the first defendant must have had independent knowledge about the missing amounts. What is also significant is that on 15 October 2010 the first defendant admitted previously taking N\$8500. The next day she paid back N\$2 000. When she drew up Exh "A" she took this into account by indicating that she took N\$6500 during October 2010.

[60] I accept that the amounts written down by the first defendant may be estimates in some, if not all the instances. However, the total amount is less than, but in line with the alleged total shortfall. Furthermore, it is clear that by admitting that she took these amounts without permission, the first defendant accepted liability for the plaintiff's loss of N\$119 500. In the premises I find that the plaintiff has proved the damages sustained by the first defendant's unlawful and intentional conduct. However, as the plaintiff's claim sounds in delict, interest on the amount payable shall run from the date of judgment.

The claim against the second defendant

[61] As I have stated before, the second defendant testified that she did not proceed with what she called 'the arrangement' between her and the Bassons because they did not withdraw the case against the first defendant. In this respect the second defendant's evidence does not support her plea, which was to the effect that she offered to pay the money back in the mistaken belief that the first defendant was indebted to the plaintiff. She also did not testify that she did not pay the money because the first defendant was not indebted to the Bassons. Be that as it may, on the facts I have found that the first defendant is indebted to the plaintiff. The second defendant therefore did not make the offer to repay under any mistaken belief.

[62] Mr *Ueitele* presented submissions in support of the other part of her plea, namely that the Bassons never accepted her offer, but made a counter-offer, which she never accepted. Mrs *Rix* on behalf of the plaintiff simply submitted that the facts indicate that the second defendant's offer was accepted and that she failed to perform in terms of the agreement reached.

[63] In *JRM Furniture Holdings v Cowlin* 1983 (4) SA 541 (W) the following was stated (at 544A-H):

'The trite rule relevant in this regard is that the acceptance must be absolute, unconditional and identical with the offer. Failing this, there is no *consensus* and therefore no contract. (Wessels *Law of Contract in South Africa* 2nd ed vol I para 165 et seq.) Wille *Principles of South African Law* 7th ed at 310 states the principle thus:

"The person to whom the offer is made can only convert it into a contract by accepting, as they stand, the terms offered; he cannot vary them by omitting or altering any of the terms or by adding proposals of his own. It follows that if the acceptance is not unconditional but is coupled with some variation or modification of the terms offered no contract is constituted. . .".

.....

Counsel for the applicant, however, relied on the fact that the rule is not without qualification. One quasi-exception to it exists where an acceptance incorporates a reference to a term which is implied in the offeree's favour. It is regarded as no more than a statement of the legal position and in no way varies the terms of the offer. (Christie *The Law of Contract in South Africa* at 54.) A second occurs where an offeree enquires whether the offeror will modify his terms. This does not constitute a refusal. (*Amalgamated Society of Woodworkers of SA v Schoeman NO and Another* 1952 (3) SA 85 (T) at 87, quoting Wessels (*op cit* para 177).) In his note on the *ACC Bio Kafee* case Professor E Kahn, writing in 1958 *SALJ* at 12, refers to the statement of *Corbin* vol 1 para 84 at 266 that:

"An expression of acceptance is not prevented from being exact I and unconditional by the fact . . . that the offeree makes some simultaneous 'request', but it must appear that . . . the offeree has

assented to the offer, even though the offeror shall refuse to comply with the request.'

A third (suggested) case where added terms do not invalidate the acceptance is stated as follows by Williston on Contracts (revised ed, 1936) vol 1 at 228:

"A further distinction has been suggested in regard to added H terms in an acceptance. It has been held that, if an acceptance in positive terms is made, the addition of a demand for some performance to which the acceptor would not be entitled under a proper interpretation of the agreement will not invalidate the acceptance and prevent the formation of a contract."

Presumably such demand might, in a given case, constitute a repudiation of the offeree's contractual obligations, but that is another matter.'

[64] Having considered the rule and the quasi-exceptions discussed in the quoted case, it seems to me that the matter should be viewed as follows. When the second defendant made the offer, the Bassons knew that she did not intend making payment immediately, but only in 32 days. They testified that they accepted this offer, but wanted it confirmed in writing. It is highly improbable that they would have been willing to withdraw the criminal case upon an oral offer. In my view they did not accept the oral offer. In effect they asked the second defendant to make the offer in writing. This also appears from the terms of the second defendant's letter, which states, in effect, that the money will be paid 32 days 'after acceptance of this request and if the waiting time is in order with you.' Clearly the second defendant was making an offer here which was still open to acceptance. Then, when the Bassons received the offer in writing, they wrote back to state that they required a letter from the bank, setting out all the details they required and ended their letter off by expressly stating: "On receiving of such letter only, we can proceed with withdrawing the case against Miss Basson." In my view this statement indicates that they did not accept the offer, but set a new condition to which they were not entitled and without the fulfilment of which, they were not prepared to withdraw the case. In effect they made a counter-offer. There is no evidence that it was accepted. In my view no agreement was reached.

[65] I pause to note that, even if it could be said that an agreement had been reached, it seems to me that there were two conditions which had to be met before liability to make payment arose. These are that the second defendant had to supply the letter from the bank and the criminal case had to be withdrawn. Neither of these conditions was met.

[66] The result is, then, as follows:

1. There shall be judgment for the plaintiff against the first defendant for:
 - (a) Payment in the amount of N\$119 500-00.
 - (b) Interest at the rate of 20% per annum from date of judgment to date of payment.
 - (c) Costs of suit.
2. The plaintiff's claim against the second defendant is dismissed with costs.

K van Niekerk

Judge

APPEARANCE

For the plaintiff:

Mrs M D Rix
of Rix & Company

For the defendants:

Mr S F I Ueitele
of Ueitele & Hans Legal Practitioners