

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

Case No: CC 27/2006

THE STATE

v

HANS PETER ROTHEN

Neutral citation: *S v Rothen* (CC 27/2006) [2018] NAHCMD 44 (28 February 2018)

Coram: SHIVUTE, J

Heard: 4 – 20 March 2014, 2 June 2014,
23 – 24 September 2014, 24 April 2015,
9-13 November 2015, 23-27 November 2015,
4 -8 July 2016, 6 -8 February 2017,
27- 28 June 2017 and 3 -6 July 2017

Delivered: 28 February 2018

Flynote: Criminal Law – Fraud – Misrepresentation Accused holding 50% member's interest in Seaside Properties Investments CC depositing VAT refund cheques issued in the name of Seaside Properties Investment CC into account of Seaside Properties which is his own private business account without the consent of the other member of the CC – Cheques written not negotiable – Cheques not endorsed at the back or signed by the accused and his co-member of the CC who

had co-signatory powers – Accused by completing deposit slips and by presenting them to bank officials made a misrepresentation that cheques could be lawfully deposited into bank account of Sea Side Properties – There has been perversion or distortion of truth – Court satisfied there has been act of misrepresentation.

Prejudice – Counsel for defence arguing that considering the absence of the complainant (other member of CC) as a participating member in the management of CC – the possibility of potential prejudice arising cannot be described as anything else than a ‘remote or fanciful possibility’ – Allegations that the VAT refund cheques contributed to the SSPI account being overdrawn such allegations are not supported by evidence since the shortfall would in any event have occurred – Meaning of potential prejudice – (a) Potential prejudice means that the misrepresentation looked objectively involved some risk of prejudice or that it was likely to prejudice – (b) What is required is that prejudice can be, not will be caused – (c) The possibility of prejudice must be a reasonable possibility. The test is objective in the sense that it must be determined whether a reasonable person could in the normal course of events, have suffered prejudice. If the misrepresentation is so far-fetched that no reasonable person would believe it, there is no potential prejudice – (d) The prejudice need to be necessarily suffered by the represented. Prejudice to a third party ... is sufficient. (e) The fact that the party to whom the misrepresentation has been made was not in fact misled by the misrepresentation is irrelevant. It is sufficient for conviction that misrepresentation had the potential of leading to prejudice – (f) Whether there is potential prejudice must be determined according to the facts which exist at the time the misrepresentation is made. Whether the defrauded party would ultimately have suffered the prejudice anyway is irrelevant – The court having applied the above principles found that – The fact that cheques were not deposited into SSPI’s account the accused removed joint control over those funds from the member of SSPI – The fact that VAT refund cheques were not deposited into SSPI’s account contributed to an overdrawn bank account of CC during that period – Therefore the potential prejudice towards the entity, its members and creditors. The funds were at risk of not going to its rightful owner – Accused’s actions created a reasonable possibility of prejudice- The possibility of the potential prejudice arising cannot be described as ‘remote or fanciful’ possibility – In the circumstance, the entity and its other member have suffered both actual and

potential prejudice at the moment the accused made a representation because he did not get authorisation from the other member to deposit the funds in an incorrect account. By signing that CC was going to suffer an overdraft in anyway does not afford the accused a defence as it is immaterial – State had proved element of prejudice beyond a reasonable doubt.

Unlawfulness – Counsel for defence arguing – Accused did not know that his actions were irregular or unlawful – proceeds of cheques benefitted the CC – The accused did not deposit the money out of his ignorance – He deposited the money into an incorrect account well knowing of his unlawful conduct – Accused by completing the deposit slip and indicating the name of the bank account which is almost similar to the CC's name except for the words 'Investments CC' was unlawful conduct – Accused by saying proceeds of VAT refund cheques benefitted the CC is immaterial – It can only be regarded as mitigating factor – Intent Counsel for accused arguing that accused had no intention to defraud or to deceive other than acting in the best interest of-

SSPI – Held: Intent is a state of mind which can only be proven by inference – The court may determine intent by considering all facts and circumstances of the case – The court will also have to look at the conduct of the accused, the conduct being either an act or omission – Accused knew very well that there was another member of the CC – He knew that the proceeds of VAT refund cheques was that of Seaside Properties Investment CC – Accused was not authorised to deposit the money into an incorrect account either by resolution or endorsement of the cheques – Accused intentionally induced the bank to embark upon course of action to make funds available to him alone which amounts to the deprivation of the CC of its property or exposing the CC to risks – Accused had the capacity and knowledge to make a voluntary choice by doing what he did – Accused acted intentionally – Accused guilty of fraud.

Criminal Law – Theft – Act of appropriation – Accused arguing that although he made entries in the accounting books that N\$150 00 being salaries there was no act of appropriation – Accused testifying that the credit entry made in the books represented a credit right .

Held: If the salary were not paid as claimed by the accused the formular should have been processed as follows: - A debit to salaries of N\$150 000 and then a credit to the loan account. Another option is to electronically transfer funds out of the bank account as cash pay-out or a cheque issued for that or the CC does not physically pay out these amounts but a loan account is credited. – No such accounting and supporting the two options – When money is stole by false entries, it is not corporeal thing such as specific notes or coins which are stolen but something incorporeal namely credit. In the case of theft of credit there is no requirements of an act of appropriation to be physically contact with any specific notes or coins – Accused found guilty of theft in the forum of credit – The making of an entry in the book of accounting representing a credit right amounts to an act of appropriation

ORDER

SHIVUTE J:

[1] The accused person pleaded not guilty to an indictment containing 12 counts, namely 9 counts of fraud alternatively theft (counts 1 – 8, and 11), a count of theft, alternatively fraud (count 9) and fraud, alternatively theft (count 10). The 12th count is that of carrying on business recklessly, with gross negligence or with intent to defraud in contravention of s 64(2) of the Close Corporation Act 26 of 1988 as amended.

[2] The particulars of crimes and offence were framed as follows:

COUNT 1:

It is alleged that upon or about or between 15 and 22 January 2003 and at or near Swakopmund in the district of Swakopmund, and/or within the jurisdiction of the High Court of Namibia the accused did wrongfully, unlawfully, falsely and with the intent to defraud, give out and pretend to First National Bank, Swakopmund and/or its employees, that:

- (a) A Ministry of Finance cheque number 11786164, to the value of N\$397 652 payable to Sea Side Properties Investment CC, was his own and/or that of Sea Side Properties;
- (b) He and/or Sea Side Properties is/are entitled to the proceeds generated by the deposit of the said cheque into the account of Sea Side Properties;
- (c) He could and/or had the necessary authorization to deposit the said cheque into the bank account of Sea Side Properties; and/or
- (d) He does not have to deposit the said cheque into the account of Sea Side Properties Investment CC.

And did then and there by means of the said false pretences induce First National Bank, Swakopmund and/or its employees, to the loss and prejudice and/or the potential loss and prejudice of First National Bank, Sea Side Properties Investment CC, its other members, Bernd Martin Muller and/or Louise Jennifer Le Grange, previously De Melo, to permit the deposit and payment of the cheque to the value of N\$397 652 made out and payable to Sea Side Properties Investment CC into the bank account of Sea Side Properties;

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

- (a) A cheque of the Ministry of Finance with number 11786164, to the value of N\$397 652 payable to Sea Side Properties Investment CC, was not his own and/or that of Sea Side Properties;
- (b) He and/or Sea Side Properties is not entitled to the proceeds and/or full proceeds of the aforesaid cheque;
- (c) He could not and/or did not have the necessary authorization to deposit the said cheque into the bank account of Sea Side Properties; and/or
- (d) He had to deposit the said cheque into the account of Sea Side Properties Investment CC.

And thus the accused did commit the crime of Fraud.

ALTERNATIVELY

In that upon or about or between 15 and 22 January 2003 and at or near Swakopmund in the district of Swakopmund, and/or within the jurisdiction of the

High Court of Namibia did wrongfully and unlawfully steal cheque No. 11786164, to the value of N\$397 652 payable to Sea Side Properties Investments CC, the property of or in the lawful possession of Sea Side Properties Investment CC, and the partial property of its other member, Bernd Martin Muller and/or Louise Jennifer Le Grange, previously De Melo.

COUNT 2

In that upon or about or between 17 and 23 March 2003 and at or near Swakopmund in the district of Swakopmund, and/or within the jurisdiction of the High Court of Namibia the accused did wrongfully, unlawfully, falsely and with the intent to defraud, give out and pretend to First National Bank, Swakopmund and/or its employees, that:

- (a) Ministry of Finance cheque number 11938936, to the value of N\$127 790.73 payable to Sea Side Properties Investment CC, was his own and/or of Sea Side Properties;
- (b) He and/or Sea Side Properties is/are entitled to the proceeds generated by the deposit of the said cheque into the account of Sea Side Properties;
- (c) He could and/or had the necessary authorization to deposit the said cheque into the bank account of Sea Side Properties; and/or
- (d) He did not have to deposit the said cheque into the account of Sea Side Properties Investments CC,

And did then and there by means of the said false pretences induce the said First National Bank, Swakopmund and/or its employees, to the loss and prejudice and/or the potential loss and prejudice the First National Bank, Sea Side Properties Investment CC, its other members, Bernd Martin Muller and/or Louise Jennifer Le Grange (De Melo);

To permit the deposit and payment of the cheque to the value of N\$127 790.73 made out and payable to Sea Side Properties Investment CC into the bank account of Sea Side Properties;

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

- (a) The said cheque was not his own and/or that of Sea Side Properties;
- (b) He and/or Sea Side Properties was not entitled to the proceeds and/or full proceeds of the aforesaid cheque;
- (c) He could not and/or did not have the necessary authorization to deposit the said cheque into the bank account of Sea Side Properties; and/or
- (d) He had to deposit the said cheque into the account of Sea Side Properties Investment CC.

And thus the accused did commit the crime of Fraud.

ALTERNATIVELY

In that upon or about or between 17 and 23 March 2003 and at or near Swakopmund in the district of Swakopmund, and/or within the jurisdiction of the High Court of Namibia did wrongfully and unlawfully steal cheque 11938936, to the value of N\$127 790.73 payable to Sea Side Properties Investments CC, the property of or in the lawful possession of Sea Side Properties Investment CC, and the partial property of its other members, Bernd Martin Muller and/or Louise Jennifer Le Grange (De Melo).

COUNT 3

In that upon or about or between 6 and 23 May 2003 and at or near Swakopmund in the district of Swakopmund, and/or within the jurisdiction of the High Court of Namibia the accused did wrongfully, unlawfully, falsely and with intent to defraud, give out and pretend to First National Bank, Swakopmund and/or its employees, that:

- (a) Ministry of Finance cheque number 12012484, to the value of N\$112 666.93 payable to Sea Side Properties Investment CC, was his own and/or that of Sea Side Properties;
- (b) He and/or Sea Side Properties is/are entitled to the proceeds generated by the deposit of the said cheque into the account of Sea Side Properties;
- (c) He could and/or had the necessary authorization to deposit the said cheque into the bank account of Sea Side Properties; and /or
- (d) He did not have to deposit the said cheque into the account of Sea Side Properties Investments CC.

And did then and there by means of the said false pretences induce the said First National Bank, Swakopmund and/or its employees, to the loss and prejudice and/or the potential loss and prejudice of First National Bank, Sea Side Properties Investment CC, its other members, Bernd Martin Muller and/or Louise Jennifer Le Grange (De Melo);

To permit the deposit and payment of the cheque to the value of N\$112 666.93 made out and payable to Sea Side Properties Investment CC into the bank account of Sea Side Properties;

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

- (a) The said cheque was not his own and/or that of Sea Side Properties;
- (b) He and/or Sea Side Properties is not entitled to the proceeds and/or full proceeds of the aforesaid cheque;
- (c) He could not and/or have the necessary authorization to deposit the said cheque into the bank account of Sea Side Properties; and/or
- (d) He had to deposit the said cheque into the account of Sea Side Properties Investments CC.

And thus the accused did commit the crime of Fraud.

ALTERNATIVELY

In that upon or about or between 6 and 23 May 2003 and at or near Swakopmund in the district of Swakopmund, and/or within the jurisdiction of the High Court of Namibia did wrongfully and unlawfully steal cheque 12012484, to the value of N\$112 666.93 payable to Sea Side Properties Investments CC, the property of or in the lawful possession of Sea Side Properties Investments CC, and the partial property of its other members, Bernd Martin Muller and/or Louise Jennifer Le Grange (De Melo).

COUNT 4

In that upon or about or between 7 and 23 July 2003 and at or near Swakopmund in the district of Swakopmund, and/or within the jurisdiction of the High Court of Namibia the accused did wrongfully, unlawfully, falsely and with intent to defraud,

give out and pretend to First National Bank, Swakopmund and/or its employees, that:

- (a) A Ministry of Finance cheque number 12171829, to the value of N\$272 153.45 payable to Sea Side Properties Investment CC, was his own and/or that of Sea Side Properties;
- (b) He and/or Sea Side Properties is/are entitled to the proceeds generated by the deposit of the said cheque into the account of Sea Side Properties;
- (c) He could and/or had the necessary authorization to deposit the said cheque into the bank account of Sea Side Properties; and/or
- (d) He did not have to deposit the said cheque into the account of Sea Side Investments CC.

And did then and there by means of the said false pretences induce the said First National Bank, Swakopmund and/or its employees, to the loss and prejudice and/or the potential loss and prejudice of First National Bank, Sea Side Properties Investment CC, its other members, Bernd Martin Muller and/or Louise Jennifer Le Grange (De Melo);

To permit the deposit and payment of the cheque to the value of N\$272 153.45 made out and payable to Sea Side Properties Investment CC into the bank account of Sea Side Properties;

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

- (a) The said cheque was not his own and/or that of Sea Side Properties;
- (b) He and/or Sea Side Properties is not entitled to the proceeds and/or full proceeds of the aforesaid cheque;
- (c) He could not and/or did have the necessary authorization to deposit the said cheque into the bank account of Sea Side Properties; and/or
- (d) He had to deposit the said cheque into the account of Sea Side Properties Investments CC.

And thus the accused did commit the crime of Fraud.

ALTERNATIVELY

In that upon or about or between 7 and 23 July 2003 and at or near Swakopmund in the district of Swakopmund, and/or within the jurisdiction of the High Court of Namibia did wrongfully and unlawfully steal cheque 12171829, to the value of N\$272 153.45 payable to Sea Side Properties Investments CC, the property of or in the lawful possession of Sea Side Properties Investments CC, and the partial property of its other members, Bernd Martin Muller and/or Louise Jennifer Le Grange (De Melo).

COUNT 5

In that upon or about or between 22 September and 3 October 2003 and at or near Swakopmund in the district of Swakopmund, and/or within the jurisdiction of the High Court of Namibia the accused did wrongfully, unlawfully, falsely and with intent to defraud, give out and pretend to First National Bank, Swakopmund and/or its employees, that:

- (a) A certain cheque of the Ministry of Finance with number 12271513, to the value of N\$44 302.40 payable to Sea Side Properties Investment CC, was his own and/or that of Sea Side Properties;
- (b) He and/or Sea Side Properties is/are entitled to the proceeds generated by the deposit of the said cheque into the account of Sea Side Properties;
- (c) He could and/or had the necessary authorization to deposit the said cheque into the bank account of Sea Side Properties; and/or
- (d) He did not have to deposit the said cheque into the account of Sea Side Investments CC.

And did then and there by means of the said false pretence induce the said First National Bank, Swakopmund and/or its employees, to the loss and prejudice and/or the potential loss and prejudice of First National Bank, Sea Side Properties Investment CC, its other members, Bernd Martin Muller and/or Louise Jennifer Le Grange (De Melo);

To permit the deposit and payment of the cheque to the value of N\$44 302.40 made out and payable to Sea Side Properties Investment CC into the bank account of Sea Side Properties,

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

- (a) The cheque of the Ministry of Finance with number 12271713, to the value of N\$44 302.40 payable to Sea Side Properties Investments CC, was not his own and/or that of Sea Side Properties;
- (b) He and/or Sea Side Properties is not entitled to the proceeds and/or full proceeds of the aforesaid cheque;
- (c) He could not and/or did have the necessary authorization to deposit the said cheque into the bank account of Sea Side Properties; and/or
- (d) He had to deposit the said cheque into the account of Sea Side Properties Investments CC.

And thus the accused did commit the crime of Fraud.

ALTERNATIVELY

In that upon or about or between 22 September and 3 October 2003 and at or near Swakopmund in the district of Swakopmund, and/or within the jurisdiction of the High Court of Namibia did wrongfully and unlawfully steal the cheque 12271513, to the value of N\$44 302.40 payable to Sea Side Properties Investments CC, the property of or in the lawful possession of Sea Side Properties Investments CC, and the partial property of its other members, Bernd Martin Muller and/or Louise Jennifer Le Grange (De Melo).

COUNT 6

In that upon or about or between 24 November and 4 December 2003 and at or near Swakopmund in the district of Swakopmund, and/or within the jurisdiction of the High Court of Namibia the accused did wrongfully, unlawfully, falsely and with intent to defraud, give out and pretend to First National Bank, Swakopmund and/or its employees, that:

- (a) A certain cheque of the Ministry of Finance with number 12436663, to the value of N\$15 521.56 payable to Sea Side Properties Investment CC, was his own and/or that of Sea Side Properties;

- (b) He and/or Sea Side Properties is/are entitled to the proceeds generated by the deposit of the said cheque into the account of Sea Side Properties;
- (c) He could and/or had the necessary authorization to deposit the said cheque into the bank account of Sea Side Properties; and/or
- (d) He does not have to deposit the said cheque into the account of Sea Side Investments CC.

And did then and there by means of the said false pretence induce the said First National Bank, Swakopmund and/or its employees, to the loss and prejudice and/or the potential loss and prejudice of First National Bank, Sea Side Properties Investment CC, its other members, Bernd Martin Muller and/or Louise Jennifer Le Grange (De Melo);

To permit the deposit and payment of the cheque to the value of N\$15 521.56 made out and payable to Sea Side Properties Investment CC into the bank account of Sea Side Properties;

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

- (a) The cheque of the Ministry of Finance with number 12436663, to the value of N\$15 521.56 payable to Sea Side Properties Investments CC, was not his own and/or that of Sea Side Properties;
- (b) He and/or Sea Side Properties is not entitled to the proceeds and/or full proceeds of the aforesaid cheque;
- (c) He could not and/or did have the necessary authorization to deposit the said cheque into the bank account of Sea Side Properties; and/or
- (d) He had to deposit the said cheque into the account of Sea Side Properties Investments CC.

And thus the accused did commit the crime of Fraud.

ALTERNATIVELY

In that upon or about or between 24 November and 4 December 2003 and at or near Swakopmund in the district of Swakopmund, and/or within the jurisdiction of the High Court of Namibia did wrongfully and unlawfully steal cheque 12436663,

to the value of N\$15 521.56 payable to Sea Side Properties Investments CC, the property of or in the lawful possession of Sea Side Properties Investments CC, and the partial property of its other members, Bernd Martin Muller and/or Louise Jennifer Le Grange (De Melo).

COUNT 7

In that upon or about or between 5 and 26 January 2004 and at or near Swakopmund in the district of Swakopmund, and/or within the jurisdiction of the High Court of Namibia the accused did wrongfully, unlawfully, falsely and with intent to defraud, give out and pretend to First National Bank, Swakopmund and/or its employees, that:

- (a) A certain cheque of the Ministry of Finance with number 12521493, to the value of N\$61 022.71 payable to Sea Side Properties Investment CC, was his own and/or that of Sea Side Properties;
- (b) He and/or Sea Side Properties is/are entitled to the proceeds generated by the deposit of the said cheque into the account of Sea Side Properties;
- (c) He could and/or had the necessary authorization to deposit the said cheque into the bank account of Sea Side Properties; and/or
- (d) He does not have to deposit the said cheque into the account of Sea Side Investments CC.

And did then and there by means of the said false pretence induce the said First National Bank, Swakopmund and/or its employees, to the loss and prejudice and/or the potential loss and prejudice of First National Bank, Sea Side Properties Investment CC, its other members, Bernd Martin Muller and/or Louise Jennifer Le Grange (De Melo);

To permit the deposit and payment of the cheque to the value of N\$61 022.71 made out and payable to Sea Side Properties Investment CC into the bank account of Sea Side Properties;

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

- (a) The cheque of the Ministry of Finance with number 12521493, to the value of N\$61 022.71 payable to Sea Side Properties Investments CC, was not his own and/or that of Sea Side Properties;
- (b) He and/or Sea Side Properties is not entitled to the proceeds and/or full proceeds of the aforesaid cheque;
- (c) He could not and/or did have the necessary authorization to deposit the said cheque into the bank account of Sea Side Properties; and/or
- (d) He had to deposit the said cheque into the account of Sea Side Properties Investments CC.

And thus the accused did commit the crime of Fraud.

ALTERNATIVELY

In that upon or about or between 5 and 26 January 2004 and at or near Swakopmund in the district of Swakopmund, and/or within the jurisdiction of the High Court of Namibia did wrongfully and unlawfully steal cheque 12521493, to the value of N\$61 022.71 payable to Sea Side Properties Investments CC, the property of or in the lawful possession of Sea Side Properties Investments CC, and the partial property of its other members, Bernd Martin Muller and/or Louise Jennifer Le Grange (De Melo).

COUNT 8

In that upon or about or between 21 and 25 March 2004 and at or near Swakopmund in the district of Swakopmund, and/or within the jurisdiction of the High Court of Namibia the accused did wrongfully, unlawfully, falsely and with intent to defraud, give out and pretend to First National Bank, Swakopmund and/or its employees, that:

- (a) A certain cheque of the Ministry of Finance with number 12647852, to the value of N\$62 361.65 payable to Sea Side Properties Investment CC, was his own and/or that of Sea Side Properties;
- (b) He and/or Sea Side Properties is/are entitled to the proceeds generated by the deposit of the said cheque into the account of Sea Side Properties;
- (c) He could and/or had the necessary authorization to deposit the said cheque into the bank account of Sea Side Properties; and/or

- (d) He does not have to deposit the said cheque into the account of Sea Side Investments CC:

And did then and there by means of the said false pretences induce the said First National Bank, Swakopmund and/or its employees, to the loss and prejudice and/or the potential loss and prejudice of First National Bank, Sea Side Properties Investment CC, its other members, Bernd Martin Muller and/or Louise Jennifer Le Grange (De Melo);

To permit the deposit and payment of the cheque to the value of N\$62 361.65 made out and payable to Sea Side Properties Investment CC into the bank account of Sea Side Properties;

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

- (a) The cheque of the Ministry of Finance with number 12647852, to the value of N\$62 361.65 payable to Sea Side Properties Investments CC, was not his own and/or that of Sea Side Properties;
- (b) He and/or Sea Side Properties is not entitled to the proceeds and/or full proceeds of the aforesaid cheque;
- (c) He could not and/or did have the necessary authorization to deposit the said cheque into the bank account of Sea Side Properties; and/or
- (d) He had to deposit the said cheque into the account of Sea Side Properties Investments CC,

And thus the accused did commit the crime of Fraud.

ALTERNATIVELY

In that upon or about or between 21 and 25 March 2004 and at or near Swakopmund in the district of Swakopmund, and/or within the jurisdiction of the High Court of Namibia did wrongfully and unlawfully steal the cheque 12647852, to the value of N\$62 361.65 payable to Sea Side Properties Investments CC, the property of or in the lawful possession of Sea Side Properties Investments CC, and the partial property of its other members, Bernd Martin Muller and/or Louise Jennifer Le Grange (De Melo).

COUNT 9

In that upon or about or between 30 August 2003 and 13 April 2004 and at or near Swakopmund in the district of Swakopmund, and/or within the jurisdiction of the High Court of Namibia did wrongfully and unlawfully steal N\$150 000 the property of or in the lawful possession of Sea Side Properties Investments CC, and the partial property of its other members, Bernd Martin Muller and/or Louise Jennifer Le Grange (De Melo).

ALTERNATIVELY

In that upon or about or between 30 August 2003 and 13 April 2004 and at or near Swakopmund in the district of Swakopmund, and/or within the jurisdiction of the High Court of Namibia the accused did wrongfully, unlawfully, falsely and with the intent to defraud, give out and pretend to PricewaterhouseCoopers and/or Bernard Grovè that:

- (a) He and his wife were entitled to, and/or authorized to take wages in the amount of N\$75 000 each from Sea Side Properties Investments CC and/or;
- (b) Such wages explained the deficiency of N\$150 000 in the accounting books of Sea Side Properties Investments CC.

And did then and there by means of the said false pretence induce the said PricewaterhouseCoopers and/or Bernard Grovè, to the loss and prejudice and/or the potential loss and prejudice of Sea Side Properties Investment CC, its other members, Bernd Martin Muller and/or Louise Jennifer Le Grange (De Melo);

To allow this as an expenditure of Sea Side Properties Investment CC in their audit of Sea Side Properties Investment CC;

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

- (a) He and his wife were not entitled to, and/or authorized to take wages in the amount of N\$75 000 each from Sea Side Properties Investments CC; and/or

- (b) Such wages were indicated in an attempt to explain the deficiency of N\$150 000 in the account books of Sea Side Properties Investments CC.

And thus the accused did commit the crime of Fraud.

COUNT 10

In that upon or about or between 14 and 17 May 2004, and at or near Windhoek in the district of Windhoek, and/or within the jurisdiction of the High Court of Namibia the said accused did wrongfully, unlawfully, falsely and with the intent to defraud, give out and pretend to Louise Jennifer De Melo, that:

- (a) He was entitled and/or authorised by Berndt Martin Muller to have her sign the documents;
- (b) She had to sign the documents to get the affairs of Sea Side Properties Investment CC in order;
- (c) She had to sign the documents to transfer 50% member's interest in Sea Side Properties Investment CC, which Louise Jennifer De Melo held as a fiduciary on behalf of Berndt Martin Muller, to return such 50% member's interest in Sea Side Properties Investment CC to Berndt Martin Muller; and/or
- (d) She had to sign the documents to transfer 50% member's interest in Sea Side Properties Investment CC, which Louise Jennifer De Melo held to return such 50% member's interest in Sea Side Properties Investment CC to Berndt Martin Muller;

And did then and there by means of the said false pretences induce the said Louise Jennifer De Melo, to the loss and prejudice and/or the potential loss and prejudice of Sea Side Properties Investment CC, its other members, Berndt Martin Muller and/or Louise Jennifer Le Grange (De Melo),

To sign the document to effect the transfer of the 50% member's interest in Sea Side Properties Investment CC she held in trust for Berndt Martin Muller and/or held herself to the accused.

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

- (a) He was not entitled and/or not authorized by Berndt Martin Muller to have her sign the documents;
- (b) She did not have to sign the documents to get the affairs of Sea Side Properties Investment CC in order as she already in October 2003 signed the necessary documents to effect the 50% member's interest, as held by Louise Jennifer De Melo on behalf of Berndt Martin Muller and/or by herself to Berndt Martin Muller in terms of an original agreement;
- (c) The documents she signed would not transfer 50% member's interest in Sea Side Properties Investment CC, which Louise Jennifer De Melo held as a fiduciary on behalf of Berndt Martin Muller, to return such 50% member's interest in Sea Side Properties Investment CC to Berndt Martin Muller;
- (d) The documents she signed would not transfer 50% member's interest in Sea Side Properties Investment CC, which Louise Jennifer De Melo held on return such 50% member's interest in Sea Side Properties Investments CC to Berndt Martin Muller; and/or
- (e) The documents she signed would in effect transfer an additional 50% member's interest in Sea Side Properties Investment CC to the accused;

And thus the accused did commit the crime of Fraud.

ALTERNATIVELY

In that upon or about or between 14 and 17 May 2004, and at or near Windhoek in the district of Windhoek, and/or within the jurisdiction of the High Court of Namibia the said accused did unlawfully and with the intent to defraud and steal, misrepresented to Louise Jennifer De Melo, that:

- (a) He was entitled and/or authorized by Berndt Martin Muller to have her sign the documents;
- (b) She had to sign the documents to get the affairs of Sea Side Properties Investment CC in order;
- (c) She had to sign the documents to transfer 50% member's interest in Sea Side Properties Investment CC, which Louise Jennifer De Melo held as a fiduciary on behalf of Berndt Martin Muller, to return such 50% member's interest in Sea Side Properties Investments CC to Berndt Martin Muller;

- (d) She had to sign the documents to transfer 50% member's interest in Sea Side Properties Investment CC, which Louise Jennifer De Melo held to return such 50% member's interest in Sea Side Properties Investment CC to Berndt Martin Muller;

The accused as such, did by means of the said misrepresentation obtain from Louise Jennifer De Melo her signature on documents that in fact was necessary to effect an additional 50% of the member's interest in Sea Side Properties Investment CC, the property of Berndt Martin Muller, which was in lawful possession of the said Louise Jennifer De Melo, to be registered in his name and which 50% member's interest he did steal;

Whereas the said accused when he pretended as aforesaid, well knew that

- (a) He was not entitled and/or authorized by Berndt Martin Muller to have her sign the documents;
- (b) She did not have to sign the documents to get the affairs of Sea Side Properties Investment CC in order she already in October 2003 signed the necessary documents to effect the 50% member's interest, as held by Louise Jennifer De Melo on behalf of Berndt Martin Muller and/or by herself to Berndt Martin Muller in terms of an original agreement;
- (c) The documents she signed would not transfer 50% membership interest in Sea Side Properties Investment CC, which Louise Jennifer De Melo held as a fiduciary on behalf of Berndt Martin Muller, to return such 50% membership interest in Sea Side Properties Investment CC to Berndt Martin Muller;
- (d) The documents she signed would not transfer 50% membership interest in Sea Side Properties Investment CC, which Louise Jennifer De Melo held on return such 50% membership interest in Sea Side Properties Investments CC to Berndt Martin Muller; and/or
- (e) The documents she signed would in effect transfer an additional 50% membership interest in Sea Side Properties Investment CC to the accused;

And thus the accused did commit the crime of theft by false pretences.

COUNT 11

In that upon or about 17 May 2004 and at or near Swakopmund in the district of Swakopmund, and/or within the jurisdiction of the High Court of Namibia the accused did wrongfully, unlawfully, falsely and with intent to defraud, give out and pretend to First National Bank, Swakopmund and/or its employees, that:

- (a) He was entitled to N\$1 093 471.43 in the account of Sea Side Properties Investments CC;
- (b) The N\$1 093 471.43 was his own and/or that of Sea Side Properties and not that of Sea Side Properties Investments CC and /or;
- (c) He legally and properly obtained a 100% member's interest in Sea Side Properties Investment CC and as such was entitled to decide what to do with assets of Sea Side Properties Investment CC.

And did then there by means of the said false pretences induce the said First National Bank, Swakopmund and/or employees, to the loss and prejudice and/or the potential loss and prejudice of First National Bank, Sea Side Properties Investment CC, its other members, Berndt Martin Muller and/or Louise Jennifer Le Grange (De Melo), to

Believe any /or all of the above misrepresentations and/or any part thereof and/or

Effect the transfer of N\$1 093 471.43 out of the bank account of Sea Side Properties Investment CC into the bank account of Sea Side Properties.

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

- (a) He was not entitled to N\$1 093 471.43 in the account of Sea Side Properties Investments CC;
- (b) The N\$1 093 471.43 was not his own and/or that of Sea Side Properties but belonged to Sea Side Properties Investments CC; and/or
- (c) He improperly and by illegal means and/or through misrepresentation obtained an additional 50% member's interest in Sea Side Properties

Investments CC and as such was not entitled to decide what to do with the assets of Sea Side Properties Investments CC.

And thus the accused did commit the crime of fraud.

ALTERNATIVELY

In that upon or about 17 May 2004 and at or near Swakopmund in the district of Swakopmund, and/or within the jurisdiction of the High Court of Namibia did wrongfully and unlawfully steal N\$1 093 471.43 from Sea Side Properties Investments CC, the property of or in the lawful possession of Sea Side Properties Investments CC, and the partial property of its other members, Berndt Martin Muller and/or Louise Jennifer Le Grange (De Melo).

COUNT 12

In that on or about or between 22 January 2003 and June 2004, and at or near Walvis Bay in the district of Walvis Bay, and/or within the jurisdiction of the High Court of Namibia the accused did wrongfully and unlawfully carry on the business of Sea Side Properties Investment CC recklessly, with gross negligence or with intent to defraud or for any fraudulent purpose in contravention of s 64 (2) of the Close Corporation Act 26 of 1988 by:

- (a) Misleading bank officials as to the assets of Sea Side Properties Investment CC;
- (b) Depositing assets of Sea Side Properties Investment CC into his bank account and/or accounts he had sole access to;
- (c) Making false statements to auditors concerning the assets of Sea Side Properties Investment CC;
- (d) Misleading members who had a member's interest in Sea Side Properties Investment CC;
- (e) Enriching himself and/or advancing loans to himself and/or his wife to the detriment of Sea Side Properties Investment CC and/or members who had a member's interest in Sea Side Properties Investment CC;
- (f) Obtaining signatures on documents under false pretences to obtain a 100% member's interest from members who had a member's interest in Sea Side Properties Investment CC;

- (g) Withholding assets of Sea Side Properties Investment CC from other members and/or other persons;
- (h) Instructing attorneys to ensure that Sea Side Properties Investment CC does not abide by its contractual obligations to transfer property in terms of such obligations and/or to expose Sea Side Properties Investment CC to unnecessary business risks and/or legal claims;
- (i) Generally conducting the business of Sea Side Properties Investment CC as if it is not a separate legal entity to which he owns a fiduciary duty but as if the property of the close corporation is there for his personal advantage and/or personal use;
- (j) Generally conducting the business Sea Side Properties Investment CC as if it is not a separate legal entity to which he owes a fiduciary duty but as if the property of Sea Side Properties Investment CC is there for his personal advantage and/or personal use and/or that of Sea Side Properties and/or Sea Side Properties Development CC;
- (k) In breach of his fiduciary duty to Sea Side Properties Investment CC, sabotaging the contractual opportunities of Sea Side Properties Investment CC for his own advantage and/or that of Sea Side Properties and/or Sea Side Properties Development CC;
- (l) Unfairly, prejudicially, unjustly or inequitably conducting the business of Sea Side Properties Investment CC to the detriment of other members who had a member's interest; and/or
- (m) Using confidential information of Sea Side Properties Investment CC to advance the interest of rival concerns of Sea Side Properties and/or Sea Side Properties Development CC and/or his own business of Sea Side Properties and/or Sea Side Properties Development CC to the prejudice of Sea Side Properties Investment CC.

[3] The accused pleaded not guilty to all the counts. In amplification of his plea of not guilty he explained in terms of s 115 of Act 51 of 1977 that he had no intention to defraud or to steal in respect of counts 1 - 8 and 11. He further stated that all the proceeds of the cheques in respect of counts 1 - 8 were used in the furtherance of the business of Sea Side Properties Investment CC. Concerning count 9, the accused denied that there was an act of appropriation by him or his wife. With regard

to count 10, the accused admitted that he took the Sea Side Investment Properties CC documents to Louise Jennifer Le Grange to sign over the 50% member's interest back to him but denied that he did so with the intention to defraud her or Mr Muller or did so under false pretences. According to the accused, Ms Le Grange was at all times aware that she was signing off and consenting to the 50% member's interest to return back to the accused. Concerning count 12, the accused denied that he recklessly or with gross negligence managed the affairs of the Sea Side Properties Investment CC or that he intended to defraud or make any false representation. He further explained that the development business of Sea Side Properties Investments CC was successfully concluded and the silent member of the CC, Mr Berndt Muller, did receive the proceeds and the profit agreed upon between the accused and Mr Muller during June 2002 to 29 November 2002. However, Mr Muller ceased to be a member of the Sea Side Properties Investments CC on 29 November 2002. By then the sale agreement between the CC and Mr Muller, the complainant, concerning the four units he would receive as profit sharing from the development was already signed by the accused and the complainant.

[4] It is trite proposition of law that in criminal proceedings the State bears the burden of proof to prove the charges preferred against an accused beyond reasonable doubt.

[5] I will now proceed to summarise the evidence. I find it convenient to deal first with the evidence of Ms Louise Jennifer Le Grange (née De Melo). She testified that she and Mr Muller had a relationship and that during 2002 she was approached by the complainant, Mr Muller, who requested her to 'hold' his 50% member's interest in Sea Side Properties Investment CC. On 26 November 2002 she, the complainant and the accused met at the accused's office. They discussed the terms of the temporary transfer of the complainant's 50% member's interest from the complainant to Ms De Melo. The terms of the agreement were that Ms De Melo would return the 50% member's interest to the complainant upon the finalisation of complainant's divorce. After the discussion they signed the documents regarding the transfer whereby the member's interest was transferred to Ms De Melo free of consideration. Another part of the agreement was that the complainant and the accused would continue to conduct the business of the Sea Side Properties Investment CC as if the transfer did not take place. In May 2003 she was contacted by Mr Muller to sign the

necessary documents in order to transfer back the 50% member's interest to him. She complied with the request and signed the documents in October 2003 at the offices of Binneman Visser in Windhoek.

[6] However, to her surprise during May 2004 she was contacted by a certain lady who claimed to be an employee of Swakopmund Municipality and thereafter by the accused in connection with the 50% member's interest in the CC in question. She was informed that according to the documents she was still the holder of the 50% member's interest. The accused informed her that the transfer of the 50% member's interest in the Seaside Properties Investment CC (SSPI) was not done because something went wrong at PricewaterhouseCoopers (PWC). An arrangement was made for the accused to prepare the documents and for him to travel to Windhoek to bring the documents to Ms De Melo to sign. On 12 May 2004 the accused came to Windhoek and gave a three page document titled 'Amended Founding Statement' that was admitted in evidence and marked as exhibit 'F'. Ms De Melo signed the document ceasing as a member and Mr Hans Peter Rothen remained as the only member who has 100% member's interest. According to Ms De Melo, at the time she was signing she believed she was returning the 50% back to Mr Muller as the accused did not explain the content of the document to her and she also did not read it. Apart from the witness signing ceasing to be a member of the SSPI she also received a warranty from the accused personally indemnifying the witness against any claim from any third party against her arising from any liability in law in her capacity as a member of SSPI. Ms De Melo ceased to be a member of the SSPI on 12 May 2004.

Although she was a member, she had no intention to own the member's interest because she knew she was holding the 50% member's interest temporarily on behalf of Mr Muller. On the same date the accused and the witness De Melo both signed a mandate by a Close Corporation, exhibit 'H', authorising the accused to be the sole representative of the bank account of the said SSPI held at FNB Swakopmund. The mandate by a Close Corporation is a one page document that was signed on 12 May 2004. Although the witness testified that she was familiar with the workings of close corporations, when she signed the necessary documents so that her name could be removed from the CC she did not read those documents. She later learnt that the documents she signed were in fact transferring the 50% member's interest to the

accused and not to the complainant. The 50% member's interest was given to the accused without any consideration.

[7] Through cross-examination, the witness conceded that before she signed the indemnity form she read it and understood the content. She also said before she signed the document ceasing her 50% membership and all the necessary documents when she was approached by the accused concerning the transfer of her 50% member's interest she had told the accused that she would first seek legal advice. Furthermore, it came to light through cross-examination that Ms De Melo is a qualified nurse and she worked as a pharmaceutical representative who was responsible for installing pharmaceutical equipment as she was a theatre sister. She further said when she signed the documents she was in shock and she just wanted her membership to cease as she thought that had already been done.

[8] The complainant, Berndt Muller, testified that he and the accused had entered into an agreement in terms of which he purchased 50% member's interest in SSPI for an amount of N\$300 000. After his member's interest was registered, he also had signatory powers to the bank account of the SSPI as it was his desire to be involved in the financial affairs of the business. Sometime after he had acquired his member's interest, he discussed with the accused and Ms De Melo on separate occasions that he wanted to transfer his member's interest to Ms De Melo in order for him to avoid putting the CC or his 50% member's interest at risk since his wife was suing him for the alleged breach of their divorce settlement agreement. After he discussed the issue with the accused and Ms De Melo individually, they again discussed it together on 29 November 2002 when the member's interest was transferred to Ms De Melo.

[9] Mr Muller took the accused into his confidence regarding his intention to transfer the 50% member's interest to Ms De Melo temporarily. The accused was aware that it was a temporary arrangement and after the accused had sorted out his divorce settlement agreement the 50% member's interest would be transferred from Ms De Melo back to him. The accused and the complainant continued to run the affairs of the business of SSPI as if the 50% member's interest was still registered in the complainant's name.

[10] The complainant's version that he continued to conduct the business of SSPI with the accused after the member's interest was registered in Ms De Melo's name

was corroborated by the version of Ms De Melo. During May 2003 he requested Ms De Melo to transfer back the 50% member's interest to him and PWC was instructed to oversee the process. The complainant signed the documents regarding the transfer in question but the transfer was not processed. It is the complainant's further testimony that at some stage he became concerned about the manner in which the accused was conducting the business of the CC in question. The accused and the complainant also had a disagreement about how much was to be spent and what had to be done with regard to the landscaping. He also found out that the person who was doing the landscaping was paid despite his disapproval of the expenses.

[11] Complainant testified further that he was introduced to the accused by a certain attorney in connection with Palm Gardens Holding. The whole project was to develop certain ervens and to develop town houses. The complainant wrote a letter to the accused setting out the conditions of the development and the accused also wrote a letter agreeing to the conditions. In terms of the letter, the complainant was going to purchase 50% member's interest in SSPI. The total amount he had to pay was N\$300 000 which he paid when the member's interest in the CC was transferred to him and after the property was purchased from the Municipality. The two letters were admitted into evidence and marked as exhibits 'M' and 'N'. The transfer of the 50% member's interest was concluded on 21 June 2002 when both parties signed the Amended Founding Statement. Both parties opened a bank account for SSPI of which both members were signatories to the business account. Both members would have to authorise bank transactions on the account. The amended Founding Statement was admitted in evidence and marked as exhibit 'O' whilst the mandate by the close Corporation was marked as exhibit 'P'.

[12] The complainant continued to testify that he had gone through a divorce. During and after his divorce his ex-wife was allegedly making unreasonable demands. The complainant formed a family trust which would benefit his children and Ms De Melo was a trustee of the complainant's family trust. Due to the alleged unreasonable demands from his ex-wife, he arranged with Ms De Melo to transfer his 50% member's interest in the SSPI to hold it in trust for him or to have temporary membership in the CC up until such a time that he had resolved his issue concerning the divorce settlement. The complainant is not very certain whether at the time he approached Ms De Melo concerning the transfer of the 50% member's

interest in the SSPI he was already divorced or not but he was of the opinion that he was divorced. After the complainant consulted with Ms De Melo, he and Ms Melo met at the accused's office and they discussed in detail, the transfer of the member's interest. The matter was also discussed by the auditor at PricewaterhouseCoopers, the complainant and the accused. The 50% member's interest was transferred to Ms De Melo on 29 November 2002 and the complainant signed that he ceased to be a member of SSPI. Another reason why the complainant transferred his 50% member's interest to Ms De Melo was to avoid putting the CC at risk because his wife was suing him for breach of their divorce settlement. Ms De Melo had no signing authority and it was orally agreed that although the complainant had ceased to be a member he and the accused would now handle the affairs of SSPI. The complainant took the accused into his confidence and they continued to conduct the business of the CC. The amended Founding Statement whereby the 50% member's interest was transferred to Ms De Melo was admitted into evidence and marked as exhibit 'E'.

[13] After the divorce issues had been settled, Ms De Melo wanted to rid herself of the obligations towards the complainant. During the beginning of the year 2003, there was a discussion between the complainant and Ms De Melo for the 50% member's interest to be transferred to the complainant. The complainant and Ms De Melo signed the documents for transfer. The documents were supposed to be sent by Binneman Visser to forward them to PricewaterhouseCoopers to facilitate the transfer of member's interest into the complainant's name. However, PricewaterhouseCoopers did not take any action to register the 50% member's interest into the complainant's name. Before they registered the 50% member's interest, they were supposed to take the documents to the accused for his signature. The 50% member's interest had never been returned to the complainant. To the complainant's surprise, he received a notice from the accused that the 50% member's interest was transferred to accused and that the accused had 100% membership of SSPI. The accused sent the letter dated 24 May 2004 via his legal representative. What prompted the accused to send the letter to the complainant was because the complainant was worried about how the financial affairs of the CC were being run by the accused and the complainant requested the auditors to conduct an audit report on SSPI's finances. According to the report, there was a shortfall of N\$360 000 that was not deposited into the CC's account as per their

agreement. The complainant also queried about the VAT cheques that were issued by the Receiver of Revenue. It was reported to the complainant that the VAT cheques were not deposited into the CC's account.

[14] Upon the complainant realising that the VAT cheques were not deposited in the SSPI's account where it was supposed to be deposited, he made a request to the Bank for the cheque monies to be transferred to SSPI. The cheques were issued in favour of SSPI and not in favour of Sea Side Properties in whose account they were deposited. The bank complied with the complainant's request. The result of transferring the funds where it belonged resulted in the accused's private business account being overdrawn. However, upon the accused having learned that the funds were transferred to the account in whose favour the cheques were issued, the accused went back to the bank and instructed them to re-transfer the funds to the accused's private business account to wit Sea Side Properties. According to the complainant, although his 50% member's interest was transferred to Ms De Melo, it was agreed between the accused, the complainant, as well as Ms De Melo that the complainant would continue to act normally with regards to the SSPI and there would be no change in the complainant's relationship to the CC. The accused also regarded the complainant as an existing member of the CC. He took cheques to him after the 50% member's interest was transferred to Ms De Melo. For all intents and purposes the accused acted as if the complainant was still a member of SSPI. The complainant continued to testify that after the money was transferred to Sea Side Properties Investment CC, the accused phoned the complainant to have a discussion with regards to the funds in the account; the complainant welcomed the idea. However, the accused never went to the complainant. Instead, he took a drastic action by taking full control of the account in order for him to sort out his overdraft problems by taking the complainant's member's interest by deceit from Ms De Melo.

[15] The total amount of the VAT cheques issued in favour of SSPI reflected in the private business account of the accused, namely Sea Side Properties is N\$ 1 093 471.43 (one million ninety three thousand four hundred and seventy one Namibia Dollar and forty three cents). The accused knew that the 50% member's interest belonged to the complainant and he was not allowed to take it from Ms De Melo. Again, the accused and the complainant had an agreement that both of them

should sign all documents concerning the account and the agreement did not state that if the complainant ceased to be a member, the agreement should also lapse. Furthermore, the accused took a loan on the account of the CC when the complainant was still a rightful signatory to the CC's account without the complainant's permission. According to the complainant, by taking a loan on the CC the accused violated their agreement and their signing right and put the CC at risk without the complainant's knowledge. In terms of their agreement, if the CC required more funds, the members must pay those funds into the CC's account and keep them at equal level. The letter written by the complainant concerning VAT cheques was admitted into evidence and marked as exhibit 'S' whilst the letter written by the accused to Kinghorn Legal Practitioners was admitted into evidence and marked as exhibit 'R'.

The cheques referred to by the complainant in exhibit 'S' are the cheques that have allegedly been stolen in respect of counts 1 to 8. Whist exhibit 'R' stated that the complainant had become a 100% sole member of Sea Side Properties Investments CC with effect from 17 May 2004. It was again the complainant's testimony that he and the accused agreed that when any development was not finalised whatever came out of the profit would be shared equally. The complainant specifically made a request that the same agreements would provide two signatures for the sale of any piece of land. However, the accused violated the agreement by transferring most of the immovable properties without the complainant's signature. Although the accused was allowed to perform the nitty gritty of the day to day business of the CC he was not supposed to take major decisions of the business that has not been agreed upon. The accused had authority to carry out the business of the development project of the CC within the CC's budget. Concerning the landscaping on the development, its budget was surpassed by what had been agreed upon. The complainant submitted another quotation to the accused but he ignored it and went ahead without the complainant's consent and this resulted in the CC suffering a loss.

[16] The complainant further testified that out of the assets of the CC they decided that each member should get four units worth N\$120 000 each and this was supposed to be for the purchasing of walls and roof only. Two of the units, belonging to the complainant were not transferred to him because the accused stopped the transfer. Two of the units were given to the complainant on the basis of profit

sharing. A unit which the complainant bought from another person was never transferred to the complainant. The accused made the complainant pay for the two units that were transferred to the complainant. However, the accused never paid for the units that were allocated to him according to the complainant's knowledge. The complainant did not pay for the two units that were not transferred to him. The transfer of the three units was stopped by the accused after the complainant caused the funds for the VAT cheques to be transferred to SSPI account. The accused wrote to Kinghorn and Associates informing them that he was withdrawing the transfer because of the dispute between the members of the CC. The letter dated 26 April 2004 written by the accused was marked as exhibit 'T'.

[17] Apart from the account of Sea Side Properties Investments held at First National Bank, the accused and the complainant had opened another account with Nedbank to hold the monies regarding the corporate account that manages the monies for water and lights. In other words, this was a corporate account that was used for paying insurance. It was not an account for the communal things of the development. The accused never used the account. Instead he opened another account at FNB where he had sole signing power. The account at FNB was opened on the 7th or 10th of July 2003. The complainant continued to testify that the unit which he purchased from somebody else was later returned to him (unit 11).

[18] The complainant further testified that the accused had signed for the units which were part of the development projects without the complainant's signature namely units A 1-3, 5-10, 12, 13, 15, 16, 18, 19, 20 and 27 (see exhibit 'Z'). The witness further testified that the accused diverted the funds of the jointly owned CC into accounts that were under his control. Accused paid for things behind the complainant's back, an example is when he paid for the landscaping service. The accused channelled other funds apart from the VAT cheques into his private accounts. As a result of the accused taking decisions of the CC unilaterally, the complainant addressed a letter to him dated 22 December 2003 complaining about the funds of the CC being transferred into a wrong account and about agreements made on behalf of the CC regarding the gardening and security services and the unilateral imposition of levies on the residents (see exhibit 'AA'). As a result of the accused's alleged mismanagement of assets of the CC, complainant suffered a loss of about N\$200 000. Because the developer did special work for the complainant's

units whereby the complainant paid him N\$200 000 (two hundred thousand Namibia Dollar), but at the same time the CC paid him the same amount. The accused further got an extra garage which was worth N\$20 000 (twenty thousand Namibia Dollar). The accused also obtained a loan of N\$500 000 (five hundred thousand Namibia Dollar), from the bank and the CC had to pay interest. Furthermore, the accused took N\$150 000 (one hundred and fifty thousand Namibia Dollar) from the CC for the purposes of salaries for him and his wife. The accused and his wife were not allowed to receive salaries. The accused deposited N\$100 000 (one hundred thousand Namibia Dollar) into his loan account of the CC and it vanished. It was never paid and it was not reflected on the bank statement, this goes for the N\$ 240 000 (two hundred and forty thousand Namibia Dollar) paid for the two units. He did not get the units and the money was still lying at the lawyers' office. The complainant was deprived of his money for more than 10 years.

[19] The complainant received a letter dated 10 February 2004 via his lawyers and was marked as exhibit 'BB'. According to the letter the agreement between the accused and the complainant was that the accused was supposed to get three units for his N\$300 000. However, this is disputed by the complainant. The letter also stated that the complainant earned a profit of 1.5 million, again the complainant disputed it. The letter further stated that the reason why certain amounts of money were transferred from the CC was for the daily running of the business and all the monies received from the purchase were correctly booked with the auditor as reflected on the auditor's report. The letter further stated that the complainant would pay the invoices dated 16 October 2003 for outstanding amounts of N\$36 156. 72 (thirty six thousand one hundred and fifty six Namibia Dollar seventy two cents) for section 11 and N\$14 162.82 (fourteen thousand one hundred and sixty two Namibia Dollar eighty two cents) for sections 18, 19, 20 and 28. This is not disputed by the complainant. The accused further said that he had to advance to SSPI an amount of N\$200 472.47 (two hundred thousand four hundred and seventy two Namibia Dollar and forty seven cents).

[20] During cross examination, it was put to the complainant that during 2002 the complainant was aware that certain expenses of SSPI were paid out of the Sea Side Properties CC to which he confirmed and stated further that after the creation of the Sea Side Properties Investment CC this ought to have been discontinued. The

complainant was asked about the two units that were transferred to him without paying N\$120 000 (one hundred and twenty thousand Namibia Dollar) each and whether it was part of the profit sharing or not. The witness responded that the purchase price was supposed to reflect in the account book as a debt. However, parties agreed that the purchase price would not be paid out of the purchaser's pocket but would be settled indirectly by way of a set off against their respective profit sharing and by way of a loan account entry. The complainant was further asked to what extent he wanted to be involved in the running of the CC after he had ceased to be a member and he replied that he wanted to be involved in the payments and expenses made by the CC as well as major decisions concerning the CC. The complainant was again asked as to how often he was available in respect of the day to day running of the business. He said that he was reachable as he spent most of the time at the farm in the district of Swakopmund. He was available, he had a phone and a fax machine and that papers would be exchanged easily during the main construction of the units. The accused by saying that he was not available, that was not correct, the accused was making excuses. It was put to the complainant that he was not involved in the day to day running of the business and that it was only the accused who was running the business on a daily business and that the management and the decisions concerning the development were left to the accused. The complainant responded that he did not want to be involved in the day to day management for example what has been done at the site. However, where the finances of the CC were concerned he specifically made it a point that he had to be involved. He has to sign the cheques and no property should be transferred without his signature.

[21] The complainant was asked again whether he could recall when the accused introduced him on or about 21 or 22 November 2002 that he was a silent partner who left all the decisions to him and that he thanked the complainant for all the trust he put in him. The witness confirmed what the accused said although he was not pleased with what the accused said he could not jump in the presence of the customers and confirm or deny it. See exhibit 'GG'. It was further put to the witness that he and the accused had approved or issued cheques in the sum of N\$ 6 987 433.48 (six million nine hundred and eighty seven four hundred and thirty three Namibia Dollar and forty eight cents) for the expenses of Sea Side Properties

Investment CC and the witness respondent in the affirmative. See exhibit 'FF' (stabs or counterfoils). It was put to the complainant that gardening services expenses amounted to N\$ 180 599 (one hundred and eighty thousand five hundred and ninety nine), the witness said that he did not agree with it. See exhibit 'JJ'. It was again put to the complainant that the accused paid on behalf of Sea Side Properties Investment CC by using the money from Sea Side Properties CC an amount of N\$ 71 990 (seventy one thousand nine hundred and ninety) to Swakop Electrical Supply. The witness replied that although payment was made, that was not correct, the expenses were unauthorised. The accused did it because he was avoiding the complainant not to sign. A question was put to the complainant that during 2003 until April 2004 expenses totalling to N\$ 612 584 (six hundred and twelve thousand five hundred and eighty four Namibian Dollar) from the operational account were paid including certificates no 12 and 13 paid to coastal construction. The complainant disputed that there was an operational account and that all the expenses were unauthorised.

[22] It was put to the complainant that the purpose of issuing a crossed cheque was to protect the drawer. In reply the complainant said it was not only to protect the drawer but also the drawee. It was put to the complainant that he was supposed to cease as a member of the CC upon his receiving the four sectional title units and the accused would regain the 100% membership. The complainant testified that there was no such agreement at all. The complainant confirmed that the money that was placed in the trust of a legal practitioner in respect of two units and that those units have been transferred to the witness. Counsel for the accused put it to the complainant that the reason why the complainant continued to co-sign the cheques after he had ceased to be a member of the CC was because he and the accused entered into a building contract with a certain Meyer of Coastal Construction. The witness' response was that it was not true. Furthermore, it was put to the witness that it was not wrong for the accused to deposit the cheques in respect of counts 1 to 8 into Sea Side Properties account which was an operational account. The witness responded that it was not an operational account and that they never agreed to have an operational account to be held in the name of the Sea Side Properties. A further question was that the witness was not available all the time to co-sign the cheques.

He replied that it was very easy to get access to him by way of a phone or fax when he was on the farm.

[23] Concerning the N\$150 000 or N\$75 000 in respect of the accused and his wife each, there was no payment made to them if one had regard to the cheque account. The complainant answered that although there was no indication on the cheque account, there are entries in the book for the salary of N\$75 000 (seventy thousand Namibia Dollar) in respect of the accused and his wife each.

[24] With regards to count 12, it was put to the witness that the accused never conducted the business of Sea Side Properties Investments CC in a negligent or reckless manner or with any intent to defraud. The complainant responded that the accused took the complainant's loan account away and it vanished without trace. He annexed additional properties to himself namely a garage which he took without permission in respect of N\$300 000 (three hundred thousand Namibia Dollar) and the loan account. It was put to the witness that he, the complainant, got his four units as agreed and that the complainant voluntarily ceased to be a member on 29 November 2002 and he was not entitled to interfere in the CC's business. The complainant responded that a loan account was a separate thing from membership. The accused had no right to get rid of the complainant's loan account. Furthermore, the complainant insisted that he did not cease to be a member on 29 November 2002 because Ms De Melo was holding his member's interest in trust.

[25] Fransina Gregory testified that on 22 January 2003, she was on duty at First National Bank when the accused came to deposit a cheque of N\$379 652 (three hundred and seventy nine thousand and six hundred and fifty two). The cheque was written not negotiable and it was issued to Sea Side Properties Investment CC. The accused completed the deposit slip indicating that it should be deposited in the account of Sea Side Properties. According to her, the account holder where the cheque was deposited looks more or less the same as the name of the payee. She did not realise that there were two different accounts. The cheque was deposited in Sea Side Properties account. If the cheque is written not negotiable it cannot be deposited in an account other than that of the payee unless it was signed at the back. In this case the cheque was not signed at the back because she did not realise that there were two different entities.

[26] Antoinette Posthuma's testimony was that during 2003 she was employed at First National Bank Swakopmund as a teller. On 3 October 2003, the accused presented to her a deposit slip which he had already filled in bearing the account holder of Sea Side Properties. He was depositing a cheque issued by the State in the amount of N\$44 302.40 (forty four thousand three hundred and two Dollar and forty cents) made out to Sea Side Properties Investments CC. The two names Sea Side Properties and Sea Side Properties Investment CC are close to each other or are very similar yet they are two different accounts. The cheque was written not negotiable which means it should be deposited into a bank account of Sea Side Properties Investment CC and it could not be cashed at the counter. If there are two signatories to the account of the payee and the money is not deposited in the payee's account, both signatories need to sign at the back of the cheque. In the present matter the cheque was not signed at the back because they all knew the accused and when they (the employees at the bank) saw the deposit slip written Sea Side Properties they presumed it was correct.

[27] The next witness called by the state was Dieter Lombard who was employed by First National Bank as a Branch Administrator in Swakopmund during 2003. According to this witness the accused had two accounts with FNB that gave rise to the case. In 2004, the complainant Mr Muller came to the bank and lodged a complaint that the accused had deposited cheques into his private account instead of a joint account. The cheques were deposited into bank account of Sea Side Properties. These cheques were both deposited by the accused on 23 May 2003 and on 28 March 2003. None of the cheques was endorsed at the back. The cheque deposited on 23 May 2003 was in the amount of N\$112 666.93 (one hundred and twelve thousand six hundred and sixty six Namibia Dollar and ninety three cents) whilst the cheque issued on 28 March 2003 was in the amount of N\$127 790.73 (one hundred and twenty seven thousand seven hundred and ninety Namibia Dollar and seventy three cents).

[28] Avril Bruwer gave evidence that during 2003 she was employed by PricewaterhouseCoopers in Walvis Bay. She received instructions to prepare a Close Corporation document in order to effect the transfer of 50% member's interest in Sea Side Properties Investment CC from De Melo to the complainant. She prepared the documents and sent them to Binneman Visser in Windhoek in order to

obtain the signature of Ms De Melo. She made arrangements with PWC Windhoek to return the documents to her. Upon receiving the documents back, she gave them to Marlene van Aarde to take them to Swakopmund in order to obtain the complainant's signature. The complainant's signature was obtained. The documents were given to Mr van Wyk to take them to the accused to obtain his signature. Unfortunately Mr van Wyk was transferred to Tsumeb. As a result, the witness sent the documents by post to the accused. Her testimony was corroborated by the testimony of Ms van Aarde who testified that she took the documents to the complainant and the complainant affixed his signature on the documents and referred the documents to Ms Bruwer.

[29] Binneman Visser who is a chartered accountant, testified that he received a request from the complainant to audit the books of Sea Side Properties Investment CC. The complainant suspected that the accused was getting more benefits from the CC than what he was entitled to get in terms of their profit sharing. He prepared two reports marked exhibit 'UU' and 'VV'. These reports were based on bank statements of Sea Side Properties Investments CC, bank statements of the Trust and bank accounts of Sea Side Properties, cash summaries prepared by the accused and the deeds of sale of the property sold by the CC as source documents. According to his reports inter alia:

- (a) There were discrepancies between budgeted and actual figures that appear on the financial statements.
- (b) It appeared Mr Rothen had given himself an extra garage.
- (c) No transaction contracts for garages G 12 and G 55 which appeared on the drawings.
- (d) No deposits appeared on the bank account as payments for extras by members.
- (e) Although the complainant had provided proof of a direct bank transfer of the amount of N\$200 000 (two hundred thousand Namibia Dollar) for his extras made to Coastal Construction on 2 May 2003, the financial statements and architect's certificate did not reflect the above mentioned amount.

- (f) The VAT refunds, due to Sea Side Properties Investments CC which amounted to N\$1 093 771.43 (one million ninety three thousand seven hundred seventy one and forty three cents) were deposited into the business account of Sea Side Properties.
- (g) Credit balance owed to H Rothen per cash summary was N\$207 278.86 (two hundred and seven thousand two hundred and seventy eight Namibia Dollar and eighty six cents). Amount paid to H and M Rothen (services rendered) was N\$ 150 000 (one hundred and fifty thousand Namibia Dollar).
- (h) Amount received as interest on business account H Rothen-N\$57 865.84(fifty seven thousand eight hundred and sixty four Namibia Dollar).
- (i) Amount shown as cash on financial statements N\$586 96 (five hundred and eighty six ninety six Namibia Dollar).
- (j) All cheques drawn on Sea Side Properties Investment CC's bank account were signed by both H Rothen and BM Muller.
- (k) According to 'WW' the fair value of the 50% interest in the CC on 7 April 2004 had been N\$606 543 (six hundred and six thousand five hundred forty three Namibia Dollar). See also exhibit 'HH'
- (l) According to the budget, the CC was supposed to spend N\$7.7 million. However, it ended up spending about N\$8.1 million.

[30] According to the witness, if cash was used there should be a cash box and there should be cash in it. If the calculation was correct that amount should have been in real cash. The 50% member's interest suffered by the complainant was N\$597 593 (five hundred ninety seven thousand five hundred ninety three Namibia Dollar). See exhibits 'UU' , 'VV', 'WW', 'XX','YY' and 'ZZ' to be read together.

[31] Andreas Francois Schultz, a property valuer testified that he compiled a report pertaining to the value of certain sections and buildings on Erf 1358 Swakopmund after he received instructions from the complainant's lawyers. Upon determining the market value of sections and components situated at Erf 1358, Swakopmund namely:

- (ii) Sections 15, 16, 17, 18, 19, 20, 28 and 30 as on 1 August 2002;
- (ii) Garage G 12 as on 1 August 2002 and on 1 May 2006 and;
- (iii) Original and attested layout of cluster 5 as on 1 August 2002, he came to the following conclusion:
 - (a) The enrichment of the accused by enlarging parts of Sections 15, 16, 17 and 30 in comparison to Sections 18, 19, 20 and 28 of Mr Muller, amounts to N\$223 792 based on the 2002 market value of the relevant properties.
 - (b) The value of section 31 of which the proceeds were not shared with Mr Muller was set at N\$25 000.
 - (c) The increase in value of cluster 5 (excluding the increase in value of Mr Muller was estimated at N\$12 692 (twelve thousand six hundred and ninety two Namibia Dollar). The findings are contained in exhibit 'AAA'.

[32] Marthinus Brits a branch manager of FNB Swakopmund by then testified that the accused applied for unlimited overdraft facility in the name of Sea Side Properties Investment CC. Although the CC consisted of two members, he neglected to request a resolution from both members consenting to the overdraft. It was necessary for both members to consent to the overdraft because the CC was responsible for paying interest and should the loan not be paid; the CC would be at risk. The CC had an account at FNB, where Mr Rothen and Mr Muller had signing powers. The witness further testified that on 28 April 2004 the bank transferred N\$1 093 471.43 (one million ninety three thousand four hundred seventy one Namibia Dollar and forty three cents). The total amount of the VAT cheques that was issued to Sea Side Properties Investments CC and wrongly deposited in the account of Sea Side Properties account fell into an overdraft. However, on 12 May 2004, the accused contacted him in respect of the transfer of the VAT cheques and showed him that he was a 100% member of Sea Side Properties Investment CC and instructed him to reverse the transaction made on 28 April 2004. The witness complied with the instruction. The witness further identified exhibits BBB, CCC, DD and EEE in this regard.

[33] Neels van Wyk a chartered accountant by profession and former partner of PricewaterhouseCoopers testified that he was in charge of a client trading as Sea Side Properties Investments CC. During 2002, he was approached by the complainant who informed him that due to medical difficulties and divorce problems he wanted to transfer his 50% member's interest in the CC to Ms De Melo. He wanted to park his interest as a temporary measure in Ms De Melo. He advised the complainant to discuss the issue with the accused who also had 50% interest in the CC. After some time, the complainant again phoned the witness and informed him that he wanted his 50% member's interest to be transferred from Ms De Milo back to him. Thereafter, the witness should make an arrangement for the transfer. The witness instructed the secretarial department to see to it that the 50% members' interest is re-transferred to Mr Muller. They needed to obtain signatures from the members on page 3 of the CC2 document as well as the signature on page 8 of the member who ceased to be a member as well as the resolution. The witness identified exhibit 'TT' as the documents he caused to be prepared in connection with the transfer of the member's interest. However, the Amended Founding Affidavit was not signed by the accused. During 2002 the witness was transferred from Walvis Bay to Tsumeb and he could not tell how the documents were sent to the accused. However, according to the documents the transfer to Mr Muller was not done. Furthermore, the State produced by consent a table of VAT cheques in issue and it was marked as exhibit 'GGG' as well as the original cheques deposited and deposit slips.

[34] Another witness called by the State was Mr Hans Frederick Hashagen, a chartered accountant specialising in forensic accounting and investigations. This witness's evidence is mainly related to count 9. The witness was instructed by the complainant's lawyers to prepare a forensic report because there was a civil dispute between the complainant and the accused. The source of the report was based on the documents provided to him by the complainant's lawyers, documents from PricewaterhouseCoopers or from the accused and the general ledger, bank statements of Sea Side Properties Investments CC and of Sea Side Properties as well as annual financial statements for the relevant financial years and interviews. Mr Rothen had also provided cash book summaries that he prepared. The accused declined to be interviewed and as a result, the nature of the transactions and in

some instances supporting invoices for expenditure and deposit slips could not be confirmed. During April 2004, the complainant became aware that certain VAT cheques issued by Inland Revenue which were due to Sea Side Properties Investments CC were not deposited into Sea Side Properties Investment CC's account but into the bank account of Sea Side Properties. Sea Side properties account was controlled by the accused. According to the witness, it was wrong for the VAT cheques to be deposited into the Sea Side Properties account because they belong to Sea Side Properties Investment CC. These cheques amounted to N\$1 093 471.43 (one million ninety three thousand four hundred and seventy one Namibia Dollar and forty three cents). On 28 April 2004, the money was transferred to Sea Side Properties Investment CC's account and this resulted in an overdraft on the Sea Side Properties account. Again on 28 May 2004, the same amount of money was transferred from its rightful account of the Sea Side Properties Investment CC to Sea Side Properties account. This transfer resulted in a debit balance for Sea Side Properties Investment CC account and a credit balance for the Sea Side Properties account. The VAT refund cheques that were deposited in the account controlled by the accused were deposited during the period 22 January 2003 to 25 March 2004.

[35] The cash book summaries which were prepared by the accused and his wife were also inspected during the investigations. The period for investigations was from 1 January 2002 to 31 December 2004. The scope of their investigations was limited to analysis of documents and information made available to them. The authenticity and validity of the documentation made available to them was not verified.

[36] Concerning the refund cheques that were deposited in an account that was being controlled by the accused alone, the witness stated by completing the deposit slips in the name of Sea Side Properties with its respective bank details, the accused removed the joint control over those funds from the members of the CC. This resulted in potential prejudice towards the members and creditors of Sea Side Properties Investment CC. The fact that the cheques were not deposited into the Sea Side Properties Investment CC's account contributed to an overdraft of the bank account of the CC. During the course of their investigations, they came about N\$150 000 (one hundred and fifty thousand Namibia Dollar) which reflected as salaries of the accused and his wife in the amount of N\$75 000 (seventy five thousand Namibia Dollar) each. Upon receipt of the General Ledger from PWC they

noted that the salaries were indicated to be expenses paid cash as per summary. The credit entry of this transaction appeared in the cash control account of the General Ledger. The total credit entry amounts to N\$400 683.01 (four hundred thousand six hundred eight three Namibia Dollar and one cent). This entry corresponds to the register report for the SSPI for the month of August 2003 which includes N\$75 000 (seventy five thousand Namibia Dollar) for Mr and Mrs Rothen each. However, the said amount for the salaries could not be identified from the bank accounts document made available to them. If the salaries were not paid as claimed by the accused and merely an accounting entry, the formula should have been processed in the following manner. A debit to salaries of N\$150 000 and then a credit to the loan accounts of Mr Rothen and the accounts payable for Mrs Rothen because she did not have a loan account. Another option is to electronically transfer the funds out of the bank account as cash pay-out or a cheque issued for that or the CC does not physically pay out these amounts but a loan account is credited. There was no such accounting entry supporting the two options. Therefore the claim by Mr Rothen that the amounts stated to be salaries were not paid out but was a mere accounting entry could not be supported. If there were cash payments they have not been recorded properly.

[37] Furthermore, it was noted in the accounting records that the accused used a cash control account to account for a material value of transactions. The use of a cash control account could have been avoided as all those transactions could have been paid or received in the current account of SSPI CC which was established for that purpose. By using a cash control account the accused did not account for those transactions in terms of generally accepted accounting practices and the members of SSPI might not be able to confirm the completeness and the accuracy of those transactions. No acceptable reason for this practice was identified with regards to the operations of SSPI.

[38] It was put to the witness that although the accused instructed the accounting officer to make an accounting entry of N\$150 000 (one hundred and fifty thousand Namibia Dollar) in the book there was no payment made. The witness replied that an entry was made and no other explanation was given. It was further put to the witness

that the accused made a mistake by making such entry of N\$75 000 x 2 (seventy five thousand Namibia Dollar) twice but it was reversed the following day. The witness answered that if it was reversed the following day then it was going to be reflected in the income statement of the year 2004 where salaries and wages of staff are reflected minus N\$150 000 (one hundred and fifty thousand Namibia Dollar). That entry is reflected as an advance by the member in the member's loan account but there is no debit in the income statement and no credit in the income statement. Again, if it was reversed it was going to increase the profit but that is not the case. The witness emphasised that the N\$150 000 (one hundred and fifty thousand Namibia Dollar) had been treated as salary payment and not credit to the loan account. See exhibits 'RRR' financial statement of 2004 and 'QQQ3' cash book.

[39] The accused Hans Peter Rothen testified that he came into contact with the complainant through a certain Mr Powell, an architect. The complainant approached the accused with the idea that the two of them could develop the Palm Garden Project the accused was busy with. His proposal was to buy 50% member's interest. He did not want to have 100% of the member's interest because he had no time and knowledge to manage the project. The accused had to run it. The accused and the complainant had the projected cost and income and they decided that it would be possible for them to get two units each that would be financed by the project. The profit sharing was not in terms of money but in terms of sectional title units. First, they agreed on two units, then three units and lastly four units in respect of each of them. The accused received letters from the complainant pertaining to their discussions wherein the complainant asked the accused to confirm in writing what they had discussed. According to the contract, a bank account will have to be opened and both members will have signing authority. The complainant was aware of the projected expenses of N\$150 000 (one hundred and fifty thousand Namibia Dollar) to be paid for possible monies that would have been loaned from financial institutions. According to the sale agreement, it was intended that the whole project was going to be financed by progress payment.

[40] Although the purchased price for the 50% member's interest was N\$350 000 (three hundred and fifty thousand Namibia Dollar) it was reduced to N\$300 000 (three hundred thousand Namibia Dollar) upon complainant's request. The accused further testified that exhibits 'M' 'N' and 'Q' contain most of the points that have been

discussed and agreed upon between him and the accused. However, exhibit 'M' was not a full reflection of their discussions and agreement. There were other discussions and terms agreed upon that were not recorded. It is worth mentioning that this is contrary to the complainant's version when he testified that the initial agreement of February 2002 was the record of the agreement reached between him and the accused and that exhibit 'M' reflects what transpired and it had never been amended. The accused testified further that other agreements were not reduced to writing over time until November 2002. Furthermore, the agreement became expressly and tacitly amended by further agreement and conduct of the parties. The complainant's absence made the accused to exclusively manage the development and affairs of SSPI with his wife. The complainant was regarded as a silent partner and he made no meaningful contribution to the project.

[41] It is again the accused's version that the project expenses were partially funded from bank accounts other than the SSPI's cheque account. The complainant was aware but he never resisted. Instead, he participated in that practice. On some occasions the accused's Sea Side Properties was refunded from SSPI's cheque account for project expenses. The refunds were paid by cheques co-signed by the complainant and the accused. The complainant had also received payment by a cheque drawn from the Sea Side Properties account on 12 December 2002 as commission when he sold his two units to one of the clients. The payment from one account became impractical and that is the reason the accused had to use other accounts that were not in the name of SSPI. It is alleged by the accused that the complainant had absented himself from Swakopmund for long periods. The accused had an obligation to ensure that the expenses of the SSPI were timely paid. The accused was not aware that his actions were unlawful or irregular to deposit the VAT cheques into a different account.

[42] The accused continued to testify that some clients preferred to pay the progress payments into the estate agency's trust account. A number of payments were also received into the Sea Side Properties cheque account and the funds received were used for the project expenses when need arose. The development project could not have been concluded with the cheque payment drawn against the SSPI account requiring the joint signatures of the accused and the complainant. The amount for the VAT refund cheques paid into Sea Side Properties account was used

to reimburse development expenses already paid through the Sea Side Properties cheque account or to fund development expenses. The complainant was aware of the practice although he testified that he was not aware. The accused recorded the funds originating from the VAT refunds in the accounting records kept by him. The accused alleged that the member's interest sold to the complainant would have been returned to the accused upon the completion of the development project. When the accused introduced him the complainant never protested. The complainant ceased to be a member when his 50% member's interest was transferred to Ms De Melo. There was no full discussion between the accused, the complainant and Ms De Melo that the 50% member's interest would return to the complainant. They only met briefly and the accused signed the CC2 form. By then the complainant and the accused had already agreed on the final profit sharing and the complainant had signed the purchase agreement to take his four units. The accused testified that all the funds received as VAT refunds that were deposited into the Sea Side Properties FNB cheque account were immediately paid over to a related account, utilised to pay Palm Garden's expenses or used to pay expenses on behalf of SSPI. The accused denied that he removed joint control over those funds from the members of SSPI as other members of the SSPI were not managing the corporation. The complainant had also already acquired his right to the four units. The accused further disputed that the use of a cash control could have been avoided as all those transactions could have been paid or received in the current account of SSPI that was established for that purpose. He also disputed that he withheld material financial information with regards to the operation of the SSPI from Mr Muller. The accused insisted that the investment of capital in equal shares through the respective member's loan accounts after the changing of the agreement would only have required the complainant to contribute when there was a shortfall on his particular four units or extras to be paid over and above what was identified in the sale agreement. He also disputed that the way the operation was conducted was not acceptable.

[43] In respect of count 9 the accused admitted that he instructed his accounting officer to make an entry in the accounting book. However, there was no money paid for his salary and that of his wife. Although accused bona fide believed that he and his wife were entitled to receive salaries as they worked tirelessly to make the Palm

Gardens Development project a success, he denied any intention to steal or to defraud. He further denied that there was an act of appropriation. The accused continued to testify that concerning the salary payment, he only made a credit entry in order to have a claim should there be any funds left.

[44] With regard to count 10 he testified that he never made a misrepresentation to Ms De Melo when he gave her the CC2 form to sign over to him the 50% member's interest. Ms De Melo was aware at all times of what was happening and she consented to the member's interest reverting back to him.

[45] On count 11 the accused denied having had the prerequisite form of intent to defraud or to steal. He testified that he was the sole member of the CC at the time he caused the money to be re-transferred to Sea Side Properties account. He testified that he used the funds or intended to use the funds for the development expenses of Palm Gardens. At the time the complainant caused the account of Sea Side Properties to be debited there was no funds emanating from the VAT refunds in the Sea Side Properties cheque account. At that stage the account was already overdrawn with N\$1 443.92 (one thousand four hundred forty three Namibia Dollar and ninety two cents). The entry caused it to be overdrawn further with N\$1 094 915.25 (one million ninety four thousand, nine hundred fifteen Namibia Dollar and twenty five cents). By 28 April 2004 there was no money in the Sea Side Properties account that was realised from the VAT refunds because that money was either transferred to the SSPI account or was used towards the SSPI's development account. The SSPI was not entitled to transfer the money into its account from the Sea Side Properties account. The accused being the sole member he had the right to reverse the transaction.

[46] With regard to count 12, the accused testified that he was unaware he had to deposit the cheques into the account of SSPI or that an endorsement was required for such deposit into the Sea Side Properties cheque account. He did not see the possibility that such an endorsement may have been required. The accused denied that he acted fraudulently or negligently or recklessly. The accused explained that by making entries in the accounting books concerning his salary and that of his wife, those entries were not meant to defraud anyone. He believed that he and his wife were supposed to receive salaries but nothing was paid to them. Furthermore, by

enlarging his units he did not enrich himself as both the complainant and the accused had the right to enlarge their units. Although the complainant was aware of the accused's units being enlarged he did not protest. When the complainant signed the deeds of sale for the acquisition of his four units on 27 November 2002 this was his final share of profit sharing. The complainant's only claim that he had retained towards the accused and SSPI were those claims recorded in the deed of sale. The accused recorded the actual movements of funds. Both the project income and expenses were accounted for. The accused further testified that he sought legal advice in respect of his conduct and he never knew that such conduct was fraudulent, negligent or reckless. As far as the accused is concerned, he did his best to keep accurate records of the development and the bank accounts involved. He kept a spreadsheet program for all the changes, expenses and progress payments.

[47] Apart from the accused, the defence called three witnesses. The first witness was Calvin Isaaks, a Chartered Accountant employed as a consultant with KPMG in Cape Town. At the time he rendered his service to the accused, he was a forensic partner with KPMG. He was mandated to prepare a cash flow analysis on behalf of the accused for purposes of a civil litigation. According to him, the procedures he followed when he prepared his report were limited to essentially cash flow. He did not make a forensic analysis of the bank account entries and transactions that took place. The report by Mr Isaacks was admitted in evidence as exhibit 'XXX'. Sources of his report were an electronic version of the accused's accounting record recorded on the system known as Quicken, bank accounts, statements supporting the transactions and supporting invoices. The purpose of the report was to confirm that entries recorded in the Quicken books of account could be traced through a corresponding entry on the bank account. According to the witness, everything as stated in the Quicken books of accounts could be substantiated with an entry reflected on the bank account. Another purpose of the report was to identify whether all project related expenses as identified in the Quicken reports could be validated through to the bank accounts.

[48] The witness' findings revealed that the funds received as VAT refunds into the Sea Side Properties FNB cheque account were either immediately paid over to a related account or were used to reimburse amounts spent on behalf of Sea Side Properties Investments CC. From material perspective, the amounts in respect of

VAT refunds that were received by the project were used for project related expenses.

[49] With regard to count 9 the witness testified that in their cash flow analysis they identified from the Quicken and set records that there was accounting transactions processed for N\$415 000 (four hundred and fifteen thousand Namibia Dollar). There was no evidence to support that N\$150 000 (one hundred and fifty thousand Namibia Dollar) was paid although it was recorded as having been paid. The witness further testified that he could not agree with the procedure to be followed in the respect of N\$150 000 (one hundred and fifty thousand Namibia Dollar) as suggested by Mr Hashagen.

[50] Concerning Mr Hashagen's conclusion that if the salaries were not paid out as claimed by Mr Rothen and were merely an accounting entry, a journal should have been processed as follows: to raise the salary experienced being a debt of a N\$150 000 (hundred and fifty thousand Namibia Dollar) and to process the balances to the credit of loan accounts when accounts were payable in respect of Mr and Mrs Rothen. The witness testified that on the face of it, it would appear that there was a payment but he could not find proof of payment. Therefore, he was aware that there was no payment made and it appeared to have been an oversight or an accounting mistake. The appearance of cash payment was brought about because the loan account was not credited. The witness has also disagreed with Mr Hashagen when he concluded that by depositing the VAT cheques into a bank account under his control, the accused removed the joint control over those funds from the members of SSPI. Furthermore that the fact that the VAT refund cheques were not deposited into SSPI bank account contributed to an overdrawn bank account of the CC during that period therefore causing potential prejudice towards the entity, its members and creditors. Mr Isaaks countered that their analysis had revealed that the bank accounts were going to be overdrawn in any event because of the nature of the expenses that were incurred on the project. The expenses had to be funded out of the money that was available and if that account was not going into overdraft other accounts were going to go into overdraft. There was an overdraft that had to be incurred and had to be funded. One cannot necessarily say there is prejudice.

[51] Concerning Mr Hashagen's findings that Mr Rothen did not account for those transactions in terms of generally accepted accounting practices and the members of the SSPI might therefore not be able to confirm the completeness and accuracy for the practice that was identified with regards to the operations. The witness referred to section 58 of the Close Corporation Act and stated that annual financial statements need to be prepared in accordance with generally accepted accounting practices. So, one cannot impose an obligation requiring the general books of accounts to be prepared in compliance with generally accepted accounting practices. He further testified that Mr Rothen found the cash control account to be convenient to him to account for those transactions. According to the witness the accused is not required to follow generally accepted accounting practices when using a control cash account to account for material value transactions. The accused was only obliged to comply with generally accepted accounting practices when he is preparing annual financial statements. No evidence found that there has been noncompliance with the Act. The two accounting officers for period ended 31 August 2003 and 31 August 2004 both certified that those financial statements were prepared in accordance of generally accepted accounting practices. In respect of the report prepared by Ernest and Young Mr Isaaks disputed that the accused by utilising the VAT refund cheques due to SSPI was an attempt to cover the accounts of the cash control because the money was used to defray project related expenses. The accounting officers were also able to prepare annual financial statements on the strength of the process that the accused had in place.

[52] The witness further testified that he did not agree with Mr Hashagen's conclusion when he stated that due to the manner in which the accused managed the funds of SSPI and how the transactions were recorded it became difficult if not impossible to determine which funds were used for valid purposes. The reason for his disagreement was because the witness and his colleagues were able to identify the project related expenses and the project related income notwithstanding the system that was put in place by the accused. According to their cash flow analysis they could not find any evidence that there were monies that were missing or they were project related expenses accounted for which should not have been there.

[53] Through cross-examination the witness was asked about the discrepancies concerning the architect's certificates he referred to in his testimony but not covered

in his report. The witness explained that he discovered discrepancies with regard to architect certificate. Payments were made over and above what the certificates reflected. One global payment was made and it could not be reconciled. However, after consulting with the accused he made it clear that two payments were made. Therefore, what was referred to as discrepancies and anomalies was a matter of clarification. It was further put to the witness that various anomalies were identified, about schedules extracted, no corresponding entry was made, the transaction of a N\$100 000 (one hundred thousand Namibia Dollar) could not be substantiated and the amount of N\$150 000 (one hundred and fifty thousand Namibia Dollar) was not included in the report. The witness explained that the N\$150 000 (one hundred and fifty thousand Namibia Dollar) was not included in the report because there was no payment. The witness was asked as to what an accounting officer would do to verify the balance and the cash at hand. The witness replied that he would not know because he is not an accounting officer. He further said he was not familiar with the Quicken system. One would ask a question that if the witness is not familiar with the Quicken accounting program how would he then give testimony that transactions were done in accordance with generally accepted practice. The witness further said he was not involved in the detailed analysis of the Quicken records. When the witness was asked how he was able to validate or substantiate the payment, expenses during the exercise, he replied that he was not involved in the detailed substantiation of each and every single item. The colleagues who were with him would probably be in a better position to answer how the exercise was done.

[54] The report was prepared in his capacity as having been involved in the cash flow analysis and having seen how entries were made. Therefore, the report is not an expert summary. It is worthy to mention that Hashagen testified as an expert witness whilst Isaaks not. His comments were not expert comments as opposed to expert witness comments. Cash flow analysis is not a forensic investigation. When it was put to the witness that if he did not do a forensic investigation he could not comment on the findings of the person who did that independent and objective investigation, the witness conceded this proposition. He is not in a position to comment on expert investigation. It was further put to the witness that the four bank accounts that the witness analysed were not that of the CC that the accused had registered in order to be a vehicle for the project and the witness responded that that

was correct, except one account. When asked how entries made in the Quicken programme could be accurate if it cannot be validated or substantiated whether N\$150 000 (one hundred and fifty thousand Namibia Dollar) was paid or not, the witness could not give an answer. Again the witness was asked whether the cheque issued in the name of Sea Side Properties Investment CC was supposed to be deposited in the account of Sea Side Properties and he responded that it was not supposed to be deposited in Sea Side Properties account.

[55] The 3rd witness called by the defence was Dawn King who consulted through KPMG based in Cape Town. She holds a Bachelor of Science in Economics. Although she is not a chartered accountant, she has experience in forensic investigations. However in this case she did a cash flow analysis and compiled a report with Calvin Isaaks based on the information that was supplied to them by the accused. They found that the value of the certificate was significantly high and requested for the architect certificates. They also primarily relied on the deeds of sale. They analysed the deeds of sale as part of the verification process of the income. No payments in terms of the deeds of sale that were not allocated to the bank accounts under scrutiny. They also identified the VAT repayments in the Quicken system and it was obvious to them that they were not progress payment. No income in respect of Palm Gardens was channelled through the four bank accounts. The purposes of cash flow analysis was to ascertain what money came into these bank accounts that were related to the project, how much was that claim and what amount were expenses against that amount of money and what were they used for. Their findings pertaining to expenses against income was that a total of N\$8 600 000 (eight million six hundred thousand Namibia Dollar) and that amount represented expenses against the total amount of N\$6 500 000 from the SSPI's account and N\$1 7000 000 (one million seven hundred thousand Namibia Dollar) from Seaside Properties FNB account leaving a difference of N\$214 000 (two hundred and fourteen thousand Namibia Dollar) paid as a commission that left a balance of N\$145 030 (one hundred forty five thousand and thirty Namibia Dollar) based on a vouching exercise. Things like office furniture or bank charges were not included in the transaction vouched against the income and put them against the abovementioned difference. The money that was received into the bank accounts for the Palm Garden Project had money expensed against it for the building of the

project which they believed was used against the project. The witness further testified that they were unable to get some of the source documentation namely cheques and original invoices because they had been confiscated and were not available.

[56] It was further the witness testimony that VAT refund cheques were used for the expenses of the project. The VAT refunds contributed or substituted the income from the potential sale. Without the VAT refunds it was not going to be possible to conclude the project. With regard to the payment of N\$150 000 (one hundred and fifty thousand Namibia Dollar), she testified that she could not find any such payment in respect of the amount indicated as salaries for the accused and his wife. When they looked at the bank statements of the transactions they identified as being part of Palm Gardens development, all of them had gone through as cheque payment. No transaction of a material nature that can lead her to conclude that there was a vast amount of cash being held from the Palm Gardens income was identified. They did not see any cash withdrawal or any transaction being paid to Mr Rothen and his wife.

[57] It was put to the witness that according to her report there was a balance of N\$145 000 (one hundred and forty five thousand Namibia Dollar) that could not be accounted for. The witness replied that that was correct, but she could not say it was not vouched. The witness was further asked how she established that all the payments for the SSPI were for Palm Gardens. She explained that she was able to determine it because of the nature of the bank statement. The witness was further asked about letters acknowledging that payment was received in the amount of N\$58 500 (fifty eight thousand and five hundred Namibia Dollar) as opposed to it being an invoice whether she could tell for a fact that payments were made for the Palm Gardens development because she did not verify the authenticity of those documents. The witness confirmed that she did not verify as the document was not prepared for court purposes.

[58] An assumption was made that because the letters came from the common suppliers for Palm Gardens, the payments were made although there was no independent verification. The witness was not able to confirm that these transactions were able to factually support Palm Garden Project. Likewise she was not able to determine that the letters of acknowledgement were true and that the amount was

genuinely paid. Concerning the question of into which account VAT cheques were supposed to be deposited, she confirmed that cheques were supposed to be deposited in the bank account designated on those cheques. A reasonable businessman would have deposited them as stated above specially those cheques that have been issued by an institution such as Receiver of Revenue. If that particular account is closed it has to be endorsed and put in another account. What is expected is for them to be deposited in the name on the face of the cheques. A cheque written 'Not Negotiable' cannot be negotiated.

[59] However, the witness changed her version and testified that if one has an acceptable reason, e.g. a bank account in a business that was overdrawn and you have received a cheque from the Receiver of Revenue one may deposit it in the overdrawn account and settle the debt immediately. When she was asked whether her answer would change if the cheque is issued in the name of the CC that is jointly owned and the other member deposited it in a different account which exclusively belongs to the depositor without the consent of the other member, she replied that she was unable to comment. However, she confirmed that if the other member does not know about the accounts he had no way of knowing that this member is expending the property of the CC for purposes of the CC. The witness further confirmed that she had no complete set of VAT reconciliation for the entire expenses for Palm Gardens. As to the question whether by depositing a cheque in the account other than the account which is on the face of the cheque without the awareness or consent of the other member of the CC would put the other member at risk, the witness responded that it puts the entity and the other member at risk. The witness was further asked why in her report there were no conclusions made as opposed to what she testified in court. The witness responded that there were no opinions expressed or conclusions made in the report, because the report was compiled for a different purpose. The witness was asked whether she had included the amount of N\$150 000 (one hundred and fifty thousand Namibia Dollar) allocated as wages in exhibit 'QQQ3' in her report exhibit 'SSS'. She replied that it was not included because she did cash flow analysis and in the cash flow there was no cash that related to a transaction of that nature.

[60] Herman Kinghorn, a legal practitioner, testified that he was approached by the accused during April 2004 and informed him that on the instructions of Mr Muller

FNB had debited the accused's own business account in the amount of over a million Namibia Dollars and credited the close corporation's banking account with FNB. The accused was in an overdraft and had no access to the funds. The accused explained to him that the reason why he deposited the VAT cheques in his account was because the complainant was not readily available to co-sign the cheques on behalf of the CC. He put the funds in his own business account and used the funds because he was the sole signatory of that business account for the sole purpose of expenses relating to the project development of the CC. The witness was advised that the accused did not use the VAT refund for his own purpose. The accused informed him that Mr Muller was no longer a member of SSPI and that Mrs De Melo was then a member. The witness was surprised by that revelation, because he was still executing deeds of sale in which Mr Muller was given as a co-member of the CC.

[61] Few days later, he received a letter from Van Rensburg Associates that there was an agreement between Mr Muller, Mr Rothen and Ms De Melo in terms of which there would be the re-transfer of Ms De Melo's member's interest back to Mr Muller. Upon receiving the letter, he consulted with the accused who told him that there was no such agreement. Since the witness was informed that Mr Muller was no longer a member, he advised the accused that Mr Muller had no rights as a non-member of the CC. If he wanted to get his funds back, he should regain control of the CC and retransfer those funds. The accused was advised to approach De Melo and negotiate the terms to acquire 50% from Ms De Melo and become a 100% member of the CC.

[62] The witness' office prepared the CC2 form in terms of which Ms De Melo would transfer a 50% member's interest to Mr Rothen and also prepared a warranty on indemnity in terms of which Ms De Melo would not be liable for any liabilities that she might have incurred as a member of the CC. After the accused became a 100% member of the CC, he re-transferred the money back to his business account as advised. Before the witness advised the accused on the steps he should take, the witness phoned the Registrar of Companies' office to satisfy himself as to who were the members of the CC and he confirmed that Ms De Melo was a member and not Mr Muller. The witness had a look at bank statements and accounting spreadsheets to satisfy himself that the proceeds of the VAT cheques were expended for the benefits of SSPI. He did not know about the agreements between the accused and

the complainant concerning the running of the CC. His advice to the accused was based on what the accused had told him.

[63] Having summarised the evidence I will now proceed to consider whether the State has proved its case beyond reasonable doubt in respect of all the counts. I propose first to deal with first eight counts, 1-8. Counsel for the State argued that the State has proved its case beyond a reasonable doubt that the accused had an intent to defraud. In respect of the act of misrepresentation; when the accused completed the respective deposit slips, by presenting them (to the various bank officials), he misrepresented that the said cheques could be lawfully deposited into the bank account of Sea Side Properties (an entity of which he was the sole proprietor and to which bank account he accordingly had sole access) whilst the cheques were clearly made out to Sea Side Properties Investment CC and the proceeds of cheques, legally belonged to Sea Side Properties Investment CC (to which bank account the complainant also had access). The accused was at all relevant times the sole beneficial owner of the corporation. Bank officials who testified that they were deceived by the accused in the sense that they believed that the account number entered by the accused on the deposit slips were the account number of the payee, namely Sea Side Properties Investments CC not that of a different entity. They did so because they trusted the accused as a regular customer and the names of Sea Side Properties Investment CC and Sea Side Properties are so similar that it was not picked up that Sea Side Properties was not the payee. If they had picked it up, they would have asked the accused to sign at the back of the cheque and or requested the other signatory on the account to co-sign.

[64] On the other hand counsel for the defence argued in respect of the element of the act of misrepresentation that no evidence adduced that the accused made misrepresentations to First National Bank Swakopmund or its employees. If the Court finds that the accused made any of the alleged misrepresentations the accused denies any intent to defraud or to deceive the bank or its employees.

[65] It is common cause that the VAT cheques were issued to Sea Side Properties Investment CC. It is also common cause that the accused deposited the cheques in the account of Sea Side Properties. It is not in dispute that these cheques were written 'Not Negotiable' and they were not endorsed at the back by the members

who had signatory powers. The accused was not authorised by the other member of the entity to deposit the cheques in Sea Side Properties account or any other accounts. The accused by completing the deposit slips and by presenting them to the bank officials made a misrepresentation that the said cheques could be lawfully deposited into the bank account of Sea Side Properties. There has been a perversion or distortion of the truth. In view of this the court is satisfied that there has been an act of misrepresentation.

[66] The second element of fraud to be considered is prejudice which may either be actual or potential. Counsel for the State argued that the State had adduced evidence beyond a reasonable doubt of actual prejudice to Sea Side Properties Investment CC. Counsel added that it should be borne in mind that the law requires potential prejudice only. The making of the misrepresentation, looked objectively must involve a risk of prejudice. The funds were at risk of not going to its rightful owner.

[67] Counsel for the defence argued that in the light of the fact that the complainant did not meaningfully take part in the management of the development of the corporation apart from co-signing a number of cheques on the SSPI account the State failed to prove that the accused subjectively foresaw the existence of a reasonable possibility that he may prejudice the close corporation, its members and its creditors. Furthermore, considering the absence of the complainant as a participating member, the possibility of potential prejudice arising as alleged by Mr Hashagen cannot be described as anything else than a 'remote or fanciful possibility'. Again the allegations that the deposits of the VAT refund cheques contributed to the SSPI account being overdrawn such allegations are not supported by evidence, since the shortfall in funds at that particular time would according to the accused, have occurred as progress payments (project income) were scheduled too far apart. The accused's proposition that given the cash flow position of the project such shortfall would, in any event, have occurred was supported by Ms King and Mr Isaaks who did a cash flow analysis. The possibility that an overdraft would be required during the construction of the development was already foreseen when the cost projection were drafted. Furthermore, Mr Hashagen did not explain the extent to which the deposits of the VAT refund cheques contributed to the overdraft.

[68] Potential prejudice has been defined by Snyman in *Criminal Law* 6th ed.at 528 as follows:

(1) Potential prejudice means that the misrepresentation looked objectively involved some risk of prejudice or that it was likely to prejudice.

(2) 'Likely to prejudice' does not mean that there should be a probability of prejudice, but only that there should be a possibility of prejudice. This means that what is required is that prejudice can be, not will be caused.

(3) The possibility of prejudice must be a reasonable possibility. This means that remote or fanciful possibilities should not be considered. The test is objective in the sense that it must be determined whether a reasonable person could in the normal course of events, have suffered prejudice. If the misrepresentation is so far-fetched that no reasonable person would believe it, there is no potential prejudice.

(4) The prejudice need not necessarily be suffered by the representee. Prejudice to a third party ... is sufficient.

(5) The fact that the party to whom the misrepresentation has been made was not in fact misled by the misrepresentation is irrelevant. It is sufficient for conviction that misrepresentation had the potential of leading to prejudice.

(6) Whether there is potential prejudice must be determined according to the facts which exist at the time the misrepresentation is made. Whether the defrauded party would ultimately have suffered the prejudice anyway is irrelevant.'

[69] As Mr Hashagen put it, by depositing the VAT refund cheques into a bank account under his control the accused removed the joint control over those funds from the member of SSPI. The fact that the VAT refund cheques were not deposited into SSPI's bank account contributed to an overdrawn bank account of the CC during that period and therefore the potential prejudice towards the entity, its members and creditors. The same sentiments were expressed by Mr Kinghorn, accused's witness and legal adviser, who stated that when the complainant caused the bank to debit the account of Sea Side Properties that was exclusively controlled by the accused, the accused had no access or control to the funds. He was cut off from the funds and his account had fallen into an overdraft. I fully agree with what Mr Hashagen said above. By depositing the cheques in Sea Side Properties' account the accused deprived Sea Side Properties Investment CC of the benefit of the proceeds of the

VAT cheques and by depositing them in an incorrect account had caused actual prejudice to the CC. The funds were at risk of not going to its rightful owner. The accused's actions created a reasonable possibility of prejudice. I disagree with counsel for the defence's submission that the possibility of the potential prejudice arising cannot be described as anything else than a remote or fanciful possibility. In the circumstances, the entity and its other member have suffered both actual and potential prejudice at the moment the accused made a representation because he did not get authorisation from the other member or the entity to deposit the funds in an incorrect account. By saying that the CC was going to suffer an overdraft in anyway does not afford the accused a defence because it is irrelevant. Applying the facts of this case to the legal principles as stated above, this court is satisfied that the State had proved the element of prejudice.

[70] Having discussed the element of misrepresentation, I will now proceed to the elements of unlawfulness and intention. Counsel for the State argued that the proceeds of the cheques in question did not belong to the accused, but to a separate legal entity namely Sea Side Properties Investments CC. The accused deposited the cheques in an incorrect account without any lawful justification well knowing that the money did not belong to him or his entity but to Sea Side Properties Investment CC.

[71] On the other hand, counsel for the defence argued that the accused was not aware that it was irregular or unlawful to deposit the cheques into an account other than the SSPI's. The cheques were deposited into a bank account on diverse occasions over a period of 12 months. At no stage during this period was the accused informed or advised that such procedure was not allowed or he should desist from it. He further argued that the proceeds of these VAT refunds were utilised in accordance with the confessed purpose it was deposited, namely the development expenses. The utilisation of the accounts other than that of SSPI made commercial sense given the accused's inability to use only one account to meet the ongoing obligations towards creditors of the CC and its members. He further said this was also in the interest of SSPI.

[72] I do not agree with counsel's contention that the accused did not know that his actions were irregular or unlawful. The accused did not deposit the money out of his ignorance. He deposited the money into the wrong account well knowing of his

unlawful conduct. The accused's claim of the ignorance of the law in the circumstances does not avail him a defence. The accused being a businessman ought to have acquainted himself with the tools of his trade. By saying that the proceeds of the cheques were utilised for the benefit of the development project is immaterial and it could not be a defence. Again the fact that bank officials never told the accused to desist from depositing the cheques into a wrong account does not avail the accused a defence as the accused misled the bank officials by completing the deposit slips and indicating the name of the bank account which is almost similar to the CC's name except for the words 'Investments CC'. The negligence of the bank officials does not exonerate the accused.

[73] With regard to intent, counsel for the defence argued that the accused had no intention to defraud or to deceive other than acting in the best interests of SSPI, its members and the successful completion of the development project. The accused complied with his managerial duties as well as his fiduciary duty towards the corporation. He included the deposits of the cheques in the summary of the transactions on the Sea Side Properties. Accused further provided the accounting officers the accounting records he kept as well as the bank statements of the four bank account.

[74] Counsel for the State correctly argued that the accused had subject knowledge that the said representation was false. The accused could be said to be aware that his representation was false not only if he knew but also if he had no honest belief in its truth or if he makes it recklessly, careless as to whether it is true or false. In other words it is sufficient if the accused foresaw the possibility that his representation may be false but nevertheless decided to make it. (*dolus eventualis*) See: Snyman *Criminal Law* 6th ed.at 531. The accused had the intent to defraud in that he intended for his misrepresentation to cause the bank to embark upon a course of action which caused actual or potential prejudice, namely to accept that he alone was entitled to the proceeds.

[75] It is a well-known factor that intent is a state of mind which can only be proven by inference. The court may determine the intent by considering all the facts and circumstances of the case. The Court will also have to look at the conduct of the accused, the conduct being either an omission or an act. The accused knew very

well that there was another member of the CC. He knew that the proceeds of the cheques was that of Sea Side Properties Investments CC. The accused was not authorised to deposit the money in an incorrect account either by resolution or by endorsement of the cheques. The accused intentionally induced the bank to embark upon a cause of action to make funds available to him alone which amounts to the deprivation of the CC of its property or exposing the CC to risks. What the State needs to prove as far as intent is concerned is that the accused had the capacity and knowledge to make a voluntary choice by doing what he did. The accused cannot be heard to say that the proceeds of the cheques benefited the CC because the probability or future possibility of benefit does not exonerate him from liability. It is also not a defence for the misapplication of funds. The accused had no lawful justification to deposit the cheques in the incorrect account. Although he claimed that the complainant was always not available, complainant testified that he could be reached by fax or phone and he had previously co-signed 55 other cheques of Sea Side Properties Investment CC. I disagree with counsel for the defence's proposition that the accused made a mistake. What the accused did was not a mere mistake, but it amounts to a misrepresentation which is unlawful and it was made with intent to defraud in order to cause actual or potential prejudice. The accused's particular motive or what might have happened later after the misrepresentation, for example that the proceeds will or had benefited Sea Side Properties Investments CC is immaterial, because the offence was completed at the time the misrepresentation was made. However, the accused's motive may be regarded as a mitigating factor.

[76] For the foregoing reasons, I am satisfied that the State has proved fraud beyond reasonable doubt and the accused is found guilty as charged in respect of the main counts 1-8. It follows that the accused is not found guilty on the alternative counts of the main counts in respect of counts 1-8.

[77] Having dealt with the above mentioned counts I will now proceed to deal with count 9 of theft, alternative fraud. Counsel for the State argued that with regard to unlawfulness the accused did not dispute that he and his wife were not entitled to salaries or wages in terms of his agreement with the complainant. He later unilaterally decided that they were. There is no lawful justification for accused's unilateral action of taking appropriation of the property. The accused took or appropriated N\$150 000(one hundred and fifty thousand Namibia Dollar) the

property of Sea Side Properties Investments CC or the partial property of the other member because theft is also committed by the assumption of control of property belonging to another. Counsel contended that the accused had deprived the corporation and the other member of the corporation of the ability to derive a benefit from the money irrespective whether the accused took it in cash or in some other form.

[78] Counsel further argued that the money in the sum of N\$150 000 (one hundred and fifty thousand Namibia Dollar) is property represented in the form of a credit entry in the accounting book and therefore property capable of being stolen. Counsel further argued that the accused had the intention to permanently deprive the other owners of their benefit.

[79] Counsel for the defence argued that although it was not agreed with the complainant who was not a member at the time the entry was made, the accused bona fide believed that he and his wife were entitled to a salary when the project is completed and if there were funds available. However, there was no payment made in cash or by cheque or electronically. This was confirmed by witness Hashagen by means of the Ernst Young report confirming that it did not find payment to the total of N\$150 000 (one hundred and fifty thousand Namibia Dollar) In essence, counsel contended that there was no act of appropriation in respect of the money referred to as salary as it was merely an accounting entry.

[80] It appears from the books of accounting that although an entry was made in respect of the salary of Mr and Mrs Rothen, it cannot be determined that it was taken as cash, cheque or electronic transfer. However, the accused testified that he caused the entry to be made because he believed that he and his wife were entitled to salaries. The accused further testified that the credit entry made in the books of account represented a credit right. In terms of our law there are four forms of theft one of them is theft of credit. In the case of theft of credit there is no requirement of an act of appropriation to be physical contact with any specific note or coins. The court has long recognised that when money is stolen, for example, by false entries it is not corporeal thing such as specific notes or coins which are stolen but something incorporeal namely 'credit'. For the authority of the latter proposition see *Kotze* 1965(1) SA 118 (A) 123. Theft of an incorporeal thing in the case of a credit balance

is permissible in our law. See *S v Harper* 1981 (2) SA 638 D 666 where it was held that:

'Shares (as opposed to share certificate) could be stolen. The court stated that the idea that only corporeal property would be stolen was due to the rule of Roman law that there had to be some physical handling (*contrectatio*) of the property, added that once the courts have moved away from the requirement of a physical handling, the reason for saying that there can be no theft of an incorporeal object in any circumstances would seem to have fallen away.'

[81] The making of an entry in the book of accounting representing a credit right amounts to an act of appropriation. The accused has no right to give himself and his wife a salary because it was not agreed upon by the members of the CC. The accused knew that the money belongs to the CC and he had no right to appropriate it although he believed that he deserved a salary. The accused acted intentionally with the view to deprive the CC or the other member of their benefit permanently without any lawful justification. I am therefore satisfied that the State has proved beyond a reasonable doubt that the accused stole N\$150 000 (one hundred and fifty thousand Namibia Dollar) in the form of theft of credit and he is convicted accordingly. It also follows that the accused is not guilty of fraud.

[82] I will now proceed to deal with count 10 of fraud, alternatively theft under false pretences. This offence is relating to the transfer of 50% member's interest in SSPI from Louise Jennifer de Melo to the accused. Counsel for the State argued that the accused by denying that he was not aware of the reason why the complainant transferred his 50% member's interest to De Melo was self-serving and intended solely for him to be able to deny wrong doing when he approached De Melo for the transfer into his own name instead of that of the complainant. The accused's version that he and the complainant had entered into a new oral agreement that the members' interest would revert back to him once the complainant had acquired his four units is farfetched in light of the following considerations:

(a) When the member's interest was transferred into the name of Ms De Melo, accused claimed that the complainant had already signed all of the sale agreements in respect of the units;

(b) However, when he approached Ms De Melo in May 2004 two of the units had not been transferred to the complainant and as such he was not the owner;

(c) When confronted with this reality, the accused gave an equally improbable version that Ms De Melo only held the members' interest as security for the complainant's four units. Even if the Court should accept the accused's version on this score it, would still mean that the accused knew he was not entitled to the member's interest when he acquired same from De Melo since not all of the units were transferred;

(d) The accused later changed his version regarding when the 50% member's interest would revert to him, saying that it was their agreement right from the start that he would get it back once the project had been finalised. That means it had nothing to do with the allocation of units. Similarly, on this version, he knew that he was not entitled to the 50% member's interest since the project was not finalised. According to him the CC still had obligations during May 2004.

[83] Counsel for the State further argued that the accused made a misrepresentation to De Melo which caused her to embark upon a cause of action which caused prejudice to the complainant. It makes no sense that Mr Muller, the complainant, would pay for the said member's interest and thereafter simply give it away. Furthermore, why would the complainant request PWC to cause membership to revert to him if there was an agreement that it would revert to the accused, so counsel wondered. It makes no sense that the 50% was transferred to Ms De Melo on 29 November 2002 if the contracts in respect of the four units were already signed on the 27 November 2002. Again the accused's explanation that sometime after the signing of the contract but before the transfer of the units into the complainant's name the accused asked the complainant to have 50% interest earlier (ostensibly prior to such transfer). The complainant agreed subject to accused doing something for him in return. However, this was never put to the complainant during cross-examination. If at this point in time the member's interest was registered in the name of De Melo, why did the accused allow the transfer into De Melo's name on the 29 November 2002? He had no guarantee that she would sign it over to him as she, according to him, was not even known to him.

[84] With regard to De Melo's signing of the 50% member's interest to revert to the accused, it is argued that De Melo did not read the document and she was not aware that she was giving the 50% member's interest to the accused, but that instead she thought she was returning it to the complainant. She did not read anything. Instead, she simply signed where it was necessary. Should the Court believe De Melo that she was misled by the accused into believing that she was transferring the 50% member's interest back to the complainant, it is submitted that the accused should be convicted of alternative charge of theft. This is so because the property was not hers to give away. It belonged to the complainant and the accused was well aware of this position.

[85] On the other hand, counsel for the defence argued that witness De Melo is a poor witness who was non-committal and evasive and untruthful. De Melo did not testify that during 14-17 May 2004 the accused made any misrepresentation alleged in paragraphs (a), (c) and (d) of the main charge that he was entitled or authorized by the complainant to have her sign the documents. That she had to sign the documents in order to transfer 50% member's interest in Sea Side Properties Investment CC which De Melo held as a fiduciary on behalf of the complainant. Counsel contended that without such representations, there could be no fraud or theft by false pretences. However, the accused admitted that he told the witness that she had to sign the documents for him to get the affairs of Sea Side Properties Investment CC in order. There is no evidence that this specific representation was false or that it induced De Melo into signing the documents presented to her by the accused on 12 May 2004. Counsel continued to argue that De Melo was motivated by other reasons, including the fear of being held liable for the liabilities of the corporation. She was surprised that she was still a member and she wanted her name to be removed as a member of the CC. Counsel further argued that it would be highly improbable that a witness with a fear to be held liable for the liabilities of a close corporation and after obtaining advice on the issue would not have read and considered the documents the accused presented to her, to ascertain if it contains indemnity from liability for the debts of the corporation.

[86] Again, it is counsel's criticism that it would be highly improbable that De Melo would not make any contact with the complainant in the circumstances where she believed that she was transferring her member's interest to the complainant. The complainant would have been the one to provide such an indemnity. The constant denial by De Melo that she did not read the documents would be highly improbable given the nature of the documents, the place where she affixed her signature and her identity number. Furthermore, although she initially denied that she did not read the documents, she changed her version through cross-examination that she read and approved the indemnity form before she signed it. The indemnity form as well as the founding statement and the mandate form, expressed the intent to have De Melo's member's interest transferred to the accused and nobody else. Again the accused obtained legal advice from his legal practitioner as to how he could gain control over the close corporation. Counsel contended that De Melo is a single witness in this respect therefore her evidence should be treated with caution as her evidence cannot be said to be satisfactory in all material respects.

[87] I will now proceed to deal with the issue as to whether the accused was aware of the reasons why the complainant transferred his 50% member's interest temporarily to De Melo. The complainant's version that there was a discussion with regard to the temporary transfer of the 50% member's interest to De Melo had been corroborated by De Melo. The suggestion by the accused that the 50% member's interest was going to revert to him once the complainant had acquired his four units is highly improbable. This is so because, according to the accused, at the time the 50% member's interest was transferred to De Melo, complainant had already acquired all his profit sharing. There was therefore no need for the member's interest to be transferred to De Melo if the agreement was that it had to revert to the accused at this point in time. Moreover, the accused version on this score is even more unbelievable seeing that his story changed from transferring the 50% member's interest upon acquisition of all the four units to giving up the 50% member's interest once the entire project was completed. At the time when the accused approached De Melo in 2004 for purposes of her transferring the 50% member's interest to him, two of the complainant's units were not yet transferred.

[88] Again if there was no arrangement that the complainant was not going to get back the 50% member's interest, complainant was not going to approach PricewaterhouseCoopers to facilitate the transfer of the 50% member's interest back to him. For the foregoing reasons, I reject the versions of the accused that he was not aware of the arrangement made concerning the temporary transfer of the 50% member's interest to Ms De Melo and that there was an agreement that the 50% member's interest was going to revert back to him. It is my considered view that the accused's version is highly improbable and it cannot therefore be reasonably possibly true in the circumstances.

[89] I will now turn to the issue of whether or not at the time De Melo signed the document facilitating the transfer of 50% member's interest to the accused she was aware that she was in fact transferring the interests to the accused. De Melo claimed that she was not so aware and that she did not read the documents before signing. I find it highly improbable that De Melo did not read the documents. These were not voluminous documents. They range from a one page document to three page documents. Again, after the witness was informed by the accused concerning the signing in respect of the member's interest she sought legal advice. Although the witness initially stated that she did not read the documents, under cross-examination she conceded that she read and approved the indemnity document. The accused's name was clearly visible on the page she signed and she could not have missed it. It did not make sense for her to receive the indemnity document from the accused if she was returning the 50% member's interest to the complainant. For the foregoing reasons I am of the view that the witness was aware of what she was doing and she knew that she was signing for the 50% member's interest in the CC to be transferred to the accused.

[90] Having found that the witness was aware as to who she was giving the 50% member's interest, I come now to consider the question whether the 50% member's interest had passed over to De Melo or it remained with the complainant. Counsel for the State argued that the only deciding factor is whether or not Mr Muller, the complainant, subjectively intended ownership to pass to Ms De Melo or not. The evidence presented before Court is that Mr Muller had no intention to pass ownership to De Melo. Counsel for the State argued that the essential element is an intention on the part of the transferor to transfer ownership and the intention of the

transferee to become the owner of the property. Counsel referred me to authorities in support of her proposition.

[91] Counsel for the defence on the other hand argued that at the time the accused obtained the 50% member's interest, Mr Muller ceased to be a member as he had transferred his member's interest to Ms De Melo. Counsel referred me to section 30(2) of Act 26 of 1988 which states that: 'two or more persons shall not be joint holders of the same member's interest in a corporation'. It was further counsel's argument that a nominee holding in trust (other than sanctioned by the Act) of a member's interest is not possible.

[92] The evidence before this Court is that Mr Muller caused his 50% member's interest to be transferred to Ms De Melo temporarily, because he had problems with his divorce settlement agreement. His wife was constantly suing him for breach of contract of divorce settlement agreement. Complainant, in his own words said, he did not want to put the CC or his 50% member's interest at risk. He thus transferred his member's interest to De Melo with the view to getting it back when his divorce issues had been resolved. This arrangement was known by the accused and Ms De Melo. After the complainant transferred his 50% member's interest, he continued to be involved in the conduct of Sea Side Properties Investment CC although not on a daily basis like the accused. The complainant was a co-signatory to the cheques of the CC. Ms De Melo never played any role in the conduct of the business of the CC.

[93] It is correct that the 50% members' interest was transferred from Mr Muller to Ms De Melo and thereafter from Ms De Melo to Mr Rothen. But still the question to be decided is apart from the documents being signed, was there a real intention to pass membership to the so called members. Although the documents were signed one has to dig deeper as to the background why the member's interest was transferred to De Melo. From the record it is evident that Mr Muller had no intention to pass ownership of the member's interest to Ms De Melo and Ms De Melo had no intention of owning the 50% member's interest. One of the bases of the contract is an agreement between two or more contracting parties. The basis of a contract as

an agreement creating obligations is either the true agreement or consensus between the contractants which is an application of what is known as the intention theory or the reasonable reliance (belief) by one contractant, that there is in fact an agreement (which represents a qualification of the intention theory by what is known as the reliance theory. According to the reliance theory, there is a contract if a party's true intention is in agreement with the reasonable impression that he has regarding the other party's intention. Consensus must exist in an agreement regarding consequences which they wish to bring about. The elements of an agreement between contractants are the following:

- (a) They must agree on the consequences which they wish to create.
- (b) They must have the intention to bind themselves legally viz to actually create obligations.
- (c) They must be aware of their unanimity. (See Luanda Hawthorne and Jan Lotz Contract Law Casebook, 1999 2nd ed Juta & Co at page 1).

[94] Although Mr Muller and Ms De Melo created an impression of having created a contractual transfer of the 50% member's interest, Mr Muller's true intention was not to effect the transfer of ownership and Ms de Melo had no intention of accepting the ownership. In order to reach the consensus which is necessary for the conclusion of a contract, it is essential that the parties actually intend is to create obligations. Where one of them had no intention to be legally bound in transferring the ownership, the consensus which is necessary for a contractual agreement to arise will be absent even though they tried to create the impression that they intended to be bound. The law looks at their true intention and not at their simulated intention. As was pointed out by the Supreme Court in *Strauss v Labuschagne* 2012 (2) NR 460 at para 45 in construing an agreement, the court must be satisfied that there is a real intention, definitely ascertainable different from the simulated intention.

[95] In the present matter the contract was riddled with irregularity because it was entered into in order to mislead potential creditors, eg Mr Muller's ex-wife. There was

no true intention on the part of Mr Muller to transfer the 50% member's interest to Ms De Melo. Ms De Melo also had no true intention to accept ownership of the 50% member's interest from Mr Muller. In view of the foregoing reasons, ownership of 50% member's interest was not passed over to Ms De Melo. It follows that Mr Muller was still a member of Sea Side Properties Investment CC.

[96] Returning to the issue whether the accused committed fraud, if it has to be accepted that the accused did not make a misrepresentation in respect of what is stated in paragraphs (a), (c) and (d) of the charge to Ms De Melo, the accused admitted that he told Ms De Melo that she had to sign the documents to get the affairs of Sea Side Properties Investment CC in order (paragraph (b) of the charge). The presentation of the documents by the accused to Ms de Melo for her signature for the above-mentioned reason amounts to a misrepresentation. The fact that the party to whom the misrepresentation has been made was not in fact misled by the misrepresentation is irrelevant. It is sufficient for the conviction that misrepresentation had the potential of leading to prejudice. At the time the accused was making a misrepresentation, he was aware that he was not entitled to get the 50% member's interest from Ms De Melo. The accused was aware of the arrangement made with regard to the transfer of the 50% member's interest to Ms De Melo. Furthermore, the accused's intention was also not to get the 50% member's interest to put the affairs of the CC in order but to gain 100% member's interest so that he could present the document to the bank to mislead the employees of the bank that he was 100% member of Sea Side Properties and was entitled to the money that was reversed to the account of the CC and that he was entitled to cause it to be reversed back to the account of his own business which he was controlling.

[97] The accused made a misrepresentation in order to cause actual or potential prejudice to Mr Muller the other member and to Sea Side Properties Investment CC. The accused had no lawful justification for his actions. He had the knowledge and the capacity that he was not entitled to the 50% member's interest but decided to make a voluntary choice to act the way he did. The accused's version that he was advised by his legal practitioner, which version the legal practitioner also confirmed does not avail him a valid defence either. This is so, because the legal practitioner advised him on the basis of the information given by the accused. The accused did

not disclose all the relevant facts to the lawyer. He never explained to the lawyer the arrangement made in connection with the transfer of the 50% member's interest from Mr Muller to Ms De Melo and the reasons why such arrangement was made although he was part of it. Again, Ms De Melo cannot pass ownership to Mr Rothen because she had never been a member of the CC given the circumstances in which she was given the 50% member's interest. I am therefore satisfied that the State has proved its case beyond all reasonable doubt that his conduct complies with all the elements of fraud. The accused is found guilty of fraud. Concerning the alternative count of theft under false pretences he is acquitted forthwith.

[98] I will now proceed to deal with count 11 of fraud, alternatively theft. Most of the arguments advanced in respect of this count were the same as those advanced in the counts I have already dealt with. Counsel for the State argued that according to the accused's own admission through cross-examination of Ms De Melo, it was put to the witness that he told Ms De Melo that he needed the transfer of her 50% member's interest because the complainant had caused the transfer of the accused's more than 1 million Namibia Dollar to the bank account of Sea Side Properties CC. The transfer resulted in the freezing of the accused's account. This in turn embarrassed and prejudiced the accused. Again, under cross-examination, the accused admitted that he omitted to tell De Melo that he was technically not entitled to the member's interest as two of the units were not yet transferred to the complainant. It was again put to the witness (De Melo) that 50% member's interest would in any event revert to him upon the conclusion of the development of Palm Gardens.

[99] On the other hand, counsel for the defence argued that the proceeds of the VAT refunds were intended for the development expenses of the SSPI either as payment of those expenses or reimbursing development expenses already paid on behalf of SSPI from the Sea Side Properties account. A substantial portion of the VAT refunds were transferred from Sea Side Properties cheque account to the SSPI account. Therefore, there cannot be an issue of the accused incorrectly depositing the cheques. At the time the complainant caused First National Bank to debit the account of Sea Side Properties and to credit the account of SSPI with an amount of N\$1 093 471.43 (one million ninety three thousand four hundred seventy one Namibia Dollar and forty three cents) there were no funds emanating from the VAT

refunds left in the Sea Side Properties cheque account. At that stage the account was already overdrawn. Furthermore, Sea Side Properties Investment CC was not entitled to the transfer of the money in the amount as mentioned above as the same amount received in Sea Side Properties cheque account was already partially transferred to the SSPI account and applied towards the development expenses. Complainant's action to cause the funds to be reversed caused actual prejudice to the accused in the form of lost interest of N\$20 000 (twenty thousand Namibia Dollar).

[100] Furthermore, at the time the complainant instigated the reversal of funds he was no longer a member of the CC and the accused had the right to insist that the effect of the unlawful entries on the Sea Side Properties and SSPI bank accounts should be reversed. Again at the time the complainant caused the reversal of funds the accused was the only member of the CC.

[101] The accused made misrepresentation to Ms De Melo that she must sign so that he could put the affairs of the Sea Side Properties Investment CC in order. The accused knew very well that his intention was not to put the affairs of the CC in order but he needed the transfer of the 50% member's interest because the complainant had caused the transfer of more than one million Namibia Dollar from the accused's business account to SSPI's account. The accused was aware that he was not entitled to have 100% member's interest because he knew of the arrangement and the reasons why the 50% member's interest was transferred from complainant to Ms De Melo. He in fact took part in the arrangement. Again the accused knew that technically he was not entitled to the member's interest as two of the units were not yet transferred to the complainant. When the accused made a misrepresentation to FNB after he unlawfully obtained the 50% member's interest from De Melo as described in count 10, he became 100% member in Sea Side Properties Investment CC and thereby induced the bank officials to transfer the proceeds of the cheques in the amount equivalent to the amount of the VAT cheques to his own bank account.

[102] By claiming that the complainant was not a member of the CC does not assist the accused as he knew that he was still a member. The accused removed the funds from the account of the CC therefore causing actual prejudice to the CC and to the other member. The accused had the subject knowledge that the said representation

was false. The accused had the intent to defraud in that he intended for his misrepresentation to cause the bank to embark upon a course of action which caused actual or potential prejudice, namely to accept that the accused alone was entitled to the proceeds of VAT cheques and to make the proceeds available to him. Again, the accused by saying that he was legally advised to do what he did does not avail him a defence for the reasons given in count 10. By saying that the funds were first transferred into Sea Side Properties account and thereafter to Sea Side Properties Investment CC's account did not avail him a defence because it was not justified for him to deposit the VAT cheques in the Sea Side Properties bank account and what happened thereafter is immaterial. To say that the proceeds of the VAT refunds benefitted the CC is immaterial. I am therefore satisfied that the State has proved fraud beyond reasonable doubt in respect of count 11. The accused is found guilty as charged. Concerning the alternative count he is found not guilty.

[103] I will now proceed to deal with count 12 of the contravention of section 64(2) of the Close Corporation Act. The particulars of the offence stated in the charge are identical to the facts adduced to prove the other 11 counts the accused is charged with. In terms of s 83 of the Criminal Procedure Act 51 of 1977 the prosecution is permitted to bring in as many charges as can be justified by the facts to be proved. However, it ultimately lies with the trial court in the end to decide on the facts whether or not conviction of the offences charged will constitute a duplication of convictions.

[104] There are two tests as approved by the Supreme Court in *S v Gaseb and others* 2000 NR 139 (SC) that should be applied by the court in determining whether or not there is a duplication of convictions:

'The two most commonly used tests are the single evidence test and the same evidence test. Where a person commits two acts of which each standing alone, would be criminal, but does so with a single intent, both acts necessary to carry out that intent, then he ought only to be indicted for, or convicted of, one offence because the two acts constitutes one criminal offence. See *R v Sabuyi* 1905 TS at 171. This is the single intent test. If the evidence requisite to prove one criminal act necessarily involves proof of another criminal act, both acts are to be considered as one transaction for the purpose of a criminal transaction. But if the evidence necessary to prove one criminal act is complete without the

other, criminal act being brought into the matter the two acts are separate criminal offences. This is the same evidence test'. (Reference to authorities omitted)

[105] It is my considered view that the particulars of the offence alleged in paragraphs (a) to (m) of count 12 constitute the offences of fraud and theft of which the accused has already been convicted in this judgment. It is thus clear that the accused acted with a single intent in respect of each conduct alleged in those paragraphs to commit the offences he has already been convicted of. Therefore, he cannot be convicted on count 12 as this may constitute duplication of convictions. The accused is therefore found not guilty on both the main and alternative counts and is acquitted.

[106] In the result the following verdicts are made:

Counts 1 -8: Guilty of fraud.

Alternatives counts 1 -8 not guilty

Count 9: Guilty of theft.

Alternative not guilty

Count 10: Guilty of fraud

Alternative not guilty

Count 11: Guilty of fraud.

Alternative not guilty

Count 12: Not guilty.

Alternative not guilty

N N Shivute
Judge

APPEARANCES

STATE: Ms. Husselman
Office of the Prosecutor-General, Windhoek

ACCUSED: Mr. Botes
Instructed by Engling, Stritter & Partners
(c/o Kinghorn Associates:Swakopmund)