

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA, MAIN DIVISION, WINDHOEK

JUDGMENT

Case number: HC-MD-CIV-ACT-CON-2022/05400

In the matter between:

PETRUS CHRISTOFFEL POTGIETER

PLAINTIFF

and

REGINA VRIES

DEFENDANT

Neutral citation: *Potgieter v Vries* (HC-MD-CIV-ACT-CON-2022/05400)
[2024] NAHCMD 604 (16 October 2024)

Coram: DE JAGER J

Heard: 12, 13, 14 and 16 August 2024

Delivered: 16 October 2024

Flynote: Evidence – Onus of proof – The defendant alleging an agreement different from that pleaded by the plaintiff bears the onus to prove such agreement – The defendant failed to prove acquisition of member's interest under section 33(1)(b) of the Close Corporations Act 26 of 1988 which involves member's interest acquisition, through the adjustment of interests, by the potential new member from the existing member/s without consideration to

them while there is an agreement between all of them inter se of the adjustment.

Pleadings – Replication – Not necessary for replication as the plaintiff's answer to the plea was not a confession and avoidance.

Evidence – Onus of proof – The defendant alleging she performed by payment bears the onus to prove the payments alleged by her – The defendant failed to discharge that onus.

Purchase contract – Breach – The defendant's failure to pay the purchase consideration – Material – The plaintiff entitled to cancel – Demand and cancellation by summons – The plaintiff's subsequent conduct showed intention not seeking payment but cancellation.

Summary: The plaintiff and the defendant are before the court in a civil trial. The plaintiff instituted a contractual claim against the defendant seeking cancellation of an agreement concluded between them whereby the defendant acquired ten per cent member's interest in Hydraulics Services Close Corporation (Hydraulics) and that the ten per cent member's interest be returned to the plaintiff. The basis of the claim is that the defendant materially breached the agreement, alternatively, the defendant repudiated it, in either event, by failing to pay the purchase price. The defence is that the agreement alleged by the plaintiff does not exist, but there is an agreement between the parties as alleged by the defendant, in terms of which the defendant performed. The main issues to be decided are the agreement between the parties and the defendant's performance, while the other issues follow from those central issues. Only the plaintiff and the defendant testified.

Held that, whereas the defendant did not simply deny the agreement pleaded by the plaintiff she bears the onus to prove the agreement was what she pleaded it to be, and she failed to prove that the acquisition of the ten per cent member's interest was under section 33(1)(b) of the Close Corporations Act 6 of 1988 (the Act). Section 33(1)(b) of the Act applies where there is a member's interest acquisition, through the adjustment of interests, by the potential new

member from the existing member/s without consideration to them while there is an agreement between all of them inter se of the adjustment. The defendant failed to prove there was an agreement that the plaintiff's member's interest would be reduced without any consideration to him. On the defendant's own version, the plaintiff would receive consideration for the reduction of his member's interest.

Held that, the plaintiff sold to the defendant and the defendant bought from the plaintiff ten percent of his member's interest in Hydraulics for a purchase consideration of N\$100 000 to be paid within a reasonable time in October and November 2020 by the defendant in paying Hydraulics' suppliers and such others identified by the plaintiff and by allocating those payments to the plaintiff's credit on his Hydraulics loan account.

Held that, whereas the plaintiff's answer to the defendant's plea is not a confession and avoidance, the plea did not call for a replication.

Held that, the onus to prove the alleged payments was on the defendant, which she failed to discharge. The defendant's version that the payments made from 22 October to 21 November 2020 were made under the membership agreement is improbable and unsupported by her own facts, while that part of the plaintiff's version is probable and supported by the facts. Those payments identified by the plaintiff to have been made under the overdraft agreement and not the membership agreement were made under the overdraft agreement and not the membership agreement. Therefore at least about N\$60 000 was unpaid for the membership agreement. At least a further N\$12 658 was unpaid, bringing the unpaid total to about N\$72 658, leaving a balance of about N\$27 342 that could possibly have been paid for the membership agreement. Seeing that the defendant admittedly received about N\$94 000 from Hydraulics above her salary more than that which the plaintiff received extra, it is improbable that the defendant paid the balance of N\$27 342.

Held that, it follows that the defendant breached the agreement by failing to pay the purchase consideration, which, by its nature, is material, entitling the plaintiff to cancel the agreement.

Held that, the agreement was cancelled. Demand and cancellation by summons were alleged in the particulars of claim and the plaintiff's subsequent conduct showed a clear intention that he does not seek payment from the defendant and he does not wish to continue with the agreement.

Held that, the plaintiff is entitled to the primary relief sought and costs following the event.

ORDER

1. Cancellation of the agreement concluded between the plaintiff and the defendant whereby the defendant acquired ten per cent member's interest in Hydraulics Services Close Corporation, a close corporation with registration number CC/1999/1260, is confirmed.

2. The defendant must, within 14 days after the date of this order, sign the necessary documents and take all necessary steps to transfer the ten per cent member's interest she holds in Hydraulics Services Close Corporation to the plaintiff, failing which the deputy sheriff for the district of Walvis Bay is authorised to sign all necessary documents on behalf of and in the defendant's name to effect transfer of her ten per cent member's interest to the plaintiff.

3. The defendant must pay the plaintiff's costs of suit, including the costs of one instructing and one instructed legal practitioner where employed.

The matter is finalised and removed from the roll.

JUDGMENT

DE JAGER J:

Introduction

[1] The plaintiff, Petrus Christoffel Potgieter, and the defendant, Regina Vries, are before the court in a civil trial after the plaintiff instituted a contractual claim against the defendant. The plaintiff seeks cancellation of an oral agreement concluded between the parties in October 2020 at Walvis Bay whereby the defendant acquired ten per cent member's interest in Hydraulics Services Close Corporation (Hydraulics) and that the ten per cent member's interest be returned to him on the basis that the defendant breached the agreement by failing to pay the purchase price for the member's interest. The defence is that the agreement alleged by the plaintiff does not exist, but there is an agreement between the parties as alleged by the defendant, in terms of which the defendant performed. The main issues to be decided are the agreement between the parties and whether the defendant performed. The other issues for determination follow from those central issues. Both the plaintiff and the defendant testified. No other witnesses were called.

The plaintiff's case on the pleadings

[2] The plaintiff's case, on the particulars of claim, is as follows.

(a) In October 2020 at Walvis Bay, the parties concluded an oral agreement whereby the plaintiff sold ten per cent of his member's interest in Hydraulics to the defendant for N\$100 000, which had to be paid by the defendant to the plaintiff within a reasonable time. It was a term of the agreement that if the defendant fails, refuses and/or neglects to pay as agreed, that breach would be material, entitling the plaintiff to cancel the deal and claim the immediate return

of the ten per cent member's interest. On 16 December 2020 the plaintiff transferred ten per cent member's interest in Hydraulics to the defendant.

(b) Despite demand, the defendant materially breached her obligations under the agreement by failing to pay the plaintiff N\$100 000 or any part thereof within a reasonable time. The defendant's breach goes to the root of the agreement, entitling the plaintiff to cancel it, which he did and which the defendant accepted; alternatively, he cancels it with the particulars of claim. Alternatively, the defendant repudiated the agreement through her breach, which repudiation the plaintiff accepted.

(c) The defendant is liable to the plaintiff for payment of N\$100 000, which is due, owing and payable. Notwithstanding demand, alternatively, summons constituting demand, the defendant fails, refuses and/or neglects to pay the plaintiff.

[3] The particulars of claim carry the following apparent problems. The plaintiff alleges he cancelled the agreement or accepted the defendant's repudiation thereof, yet he claims to be entitled to payment of N\$100 000. The plaintiff fails to claim return of the member's interest in the body of the particulars of claim. Instead, he claims payment of N\$100 000, which he alleges is due, owing, and payable. The defendant did not rely on those issues for her defence. In the court's view, they were ironed out through the evidence adduced and the ultimate relief sought by the plaintiff. The plaintiff did not persist with the alternative relief for payment of N\$100 000 unless the court would find that a case was made for such relief instead of the main relief which is not the case.

The defendant's case on the pleadings

[4] The defendant denies the agreement and its terms as pleaded by the plaintiff. According to the defendant, the position is as follows.

(a) In October 2020 at Walvis Bay, the plaintiff, as a member of Hydraulics, and the defendant, acting in person, concluded an oral agreement whereby the defendant was to contribute N\$100 000 from her personal bank account to Hydraulics to acquire member's interest in Hydraulics. The N\$100 000 was to

be paid by the defendant directly to Hydraulics's suppliers, employees and debtors and to persons identified by the plaintiff.

(b) The defendant contributed N\$100 000 to Hydraulics's suppliers, employees and debtors and to persons identified by the plaintiff and acquired member's interest in Hydraulics under section 33(1)(b) of the Close Corporations Act 26 of 1988 (the Act). Pursuant to that, the plaintiff reduced his member's interest so that he holds 90 per cent and the defendant holds ten per cent and the plaintiff complied with section 38(b) of the Act. The plaintiff attended to amend Hydraulics's founding statement to reflect the ten per cent member's interest in the defendant's favour.

(c) The defendant's contribution of N\$100 reflected on Hydraulics's amended founding statement does not accurately reflect what the defendant contributed to Hydraulics, amounts to a mutual bona fide error and does not reflect the parties' common intention. The parties agreed on N\$100 000, which had to be reflected on the amended founding statement. The defendant seeks rectification thereof from N\$100 to N\$100 000.

(d) The defendant denies the alleged breach, that it was material, that she repudiated the agreement, and that it was cancelled. The basis for her denials is that there was no agreement as alleged by the plaintiff. She pleads the agreement was as pleaded by her. The defendant pleads she did not fail to pay the purchase price because there was no agreement and no obligation to pay any purchase price to the plaintiff in his personal capacity, and there could be no breach, repudiation or cancellation of the agreement alleged by the plaintiff. Thus, there is no purchase price due, owing and payable to the plaintiff. The defendant made contributions under the agreement pleaded by her, and she performed under that agreement.

The plaintiff's evidence

[5] The following undisputed facts are recorded upfront. Hydraulics has a bank account with Standard Bank Namibia Limited, the statement of which was admitted as exhibit F (Hydraulics's account). The defendant has a savings bank

account and two cheque bank accounts with Bank Windhoek Limited, the statements of which were admitted as exhibits G, H and J, respectively. The defendants' bank accounts will be referred to as the savings account, account 8018 and account 8002 (being the first four digits of the respective cheque accounts used for identification purposes), respectively.

[6] The plaintiff's evidence was as follows.

[7] In 2019 the plaintiff became the sole owner of Hydraulics after having been a part owner since 2011. The defendant worked as Hydraulics's bookkeeper. In August or September 2020, the defendant asked the plaintiff if she could buy member's interest in Hydraulics. The defendant received money from her recently finalised divorce, and she wanted to invest it. The plaintiff said he would be willing to sell ten per cent and that the defendant's timing was good because, in October, many marine vessels were in the dock, and Hydraulics needed funds to buy parts.

[8] In October 2020 at Walvis Bay, the plaintiff and the defendant reached an oral agreement whereby the plaintiff sold ten per cent member's interest in Hydraulics to the defendant for N\$100 000, which would be paid by the defendant to the plaintiff into the plaintiff's loan account, and the plaintiff would reinvest or pay it into Hydraulics. To make things easier, the defendant would buy parts or pay suppliers for Hydraulics on the plaintiff's behalf, and the cost thereof would be reflected in the plaintiff's credit on his Hydraulics loan account. If the defendant did not pay N\$100 000 in October 2020, the plaintiff could claim the member's interest back. The agreement is referred to as the membership agreement. In cross-examination, it was placed in dispute that the defendant had to pay for parts. The plaintiff clarified that if he talked about parts, he meant suppliers.

[9] In cross-examination, the plaintiff said the reasonable payment time was October 2020, within 20 days from the release of the funds until the end of October 2020. He explained that the defendant had to pay N\$3000 on 2 October 2020 for the funds to be released in three days on 5 October 2020 so Hydraulics could buy parts for work to be done during that period.

[10] In October 2020, the defendant informed the plaintiff that there would not be enough money at the end of that month to pay salaries. The defendant said she could provide N\$60 000 from her 'personal bank loan', but Hydraulics must refund her no later than the end of November 2020. The defendant assisted Hydraulics accordingly, and Hydraulics refunded her as agreed on 27 November 2020. That agreement is referred to as the overdraft agreement.

[11] On 16 December 2020, ten per cent member's interest was transferred to the defendant. The plaintiff had no reason not to trust the defendant. She had worked for Hydraulics for many years and did its books. In cross-examination, the plaintiff explained that the transfer documents were signed in December 2020, but the transfer process started in October 2020. The transfer only happened after the defendant supposedly paid the purchase price, as he had no reason to doubt that to be the case.

[12] In mid-2022, it came to the plaintiff's attention that various suppliers of Hydraulics were unpaid, and he requested the defendant to provide bank statements dating back to January 2019. At the time, only the defendant had banking access via a login token. Two days later, the defendant provided incomplete bank statements. The plaintiff went to Standard Bank and obtained statements from 2019 to mid-2022. On further investigation the plaintiff found various irregularities on Hydraulics's bank statements.

[13] On 17 May 2022, as the plaintiff was working in his office on the bank statements, the defendant asked to speak to him at which point the plaintiff had not informed the defendant he was investigating her. The plaintiff could see the defendant was extremely upset. She was shaking and crying. The plaintiff asked if the bank statements in front of him were the reason why she was so upset, to which the defendant replied in Afrikaans, freely translated to English, as follows:

'Pottie, do not lock me up. I will do anything. I will give your shares back and sell everything. Just please do not lock me up. What about my children Pottie?'

[14] The plaintiff replied in Afrikaans, freely translated to English, as follows:

'But what about my children Gina? And all the workers and their children and families? You know how difficult it has been in the last year with the business. And now I must find out that you are the cause of this! Let us start with the truth.'

[15] The defendant then admitted that she stole the money and said in Afrikaans, freely translated to English:

'Yes Pottie, I am sorry, I did take.'

[16] The plaintiff explained to the defendant that what he saw on the bank statements was shocking and that he was still working through each transaction. He gave her copies of the Standard Bank statements and instructed her to underline each transaction she fraudulently withdrew or paid to other non-Hydraulics entities. The plaintiff told the defendant that a decision would only be made after the investigation and comparison with what the defendant underlined.

[17] Later that afternoon, the plaintiff received a letter from the defendant expressing regret and asking that he find it in his heart to forgive her. The defendant also asked for one year to repay all the money taken. The letter was read out in court. The next day, the plaintiff asked the defendant if she would admit in writing that she stole the money from Hydraulics. The defendant said she would and provided a written admission. The written admission was read out in court. After the letter and admission were read out in court by the plaintiff, the defendant's counsel objected to their admission into evidence as they were not discovered, and according to her, they are irrelevant and inadmissible. The objections were upheld because the documents were not discovered, the letter and admission were not admitted into evidence as exhibits, but the plaintiff's oral testimony stood.

[18] The plaintiff reviewed the underlined statements provided by the defendant and realised that only the tip of a large-scale theft was found. The impact on Hydraulics was much more significant than the plaintiff could handle, and he obtained legal advice. The number of suspected transactions was much

more than suspected, and Hydraulics was in considerable debt with the Namibia Revenue Agency and its suppliers.

[19] The plaintiff, on behalf of Hydraulics, opened a criminal case of theft and fraud against the defendant and instituted a civil action against her for return of the stolen money, claiming N\$2 921 657,63, while waiting for finalisation of a forensic audit. The defendant was formally disciplined and dismissed which led to a matter pending before the Labour Commissioner.

[20] The plaintiff also found that the N\$100 000, which the defendant was supposed to have used to purchase parts in October 2020 and apply to the plaintiff's credit against his Hydraulics loan account, never occurred. The defendant transferred money from Hydraulics's account to her bank account and then used that money to pay the parts and then still claimed the N\$60 000 repayment from Hydraulics on the overdraft agreement. The defendant never used her own money at all, so he said. The defendant's failure to pay the purchase price or buy the parts as agreed is a material breach and entitled the plaintiff to claim back the ten per cent member's interest transferred to her, hence the claim for return of the member's interest.

[21] Under cross-examination, the plaintiff further testified as follows.

[22] The plaintiff never demanded payment of the N\$100 000 from the defendant, and he never cancelled 'anything'.

[23] The plaintiff was asked why he did not change his particulars of claim to theft and fraud after he discovered that the defendant had not paid the N\$100 000. The plaintiff explained that, through investigation, he established that the defendant did not pay, and a witness statement was submitted to explain why the plaintiff's case was that the defendant did not pay.

[24] The plaintiff was taken through the payments the defendant claims were made for N\$100 000. The plaintiff was well prepared and able to answer those questions, supporting his answers (where applicable) with references to the bank statements of Hydraulics's account and the defendant's two cheque

accounts. A summary of the plaintiff's answers on the alleged payments is as follows.

(a) Under the overdraft agreement, the defendant assisted Hydraulics with payments totalling about N\$60 000. N\$60 000 was repaid to the defendant on 27 November 2020. The following payments were made by the defendant from 22 October 2020 to 21 November 2020 for the overdraft agreement and not for the membership agreement. N\$4200 on 22 October 2020, N\$3 821,47¹ on 24 October 2020, N\$8 020,10 on 26 October 2020, N\$8295 on 30 October 2020, N\$8790 on 30 October 2020, N\$3810 on 30 October 2020, N\$5 782,50 on 30 October 2020, N\$2 244.85 on 9 November 2020, N\$1 096,41 on 11 November 2020, N\$365,47 on 11 November 2020, N\$408 on 11 November 2020, N\$6 930,34 on 11 November 2020, N\$2 358,62 on 13 November 2020, N\$763.19 on 18 November 2020, and N\$ 2 336,59 on 21 November 2020. According to the court's calculation, those payments add up to N\$59 222,54.

(b) The following alleged payments were not booked to Hydraulics's Pastel accounting system. The plaintiff has no guarantee that they were for the N\$100 000 as it should have been reflected on Hydraulics's books. The plaintiff does not know what the defendant did with the following alleged payments. N\$10 500 on 22 October 2020, N\$19 000 on 3 November 2020, N\$5000 on 14 November 2020, N\$7500 on 18 November 2020, and N\$1000 on 18 November 2020. The plaintiff said he could not testify to the N\$1000 allegedly paid on 18 November 2020 but pointed out that there were two cash withdrawals on one day. That payment is further dealt with below. In re-examination, the plaintiff clarified that he did not receive the alleged cash payments of N\$10 500 on 22 October 2020, N\$19 000 on 3 November 2020 and N\$5000 on 14 November 2020.

(c) The N\$5158 allegedly paid on 11 November 2020 toward the plaintiff's NHP medical aid instalment was a payment made for the defendant's medical aid. In re-examination, the plaintiff said that his medical aid was suspended at the time due to non-payment.

¹ The payment is reflected on the bank statement as N\$3 281,47.

(d) For the N\$505,36 allegedly paid on 19 November 2020 and N\$3000 allegedly paid on 20 November 2020, the plaintiff pointed out that N\$4000 was transferred from Hydraulics's account to the defendant's account on 19 November 2020. In re-examination, he pointed to the bank statements showing N\$3000 was paid to Hydraulics's account on 20 November 2020, but the day before, N\$4000 was paid from Hydraulics's account to the defendant's account 8018.

(e) The N\$200 allegedly paid on 5 January 2021 was for a personal loan by the defendant to a Hydraulics employee, which had nothing to do with the plaintiff or Hydraulics.

(f) For the N\$5000 allegedly paid on 20 January 2021, the plaintiff said that on that day, the defendant had N\$5000 in petty cash on hand, which she withdrew and paid to the plaintiff via electronic wallet (e-wallet). In re-examination, the plaintiff referred to Hydraulics's bank statement showing that on 14 January 2021, N\$5000 was paid to the defendant, and a payment of N\$15 000 was also made to her from Hydraulics's bank account on 18 January 2021.

(g) For the N\$1000 and N\$1 392,62 allegedly paid on 22 January 2021, the plaintiff said the defendant was not in the office that day, and he gave no instruction for the payment of N\$1 392,62 to Hydromatic Centre.

(h) For the N\$2000 allegedly paid on 4 February 2021, the plaintiff said that on the same day, the defendant paid N\$4000 from Hydraulics's bank account to her, and then she only paid N\$2000 for Hydraulics business. In re-examination, the plaintiff pointed to Hydraulics's bank statement showing that on 4 February 2021, N\$4000 was paid from Hydraulics to the defendant.

(i) For the N\$1500 allegedly paid on 19 February 2021, the plaintiff said it was paid from Hydraulics's account to the defendant's account. In re-examination, the plaintiff showed with reference to Hydraulics's bank statement and the defendant's statement for account 8018 that on 19 February 2021,

N\$1500 was paid from Hydraulics's bank account to the defendant's account 8018.

(j) The plaintiff was not questioned about the two alleged payments of N\$500 on 5 November 2020.

[25] The plaintiff's further testimony under cross-examination was as follows.

[26] The defendant's counsel told the plaintiff that by 21 November 2020, N\$99,955,27 had been paid by the defendant to suppliers identified by the plaintiff. The plaintiff disputed that statement.

[27] The plaintiff was further told that the overdraft payments came from the N\$100 000, which came from the defendant's account. The plaintiff disputed that with reference to the bank statements.

[28] The plaintiff pointed out that from the beginning of November to 27 November 2020, about an additional N\$25 000 was transferred from Hydraulics's account to the defendant's personal account. In re-examination, the plaintiff showed on the bank statements that the following payments were made from Hydraulics's account to the defendant. N\$10 000 on 6 November 2020 after a customer paid that amount into Hydraulics' account on even date, N\$10 000 on 17 November 2020, and N\$4000 on 19 November 2020. He also showed that the N\$60 000 was paid to her on 27 November 2020.

[29] The plaintiff testified that the defendant said it would cost N\$3000 for the N\$100 000 to be released in three days, and Hydraulics paid her N\$3000 for that, but it only cost N\$2500.

The defendant's evidence

[30] The defendant testified as follows.

[31] The defendant left Hydraulics in 2014 after being employed there as an accountant or bookkeeper since 2009. She resumed working there as a bookkeeper in June 2017 after the plaintiff made her an offer, which she accepted. The defendant's duties as a bookkeeper included taking orders from

clients, making payments to clients (cash or bank), paying employees' salaries, preparing cash books, and creating reports on Pastel, the accounting system used by Hydraulics.

[32] Under a deed of settlement in her divorce proceedings, she received N\$300 185. N\$120 000 was paid into her savings account, and the remainder was paid on 20 March 2020.

[33] October is usually a difficult month for Hydraulics because most fishing companies have recess, during which they do repairs and maintenance on their fishing vessels. The vessels are anchored in dry dock, and most companies withhold their major work from August to September.

[34] The defendant knew Hydraulics had financial difficulties and could not pay all its debts. At the beginning of October 2020, the defendant told the plaintiff she could help with some money for the month. The plaintiff said he was going to ask her to buy shares from Hydraulics and the plaintiff agreed for the defendant to buy ten per cent. The plaintiff indicated that the defendant would have to pay some of Hydraulics's suppliers and creditors and persons the plaintiff would inform her to pay. The payment had to come from her personal bank account as she could not pay the money into Hydraulics's account as it was in a minus. It was, however, pointed out to her in cross-examination that Hydraulics's account was not in a minus at the beginning of October 2020.

[35] The N\$100 000 was in the defendant's savings account, and the defendant requested for the funds to be released in two days, for which she had to pay a penalty fee of N\$2500 as the usual waiting period is 32 days. The money was reflected in the defendant's savings account on 5 October 2020. She then transferred it to account 8018 and it reflected therein on the same day. She made the payments from account 8018 and account 8002. The defendant then described the payments she made. She supported it with references to bank statements, invoices and notifications of payment (where applicable).

[36] According to the defendant, she made the following payments on the following dates for the following subject matters from account 8018. N\$4200 on

22 October 2020 to Walvis Bay Primary School for the plaintiff's daughter's school fees, N\$3 821,47 on 24 October 2020 for Hydraulics's supplier Duplex Liquid Meters, N\$8 020,10 on 26 October 2020 for Hydraulics's supplier Commercial Shearing, N\$8295, N\$8790, N\$3810 (via e-wallet) and N\$5 782,50 on 30 October 2020 for salaries, N\$500 cash on 5 November 2020 which she cannot recall what it was for and another N\$500 cash on 5 November 2020 for the plaintiff, N\$2 244,85 on 9 November 2020 for Bachmus Oil and Fuel, N\$505,36 on 19 November 2020 for Hydromatic Centre, N\$3000 on 20 November 2020 to the plaintiff via e-wallet, N\$3000 on 20 November 2020 to Hydraulics, and N\$2 336,59 on 21 November 2020 for Parker Stores.

[37] According to the defendant, she made the following payments on the following dates for the following subject matters from account 8002. N\$10 500 on 22 October 2020 cash to the plaintiff (withdrawn from account 8002 after transferring it from account 8018 to 8002), N\$19 000 on 3 November 2020 cash (withdrawn from account 8002 after transferring it from account 8018 to 8002), N\$1 096,41 on 11 November 2020 for Hydraulics's supplier BMG, N\$365.47 on 11 November 2020 for Hydraulic's supplier BMG, N\$408 on 11 November 2020 for Hydraulics's supplier Hytec, N\$6 930,34 on 11 November 2020 for Hydraulics's supplier Novel Motors, N\$5158 on 11 November 2020 for the plaintiff's NHP medical aid monthly instalment, N\$2 358,62 on 13 November 2020 for Erongo Red, N\$5000 on 14 November 2020 cash withdrawn, N\$763,19 on 18 November 2020 for Hydraulics's supplier BMG, N\$7500 on 18 November 2020 cash withdrawn, and N\$1000 on 18 November 2020 cash for Hydraulics (paid from account 8002 after transferring it from account 8018 to 8002).

[38] After listing those payments, the defendant said the total payment made in November 2020 was N\$99 955,27. She said the plaintiff then completed the necessary registration documents to effect the changes, which were submitted to the Business Intellectual Property Authority on 20 November 2020. The registration was effected on 16 December 2020.

[39] The defendant disputes the plaintiff's claim that she would buy shares from him and make payments of N\$100 000 to him. According to the defendant,

the agreement was that she pay suppliers, debtors and persons identified by the plaintiff. The plaintiff gave such instructions, and she complied and made payments directly to those identified by the plaintiff. The defendant said there was no agreement that she had to pay the plaintiff N\$100 000 or that it had to be done within a reasonable time. According to the defendant, she did, therefore, not break the agreement.

[40] The defendant continued that the remainder of the payments were made in January 2021 from account 8018 as follows. N\$200 on 5 January 2021 for an employee of Hydraulics via e-wallet, N\$5000 on 20 January 2021 for Hydraulics's parts via e-wallet, N\$1000 on 22 January 2021 for an employee of Hydraulics via e-wallet, N\$1 392,62 on 22 January 2021 for Hydromatic Centre, N\$2000 on 4 February 2021 for Hydraulics's employee via e-wallet, and N\$1500 on 19 February 2021 for Hydraulics.

[41] The following transpired from the defendant's cross-examination.

[42] The defendant was not upset when she approached the plaintiff on 17 May 2022. She admitted her conversation with the plaintiff on 17 May 2022 and what she said to the plaintiff, but she denied apologising and admitting she took the money. She wanted to explain certain transactions to the plaintiff she made without informing him. She admitted the plaintiff asked her to underline transactions she fraudulently withdrew or paid to other non-Hydraulics entities. She admitted to writing the plaintiff the letter but said she was told to write it under a false pretence. She said the plaintiff made her feel guilty and rushed her to underline the transactions, giving her two days. The defendant disputed that she took money from Hydraulics to pay that which she undertook to pay herself.

[43] The defendant is aware of the overdraft agreement but said it had nothing to do with why she was in court, and she was not prepared to explain that agreement. She indicated that Hydraulics's account was not in overdraft in October 2020 and the overdraft agreement only came on 11 November 2020 on account 8002 when account 8002 went into a minus. The defendant confirmed that she paid about N\$60 000, it had to be refunded to her, and it was refunded

to her in full on 27 November 2020, but she said she then already gave N\$100 000 beginning October 2020. When asked about what payments she made for the overdraft agreement, she said she did not have a reconciliation for the N\$60 000. She did not even try.

[44] The defendant confirmed that by 11 November 2020, account 8018 was depleted, and she carried on with payments from account 8002. The bank statement provided for account 8002 starts from 11 November 2020, the first page provided is page 66 of 141, and the top part of that page was not placed before court. The defendant was asked in cross-examination why the top part of that page was missing, and it was suggested that it was tampered with to hide something. The defendant could not explain the situation.

[45] When asked why she did not repay N\$500 after the penalty fee was only N\$2500 while she was paid N\$3000, she said many other things were done with the money from her account. In re-examination, in response to a leading question, the defendant said there was no expectation that the N\$3000 be repaid.

[46] The defendant admitted that the NHP payment of N\$5158 on 11 November 2020 was for her medical aid instalment, not that of the plaintiff, as she previously testified. She could not explain why she gave the court incorrect facts.

[47] When it was illustrated to her with reference to the bank statements that from the alleged cash payment of N\$3000 to Hydraulics on 20 November 2023, N\$4000 was transferred to her account 8018 from Hydraulics's account the day before, she did not know what to answer. Later, she said the N\$4000 could have been for something else; it could have been a loan, so she said.

[48] When asked why she made further payments after November 2020 if, according to her, she had paid what she had to by that time, she said she still had money in the account and could help Hydraulics.

[49] It was pointed out to the defendant that on 18 January 2021, N\$15 000 was paid to her account 8018 from Hydraulic's account, and after that, on 20

January 2021, a payment of N\$5000 was made by her for parts, and it looked like she used N\$5000 of the N\$15 000 to pay for the parts while claiming she paid N\$5000 from her funds. The defendant said it was for another agreement. She said the plaintiff took N\$20 000, and if he would take N\$20 000, she could take N\$15 000. She was then shown that on 14 January 2021, she took N\$5000 from Hydraulic's account and then again N\$15 000 on 18 January 2021. She could not explain it.

[50] It was pointed out to the defendant that for the payment of N\$2000 allegedly made on 4 February 2021, Hydraulics's bank statement showed that she paid herself N\$4000 to one of her accounts. However, on the statements before court, it was not transferred to the savings account or account 8018, so it must have gone to account 8002, for which the court does not have complete statements or another unknown account. She could not explain what the N\$4000 payment was for. The statement for the defendant's account 8002 only goes up to 3 December 2020.

[51] It was shown to the defendant that the payment of N\$1500, which she alleged she made on 19 February 2021 to Hydraulics, was a payment from Hydraulics to her and not a payment by her to Hydraulics, as she claimed. It was further shown to her that, as a result, for the alleged payment of N\$2500 made on 26 February 2021, which she said was for flowers, she was only out of pocket with N\$1000. She was told she had been a bookkeeper for about 20 years; how could she make such a mistake? She said she has many cases with the plaintiff, and she cannot remember all of them, she is human and can make a mistake. She said it should then read that on 26 February 2021, she made a payment of N\$2 500 for Hydraulics from account 8018, but she did not know how to rectify the situation of a balance left of N\$1000. She agreed she was only out of pocket with N\$1000, not N\$2500. The defendant's counsel argued that only N\$1000 could then be for the purchase price.

[52] It was put to the defendant that the payments the plaintiff said were for the overdraft agreement added up to N\$59 727,90. She said it was N\$58 969,61 after she used a calculator to check the total put to her. It was further put to her there is a difference of about N\$800 with the amount of N\$60 000 and

that confirms the plaintiff's case that those payments were for the overdraft agreement, all paid between 22 October and 21 November 2020. She did not have an answer.

[53] It was further put to her that all payments she received from Hydraulics from October to November 2020, excluding her salary, added up to N\$118 000. She said the N\$10 000 paid to her from Hydraulics on 17 November 2020 and the N\$15 000 on 18 January 2021 were for another agreement. It was also put to her that for the following periods, she and the plaintiff received the following amounts from Hydraulics over their respective salaries. For October 2020, the plaintiff received N\$99 000 more, and the defendant received N\$5000 more. For November 2020, the plaintiff received N\$53 000 more, and the defendant received N\$113 000 more, and if the amount paid to her for the overdraft agreement is taken out, she received N\$53 000 more. For December 2020, the plaintiff received N\$28 000 more, and the defendant received N\$40 000 more. For January 2021, the plaintiff received N\$38 000 more, and the defendant received about N\$40 000 more.

[54] It was concluded that for those four months, the defendant received N\$280 558,33 from Hydraulics, to which she agreed, and N\$202 099,60 was more than her salary, while the plaintiff only received N\$78 000 more than his salary. The defendant received N\$124 099,67 more than the plaintiff and if her bonus was subtracted, she still received about N\$94 000 more than the plaintiff. It was then put to her that it makes no sense for the 90 per cent member to receive so much less than the ten per cent member in a four-month period. She then said they were all other agreements, and they agreed that if 'I take this, you take this' and it was said 'please, do not suffer in silence if you need something, you take something, if I need something, I would take it'.

[55] Even though the defendant, under cross-examination, said that the penalty fee was paid for the funds to be released earlier because the plaintiff was in a hurry, they needed the money and could not wait for 32 days, she refused to accept that the N\$100 000 had to be paid in a reasonable time in October 2020 and a bit in November 2020.

The determination

[56] The first main issue to be decided is the agreement.

[57] The defendant did not simply deny the agreement pleaded by the plaintiff. She went further and pleaded what she alleges the deal was. Thus, she bears the onus to prove the agreement was what she pleaded it to be.

[58] According to the defendant, she acquired the member's interest under section 33(1)(b) of the Act.² Section 33(1)(b) of the Act applies where someone contributes to the close corporation for acquisition of member's interest. The existing member/s and the potential new member must then agree inter se what percentage member's interest is allocated to the potential new member and with what percentage the existing member/s interest is reduced so as to have their aggregate member's interest at 100 per cent. There is, effectively, an acquisition, through the adjustment of interests, by the potential new member from the existing member/s of member's interest without consideration to them.

[59] The defendant failed to prove that there was an agreement between the plaintiff and the defendant that the plaintiff's member's interest would be reduced without any consideration to the plaintiff. On the defendant's own version, some of the alleged payments were for the plaintiff as opposed to Hydraulics. The plaintiff's case was that even though the defendant would contribute N\$100 000 to Hydraulics, the contributions must be entered to his credit in his Hydraulics loan account, thereby he would receive consideration for the reduction of his member's interest. On the facts, the acquisition of the defendant's member's interest was in the form of a purchase agreement. As a result, the defendant failed to prove the agreement alleged by her.

[60] From the evidence adduced and based on the parties' respective versions of the agreement (which are, in essence, not materially divergent), and

² '33. (1) A person becoming a member of a registered corporation shall acquire his member's interest required for membership –

(a) from one or more of the existing members or his or their deceased or insolvent estates; or
(b) pursuant to a contribution made by such person to the corporation, in which case the percentage of his member's interest is determined by agreement between him and the existing members, and the percentages of the interest of the existing members in the corporation shall be reduced in accordance with the provisions of section 38(b).'

considering their actions, their minds have met, and they have reached consensus on the following. The plaintiff sold to the defendant and the defendant bought from the plaintiff ten percent of his member's interest in Hydraulics. The purchase consideration was N\$100 000. Payment had to be made by the defendant within a reasonable time in October and November 2020. It was common cause that a penalty fee was paid to release the funds within a few days. The defendant herself testified October was a difficult month for Hydraulics, it had financial difficulties, the plaintiff was in a hurry, and they needed the money to buy parts to do the work. On the defendant's own version, about N\$100 000 was paid by 21 November 2020 whereafter the transfer was registered in December 2020. The defendant's explanation that she continued to make payments in January 2021 because she still had money and could help does not support her position that the purchase consideration was not due in a reasonable time.

[61] Regarding the payment mode, the court finds that the defendant had to pay Hydraulics' suppliers and others identified by the plaintiff and allocate those payments to the plaintiff's credit on his Hydraulics loan account. That is what the parties did. The plaintiff testified that the defendant made three allocations, but he did not say what they were. That testimony was undisputed. It supports the agreement as testified by the plaintiff.

[62] The second main issue to be decided is whether the defendant performed under the membership agreement. The entire defence hinged on the defendant's denial of the agreement alleged by the plaintiff and reliance on the agreement pleaded by the defendant, which version the court rejected. The defendant is adamant she paid N\$100 000, and that must be her position, whichever agreement the court accepts. Otherwise, the court should now give judgment in the plaintiff's favour.

[63] The onus to prove the alleged payments was on the defendant. In *Caltex Oil (Namibia) (Pty) Ltd v Tjikune*³, the court enunciated that as the defence was one of payment, the defendant bore that onus, and that onus remained throughout on the defendant, and there is no transfer thereof to the plaintiff. The

³ *Caltex Oil (Namibia) (Pty) Ltd v Tjikune* 1997 NR 230 (HC) at 231C-D and 233J-234C.

court continued to say all the evidence must be examined to decide whether the defendant discharged the onus.

[64] The defendant's counsel told the plaintiff that there was no such thing as an overdraft agreement. However, under cross-examination, the defendant admitted there was one, but she said she was not prepared for it, as that was not why she was before the court.

[65] During closing submissions, the court enquired from the plaintiff's counsel whether the overdraft agreement should not have been pleaded in a replication to the plea. The plaintiff argued that a replication would have been advisable, but that did not change the fact that the money used to pay did not belong to the defendant. It was submitted that during evidence, it came out how payment had to be made and the dispute comes in whether that was done and how quickly it had to be done. The plaintiff's counsel further submitted that the overdraft agreement was not part of the plaintiff's cause of action and, therefore, it was not necessary to plead it.

[66] A replication is usually necessary when the plea is a confession and avoidance. The question is whether the plaintiff's answer to the defendant's plea is a confession and avoidance. Having scrutinised the pleadings, the answer is 'no' because of what the defendant pleaded. The defendant did not simply plead that she performed under the agreement alleged by the plaintiff. She denied the agreement pleaded by the plaintiff and pleaded her own, and that was the basis on which the rest of her denials followed. The structure of the plea, in the court's view, did not call for a replication.

[67] The overdraft agreement was referred to in the plaintiff's witness statement, and the plaintiff's position that the defendant did not use her own money for the N\$100 000 was set out in his witness statement, dated before the defendant's witness statement. By then, the plaintiff did not know what the defendant would rely on other than what was contained in her plea. It was only in the defendant's witness statement that was dated after the plaintiff's that she listed the alleged payments, which the plaintiff already gave an indication that it was not the defendant's money that was used. The defendant should have been

prepared that she would be cross-examined on the overdraft agreement and the plaintiff's version that the alleged payment was not her money. It must also be stated that, if the defendant was prepared on the membership agreement, she should have been able to answer to the plaintiff's version that specifically identified payments were made under the overdraft agreement and not the membership agreement. She could simply not answer those questions.

[68] In cross-examination, the plaintiff identified several payments made from 22 October to 21 November 2020 and said those were made under the overdraft agreement and not the membership agreement. It was put to the defendant in cross-examination that those payments add up to N\$59 727,90. The defendant's calculation came to N\$58 969,91. It is common cause that the defendant was paid N\$60 000 on 27 November 2020 for repayment on the overdraft agreement. The defendant said the overdraft agreement only started on 11 November 2020, and by then, she had already contributed N\$100 000. If the defendant's version is to be accepted, it would mean that from 11 November 2020 to 27 November 2020, she paid N\$60 000 for the overdraft agreement and by 11 November 2020, she had already contributed N\$100 000 for the membership agreement. On the defendant's own version, the payments for the membership agreement were made until 21 November 2020, and she continued with payments in January 2021. The defendant's version is not only improbable but unsupported by her own facts, while that part of the plaintiff's version is probable and supported by the facts.

[69] The court finds that the payments made from 22 October to 21 November 2020, which the plaintiff identified as having been made under the overdraft agreement rather than the membership agreement, were made under the overdraft agreement rather than the membership agreement. Thus, at least about N\$60 000, more than half of N\$100 000, was unpaid for the membership agreement. That, however, was only some of what was shown by the evidence to have been unpaid.

[70] The alleged payment of N\$5158 on 11 November 2020 was not paid because the defendant paid her own medical aid instalment and not that of the plaintiff. The alleged payment of N\$1000 on 18 November 2020 with the

reference 'HYD SER' was not paid from account 8018 for Hydraulics, because on the same day, N\$1000 was deposited into account 8002 with the same reference. The alleged payment of N\$3000 on 20 November 2020 was not paid because, on 19 November 2020, there was a transfer from Hydraulics's account to the defendant's account 8018, for which she could not provide any satisfactory explanation. The alleged payment of N\$2000 on 4 February 2021 was not paid because, on the same day, she transferred N\$4000 from Hydraulics's account to one of her accounts, for which she could not provide any satisfactory explanation. The alleged payment of N\$1500 on 19 February 2021 was not paid because it was a payment by Hydraulics to the defendant and not a payment by the defendant.

[71] Thus, the court finds that another N\$12 658 was unpaid, bringing the total unpaid amount to N\$72 658. That leaves a balance of N\$27 342 that could possibly have been paid for the membership agreement.

[72] The evidence showed that both the plaintiff and the defendant received money from Hydraulics apart from their salaries but the defendant, holding only ten per cent member's interest in comparison to the plaintiff's 90 per cent interest, received much more than the plaintiff. The defendant could not provide any satisfactory explanation for that. In those circumstances, and because the defendant admittedly received about N\$94 000 from Hydraulics above her salary, more than that which the plaintiff received extra, the court finds that it is improbable that the defendant paid the balance of N\$27 342 and the defendant failed to prove that she paid N\$100 000 for the membership agreement. The court's finding is further supported by the surrounding facts and circumstances of the parties' conversation of 17 May 2021, the parts admitted by the defendant.

[73] Having regard to the factual findings made, the court does not have to make any credibility findings, and the court declines to do so.

[74] That brings the court to the issues that follow from the two main issues.

[75] It follows that the defendant breached the membership agreement by failing to pay the N\$100 000 within a reasonable time.

[76] In an agreement of purchase and sale, payment of the purchase price is one of its essential terms, and it follows that a breach thereof is material and would entitle a party to cancel it. It thus follows that the defendant's breach entitled the plaintiff to cancel their agreement.

[77] The court referred the plaintiff's counsel to the plaintiff's testimony that he never demanded payment and never cancelled. The plaintiff's counsel submitted that the demand and cancellation were by way of summons but the plaintiff did not appreciate the legality thereof. Demand and cancellation by summons were alleged in the particulars of claim, and the plaintiff's subsequent conduct, as per the evidence adduced, showed a clear intention that he did not seek payment from the defendant and did not wish to continue with the agreement. In those circumstances, the court finds that demand and cancellation were established.

[78] Having made those findings, the plaintiff is entitled to confirmation of the agreement's cancellation and the return of the ten percent member's interest.

[79] The court enquired from the plaintiff's counsel that if the court would find in the plaintiff's favour, should the plaintiff not restore what the defendant did pay. It was submitted that, based on the total figures provided, the defendant did not pay anything, but if the court would find that the defendant did pay something, the plaintiff should, ex lege, be ordered to return that. Having regard to the amount of money which the defendant received from Hydraulics above her salary and the plaintiff's position that the defendant's payment did not come from her own money, the court finds that the defendant did not prove that she paid anything, and the plaintiff need not repay her anything for the membership agreement.

[80] On costs, the general rule is applied, and it follows the event.

Conclusion

[81] In conclusion, it is ordered that:

1. Cancellation of the agreement concluded between the plaintiff and the defendant whereby the defendant acquired ten per cent member's interest in Hydraulics Services Close Corporation, a close corporation with registration number CC/1999/1260, is confirmed.
2. The defendant must, within 14 days after the date of this order, sign the necessary documents and take all necessary steps to transfer the ten per cent member's interest she holds in Hydraulics Services Close Corporation to the plaintiff, failing which the deputy sheriff for the district of Walvis Bay is authorised to sign all necessary documents on behalf of and in the defendant's name to effect transfer of her ten per cent member's interest to the plaintiff.
3. The defendant must pay the plaintiff's costs of suit, including the costs of one instructing and one instructed legal practitioner where employed.

The matter is finalised and removed from the roll.

B DE JAGER

Judge

APPEARANCES

PLAINTIFF: T M Wylie
Of Wylie Legal Practitioners, Swakopmund

DEFENDANT: E Shifotoka
Instructed by Rieth Legal Practitioners, Windhoek