REPUBLIC OF SOUTH AFRICA

SOUTH GAUTENG HIGH COURT, JOHANNESBURG

CASE NO: 2009/36699

(1) REPORTABLE: YES / NO
(2) OF INTEREST TO OTHER JUDGES: YES/NO
(3) REVISED.

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DATE SIGNATURE

In the matter between:

BUSH, ANDREW JAMES	First Plaintiff
BEEVERS, GAVIN ANTHONY	Second Plaintiff
PASSMORE, BRIAN	Third Plaintiff
ASTRUP, GARY LARS	Fourth Plaintiff

and

B J KRUGER INC	First Defendant
KRUGER, BAREND JOHANNES	Second Defendant

J U D G M E N T

Summary: Attorney receiving money in to trust account– factual dispute as to purpose for which the money was so received. Attorney's version highly improbable having regard to the objective facts and rejected. Attorney ordered to repay the amounts lent to him.

WEPENER, J:

[1] Four golfing friends are claiming the return of monies advanced by them to the first defendant, a firm of attorneys, at the instance of the second defendant, the only member of the first defendant. The second defendant is also joined in the proceedings by virtue of the provisions of section 53(b) of the Companies Act No. 61 of 1973 (the Act), he having been a director of the first defendant at all relevant times. The memorandum of association of the first defendant provides that all directors of the first defendant shall be jointly and severally liable with the first defendant for the debts and liabilities of the first defendant, contracted during their periods of office. There is no dispute that the second defendant, qua director, would be liable for the debts of the first defendant, should the first defendant be liable to compensate the plaintiffs.

[2] I refer to the four plaintiffs by their surnames as Bush, Beevers, Passmore and Astrup. The four claims of the plaintiffs arose when one John Rogers (Rogers) advised them during November 2007 that he was aware of a scheme in terms of which the plaintiffs could invest money with an attorney, which turned out to be the second defendant practising under the name and

style of the first defendant. The plaintiffs also discussed the possible investment amongst themselves, in particular after Bush had received information regarding a bridging finance scheme offered by the defendants, from Rogers.

[3] The plaintiffs all testified that the understanding was that they would invest money with the first defendant for a short-term period of approximately four months and receive a return of 3% interest compounded monthly. Although Astrup testified that he was investing with B J Kruger, using the name of the second defendant, it is clear that the parties referred to the first and second defendants as BJ Kruger Inc, BJ Kruger and Kruger interchangeably in evidence. There was no suggestion that any investment or loan was made with or to the second defendant in his personal capacity and the evidence established that money was paid to the first defendant's trust account as was the requirement of the defendants. In order to obtain more information about the bridging finance scheme, the plaintiffs (excluding Astrup) had occasion to visit the defendants at the first defendant's office in Pretoria. Each of the three plaintiffs testified that they thought that they were at the office of the first defendant. Bush testified that he first went to the office of the second defendant and then to the boardroom which he thought was a shared boardroom. This was not challenged in cross-examination. The significance of this is that the cross-examination was directed to show that the plaintiffs did not meet at the offices of the first and second defendants but elsewhere in the offices of Rogers or Real Africa Estate and Travel (RAET). Nothing much turns on this and the impression of the plaintiffs that they visited

the defendants at their office is strengthened by the fact that the second defendant gave them what was referred to as a power point presentation during their visit to the defendants in Pretoria. The power point presentation contained the logo of the first defendant. Bush testified to this effect and so did Beevers and Passmore, who attended the power point presentation at a different time than Bush.

[4] Beevers testified that the investment opportunity appealed to him – it was a good return. The investment would be with an attorney and consequently be quite secure. The period of the investment also suited him as he had provisional tax bills to pay in August 2008. Had it not been for the short-term investment he would not have considered to invest in the scheme. Bush gave similar evidence. He had not yet acquired a business which he intended to acquire and a short term investment would have been suitable to him so that the funds could be available when he acquired a business. This evidence of both Beevers and Bush remains unchallenged and there is no reason to doubt that they intended to invest for a short term only for the reasons supplied by them. The evidence of Beevers was that the investment would be for a period of four months with a possibility of a short extension – but that a period of longer than six months was never contemplated. Beevers was also the person who advised Passmore and Astrup of the scheme and it is not surprising therefore that they also formed the impression that the investments would be for a relatively short period of time. Prior to attending the power point presentation during late November 2007, Beevers and

Passmore were required to sign a confidentiality agreement. Bush and Astrup testified that they too were required to sign confidentiality agreements.

[5] Two of these agreements were signed by the respective plaintiffs and by the second defendant on behalf of the first defendant. It is a document which covers a relationship between the plaintiffs and the first defendant. Astrup testified that his confidentiality agreement was signed by Rogers as a representative of the first defendant. The document proves so and this evidence was not challenged. The relevance of the role of Rogers is the following: did Rogers act as a representative of the defendants or did he act as representative of the plaintiffs? – the latter allegation which was made by the defendants in further particulars and in an affidavit resisting summary judgment.

[6] Beevers testified that Rogers had been canvassing persons who could potentially become involved in the scheme. Rogers was the person who asked him to sign the confidentiality agreement between himself and the first defendant. Rogers was present at the power point presentation to which Beevers was invited but it was the second defendant who gave the presentation. The reaction of Beevers that it was pleaded that Rogers represented him in any matter was '*rubbish*'. This evidence of Beevers that Rogers did not represent him (despite the allegations to the contrary in the further particulars and affidavit) remained unchallenged throughout the evidence. Under cross-examination Beevers added that Rogers was the first contact, he solicited people, he organised a meeting and copied letters to the

second defendant. Beevers testified that Rogers and the second defendant were together in the scheme '*in one way or another*' in that they were parties in a business venture. There was also evidence that Rogers received a commission from the first defendant, supporting the notion that he was in one or another way involved with the defendants. The contention that Rogers represented any of the plaintiffs can be rejected and there exists no reason not to accept the plaintiffs' evidence in this regard. Indeed, despite the attempt to make out that Rogers represented the plaintiffs in further particulars and an affidavit, the second defendant never testified in examination in chief that he indeed represented the plaintiffs. This is significant and puts paid to such suggestion, in my view, made falsely in the further particulars and the affidavit.

[7] Despite Rogers being available at the trial and still being on a good footing with the second defendant, the defendants failed to call Rogers to attempt to support or establish, what I find to be a false version of the defendants. This failure strengthens the inference that Rogers was associated with the defendants and never represented the plaintiffs. Insofar as any inference is to be drawn, he represented the defendants and his conduct or activities can be ascribed to the defendants. Also, there is no evidence before me to show that Rogers indeed represented any of the plaintiffs. The irresistible inference is that he was indeed the first line of contact for the defendants, solicited the plaintiffs' interest by outlining the scheme, being present at the power point presentations, signing at least one document on behalf of the first defendant, taking part in numerous emails between the

plaintiffs and the defendants and generally acting on behalf of the defendants. An analysis of the documents written by Rogers and copied to the second defendant bears this out. I give examples. The documents styled '*Investment Account*' which were sent to each plaintiff by Rogers, were sent on a letterhead of the first defendant. Although it was put to one of the plaintiffs that Rogers sent these accounts unauthorisedly, Rogers states in an email to all the plaintiffs, and copied to the second defendant, the following:

> '*Barend* (the second defendant) *has noticed that there is a difference between calculating the interest on a daily versus monthly compound basis. The statements <u>we</u> sent you earlier actually use a daily compounding formula which unfortunately gives the wrong amount as the investments are based on a monthly capital basis.*
>
> *…*
>
> *I will re-send the statements tomorrow after he has re-calculated the interest amounts using this formula rather than as was used in error which was compounded daily.*'

[8] It is clear that the second defendant knew that Rogers alleged that they both ('*we*') had sent the statements. After re-calculating the interest, new investment accounts were forwarded to the plaintiffs. These accounts are similar in format to the first accounts and are all on the letterhead of the first defendant. It becomes increasingly clear that Rogers acted on behalf of the first defendant with the full knowledge and consent of the second defendant regarding the investment scheme. The second defendant's evidence that the document was sent without authority does not impress. The document contains correct information as well as the first defendant's logo. The second defendant did nothing or could show nothing to support that he advised the recipient that the document was sent without authorisation. I reject the

allegation regarding the lack of the authority of Rogers who was indeed a full participant from the point of view of RAET and the defendants.

[9] The four plaintiffs all understood that they would be advancing money to the first defendant for a short period of approximately four months and earn 3% interest compounded monthly on these advances. The view was based on what Rogers had told them and as far as the first three plaintiffs were concerned, what the second defendant told them during the power point presentation where Rogers was present. Bush, Beevers and Passmore, who attended a meeting with the second defendant in Pretoria where he gave a power point presentation, testified that the presentation contained the first defendant's logo as is evident from the documents in the bundle pages 1-12 handed in during the hearing. It was, however, put to them that the logo on the presentation was that of RAET of which Rogers was the CEO (and the second defendant the principal). Beevers was adamant that it was not so as he knew Rogers as a '*wheeler and dealer*' and if the presentation showed an involvement of Rogers, he would never have parted with money. The power point presentation on a RAET letterhead could not possibly be the presentation given to him.

[10] There is no explanation before me why the second defendant would give a power point presentation on the letterhead of RAET – all other documents emanating from the first and second defendants are on the letterheads of the first defendant. The document in the bundle displaying the power point presentation on the RAET letterhead is in stark contrast to every

other document contained in the bundle in this matter. It is highly improbable that the second defendant presented the scheme, which he and his companies had an interest in, on the letterhead of RAET. RAET could not offer the services contained in the power point presentation. In particular the complete conveyancing solution, general legal assistance and advice, bond registration and the entire conveyancing process – all of which only the first and second defendants could offer – would be out of place on a RAET letterhead. The contact details are those of the first and second defendants and it include the second defendant's email address. The entire document has nothing to do with RAET. During the presentation it was explained to Beevers (and Passmore) that the first defendant would receive the money, and it would then be utilised as bridging finance. All legal matters were to be handled by the first defendant and the first defendant would effectively be the administrator of the investment. During cross-examination it was put to Beevers that the investment would either be through the B J Kruger Property Group (Pty) Ltd (the Company) or SA Home Savers. His response was that he did not recall that these entities were mentioned at all. Indeed, during evidence in chief the second defendant never mentioned SA Home Savers at all. During the evidence of the second defendant, it became common cause that he never mentioned SA Home Savers to the plaintiffs at all.

[11] Much of the cross-examination of the plaintiffs concentrated on the fact that the particulars of claim refer to a loan and that they did not use the word '*loan*' in the evidence or in documents which emanated from them. I am of the view that the use of the word '*loan*' is irrelevant. To summarise the

evidence of Beevers: He at no time invested in property; he was soon going to need the money for tax purposes; he was quite happy for a lawyer to take his money for four months; he did not care who the defendants would finance; he gave his money to the first defendant – it had to give it back; his deal was with the first defendant. However, the word *'lent'* was indeed also used by Beevers as indicated below. The cross-examination of Beevers turned around the manner in which the first defendant applied the funds and the witness was unable to comment thereon, because he testified that it was none of his concern how the first defendant supplied the bridging finance to his clients. During the power point presentation the second defendant explained that he would advance the money to third parties as bridging finance; that he would earn 5% interest – the second defendant would take 2% and all other fees and charges which a conveyancer can make on these deals. Despite cross-examination on other issues, this aspect of Beevers' evidence was not challenged.

[12] The one thing that Bush, Beevers and Passmore agreed on was that the second defendant explained the manner in which he would supply bridging finance and secure the money advanced to third parties. Effectively he would only advance 40% to 50% of the nett equity the borrower had in property. Thus he was secure in receiving his capital back. This, the plaintiffs testified, together with the fact that it was an attorney who received their money into his trust account, gave them comfort in advancing the money to the first defendant. The plaintiffs, in particular Bush, Beevers and Passmore, were clear in their evidence that they would advance money to the first

defendant by paying it into its trust account and that the funds would be repaid by the first defendant together with interest to them. In my view that is nothing other than a loan to the first defendant. All the plaintiffs testified that they advanced money so that the first defendant could supply bridging finance to third parties. Indeed, neither Bush nor Beevers could have afforded to tie money up in properties as the funds had been earmarked for other purposes. Yet, the cross-examination of the witnesses centered around the fact that they had agreed to invest in properties and even acquire those properties in the event of the third parties not being able to repay the bridging finance to the first defendant. Needless to say all of the plaintiffs denied this and such a course of conduct by Bush and Beevers would be improbable having regard to the evidence regarding the need of their funds for identified purposes i.e. acquiring a business and paying income tax. Beevers stated on a number of occasions that the money was solicited from him to pay to the first defendant and in exchange for that, in the short term, he would be receiving the capital with interest back from the first defendant. He stated that he was happy for a lawyer to take his money for four months, that the lawyer would then give bridging finance to third parties and he would get his money back in that short period of time. He was not interested or did not care who the lawyer gave the finance to. He gave his money to the first defendant who was the entity to give the money plus 3% interest back to him.

[13] The three plaintiffs, who attended the power point presentation, were adamant that the second defendant explained the bridging finance scheme to them – as that is the reason that they went to him, and denied that they were

told that the funds would be invested in property. Beevers testified that the second defendant explained that he came across clients with property-related matters. Because of this, he lent money to people and he was looking for people who could lend him money to lend to third parties. Each of the plaintiffs indicated to the second defendant what amount they had to invest, except Astrup who advised Rogers of the amount that he had available for investment purposes. Shortly after the power point presentation Bush, Passmore and Beevers received a document on the first defendant's letterhead from Rogers. The document indicated a deposit of some R2,5 million was required. As the plaintiffs all knew what they would commit to the loan, Beevers telephoned the second defendant to confirm that the loan would be secured as was stated at the power point presentation to which he received a positive answer. This evidence was not challenged. Beevers paid his share of the amount required i.e. R1 million. The payment document generated by him is marked '*Loan/Prop*'. What is important is to note that the document received from Rogers contained a reference at the top stating '*Investment: The BJK Property Group (Pty) Ltd*'. This, according to the pleadings and affidavit filed by the defendants, was the party with whom the plaintiffs contracted and not with the first defendant. Each plaintiff expressed surprise at the suggestion that they contracted with this company and stated that the reference in the letter meant nothing to them as they were reacting to what was said by the second defendant at the power point presentation. They all denied knowing such a company, least of all contracting with it. Beevers testified that he received additional documents which were attached to the letter requesting the deposit of R2,5 million. One such document was a

valuation of a property in Waterkloof. Significantly, the valuation was done on the instruction of the first defendant and not the instruction of the Company. Beevers said that he was not concerned with the attachments as these documents had a bearing on how the defendants were going to secure the loan made by the first defendant to the borrowers. During the telephone call to the second defendant, after receiving the documents, Beevers was comforted by the second defendant's explanation that the security would be as was explained at the power point presentation. This evidence was not contradicted.

[14] Beevers received a second opportunity to make a loan to the first defendant on 1 March 2008. He knew of the additional loan as a result of a communication from Rogers. When he received the document requiring the deposit he accepted it and paid the amount of R400 000.00 into the first defendant's trust account. Again, on paying over the money, the reference on the payment document generated by Beevers is '*Br Loan*', for bridging loan. A note appended by Beevers reads:

> '*Herewith proof of transfer into your account of R400 000.,00 for the bridging finance investment in Erf 991 Wonderboorm.*'

(The details regarding the erf are contained in a letter forwarded to Beevers, setting out the particulars of the amount required.) Beevers also asked for a breakdown of his participation to date as per the email of Rogers. The note was addressed to the second defendant but a response was received from Rogers, who gave a summary of the investment and stated that: '*The original investment was extended by a couple of months.*' The only entity who could so extend it was the first defendant. Beevers had no knowledge of such an

extension prior to receiving the notification from Rogers. He was irritated by the one-sided action and would not have invested a further R400 000.00, had he known that the first loan had been extended. Beevers further testified that he paid the amounts loaned from his account in Eastgate and expected payment back into his account. He said that there was never a debate that he had to be paid elsewhere.

[15] On 8 May 2008 Beevers notified Rogers to ensure that '*neither loan should be extended going forward though as the money is earmarked for an upcoming tax bill*'. The email confirms the fact that Beevers saw his investment as a short term loan and that he required the money shortly and would not have invested in property.

[16] During July 2008, when Beevers realised that he was not going to receive his money in the short term, he was horrified. The second defendant wrote to him that there was a delay and offered for him to take over certain properties. Beevers never intended to invest in properties and he, from then on, phoned the second defendant regularly to enquire as to when he could expect payment. He was continually promised that his just had to wait two weeks or a month and the money would be paid. He advised the second defendant that it was money that he lent and that it was not to be invested in property. Once again the telephone call and contents of the conversation was not challenged. The correspondence received from the first defendant written by the second defendant in the second half of 2008 all gave him no hope of receiving his money soon.

[17] Finally, Beevers reacted to the allegations contained in the plea and an affidavit resisting summary judgment. In the plea the defendants aver that payments made to the first defendant were made on behalf of the Company. It further pleaded:

> '*20.3 The defendants plead that the second plaintiff made the payments alleged pursuant to an oral agreement concluded between the second plaintiff personally and the B J K Property Group (Pty) Ltd ('the B J K Property Group') represented by the second defendant at Pretoria during December 2007. In terms of such agreement:*
>
> *20.3.1 the second plaintiff invested monies with the B J K Property Group from time to time;*
>
> *20.3.2 the second plaintiff would pay amounts payable in terms of the agreement into the first defendant's trust account from time to time;*
>
> *20.3.3 the first defendant would hold such monies in trust until the B J K Property Group called for the funds or a portion thereof due to an investment becoming available and the first defendant would pay out such funds or a portion thereof to the B J K Property Group;*
>
> *20.3.4 the full amount received by the first defendant from the second plaintiff was paid out to the B J K Property Group in terms of the agreement*.'

Beevers was quite adamant that he had no dealings with the Company, never heard of it during the power point presentation and was never made aware by the second defendant of this alleged arrangement. His idea was to invest for the short term and not become involved in property investment. Most importantly, the second defendant was at a loss during evidence to explain when and where each agreement between the plaintiffs and the Company was entered in to. He also conceded that some of the terms of the agreements pleaded by the defendants did not exist at all. Beevers also

denied the version supplied by the second defendant in an affidavit resisting summary judgment. This version reads as follows:

'*11. The plaintiffs and I came to be introduced to each other during November 2007 when John Rogers ('Rogers') introduced me to the first plaintiff. Rogers and the first plaintiff explained to me that they represented the plaintiffs who were all looking to make property-related investments.*

12. The introduction came about due to my involvement with BJK Property Group (Pty) Ltd ("the BJK Property Group").

13. The BJK Property Group is primarily property related company and deals in immovable property. For this purpose inter alia, the BJK Property Group is duly registered as an estate agency by the Estate Agency Affairs Board. In its business the B J K Property Group had come across various third parties that were either:

13.1 looking to sell their properties outright but were unable to find purchasers because potential purchasers were not able to qualify for a loan in respect of the property; or

13.2 required funds for one reason or another and were prepared to sell their property in order to receive same.

14. In either instance the BJK Property Group would be in a position to acquire the property at a value less than the going market rate if it had the requisite finance. The BJK Property Group did not have the requisite finance to buy properties itself and accordingly needed to bring in third parties such as the plaintiffs to provide the necessary funding.

15. In addition to the above, by the use of instalment sale agreements, the BJK Property Group was able to stagger payment of the purchase price which was preferential to paying one large lump sum for the acquisition of the property in question. As the BJK Property Group was only interested in properties insofar as they could in turn generate an income, it was preferable to pay monthly instalments in terms of the instalment sale agreement whilst considering whether to rent the property or on-sell it again for a profit instead of having to come up with the entire purchase price at the outset.

16. Investments such as the ones aforesaid also had a number of safety aspects that protected the investment itself:

16.1 the Alienation of Land Act would protect the BJK Property Group insofar as it could compel registration of the sale agreement against the title deed of the property so that the property could not be sold under the BJK Property Group's nose to a third party; and

16.2 the BJK Property Group could achieve transfer into its name if it paid more than half of the purchase consideration.

17. In the premises the BJK Property Group could acquire properties cheaply in terms of instalment sale agreements that permitted payment of the purchase price over a period of time, which made it easier to on-sell the property as there was no time pressure to sell same because monthly instalments were usually quite easily manageable.

18. Practically, the BJK Property Group realised that certain third party potential sellers only sold their properties to generate sufficient funds to overcome some other short term hurdle. In order to accommodate them, most of the instalment sale agreements provided for a four month waiting period during which time the seller could negotiate the cancellation of the instalment sale agreement provided both the seller and the BJK Property Group could agree to the terms of such cancellation.

19. The four-month waiting period was agreed to as the sellers who wanted to negotiate the cancellation of the sale did not find themselves in a situation where the BJK Property Group had already proceeded to deal with the property in an irreversible manner.

20. In order to provide all parties with as much certainty as possible the BJK Property Group indicated to sellers at the outset that it would charge an amount in respect of a cancellation so as to make a profit off the cancellation if one happened. As the costs to the BJK Property Group was really the amount of the deposit paid in each instance, the BJK Property Group would look to earn a profit of about 20% of the amount of the deposit in each instance where an instalment agreement was cancelled. In each instance it was for the parties to agree a cancellation amount and if that could not be done the sale would simply proceed.

21. I informed the plaintiffs of the BJK Property Group's business and how it dealt with investments and they all became interested in making investments with the BJK Property Group as a result. It is precisely because the plaintiffs knew how the BJK Property Group's business functioned that made them interested in investing.

22. I explained to them also that the BJK Property Group filled a particular niche in the market-place and employed a business concept that was working well at that stage.

23. All the plaintiff's were interested in making investments with the BJK Property Group and this led to investment agreements being concluded between the plaintiffs and the BJK Property Group. Such agreements were concluded orally between me on behalf of the BJK Property Group and the plaintiffs personally alternatively the plaintiffs being represented by Rogers and Bush in Pretoria during the latter part of 2007.

24. Although separate investment agreements were concluded with all the plaintiffs and the BJK Property Group, the terms of the investment agreements were all the same.

25. The material terms of the investment agreements were, inter alia, as follows:

25.1 the BJK Property Group would be presented with investment opportunities from time to time;

25.2 the BJK Property Group would present such opportunities to the respective plaintiffs as it, the BJK Property Group, in its sole discretion being fit;

25.3 if the respective plaintiff was interested in involving himself in a particular investment he would inform the BJK Property Group of same and pay an amount equal to the deposit required to be paid in terms of the property that was available for purchase;

25.4 the BJK Property Group would thereafter conclude an instalment sale agreement with the seller concerned and proceed to pay the deposit in terms thereof;

25.5 from that point onwards the investment would be operated and managed jointly between the BJK Property Group and the respective plaintiff using the BJK Property Group as a vehicle;

25.6 if the seller concerned wished at any time to cancel the instalment sale agreement, the terms of such cancellation would have to be accepted by both BJK Property Group and the respective plaintiff, once again with BJK Property Group being the vehicle;

25.7 any income generated from the investment would normally be shared between the BJK Property Group and the respective plaintiff in the ratio of 20%-80% respectively with the respective plaintiff to receive the greater portion due to his financial contribution;

25.8 once the four-month waiting period was over the BJK Property Group and the respective plaintiff acting together would jointly make decisions as how to deal with the property, in other words they would decide, inter alia, whether it should be on sold, rented and the terms thereof;

25.9 furthermore, insofar as there were any expenses to be incurred in respect of the investment such as, inter alia, protecting the property from further on-sale or proceeding with legal steps against recalcitrant sellers, the BJK Property Group and the respective plaintiff would contribute to such expenses in the same ratio as they would benefit;

25.10 in general the investment would be managed by the BJK Property Group and the respective plaintiff jointly; and

25.11 where the respective plaintiff was an investor in respect of the particular property together with other investors then they would hold their respective rights pro rata contributions to the investment in each case.

26. At no stage was there any agreement between any of the plaintiffs and the first or second defendant. The first defendant's involvement in the investments happened on two levels:

26.1 firstly, because investors such as the plaintiff had to wait for the requisite opportunity to come along, they would pay their determined investment amount into the first defendant's trust account for allocation to an investment as and when one arose and as when the BJK Property Group called upon such funds – as such the first defendant only ever held monies invested either on behalf of the investor, such as the plaintiffs, and/or on behalf of the BJK Property Group, it never held monies for its own sake; and

26.2 secondly, the first defendant would attend to all the conveyancing they was required as a result of each particular investment.

27. *In short there was never a contractual nexus between first and second defendants and any one of the plaintiffs.*'

Curiously, the versions contained in the defendants' plea and affidavit resisting summary judgment were not put to the plaintiffs during cross-examination at all but was commented on by the respective plaintiffs during their evidence-in-chief. They all rejected the aforesaid versions.

[18] I have thus far dealt with the evidence of the second plaintiff, Beevers, with some references to the evidence of the other three plaintiffs and the second defendant. I now turn to deal with the third plaintiff, Passmore's evidence. Passmore corroborated the evidence of Beevers in every material respect. He testified that he attended the power point presentation with Beevers and confirmed that the document in the bundle of documents at pages 1 to 12 was indeed the power point presentation which he had seen – that is the document with the logo of the first defendant. He confirms that they

were addressed by the second defendant who explained that they would be able to make deposits with, or loans to, the first defendant for a period of four months, which period could be shorter or occasionally longer. Their return would be 3% interest compounded monthly. The second defendant explained that the money would be on-lent to sellers who needed bridging finance i.e. temporary finance until they received the proceeds from the sales of their properties. Passmore explained that a loan to the seller would be secured by the sellers giving to the first defendant a special power of attorney and the first defendant would not make a loan of more than 50% of the equity in the property. Passmore also testified that the deal looked good as money was being paid into a reputable attorney's trust account overseen by auditors and the Law Society. He said that the name of the Company was never mentioned to him and he had no dealings with it. Passmore, upon receipt of the letter requiring the deposit of R2,5 million, paid over R350 000.00, the amount which he indicated at the power point presentation that he would have available.

[19] Passmore went through the same experience as Beevers regarding the non-repayment of money and I need not detail all the occurrences testified to by him. By September 2008, he too was extremely worried that the first defendant had not repaid the money and he too found the second defendant evasive regarding answers to his inquiries. Passmore attended a meeting to which the second defendant eventually came at the Wimpy Restaurant in Fourways. Bush also attended the meeting. At this meeting the second

defendant showed them a cheque of R1,5 million, the proceeds from which he claimed Bush was going to be paid R1 million i.e. his first investment.

[20] Despite all the evidence showing that Rogers arranged for the plaintiffs to visit the second defendant for the power point presentation, it was strangely put to Passmore (but not to Beevers) that Passmore was expecting to go to the office of RAET and not to the office of the first defendant. Passmore was adamant that he expected to go to the second defendant at the first defendant's office. I refer to this issue as strange as nothing (save the document which the defendant says was the power point presentation) emanated from RAET. RAET had nothing to do with the matter and does not feature in the defences raised by the defendants. The defendants' version that Passmore was expecting to visit RAET and not the first defendant is without merit and opportunistic and indicative of the serious lack of credibility of the defendants' version as put to the witnesses. However, Passmore confirmed that the money would be repaid into the plaintiffs' accounts electronically. This was not challenged.

[21] The next plaintiff who testified was Astrup who is currently residing in the United States of America. Astrup was in South Africa for a visit when he heard from Bush of the scheme of lending money to an attorney in Pretoria, but it was Rogers who explained the scheme to him in more detail i.e. that monies would be deposited with an attorney in a trust account as a loan for a short term period of three to four months. Astrup had an amount of R500 000.00 available and was also required to sign the confidentiality agreement

between himself and the first defendant. This document at pages 62 and 65 of the bundle of documents was signed by Rogers as a representative of the first defendant. This evidence of Astrup was never in dispute and reinforces the fact that Rogers represented the two defendants in the lending scheme from time to time. After the payment of the amount of R500 000.00 into the account of the first defendant Astrup received a letter dated 9 January 2008 from the first defendant acknowledging receipt of the funds. (I may mention that a letter acknowledging receipt of the funds was sent to all the plaintiffs). The letter continues to state that the funds have been allocated and that the plaintiff will be kept posted and it ends off with the words '*We thank you for your assistance*'. The context of the letter is clear. It is the first defendant thanking the plaintiff for his assistance to it. Astrup testified that he expected to receive his capital and interest back into his South African Standard Bank account held at Boksburg, the latter which is within the area of jurisdiction of this Court. He too was not happy with the unilateral extension of the maturity date by a period of two months. He too was shocked when he received a communication suggesting that the plaintiffs should take transfer of property as that was something that was never entertained by him or Rogers. Astrup stated that he was promised that the loan would be settled after a relatively short period of time of three to four months whilst 3% interest compounded monthly would be paid on the investment. He never consented to his funds being invested into property. He testified that there was no logic in what was being presented to him at that stage and he had no intention of taking transfer of properties as that was not the reason why he loaned monies. The only thing about property that he knew is that the properties were secured by the

defendants to protect the investments which he made with the first defendant. Astrup too, rejected the contentions of the defendants as contained in the plea and affidavit resisting summary judgment. The witness repeated during cross-examination that Rogers was acting as representative or agent for the defendants.

[22] After most of the evidence of the plaintiffs had been led, Astrup applied to amend his particulars of claim. I granted the amendment and indicated that I would give my reasons later. These are the reasons. Astrup sought to amend its particulars of claim in order to insert the fact that the agreement was entered into in Johannesburg alternatively Pretoria and further that the first defendant was represented by John B Rogers rather than the second defendant in entering into the agreement. The defendants object to the introduction of the reference to Mr Rogers but not to the amendment of the place where the agreement was entered into. Regarding amendments it is said that:

> '*In the event of an objection, an application to the court may also be made at any stage before judgment and can accordingly be granted at different stages of the proceedings.*'

See generally the cases cited at page 675 of Volume 1 of Herbstein and Van Winsen, *The Civil Practice of the High Courts and the Supreme Court of Appeal of South Africa* (5th edition). Amendments may even be allowed on appeal.

[23] Mr Du Toit (on behalf of Astrup) submitted that the purpose of the amendment is to allow the pleadings to be in line with the evidence of Astrup. Mr Roos objected and stated that Astrup gave no such evidence. I disagree. Astrup clearly testified that in his mind Rogers was acting as representative or agent for the second defendant. Again the name of the second defendant and his company was used interchangeably. Indeed his evidence is supported by one of the documents which the defendants required Astrup to sign i.e. the confidentiality agreement, which Rogers signed in his capacity as representative for the first defendant in the lending scheme. Having regard to the fact that Rogers had represented, the first defendant has been sufficiently dealt with in the evidence of Astrup so that it can indeed be said that the amendment is introduced to be in line with the evidence. Astrup is supported by the other plaintiffs as I have demonstrated with the analysis of the evidence of Beevers.

[24] Mr Roos also criticised the contents of the affidavit in support of the application for amendment as containing insufficient information to justify a reasonable cause – but there is nothing before me to gainsay that which is contained in the affidavit i.e. that Astrup made an error as a result of communications between him and his legal team being by telephonic and electronic means since he was residing in the United States of America. He met his counsel the day before the trial and had no proper opportunity to carefully consult. That, to my mind, is reasonable cause sufficient to allow an amendment particularly by virtue of the fact that Rogers had featured prominently in the case and was referred to extensively by both parties. The

defendants referred to a large number of documents emanating from the said Rogers and his role must have been clear to both the plaintiffs and the defendants. The defendants cross-examined extensively on the emails that emanated from Rogers and which the defendants had knowledge of.

[25] In *Trans-Drakensberg Bank Ltd (Under Judicial Management) v Combined Engineering (Pty) Ltd and Another* 1967 (3) SA 632 (D) at 638 Caney J said that the primary object of allowing an amendment is to '*obtain a proper ventilation of the dispute between the parties*'. It is well-known that the pleadings are made for the court and not the court for the pleadings. The present approach by courts to amendments has been stated by Flemming DJP in *Bankorp Ltd v Anderson-Morshead* 1997 (1) SA 251 (W) at 253 as follows:

> '*… the increased realisation that Court Rules, procedural principles and pleadings are not there for their own sake or for any other reason than to advance the good order and the administration of justice. Accordingly the stream has turned away from regarding a document or procedural step as a 'nullity' and has come to manage that which previously was thought to be unworkable or even unthinkable. I mention a few examples. Many cases of a summons being a 'nullity' have been discarded. Conditional claims and conditional counterclaims are managed. Conflicting alternative claims are often tolerated. Arguments that amendments are to be refused only because of delay in seeking amendment repeatedly fail. The overall pattern is ever firmer that, also in provisional sentence cases, an amendment is granted if a party deems it necessary to bring his real case before the Court. The exceptions are really limited once the party is bona fide and is not attempting to gain time. An amendment is refused when it is certain that the new view is untenable and will not assist the party or because of prejudice to another party or to the administration of justice which cannot be adequately averted by, for example, standing a case down, postponing it, reimbursing wasted costs.*'

[26] In *Four Tower Investments (Pty) Ltd v André's Motors* 2005 (3) SA 39 (N) at 44 it was stated as follows:

> '… *decisions in the reported cases tend to show that there has been a gradual move away from an overly formal approach. It is a development which is to be welcomed if proper ventilation of the issues in a case is to be achieved, and if justice is to be done. In line with this approach courts should therefore be careful not to find prejudice where none really exists.*'

The aforegoing are, therefore, the reasons why I allowed the amendment applied for by Astrup.

[25] The first plaintiff, Bush, who testified last on behalf of the plaintiffs also corroborated the evidence of Beevers and Passmore in every material respect. He was the person who first heard of the scheme from Rogers who advised that monies could be paid to an attorney who would on-lend it and get 5% interest – 3% to the lender, 1% to the attorney and 1% to Rogers. The attorney would also get conveyancing fees of properties transferred by him. Rodgers arranged a meeting with the second defendant who gave a power point presentation. There he was told by the second defendant, an attorney, that the latter would be handling the money – he would be lending it out on the short term for purposes of bridging finance. The security for the loans made by the first defendant was also explained and Bush was assured that he would receive 3% interest compounded monthly on the monies advanced by him. He testified that Rogers was the agent or broker for the defendants. During the power point presentation the only matter that was discussed was bridging finance. Bush was induced to get involved because he knew that the trust account of an attorney is, as he stated, sacrosanct and that the money could not be misused. Upon receipt of the first letter from the first defendant regarding funds he noted that it set out that the money was required for

bridging finance and there was no reference to the Company at all. The letter states:

> '*Bridging Finance: Transfer Piek/Louw*
> *Lynwood Park*'
>
> '*We confirm that we will keep you covered for you interest in the amount of 3% per month and hereby undertake to pay the capital and interest to you on the date of registration of the property into the name of the purchaser.*'

The first defendant, and not the Company as the defendants would have it, is consequently bound to repay the capital and the interest to Bush. As the letter accorded with what Bush had been told the previous day at the power point presentation, he paid the amount of R1,5 million into the first defendant's trust account.

[28] When the second opportunity to invest arose in January 2008 Bush, together with the other plaintiffs, paid amounts over into the first defendant's trust account as per the advices given at the power point presentation and in the letter requesting the funds. After paying the portion of the amount that he could invest, Bush received a letter from the first defendant which, after acknowledging receipt of the funds, added: '*We thank you for your assistance.*' The impression is clear i.e. that Bush loaned the money to the first defendant and so assisted it. Although the reference at the top of the letter changed from the previous letterhead to refer to '*Investment: B J K Property Group (Pty) Ltd*', Bush testified that it made no impression on him and he conducted the business on the basis of loans to the first defendant who, in turn, supplied bridging finance to clients.

[29] He also testified and showed that the first defendant, on at least one occasion, paid 1% of the 5% interest to Rogers. On 28 July 2008 the second defendant on behalf of the first defendant wrote to Bush: '*Your interest will keep running until transfer of the property takes place*'. The defendants thus assured Bush that he would earn his 3% interest regardless of the manner in which they invested the money. This assurance was not given on behalf of the Company but in the first defendant's own name.

[30] A telling part of the second defendants conduct was his scarceness when the plaintiffs started seeking him out in order to enquire about the failure to repay their investments. He failed to take their calls and failed to respond to enquiries, whilst fobbing them off.

[31] Bush testified that when the payments were not forthcoming he asked the second defendant for a meeting at the latter's office, which request the second defendant refused although the second defendant then agreed to meet at a restaurant in Fourways. After this meeting the first defendant repaid R50 000,00 to Bush into his bank account. Bush too was unimpressed, or as he said, he was horrified when he was offered properties instead of repayment of his capital and the full interest. He said that the allegations made by the second defendant that he had paid a deposit '*on the purchase of a property*' was a complete and utter fabrication by the second defendant. At some stage the first defendant also advanced money to Rogers and it was taking steps against Rogers. Rogers approached Bush with an acknowledgement of debt in favour of Bush and a draft letter to sign. The

letter requested the second defendant to cease taking steps against Rogers. Bush obtained legal advice and accepted the acknowledgement of debt and signed the letter as he was desperate for income and this would give him an additional income of R3 500.00 per month.

[32] During March 2008 the first defendant paid an amount of R117 172.60 to Bush. This was exactly a 3% return on his investment for the period December to June. It is to be noted that this amount which was paid to Bush was indeed paid into his account at Fourways, within this Court's area of jurisdiction. Bush further testified that Rogers was earning a commission from the second defendant and was acting as agent for the second defendant. The payment of a 1% commission to Rogers was also shown to have been made by the first defendant.

[33] Bush also stated that the version of the defendants, as contained in the plea and affidavit resisting summary judgment, was completely untrue and a fabrication. During the cross-examination of Bush it was stated that the second defendant explained two ways of making investments. One was a scheme of investing in property and the other was by supplying bridging finance. The witness denied this and reiterated that only bridging finance was discussed. Significantly, this version was never put to Beevers or Passmore, which leads to an inevitable conclusion that the defendants fabricated this version as the trial proceeded whilst they realised that the first investment by Bush was categorised by the defendants themselves as a bridging finance

deal. In addition, the second scheme was not an investment in property but an alleged investment in the Company.

[34] Eventually, after the plaintiffs formed the view that second defendant was avoiding them, they visited their attorney to obtain legal assistance. From the outset the attorney wrote to the second defendant and required information regarding the bridging finance deals of the plaintiffs. The second defendant replied to the inquiry but now inserted the subject-matter as '*investment in immovable property*' instead of the '*bridging finance deal*' which Mr Warrener, the attorney of the plaintiffs, had commenced the correspondence with. This was clearly an attempt to stay away from bridging finance and to lure the plaintiffs into a situation where the discussion was about investment in immovable property, the defence which the defendants have now raised. Once the attorney for the plaintiffs did not receive the documents requested from the defendants, a demand was sent out on 26 January 2009. The demand is clear in its terms: according to the plaintiffs it was recorded that:

> '*Our abovementioned four clients were introduced by you to an investment scheme. You assured our clients that their money would be deposited into your trust account and thereafter, and at all times material thereto, sufficiently secured to the extent that it would be repayable upon demand or at fixed and predetermined dates, but not exceeding a maximum period of four months at a time.*'

This means nothing more than an advance that must be repaid. In a letter dated 6 February 2009 the second defendant said as follows:

> '*The relationship between your clients, the BJK Property Group and me does not accommodate these notions. The agreement in place between the parties is, inter alia, that your clients would advance monies to the B J K Property Group by paying same in B J Kruger Inc's trust account …*'

[35] Having regard also to the plea and affidavit referred to above it is clear that there is no real dispute that the plaintiffs advanced monies. The only dispute raised by the defendants is to whom the advances were made. On the evidence of the plaintiffs, which I accept, the advances were made to the first defendant. See the definition of the word '*advance*' in the Concise Oxford Dictionary: '*hand over (payment) to (someone) as a loan before it is due*' and also '*amount of money advanced*'. Not even the defendants contend that these advances were not repayable. The defendants' stance is that the plaintiffs invested in property – a contention which I reject having regard to the totality of the evidence. I deal further with this aspect when I deal with the evidence of the second defendant.

[36] I have carefully observed each of the plaintiffs while testifying and although there may have been some answers to questions that they did not always directly and precisely supply, Beevers, Passmore and Bush appeared more advanced in years and were subjected to fairly lengthy cross-examination.

[37] Having regard to the fact that the plaintiffs testified about occurrences three years prior to the trial, there can be no criticism levelled against them for not remembering a number of smaller details precisely. There is no reason why I should not accept the evidence given by the plaintiffs. *S v Film Fun Holdings (Pty) Ltd and Others*1977 (2) SA 377 (E) at 382H. The demeanour of the plaintiffs in the witness stand fully complied with the remarks of Krause J in *R v Momokela and Another* 1936 OPD 23 at 24 where he said:

> '*After all it is a common experience that the 'demeanour' alone of a witness is but an unsafe guide in ascertaining the truth, because the nervousness of an honest witness may create a bad impression, whereas the brazen and bold liar may easily deceive the observer into believing that the witness was telling the truth. In addition to the demeanour of the witness one should be guided by the probability of his story, the reasonableness of his conduct, the manner in which he emerges from the test of his memory, the consistency of his statements and the interest he may have in the matter under inquiry.*'

[38] Three of the plaintiffs thus corroborated each other regarding the agreement which they had entered into with the first defendant as represented by the second defendant i.e. that they would lend money to it for utilisation in lending transactions on the short term whilst the first defendant would secure the repayment of the their funds plus interest. There was no suggestion that the witnesses colluded to place the same version before the court or to falsely incriminate the defendants. Indeed, Mr Cohen, who argued the matter on behalf of the defendants, did not level any negative criticism against the evidence of any of the plaintiffs.

[39] The only suggestion of possible impropriety was made against Bush at the first hearing in that it was suggested that the document which he produced as being a hard copy of the power presentation given to him by the second defendant, had been tampered with and that it was not a true copy of the document which he received from the second defendant. The insinuation of any untoward conduct regarding the document was unreservedly withdrawn by Mr. Cohen, who appeared for the defendants at the resumed hearing. The evidence of Bush that the document which he received was the one testified to by him and contained on his computer, can thus not be disputed, nor did the second defendant explain where that document could have come from. Its only source, of course, was the second defendant. The significance of the

document is that it contains the logo of the first defendant and there is no reference to the Company at all. It is a further indication that there was no reference made to the Company or any investments into properties envisaged as the second defendant wished us to believe.

[40] The plaintiffs called a Mr Du Preez, the auditor of both the first defendant and the Company, as a witness. He testified that none of the so-called property investment transactions by the plaintiffs with the Company as alleged by the defendants appeared in the books of the Company and that there were no transactions recorded in the trust account of the Company. This evidence supports the improbability of the defendants' version that the plaintiffs invested in properties through the Company or that the defendant paid over money to the Company for investment purposes. It is, in my view, a fabrication by the second defendant.

[41] In addition, Mr Roos extracted the following evidence from Du Preez: he advised the second defendant that the Company could not receive the deposits invested by persons like the plaintiffs as it would be in contravention of FSB Act (Financial Services Board Act 97 of 1990); that deposits could be received in the first defendant's trust account and then paid to the Company. Since the case of *R v Perkins* 1920 AD 307 at 310 it has been trite that, in civil proceedings, a party cannot object to hearsay answers which it has elicited under cross-examination.

[42] Firstly, this is a very good reason why the second defendant would not have disclosed the receipt by the Company of the deposits for investment purposes. It would be illegal to receive deposits or at least, he was advised that to do so would be a contravention of the Financial Advisory and Intermediary Services Act 37 of 2002 (FAIS). Secondly, and not surprisingly, the second defendant contradicted this evidence of Mr Du Preez without his version being put to Du Preez. This telling piece of evidence which explains why a reference to the Company would have been avoided rather than disclosed, was, as was argued by Mr Cloete on behalf of the plaintiffs, dropped like a hot potato when it was elicited. It is another probability showing why the second defendant would not have advised the plaintiffs of the involvement of the Company as a contracting party. On the face of it, the second defendant was acting in contravention of FAIS and, as an attorney, should have known so by just glancing at FAIS. He would hardly have advertised this contravention.

[43] The version of the defendants has been referred to throughout this judgment and I need not repeat it in detail. It essentially was that the plaintiffs contracted with the Company and not with the first defendant. The second defendant testified that this was made clear to the plaintiffs at the power point presentation.

[44] During the first portion of the trial it was put to the plaintiffs that the document used at the power point presentation was not the document which was identified by them and which contained the first defendant’s logo only, but

that a different document, contained in the bundle of documents, was used. The latter document (the second document) contained the logo of RAET. When the trial resumed, however, it became apparent that the defendants made further discovery of an email to which it was alleged that an attachment, now produced a few days before the resumed hearing (more than two years later), was indeed the correct version of the power point presentation. No explanation was offered of what is to be made of the second document which was now abandoned but remained a document which was put to the plaintiffs as being the correct version of the power point presentation.

[45] The second defendant conveniently changed his version regarding the power point presentation to a third document, failing to explain how this came about and ignoring the fact that much emphasis was placed on the second document when the evidence of the plaintiffs was challenged during cross-examination. The second defendant will have me believe that he can produce documents as if it is a deck of cards, pick any document or card that suits him and I am to believe that that is the correct document or card. The wish of the second defendant is rather fanciful and strengthens my view that he is a wholly unreliable and untrustworthy witness who fabricated evidence to suit his proposes as the trial progressed.

[46] It was put to Beevers that the first document was not a true copy of the power point presentation. The reason is obvious, the document contains the logo of the first defendant only. The second document which it was said is the correct version, contains the logo of RAET only. Despite the clear assertion to

Beevers that the second document was the only document ever to exist, a new version containing both the logo of the first defendant and RAET, was suddenly produced at the resumed hearing. The evidence of Beevers was also that he would never have put money into a scheme if RAET had an interest in it as he has a very negative perception of Rogers as a businessman.

[47] It is also significant that not one of the three documents refer to the Company as an interested party. Having found the second defendant to be inventive in his evidence, it leaves me no doubt that the document produced by Bush as being the hard copy of the power point presentation supplied to him, is indeed the correct version. It, like the other documents, supports the evidence of the plaintiffs; it refers to an investment opportunity; it refers to the involvement of the first defendant and there is no reference whatsoever to the Company. It records as follows on page 3:

> '*What you ear, when and how*
> *All investments are based on specific opportunities*
> - *You receive 3% per month compound on your investment*
> - *In order to participate in each opportunity you will be given a summary of the deal which encompasses all the documents described in the previous slide*
> - *Basically we only advance to the borrower up to 50% of the equity in the property in question*
> - *Your investment is protected because the borrower actually completes a formal agreement of sale but is given the opportunity to cancel the sale upon payment of the loan amount plus a cancellation fee from which you receive your initial investment back plus interest*
> - *Each opportunity has a specific duration which is typically 4 months but may vary*'

The important issue is that the first power point document contains only the logo of the first defendant.

[48] This does not in anyway suggest that the plaintiffs would have the opportunity to rather take transfer of property as the second defendant testified, which I found to be highly improbable for persons who were seeking short term investment opportunities. During his evidence the second defendant (albeit with some initial reluctance) agreed that the idea behind the scheme was indeed a short term investment for investors to earn a high return and receive their money back plus interest (this is quite opposite to the extensive plea regarding investment in property). The other strategies, such as the acknowledgment of debts obtained from the persons who were in need of funds and the signing of agreements of sale of their properties, were purely back-up procedures which, should the borrowers fail to repay the monies lent to them, would be utilised to secure repayment. Although these procedures were partially set in place by the defendants, I find as a fact, that it was not disclosed to the plaintiffs as being the nature of their investments. In addition, the second defendant's evidence could not show how these alleged agreements between the plaintiffs and the Company came into existence. He was at a loss to explain the terms of the agreements and continuously relied on the power point presentation which was held prior to any agreements being entered into. The second defendant had to admit that some of the so-called terms of the agreement, as alleged by him, were not correct but were also never implemented. The non-implementation of these terms, in my view, supports the plaintiffs that these terms were never discussed, negotiated or agreed upon. It appeared that the second defendant and the first defendant pleaded terms which, on the evidence of the second defendant, were not

terms between the parties at all. Such terms, as pleaded would accordingly be false.

[49] The care which Mr Roos took when cross examining the plaintiffs appear from the following paragraph as put to Mr Beevers in cross examination:

> '*What is envisaged in this first paragraph Mr Beevers is an investment into a scheme which in turn will invest in certain deals and repay after four months or in four months and the money could then be reinvested through the scheme into other deals if you chose to do so. That is all I am putting to you. That is what the words say.*'

Nothing is mentioned of the Company.

[50] The probabilities are further strengthened in the plaintiffs favour by the confidentiality agreement which the second defendant required them to sign. He required of each of the plaintiffs to sign a document called an 'Agreement of Confidentiality' between the plaintiffs and the first defendant. The document contains the first defendant's logo. There is no reference to the Company in it and one would have thought that it, as the investing entity, would require protection and not the first defendant who only acted as conduit for the funds and as an attorney. The document belies the defendant's version that the Company was the party who contracted with the plaintiffs. Although counsel for the defendants cross-examined Beevers extensively in an attempt to show that the confidentiality agreement also applied to other entities within the BJK Group (as opposed to the Company), the second defendant did not testify that the confidentiality agreement is anything another than what is purports to be i.e. an agreement between the first defendant and each of the respective

plaintiffs. One is at a loss why time was spent in cross-examination regarding this issue.

[51] After the plaintiffs advanced funds, a summary of investments was sent to each plaintiff. It is a summary supplied by the first defendant on its letterhead, containing the first defendant's particulars, reflecting the advances and interest to be earned as described by each plaintiff. It refers to the different plaintiffs as '*Investor*' and sets out particulars of an '*Investment Account*'. There is no reference to the Company at all and it is clear that the investment was made with the first defendant. Although it was put to Beevers that the second defendant would testify that Rogers generated the document without authority, he never testified. Despite this, Rogers advised Beevers that the second defendant had found some calculation error in the document and that the second defendant would send a new corrected document. Such new document was indeed sent to Beevers some time later. The dishonest attempt by the defendants when cross-examining Beevers by suggesting that the documents were sent without authority, becomes clear. I was to the avoid the clear impression created by the documents that it emanated from the first defendant and set out the investors position *vis-a-vis* the first defendant with no reference to a Company. They forgot that a second, corrected document was sent. The evidence that such a second document was sent is undisputed. The attempt to avoid the document must fail.

[52] In a letter (email) dated 28 July 2008 signed by the second defendant on behalf of the first defendant, it is said:

> '*The instruction from John indeed came through not to reinvest the moneys and we will immediately pay the money over to you as soon as the client pays over the monies into our trust account. This unfortunately has not happened yet and we are in the process of selling the properties to recover our money. Your interest will keep on running until transfer of the properties takes place. I will immediately advise as soon as the properties in question has been successfully sold and thereafter transferred.*'

It is clear that the party ('*we*') who will pay over the money is the first defendant. The entity receiving money from the borrower was the first defendant, not the Company. The entity ('*we*') who was selling the property was the first defendant in order to recover the money of the first defendant ('*our money*'). Again the alleged investment by or of the Company is a fiction. I have referred to a few documents, but there are a large number of them that support the involvement of the first defendant as the receiver of the funds from the plaintiff in order to on-lend it to third parties.

[53] A blatant untruth contained in the defendant's pleadings and affidavit resisting summary judgment is the following: the defendants pleaded and alleged that all monies were paid to the first defendant as conduit; that the first defendant held the monies until the Company called for it when the first defendant would pay out such sums to the company for it to invest. It was pleaded that *'…the full amount received by the first defendant from the first plaintiff was paid out to the BJK Property Group in terms of the agreement*' and '*The defendants plead that the first defendant paid the amounts received from the first plaintiff to the BJK Property Group in terms of the agreement pleaded above…*' Similar allegations were made regarding each plaintiff. It is common cause that no funds were ever paid out to the Company. The pleading is untrue and casts doubt as to the existence of the agreement as

alleged by the defendants. The version that the Company was the contracting party is a fabrication by the defendants.

[54] The second defendant testified that he advised the plaintiffs that they would not be involved in 'normal bridging finance' but that they will be investing in immovable property. I have already stated that persons looking for short term investments would have taken flight from the power point presentation at that time had it been so explained. He stressed that the role of the Company as recipient of the funds and investor in property was elaborately explained to the plaintiffs. I have referred to the fact that the documents, whether the first, second or third power point representation, made no reference to the involvement of the Company at all. The second defendant testified that a set of documents referred to as the 'PIEK' documents were at hand during the power point presentation and the process of investing in property was explained by referring to the PIEK documents as an example. Although reference to a bundle of documents was made to Beevers, the fact the PIEK documents were produced during the power point presentation was not put to either Bush or Astrup during their cross-examination. These documents relate to bridging finance and not to investment in property.

[55] The second defendant, the only witness who testified on behalf of the defendants, failed to impress as an honest and reliable witness. He failed to answer questions directly and not only does his version fly in the face of probabilities that exist on the undisputed facts, he had to be reminded on a

number of occasions that he had to answer the questions directly and not to digress into irrelevancies. Simple questions were not answered.

[56] I have in some instances referred to some of the deficiencies in the evidence of the second defendant when I referred to the evidence of the plaintiffs. I do not repeat them but supply further reasons for coming to the conclusion that the second defendant was a wholly unreliable and untrustworthy witness.

[57] There is also his failure to call Rogers as a witness, who was available to back up his version. In the circumstances, it can safely be assumed that this failure is a result of the fact that Rogers would not have supported the version given by the second defendant. Rogers acted as canvasser to attract participation in the scheme and acted also on behalf of the defendants in doing so. He was actively assisting the second defendant. He wrote letters, albeit to on behalf of RAET, but these letters confirm his close involvement with the other defendants and the investment scheme.

[58] There are further facts from which probabilities are apparent or which indicate that the version supplied by the second defendant must be rejected. Rogers represented RAET as well as the second defendant. It is clear that the defendants failed to distinguish between the first and second defendants, RAET and others but that the defendants are now raising the different entities in order to attempt to dilinear their different functions. In that sense, Rogers as interested person in RAET, assisted and acted and represented the

defendants in conducting commercial deals with the plaintiffs. Indeed Mr Cohen, during argument, conceded that the defendants do not take issue with what was said and done by Rogers.

[59] The second defendant would have the court believe that he explained the investment into property fully to the plaintiffs. Had he done so, and referred to the role of the Company, the plaintiffs, who were interested in short term investments, would have realised that, once a deal was put together, they would have absolutely no security for their funds whatsoever. The only beneficiaries (had the deal with the Company been explained), would have been the borrower and, in the event of default, the Company of which the second defendant was the sole director and shareholder. The plaintiffs would have a right of action against the Company. They would have no security for the return of their funds and interest. I find it highly improbable that the plaintiffs would have invested in such a speculative and risky investment, had it been explained to them. Indeed, the version put by Mr Roos to Beevers i.e. that he would be investing in property, was not true. The plaintiffs would not have invested in property, even on the defendants' version which was that the plaintiffs invested in the Company, the latter which intended to do business deals relating to property.

[60] According to the second defendant, he explained to the plaintiffs that, should the borrowers default, they would become involved with the Company and partake in the management thereof as far as the acquisition of the properties were concerned. The version is belied by the fact that the plaintiffs

were never invited to participate in the management of the affairs of the Company when the borrowers did default. Nor did they have anything in writing that would entitle them to participate in the management of the Company of which the second defendant was the sole director and shareholder. If indeed the plaintiffs had been told of this right, it is inexplicable why the second defendant did not invite them to participate in the management of the affairs of the Company when the borrowers defaulted. It too, is indicative that the plaintiffs were never told of this so-called right.

[61] What is really astounding is the evidence of the second defendant that, despite the detailed business agreement entered into between the plaintiffs and the Company, which would result in the Company obtaining a 20% interest and the plaintiffs 80% interest in the properties, should the Company acquire such properties, the second defendant offered the entire property in a 100% share to the plaintiffs, contrary to the alleged agreement. This would obviously be to the detriment of the Company and its shareholder. Again, as in so many instances, the actions of the second defendant were contrary to what the alleged agreement was. As actions speak louder than words, I am of the view, that this conduct shows that the rather elaborate agreement alleged by the second defendant to have existed between the plaintiffs and the Company, never existed. The second defendant's actions were contrary to such alleged agreement and in my view, refute the existence of any agreement between the plaintiffs and the Company. The external manifestation of the agreement, which support the plaintiffs' version, is

destructive if the defendants' version. The defendants' counsel, correctly in my view, conceded that:

> '*On a conspectus of the evidence, the primary intention behind the plaintiffs depositing money into the trust account of Inc was to get their money back within a short period of time after having made money by interest being paid to them at 3% per month for a period of somewhere between four to five months.*'

Such intention was naturally based upon what the second defendant had told them at the power point presentation.

[62] Once it became clear that the first defendant was not going to repay the monies advanced by the plaintiffs, correspondence was exchanged. It is significant that the so-called involvement of the Company is not initially disclosed. If regard is had to the various letters written by the second defendant on behalf of the first defendant, the non-existent role of the Company becomes more apparent. An example is the letter written by the defendants on 31 March 2008 to Beevers. The letter is on the first defendant's letterhead and is addressed to Beevers. It requires the deposit which is to be invested, to be paid to the first defendant. It states: '*We thank you for your assistance herein.*' There is no reference that the letter is written on behalf of the Company. It is clear that the first defendant acted as principal. As was the case of the letter that emanated from the first defendant, the defendants continued to give the impression that the first defendant was the principal. As an example, in a letter of 8 July 2008, the second defendant, on a letterhead of the first defendant, records as follows:

> '*I trust that you are well. I have to report on two matters namely VAN011 and JOL003. In both instances the transaction was not cancelled (i.e. the deposit paid was not refunded) and we therefore have to proceed to sell the properties. In the first instance the due date for payment was 30th June 2008*

> *and we have already instructed agents and auctioneers to proceed with the sale. There is a good possibility that funds will be received from a major business transaction in the first week of August and obviously if the full amount is paid, only then the sales process will stop.*'

Again, he was not writing on behalf of the Company but on behalf of the first defendant. So he also wrote on 28 July 2008:

> '*The instruction from John indeed came through not to re-invest the moneys and we will immediately pay the money over to you as soon as the client pays over the monies into our trust account. This unfortunately has not happened yet and we are in the process of selling the properties to recover our money. Your interest will keep on running until transfer of the properties takes place. I will immediately advise as soon as the properties in question has been successfully sold and thereafter transferred.*'

A large number of letters in a similar vein exists. They refute any involvement of the Company. There is a notable absence of documents which one would have expected to find at a company which was receiving funds and paying them out.

[63] The so-called full disclosure made by the second defendant during the power point presentation, also lacks credibility as a result of his non-compliance with what he alleged he would do in cases where investments in property by the Company would occur. The second defendant testified that he fully complied with his undertakings, in particular by adhering to the process as explained by him to the plaintiffs: that is to ensure that the following documents are all in place before an investment in property would be made:

> '*Process from an investment point of view*
>
> *Section 20/OTP*
>
> - *Agreement*
> - *Special power of attorney*
> - *Cancellation agreement*
> - *ID/FICA*
> - *Rates and taxes*
> - *Cancellation figures*

- *Solvency affidavit*
- *Formal sworn valuation*
- *Deed search*
- *Acknowledgment of debt*
- *Statement of assets and liabilities*
- *Income and expenses*
- *Sect. 20 Recordal*
- *Compliance with all relevant legislation.*'

It is common cause however, that the defendants failed to obtain or complete a large number of the documents in each transaction. I draw the inference that the second defendant never undertook or explained to the plaintiffs that he would obtain such documents with the result that there was no need to comply with his so-called obligations as it was never conveyed to the plaintiffs that there would be such compliance.

[64] In all the circumstances I find that, whatever the manner in which the second defendant structured the scheme which he and Rodgers pursued, the plaintiffs were advised that they would lend money to the first defendant, there being no difference between it and the second defendant attorney, as far as they were concerned and the defendants would then lend the money to third parties by way of bridging finance. The defendants further undertook that the monies lent by the plaintiffs would be repaid with compound interest of 3% per month within a relatively short period of time of approximately 4 months by the first defendant.

[65] The first defendant failed to repay the amounts lent to it by the plaintiffs and the plaintiffs are entitled to judgment in their favour. The parties agreed that the costs are to follow the event.

[66] The defendants pleaded that this Court has no jurisdiction to hear this matter as the agreements contended for by the plaintiffs had to be performed in Pretoria through the bank account of the first defendant at Pretoria. This matter was argued before me at the outset of the hearing – not as a special plea but on the basis that there should be a separation of the issue of jurisdiction from the remainder of the issues in terms of the provisions of Rule 33(4) of the Uniform Rules. The ruling given by me gave the reasons why the instruction for payment in Pretoria is irrelevant to the fact that the payment had to be effected in the bank accounts within this Court's jurisdiction. I do not repeat my judgment refusing the separation of the issue which was given at the outset of the hearing. The evidence of Beevers regarding the payment in Johannesburg was not challenged. Passmore testified that the plaintiffs' money was to be repaid electronically into the plaintiffs' accounts. This was not challenged. The evidence of the two other plaintiffs who testified that the repayment had to occur in Johannesburg was similarly left unchallenged. There is consequently no reason not to accept that the repayment would have occurred within this Court's area of jurisdiction. Indeed payments which the first defendant did make to Bush were made into his account in Johannesburg. It has not been suggested by the defendants that payment to the plaintiffs would have had to be made at any other place. The fact that the defendants were required to make payment into the accounts which are within the court's area of jurisdiction was said to be irrelevant as, it was argued, payment occurs when the instruction for payment is given by the defendants in Pretoria. For this proposition Mr Roos relied on *Salmon v Moni's Wineries*

Ltd 1932 CPD 127 and *Blumberg v Sauer* 1944 CPD 74 as well as *Buys v Roodt (nou Otto)* 2000 (1) SA 535 (O). However, all three these cases dealt with cheques and the place of payment being where the cheque was payable. See the *Buys* matter *supra* at 540I. This is to be distinguished from payment "*into an account*" as testified by the plaintiffs. The cases based on cheques are distinguishable from the present matter where payment into bank accounts within the court's area of jurisdiction, was required. See *Coloured Development Corporation Ltd v Sahabodien* 1981 (1) SA 868 (C); *Venter v Venter* 1949 (1) SA 768 (A); *Vereins-Und Westbank AG v Veren Investments and Others* 2002 (4) SA 421 (SCA).

[67] I agree with the argument of Mr Du Toit that an act of effecting electronic transfer in Pretoria does not in itself constitute payment. It is the receipt of money in the bank account of the recipient that would constitute payment. Mr Roos referred to Pollak on *Jurisdiction* at pages 64 to 65 and in particular to the matter of *Veneta Mineraria Spa v Carolina Collieries (Pty) Ltd* 1985 (3) SA 633 (D) where it was said at 643B-D:

> '… *it is well established that for breach of contract a plaintiff <u>may</u> sue in the Court of the place where the contract was entered into, the forum contractus , which in the wide sense is understood to include the place where the contract is to be performed. … In Frank Wright (Pty) Ltd v Corticas "BCM" Ltd at 463 it is pointed out that, when the place of performance is relied upon for jurisdiction,*
>
> > *"the breach in respect of which the defendant is sued must be a breach of a duty which he was bound to perform within the jurisdiction" …*'

The passage supports the case for the plaintiffs. I am of the view that payment by electronic transfer can only occur when the party entitled to

receive such payment receives it in his bank account. If the duty is to pay over so that the recipient can have access to the funds in his own account, a failure to do so is a failure which occurs in Johannesburg i.e. within the area of jurisdiction of this Court. There is consequently no merit in the plea. Mr Cohen did not persist with the argument regarding a lack of this court's jurisdiction, and the plea falls to be dismissed.

[68] In all the circumstances I grant the judgment in favour of:

68.1 The first plaintiff against the first and second defendants jointly and severally for:

68.1.1 Payment of the sum of R1 902 345.30;

68.1.2 Payment of the interest on the sum of R1 500 000.00 at the rate of 3% per month compounded monthly from 29 November 2007 to 10 January 2008;

68.1.3 Payment of interest on the sum of R2 150 000.00 at the rate of 3% per month compounded monthly from 11 January 2008 to 17 March 2008;

68.1.4 Payment of interest on the sum of R2 032 827.40 at the rate of 3% per month compounded monthly from 18 March 2008 to 24 June 2008;

68.1.5 Payment of interest on the sum of R1 952 345.21 at the rate of 3% per month compounded monthly from 25 June 2008 to 1 December 2008;

68.1.6 Payment of interest on the sum of R1 902 345.21 at the rate of 3% per month compounded monthly from 2 December 2008 to date of final payment.

68.2 The second plaintiff against the first and second defendants jointly and severally for:

68.2.1 Payment of the sum of R1 400 000.00;

68.2.2 Payment of the interest on the sum of R1 000 000.00 at the rate of 3% per month compounded monthly from 11 January 2008 to date of final payment;

68.2.3 Payment of interest on the sum of R400 000.00 at the rate of 3% per month compounded monthly from 14 April 2008 to date of final payment.

68.3 The third plaintiff against the first and second defendants jointly and severally for:

68.3.1 Payment of the sum of R350 000.00;

68.3.2 Payment of the interest on the sum of R350 000.00 at the rate of 3% per month compounded monthly from 11 January 2008 to date of final payment.

68.4 The fourth plaintiff against the first and second defendants jointly and severally for:

68.4.1 Payment of the sum of R940 000.00;

68.4.2 Payment of the interest on the sum of R500 000.00 at the rate of 3% per month compounded monthly from 11 January 2008 to date of final payment;

68.3.3 Payment of interest on the sum of R440 000.00 at the rate of 3% per month compound monthly from 31 May 2008 to date of final payment.

68.5 In addition, the first and second defendants are ordered to pay the costs of all four the plaintiffs. The costs are to include the costs of two counsel where two counsel were employed, one of which is a senior counsel.

[69] I request the Registrar of this Court to forward a copy of all documents that served before this court and this judgment, to the Law Society of the Northern Provinces as well as the Financial Services Board.

WEPENER J
JUDGE OF THE HIGH COURT

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DATES OF HEARING: *16 - 22 November 2010*

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DATES OF HEARING: *28 - 31 January 2013*

DATE OF JUDGMENT: *8 February 2013*