IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE HIGH COURT/CAPE TOWN)

Case Number: 11191/2012

In the matter between:

Hans-George Baur **Applicant**

And

Philip Frhr. Von Bodenhausen **Respondent**

JUDGMENT DELIVERED ON FRIDAY 21 SEPTEMBER 2012

Baartman,J

[1] This is an application for summary judgment. It was common cause that on 30 June 2011, the parties had entered into a loan agreement pursuant whereto the applicant, as lender, had on 15 and 19 November 2010 .and on 2 December 2010 paid into the account of Euro Centre Investments CC, at the time trading as Cape Invest **(Cape**

Invest), amounts totalling R467 500. The respondent had nominated that account for payment in the loan agreement.

[2] The applicant alleges that R452 500 was due. The respondent; admits the contract and the outstanding amount but alleges that the amount was due by Cape Investment rather than by him. I deal below with the largely common cause background and the circumstances that gave rise to the respondent's denial of liability,

BACKGROUND

[3] On 10 November 2010, the applicant and: the respondent entered into a written agreement from which the following appear:

> ***"LOAN AGREEMENT***
>
> *The following loan agreement is entered into Between*
>
> *Hans - George Baur*
>
> *BoskloofEco Estate*
>
> *Sandstone Drive Somerset*
>
> *West South Africa Permanent*
>
> *Resident*
> *(lender)*
>
> *And*
>
> *Philipp Baron van Bodenhausen ID[6……]*
>
> *Hillcrest RD.*
>
> *7130 Somerset*
>
> *-hereinafter referred to as the borrower- For an*

amount of ZAR 500 000, —

On the following conditions:

1. Basis of Contract and Loan

The loan serves as a bridging loan until 30 06 2011. The loan is a private loan.

On this basis, the lender grants the borrower a loan of ZAR 500.000.00. The value date of the value is the lender's transfer date, which will be transmitted to the recipient as a copy.

Account holder:

Cape invest

First National Bank

Branch Code: [2………]

Branch Code: [6……]

Note: Private investment"

[4] The respondent alleged that the parties intended for Cape Invest to be the borrower not him. Conversely,, the applicant alleged that the parties' intention was that which is

apparent from the contract. The process of interpretation of a contract starts with assuming that the parties to the contract had expressed their intention through the particular words employed in drafting the agreement.

(a) It follows that where the words used are clear and unambiguous, a court need look no further for the intention of the parties. (See **Scottish Union & National Insurance Co Ltd v Native Recruiting Corporation Ltd** 1934 AD 458 and **Coertzen** v **Gerard No and Another** 1997 (2) SA 836 (O)).

(b) In addition, the words employed in the contract must also be given their ordinary, grammatical meaning. (See **Aegis Assuransie Maatskappy Bpk v Van der Merwe** 2000 1 All SA 420 (T) and **Jonnes v Anglo-African Shipping Co** Ltd 1972 (2)

[5] I have applied the above process to the contract at issue in this matter and am of the view that there is nothing ambiguous in the language used in the contract. The terms are clear. It follows, as is apparent from the contract, that the respondent is the borrower and therefore the person indebted to the applicant.

[6] The intention of the parties to the contract also appears from the "Promissory Note" signed; simultaneously with the loan, agreement. The parties to the "Promissory Note" are the same as. Those to the loan agreement and the respondent is identified as the borrower who:

> *".. .Owes to the lender an amount of 500. 000, --ZAR...*
>
> *The claim is based on the following reason:*
>
> *X private loan"*

[7] The respondent as borrower further, per the "Promissory Note", undertook to repay the amount borrowed " ...by not later than 30 06 2011" In my view, the plain grammatical meaning of these 2 documents excludes the interpretation the respondent has sought to place on the agreement. The respondent is presumed to

have been familiar with and to have assented to the terms of the contract he entered into. (See **Bhikhagee v Southern Aviation (Pty) Ltd** 1949 (4) SA 105 (E)) Furthermore, the respondent does not allege that the applicant had misled him in any way. It follows that this defence is not *bona fide.*

[8] [The respondent nominated the bank account of Cape Invest as the account into which the amount borrowed must be paid. The applicant complied. It follows that the respondent's reliance on the *beheficium non numeratae pecuniae* is not *bona fide.*

[9] The respondent has indicated that Gape Invest is in liquidation and that he now seeks an opportunity to join the liquidator appointed in the liquidation to these proceedings. The respondent intends to rely on his right of *"beneficium de duobus vel pfuribus reis debendi".* However, Cape Invest was not a party to the agreement and no rights or obligations accrued to it. This defence is not open to the respondent because Cape Invest is not a co-debtor.

CONCLUSION

[10] I, for the reasons stated above, make the following order:

(a) Summary judgment is granted in terms of prayers a, b, c, d, e and f of the Notice of Motion.

Baartman, J