

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA



24/2/2017

Case Number:

55860/10

56219/10

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: YES / NO.

(2) OF INTEREST TO OTHER JUDGES: YES / NO.

(3) REVISED

24/2/2017

DATE

SIGNATURE

55858/10

In the matter between:

BMW FINANCIAL SERVICES (SA) (PTY) LTD

PLAINTIFF

and

FINLAY, SEAN ALISTER
TABATA, DUMISANI DUMEKHAYA
PASCOE, JOHN LEVALLON
TWO SHIPS TRADING 148 (PTY) LTD
AMABUBESI MOTOR TRADING GROUP (PTY) LTD

1st DEFENDANT
2nd DEFENDANT
3rd DEFENDANT
4th DEFENDANT
5th DEFENDANT

Coram: HUGHES J

JUDGMENT

HUGHES J

INTRODUCTION

[1] The Amabubesi Motor Trading Group (Pty) Ltd (the Motor Group) is made up of three companies carrying on the business of motor vehicle dealerships which shareholding composition consisted of the second defendant, Mr Dumisani Tabata, holding 6%, the fifth defendant, Amabubesi Investment (Pty) Ltd holding 49% and Padix 4 (Pty) Ltd with a 45% shareholding.

[2] The third defendant, Mr John Pascoe (Pascoe), and a Mr Roger Dixon (Dixon) were shareholders of Padix 4 (Pty) Ltd. Mr Dixon practised as an attorney since as far back as 1978. Both he and Mr Pascoe had gained experience as motor vehicle dealers having traded as such at BMW Umhlanga dealership for many years. The second defendant, also an attorney by profession, joined the Motor Group in 2006 by way of his motor dealership, Amanzimtoti Ford and Mazda.

[3] The plaintiff, BMW Financial Services (SA) (Pty) Ltd (BMW), provided credit to the Motor Group to buy and sell motor vehicles. The credit facility agreements are referred to as floorplan agreements. According to these agreements BMW will retain ownership on the vehicle on the dealers trading floor until paid and the dealer would be responsible to pay interest and finance charges on the credit facility provided by BMW. The first, second and third respondents signed suretyship agreements for the credit facility provided to the Motor Group.

[4] Mr Clive Steyn (Steyn), the then Commercial Finance Manager of BMW, was the facilitator of the floorplan credit facility of R26 million offered to the Motor Group. The terms of the floorplan agreements included, but not limited to, BMW obtaining personal sureties from the shareholders of the Motor Group and a cross company guarantee from the then Amabubesi Motor Trading Group (Pty) Ltd, now known as the Motor Group. Though the personal sureties were obtained the guarantee was never obtained.

[5] By agreement between the parties, the case before me only involves the suretyship agreements signed by the second respondent, Mr Dumisani Dumekhaya

Tabata (Tabata). The matters involving the other two respondents, Mr Sean Alistair Finlay (Finlay) and Pascoe, will be dealt with separately and not in the current case.

[6] Both Dixon and the second respondent testified in the case of the second respondent. Mr Dixon testified that Amabubesi Motor Group sought to sell its shares to Vuwa Investments (Pty) Ltd (Vuwa). The deal was structure in such a way that the second respondent, Dixon and Pascoe purchased interest in Amabubesi Investments (the majority shareholders in the Motor Group) and sold these share onward to Vuwa. In doing so release figures were required from creditors who held suretyships in Amabubesi Investments. According to the sales agreement of the shares the Dixon and Pascoe were the responsible persons tasked to obtain release figures for the surety's held by Amabubesi Investments.

[7] Dixon testified that in order to obtain the release figures for these suretyships he wrote to Wesbank, Standard Bank and BMW attaching the sales agreement and requested the release figures. He attached the agreement as one of the suspensive conditions was that the release figures be obtained. In response, and after an addendum was made to the sales agreement, to grant an extension of time, he obtained figures from Wesbank and Standard bank. However, none was forth coming from BMW.

[8] The request of 9 May 2007 was along the following line:

"RE: SALE BY VUWA INVESTMENTS (PTY) LTD & DUMISANI TABATA TO PADIX INNVESTMENT 4 (PTY) LTD & ALISON BECK OF 55% OF VUWA MOTOR GROUP

Herewith a copy of the signed agreement relating to the abovementioned transaction.

You will note that your consent to the release of Vuwa Investments (Pty) Ltd and/or Dumisani Tabata by not later than 28th May 2007 is a precondition.

We would appreciate it if you would advise us of your requirements with a view to securing the necessary releases by not later than the 28th May 2007 deadline."

[9] Dixon's evidence is that he did not anticipate any difficulties in obtaining the releases from the creditor, the aforesaid sale was to the advantage of the creditors as the dealership was "*struggling*" and "*its cash flows were at times critical*". in addition it was a material term of the sale agreement that "*Padix will extend to such creditors its own guarantee/s in substitution for those executed by Vuwa and/or Tabata if so required by the creditors.*" thus Dixon states that he was confident that they had alternative security to settle the creditors is so required.

[10] He also testified that a term in the sale agreement made mention that Vuwa and/ Tabata had executed guarantees/deeds of suretyship in favour of one or more or all of the following entities being Standard Bank, Wesbank and BMW. This is found in paragraph 8.1 of the agreement. He was adamant that he was not aware which institution did Tabata and or/ Vuwa had executed guarantees/deeds of suretyship in favour of.

[11] Dixon goes further to state that he followed up his written request with a telephone calls to all whom he had addressed requests. He states he is not sure of the date as it took place nine years ago, but this would have been shortly after his written request. He spoke to each one of those whom he had written to. At Standard Bank he spoke to Russell Parkinson, at Wesbank, J C Peters and at BMW Clive Steyn.

[12] The telephone call to Clive Steyn is disputed by the applicant, BMW, and Steyn. Dixon's testimony is that he had a short conversation with Clive Steyn who advised him that no suretyship's existed for Vuwa or Tabata and he accepted this information as there was no reason to disbelieve Steyn. He was at pains to explain that the telephone calls were made to speak specifically about the request of the suretyships or guarantees as he was eager to start the process as quickly as possible, as the equity capital injection was coming from another company being Treacle. Following on the telephone calls made, he informed Tabata as it was '*a condition precedent to the contract that I have him released.*' When asked what did he tell Tabata, Dixon testified that '*I told him that there were no suretyships in place for him or Vuwa with BMW Financial Services, that I'd been so advised by Mr Steyn and that therefore it was just one hurdle out of the way.*'

[13] Dixon further stated that two addendums were affected to the agreement until the releases were obtained as such the last addendum was para 1.3 which reads as follows: *'The consents and releases referred to in clause 8 and 9 and the conditions attached to such consents and releases have been secured and the sale contract is consequently unconditional.'* The clause mentioned were those referred to in respect of obtaining the suretyships and guarantees.

[14] Dixon concluded that he provided a letter to both Tabata and Mr Ngcuka who were selling their shares as to the status and progress of the transaction on 28 July. In that correspondence no mention is made of BMW and when asked why this is so he responded as follows: *'... [It] was not an issue in my life. I'd been informed that there were no suretyships and I've moved from that moment.'*

[15] Tabata testified that Dixon reported to him that BMW Financial Services had informed him *'that there were no suretyships for me and Vuwa Investments'*. This information came to light after 8 May 2007 but before 28 May 2007 and he had no reason to disbelieve it as *'I (he) was uncertain at the time, about whether I (he) had signed a suretyship and for which of the entities...finance houses that were listed. I (he) wasn't certain which one held my suretyship and which one held Vuwa Investments suretyship.'* He goes on further to testify that *'...from the time I was informed about this representation, by the plaintiff, the issue of a suretyship with BMW Finance for either myself or Vuwa investments was not an issue and I concluded the transaction on the basis that a suretyship did not exist, for myself and Vuwa.'*

[16] Tabata stated that on 12 October 2007 he signed the last addendum to the contract indicating that the releases had been secured and that the sale agreement was now unconditional. Following on this he wrote to Anthony Crane (Crane), an attorney responsible to make the pay-out for the sale of the shares advising into which accounts the deposits were to be made and that he should *'indicate when the releases from the securities will be available?'* Crane replied on 16 October 2007 advising that the payment in respective bank accounts were made and that *'As soon as I (he) received word from Padix Investments, I (he) will meet with them in order to exchange the release documentation for the share certificates and related documentation.'*

[17] Further, Tabata testified that after the sale was concluded he was happy that he was no longer involved in the dealership the financial institutions, Standard Bank and Wesbank, being satisfied that the new purchases could take over the sureties in place. However, this was short lived as in November 2010 his attorneys sent through a letter dated 10 November 2010 to the plaintiff's attorneys after they proceeded with an action against him, Dixon and Pascoe in three separate summons to recover on a suretyship he had signed. The import of the letter is set out below:

'I am instructed that during May 2007 Mr. Dixon, on behalf of the purchaser of Vuwa Investments' shares in the Company, requested whether any suretyships had been given on behalf of the Company in favour of your client by Vuwa Investments (Pty) Limited and/or Dumisani Tabata. He forwarded a copy of the sale agreement to your client and in terms of the sale agreement the sale was conditional on the release of Vuwa Investments (Pty) Limited and /or Dumisani Tabata from any suretyships that may have been given including any suretyship in favour of your client. Mr Dixon advises that he was instructed by your client that no suretyships had been given in favour of your client by Vuwa Investments (Pty) Limited and/or Dumisani Tabata. Relying on this representation an addendum to the sale agreement was signed confirming that the suspensive conditions had been fulfilled and the sale agreement in respect of the shares of Vuwa Investments to Padix and Mrs. Becks became unconditional and fully performed.

I confirm that I have entered an appearance to defend the action instituted against Dumisani Tabata and based on the above facts, taking into account your client's full knowledge of all steps of the transaction in respect of Zimindlela Motor Group (Pty) Limited, it appears to me unconscionable for your client to have instituted an action against Dumisani Tabata and, in any event, that your client would be estopped from making this claim.'

[18] To the aforesaid correspondence the plaintiff's attorney replied stating that they had informed their client of the issues raised and it had instructed them to deny the allegations advanced, as is set out above, and deny those allegation made in respect of their client. Lastly, they stated they were proceeding ahead with the action.

[19] Steyn in his testimony confirmed that he had received the request of Dixon as regard suretyships for Tabata and or/Vuwa. He then transmitted this email correspondence to Anne Humphries, who had taken over his department as from end of February 2007. He stated in the forwarding correspondence the following: *'Just when you thought you had enough work...This fax came today regarding the sale of shares in the Vuwa Group. Have fun'*. He explained that he said these states *'facetiously'* as he knew should not have fun as he stated *'...because I knew that these type of requests are complex and it would properly be quite the opposite as I knew Anne.'*

[20] He was adamant in his evidence in chief that he received no phone call from Dixon, in fact he stated that after he transmitted the correspondence to Humphries he did not hear anything internally or externally about it and *'as far as I (he) was concerned it was handled'*. He explained that the original suretyship agreements were kept in a walk in safe in a filing cabinet which housed the dealer files in alphabetical order.

[21] In cross-examination Steyn was at pains to explain that once he had passed the correspondence on, as it was no longer his area he did not follow up on it and even though he had consulted with Humphries and he had never asked what she had done with the request. Steyn explained that it was quite an extensive task to obtain release from ones suretyship and it involved interaction with legal department, local credit committee and if a decision was taken to release a letter would be sent out co-signed by the legal department and his department which was now headed by Humphries. This could take place by emails in the form of round robin discussion culminating in *ad hoc* meeting to discuss whether to release or not. The process take from a day if urgent to a week from whence the request was made. Lastly, when asked whether Dixon was making up the call he replied: *'I don't know. I think the contents of the call is probably more of an issue because I would not have just said there was no surety.'*

[22] During the course of cross-examination it came to the fore that Steyn had provided to the defendants the email request from Dixon, together with the email of his onward transmission to Humphries, only a week before the trial. When asked why this was so he stated:

“M’Lady, I was actually quite surprised in consultation with my legal team as to why it wasn’t already part of the documents before this, before last week. I raised it with my legal team in 2011 already if I’m not mistaken and it’s been part of the documents and then in consultation with them on Friday the 6th of May I think it was I. I referenced this letter because I remember the letter. I remember the detail of it and I remember me sending it on. So they didn’t have it so that’s when I asked them to please include it.”

Steyn confirmed when asked by the court that these emails were available to the plaintiff as far back as 2011.

[23] Steyn was questioned about the credit facility that was sought by the group, then known as the Zamindlela Motor Group, in 2008. In the credit facility application documents placed before the court, which were signed by Humphries, the commercial manager, the brief motivation to support the grant of the facility review advanced by Humphries, makes mention of other sureties but not that of Tabata. The only sureties which were record to be held by the plaintiff in these documents were that of Dixon and Pascoe. Steyn confirmed this, however, he did state that other sureties were also not mentioned and he further states that these comment in the review credit applications were those of the plaintiff. It was put to Steyn that the suretyship of Tabata is not mentioned in the aforesaid review documents because the plaintiff did not know it had the suretyship of Tabata. It was further put to Steyn that as there was no surety for Vuwa the must have assumed there was none for Tabata, hence the transmission to Dixon from Steyn that there was no suretyships for Vuwa and Tabata. Steyn denied that he advised Dixon that there was no suretyships and stated that he could not comment on what Humphries did as he was not there.

DUTY TO BEGIN

[24] The time old saying of ‘One who alleges must prove’ comes into play in this matter. Tabata acknowledged, rightly so I might add, that he had the duty to begin as he was the one who alleged estoppel and sought to be released from the suretyship with the plaintiff on the basis of the alleged representation made by Steyn.

THE SURETYSHIP AGREEMENT BETWEEN TABATA AND BMW

[25] It was argued by the plaintiff's counsel, Adv. Beckers SC, that the suretyship agreement between BMW and Tabata, precluded reliance on oral cancellation, revocation or withdrawal from the suretyship. He pointed out that this is clear from clauses 3.6 and 3.12 of the suretyship agreement. Adv. Beckers SC stated that as the representation made by Steyn is alleged by both Dixon and Tabata to have been made orally the second defendant could not rely on this representation in order to attain a release from the suretyship, as this is precluded from the suretyship agreement.

[26] For easy reference clause 3.6 and 3.12 are set out below:

"3.6 This suretyship is a continuing suretyship that shall remain of full force and effect, notwithstanding the fluctuation in, or temporary extinction of, the Customer's obligations to BMW Financial Services. This suretyship may not be withdrawn, revoked or cancelled without BMW Financial Services prior written consent.

3.12 This document was fully completed prior to signature by the Surety. The suretyship may only be amended or cancelled where such amendment or cancellation is reduced to writing and signed by the Surety and BMW Financial Services. BMW Financial Services shall not be bound by any undertakings, representations or warranties not expressly recorded in this document."

[27] I think it is also prudent to set out that pleaded by Tabata as regards the release :

"22.16 Between 8 and 28 May 2007, the plaintiff, represented by Mr Steyn, orally advised Dixon, that the plaintiff did not have a suretyship or guarantee executed by Vuwa or the second defendant (hereinafter referred to as "the representation").

22.18 Dixon informed the second defendant thereof, as the plaintiff must have contemplated would occur, and Dixon caused to be drawn up and signed, an addendum to annexure "H" which recorded inter alia that the second defendant had

been released from all the suretyships, and which the sellers and the purchasers accepted. A copy of the addendum is annexed ...marked "I".

RELEASE

22.19 In the circumstances, the plaintiff released the second defendant from the operation of the suretyship, alternatively, terminated it, alternatively is deemed to have done so.

[28] In addressing this line of argument advanced by the plaintiff I am guided by the dicta in the case of *Morgan and Another v Brittan Boustred Ltd* 1992 (2) SA 77 (A). In this case the clause which was under consideration was identical to clause 3.6 in the suretyship agreement between BMW and Tabata. See *Morgan at 782F-G*. In essence, Nestadt JA held, that this clause read with the provisions of section 6 of the General Law Amendment Act 50 of 1956, provides for a suretyship agreement to be in writing, but does not preclude an oral cancellation. See *Morgan at 782H-I*. Thus on a reading and interpretation of clause 4, the suretyship agreement would require the written consent of the creditor (BMW) if the surety (Tabata) wished to withdraw, revoke or cancel the suretyship agreement. In the case of a cancellation where the terms of the suretyship were not in dispute an oral cancellation was permitted. In the case of a cancellation of consensual or bilateral cancellation in terms of clause 3.6 no written consent is necessary. This is so as it does not amount to a variation or waiver of the suretyship agreement itself, but it rather brings to an end the entire suretyship agreement. In my view, this is what is encompassed in the request for the release sought by the surety from the creditor. See *Morgan at 784C-I*.

[29] In this matter Adv. Beckers SC refers to the cases of *Tsaperas and Others Boland Bank Ltd* 1996 (1) SA 719 (A) and that of *HNR Properties CC and Another v Standard Bank of SA Ltd* 2004 (4) SA 471 (SCA) in support of his argument. I am of the view that these two cases are distinguishable from *Morgan*, as the relevant clauses in those two cases indicated that the termination and the release, respectively, be in writing.

[30] In my view, the argument advanced by the plaintiff, that the oral representation could never have amounted to a cancellation, as written consent or cancellation could

only take place in writing, must fail, as according to *Morgan* the interpretation of the exact clause in this current matter does not preclude cancellation orally.

[31] The enquiry though does not end there and I now turn to the two defences, of estoppel and that of a tacit term advanced by the second respondent.

ESTOPPEL

[32] In the introduction above Dixon alleges that he informed Tabata that Steyn represented to him telephonically that the plaintiff had no suretyship agreements in respect of both Tabata and Vuwa. On the other hand we have Steyn alleging that he did not inform Dixon that the plaintiff had no suretyship agreements for Vuwa and Tabata. In these circumstances I acknowledge that I am guided by the dicta in by Wessels JA *National Employers Mutual General Insurance Association v Gany* 1931 AD 187 at 199.

[33] The crux of Tabata's pleadings with regards to estoppel is that the representation caused him to be advised that the plaintiff held no suretyship and even if it had, plaintiff would not rely on it. Further, that the representation was made negligently and relying on the representation Tabata acted to his prejudice with the implementation of the sales agreement.

[34] It is trite that the onus lies with the person who raises the estoppel to prove that the representation upon which the estoppel was founded was in fact made. Zulman JA in *Absa Bank Ltd v I W Blumberg and Wilkinson* 1997 (3) SA 669 at 677H states the following:

"Plainly, a party wishing to rely on estoppel must plead it and prove its essentials (see, for example, *Blackie Swart Argitekto v Van Heerden* 1986 (1) SA 249 (A) at 260I)"

[35] The objective evidence before me is that found in the documents on file. Tabata signed a suretyship with the plaintiff on 20 April 2006 and he also concluded the 'Contract for the sale of shares' on behalf Vuwa and himself on 26 April 2007. An addendum to this contract was concluded and signed by Tabata on 12 October 2007 which stated that the contract was no longer conditional as the conditions in clauses 8 and 9 of the contract of sale of shares had been fulfilled. On 8 May 2007 Dixon wrote

requests to Standard Bank, Wesbank and BMW for consents to be released from suretyships if any. On the very same day Steyn transmitted this request to Humphries by email. Yet another addendum to the contract was signed by Tabata on 11 June 2007 to accommodate an extension of time to obtain the releases by 6 August 2007. On 15 May 2007 a written release was provided by Wesbank to Tabata and Vuwa. The release from Standard Bank to Vuwa is dated 2 November 2007.

[36] The delivery date for the releases of Standard Bank, Wesbank and BMW, in the initial contract, was 28 May 2007. Dixons testimony is that between the 8 May 2007 and the 28 May 2007 he telephoned all three institutions following up on his correspondence for the releases.

Did the call to Steyn take place?

[37] The case made out by the plaintiff is that Steyn did not receive a telephone call from Dixon as Dixon alleges. The objective evidence as stated above indicates to me that the party that sought the releases moved the deadline dates in order to accommodate the institutions and thus it probable that Dixon was liaising with the institutions to obtain these releases prior to the deadline dates. Why else would he cause the addendums which catered for the extension to obtain the releases? Having said so it stands to reason, to me that he would not have excluded BMW from follow up exercise and liaisons as regards an extension to obtain releases if there was a release to be obtained from BMW.

[38] A further indicator that it more likely and probable that the call did indeed take place is the fact that the BMW transcriptions of the three telephone calls during the period of 8 to 28 May 2007. The first is a telephone call from BMW to Dixon where BMW via Dixon's voicemail is told to leave a message. The second one is also from BMW and yet again to Dixon's voicemail but this time Diane from BMW Finance lets Dixons know that she is sorry she missed his call and she was going to try again later. The last call from BMW is to Dixon's voicemail. Though there is no evidence from the plaintiff of the exact dates that the calls were made it is telling that BMW had missed a call from Dixon during that specific period. What also ties up with this is the fact that Dixon was to expect a call as Diane had advised she would try him again.

[39] In addition to the above is his testimony in cross-examination when he was asked if Dixon was lying about the call, his response was: *'I don't know. I think the contents of the call is probably more of an issue because I would not have just said there was no surety.'*

[40] The probabilities taking into account the objective facts together with the evidence and Steyn's testimony above, in my view, point to Dixon having made that call to Steyn as Dixon testified.

Was the misrepresentation such that it mislead Tabata?

[41] Adv. Beckers argued that Tabata's evidence that one year after he signed the suretyship he did not know or was uncertain as to whether he had signed cannot be accepted as being true.

[42] Let us examine the testimony of Tabata. He was asked if he recalled signing the suretyship when summons was served upon him in 2010. His reply was when this document was signed it was at the time Vuwa was being established, he was busy and a lot was going on so he does not have an independent recollection of having signed the document. Now in 2007 when he signed the contract for the sale of his shares, he was asked if at that signing whether he knew he had signed a suretyship for BMW. He replied that he did not and explained that the reason was the wording is *'Vuwa and/ or Tabata'* in the contract of sale of shares is because he was uncertain for which financial institutions he had signed suretyship agreements on his behalf and/or on Vuwa's. He further stated that the contract delegated a specific person (Dixon) to establish as a matter of fact to whom suretyships were assigned to.

[43] One of the essentials for estoppel to be successful is that the party that claims that they were misled must show that they were all the while not aware of the correct position. See *Simpson v Selfmed Medical Scheme* 1992 (1) SA 855 (C) at 860H-866F, where estoppel was not successful as the assertor knew the true facts all alone that she could not comply with the explicit requirements of her previous membership of a medical scheme.

[44] In the current situation the testimony of the Tabata, to my mind, is clear, when the summons was served in 2010 he could not recall the signing of the suretyship

document and when he signed the contract for the sale of share in 2007 he was not certain for which entities he had signed suretyship agreements for and on behalf of himself and Vuwa. There is nothing untoward about the response that he has advanced that points to him being untruthful about this aspect. In addition, he testified further, stating that he would have attained clarity as the contract tasked the Dixon to establish exactly that, who held suretyships and for whom.

[45] Another essential of estoppel is that Tabata had to show that he relied on the misrepresentation and acted on it to his detriment. In this instance he testified that he had no reason to doubt Dixon when Dixon told him what Steyn had advised, that there was no suretyships for him or Vuwa. Dixon was assigned to establish just that in terms of the contract of sale of shares. Dixon had issued out written requests to all the relevant institutions including BMW. He had obtained feedback from the other two institutions as regards what they required for the release to be granted, and eventually the releases were granted.

[46] Besides what is stated above I cannot understand why the only institution that did not respond to the written request, which the plaintiff confirms it received, was BMW. Even in the face of their suretyship requirements, as set out in their suretyship document, they would have had the knowledge of the suretyship agreements as they had the originals in safe keeping. It would be strange for BMW not to respond to the request when they had a duty to do so and had done so on previous occasions when requested by the very same parties. To me this conduct is clearly not consistent with their past conduct in these circumstances.

[47] I agree with Adv. Morison SC, for the second defendant, that at the time of the request BMW did nothing because there was nothing to be done. Unlike the other two institutions who engaged with Dixon after receipt of his request.

[48] I also take into account the testimony of the witness's for the defendant as regards the conduct of BMW in prior dealings with the defendants when BMW was supposed to ensure that there was suretyship for Amabubesi Motor Group financial transactions and it came to light that they had failed to pursue this avenue even though

it was a requirement for the grant of the financial assistance to Amabubesi Motor Group.

[49] Ultimately, the last addendum is drafted and signed in October 2007 stating that the conditions had been fulfilled and Tabata, to my mind, had nothing to fear as both Standard Bank and Wesbank were on board and there were no suretyships with BMW as per Steyn of BMW. He was thus, in my view, entitled to conclude the sale of his shares as there had been compliance with the contract.

[50] What is also evident from the documents on file is that the company and parties who bought the shares of Tabata and Vuwa had to undergo credit verification checks through BMW as they were providing finance. Throughout those checks mention is made of other suretyship agreements that BMW held of the directors and the new entity. Nothing what so ever is mentioned of the suretyship that BMW had with Tabata. One would have expected this information to emerge from the electronic records that are generated when the credit check is being conducted.

Conduct of the plaintiff

[51] The plaintiff argues that this court cannot on the probabilities find that the telephone call did in fact transpire between Dixon and Steyn, if one looks at Steyn's previous conduct in handling a release all but a year before this alleged incident. In addition, Steyn had on the very same day transmitted the request to the manager who was in charge of that specific department as he had been moved from that specific department some three months prior. Plaintiff also argued that the process of establishing whether one held a suretyship was an easy task.

[52] From the outset, according to Steyn's testimony the process referred to above was not a simple one that is obtaining the suretyship and attaining the release. He confessed that it was not an easy task and explained it at length. In my view, the fact that Steyn was no longer in that specific department was a fact not known to the second defendant, as they sent the request to the person at BMW whom they knew was the responsible for their account. Turning to Steyn's work ethos and his effectiveness of handling a release, as he had already conducted one for the defendant prior, no reliance can be placed on this as the plaintiff seeks to do, for he

was no longer in that specific department. Thus what he would have done, in my view, is of no consequence, as it lies with what Humphries would have done in the circumstances.

[53] Turning to Humphries, to me the plaintiff had to show what she did with the request when she received same, in order to suppress the contention by the second defendant that they did nothing. However, the plaintiff saw fit not to call Humphries to testify. In the light of Steyn's testimony that he and Humphries were consulted with way back in 2011, the plaintiff was the only one who knew the import of her evidence in relation to the case they had to meet. Coupled with the fact that Steyn testified that he did not at any stage, then or now, enquire from Humphries what she had done with the instruction he had passed on to her. Clearly the plaintiff had the onus to bring this evidence to the fore, as it tried to do by way of Steyn's testimony.

[54] The assertion of the plaintiff, that the defendant could have called Humphries if they so wished, is in my mind, in these circumstances, preposterous, as according to the second defendant they only became aware of Humphries a week before the trial commenced. Bearing in mind that Humphries now resides in Germany.

[55] The question needs to be asked, why the plaintiff has not advanced Humphries' explanation as regards what she in fact did after she obtained the request from Steyn. In my view, the plaintiff is the only one who is able to furnish the chain of evidence demonstrating that they had or had not complied with their obligation to act on the query made. The duty to call Humphries in these circumstances fell in BMW's lap and having failed to demonstrate what transpired after the query was received only leads me to drawing a negative inference. See *Brand v Minister of Justice* 1959 (4) SA 712 (A) 715F-716F; *Raliphaswa v Mugivhi and others* 2008 (4) SA 154 (SCA) at para[15] on 157I-158A. Snyders AJA states the following:

"When a witness is equally available to both parties, but not called to give evidence, it is logically possible to draw an adverse inference against both.¹ The party on whom the onus rests has no greater obligation to call a witness, but may find that a failure to call a witness creates the risk of the onus proving decisive.² In the present matter the appellant did not have an opportunity equal to the respondents to call this witness. The adverse inference drawn by the trial court against the appellant was unjustified in the circumstances. An adverse inference in any event does not operate to destroy a case otherwise proved, which is what the appellant managed to do.³

[56] Therefore in my view the second defendant clearly did not have an equal opportunity as opposed to the plaintiff to call Humphries to testify in this instances. I am fortified in my view that the adverse inference I have drawn against the plaintiff for failing to do so is justified.

Conclusion of estoppel

[57] In conclusion, the objective evidence, documentary evidence and the testimony of the witness's reinforces my view that in weighing up the evidence before me these point to the probabilities favouring the second defendant.

[58] That the telephone conversation did take place, the representation was made by Steyn, Dixon conveyed this representation to Tabata who had no reason to disbelieve it as he was not certain which suretyships he had signed and he was misled by the representation which he acted upon to his detriment.

[59] I do not view it necessary to deal with the alternative arguments raised by the second defendant.

TACIT TERM

[60] The second defendant amended its prayer to its plea to read as follows:

"Wherefore the Second Defendant prays that the Plaintiff's claim against him be dismissed with costs, alternatively, that the Plaintiff be directed to furnish the second defendant with a written release from the suretyship relied upon by the Plaintiff herein, such release to be effective from the 31st May 2007."

[61] Adv. Morison SC argued that the testimony of Steyn, the fact that the releases were granted by Standard Bank and Wesbank and the conduct of the parties, inclusive of the plaintiff's, after the grant of these releases demonstrates that the release would have inevitably been granted by BMW. Thus the tacit term contended for by Tabata would be fulfilled as it is necessary to give business efficiency to the suretyship and must be found to be in the suretyship.

[62] Adv. Beckers on the other hand argues that the tacit term contended for by Tabata was not pleaded and does not and cannot arise from the language of the suretyship. The argument goes further; that what was in fact pleaded by Tabata does not give rise to that pleaded. In addition, in Tabata's testimony, he conceded that *'The requirements may be far more than just an additional deed of suretyship, the creator will determine that. And you've said so long as it's reasonable,'*

[63] In determining whether the tacit term contended for should be imputed in the suretyship I am mindful of the dicta in *City of Cape Town (CMC Administration) v Bourbon-Leftley & another NNO 2006 (3) 488 (SCA) at para [19] &[20]*. The circumstances in this matter on an examination of the suretyship, the conduct of both BMW and Tabata in concluding the suretyship and their conduct thereafter leaves me with no doubt that BMW would have made demands for other requirements to be fulfilled before the grant of the release sought by Tabata, which he rightly, in my view, acknowledged in his testimony. This would not have been peculiar, as this is exactly what both Standard Bank and Wesbank, did prior to granting their releases.

[64] Another factor is that Tabata signed the suretyship with the terms it encompassed and did not adduce any evidence that he was not happy to do so or there had been any attempt to change and or add other terms to the plaintiff's so called *'standard form of contract which were not subject to negotiations'*.

[65] I also have a problem with Tabata's submission as to when the tacit term would have come into existence. The case of Tabata is that as there was no suretyship with BMW he and Dixon continued with the finalisation of the contract for the sale of the share. This, according to the testimony of both Dixon and Tabata, was done with the exclusion of BMW. BMW was only aware of a conditional contract and not aware of the various addendums which ultimately culminated in the conclusion of the contract. For all intensive purpose BMW knew the contract could or could not have materialised taken into account the conditional clauses in the contract.

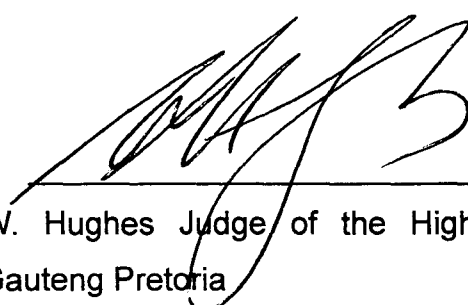
[66] In my view the tacit term sought to be relied upon in this case is one where BMW would have had to first go to its various departments to discuss and consider before acceding to importation of the term.

[67] I am therefore not convinced that the tacit term sought to be imported is justified in these circumstances.

[68] The second defendant succeeds on a balance of probabilities with the requirements of his reliance on the estoppel defence raised and therefore would be entitle to his costs as the victor. The parties agreed that the case of the third defendant be postponed and an order was duly granted by consent.

[69] Consequently the following order is made:

[1] The plaintiff's, BMW, claim against the second defendant, Dumisani Tabata, is dismissed with costs, such costs to include the employment of senior counsel.



W. Hughes Judge of the High Court,
Gauteng Pretoria

Appearances:

For the Plaintiff: Adv Beckers

Instructed by: Smit Jones & Pratt

For the Defendant: Adv Morison SC

: E Ferreira

Instructed by: Ramsay Webber

Date heard: ~~09 June 2016~~ & ~~09 September 2016~~ 11 May 2016

Date delivered: 24 February 2017