THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Not Reportable

Case no: 445/2017

In the matter between:

BMW FINANCIAL SERVICES (SA) (PTY) LTD **APPELLANT**

and

DUMISANI DUMEKHAYA TABATA **RESPONDENT**

Neutral citation: *BMW Financial Services (SA) (Pty) Ltd v Tabata* (445/2017) [2018] ZASCA 25 (23 March 2018)

Coram: PONNAN, WALLIS, WILLIS and MATHOPO JJA and PILLAY AJA

Heard: 15 March 2018

Delivered: 23 March 2018

Summary: Estoppel – surety seeking release from suretyship told that no suretyship had been executed – accepting information and acting on it – creditor estopped from relying on suretyship – factual appeal.

ORDER

On appeal from: Gauteng Division of the High Court, Pretoria (Hughes J, sitting as court of first instance):

The appeal is dismissed with costs, such costs to include those consequent upon the employment of two counsel.

JUDGMENT

Wallis JA (Ponnan, Willis and Mathopo JJA and Pillay AJA concurring)

[1] When the Vuwa Motor Group (Pty) Ltd (VMG) ran into financial difficulties in 2008, the appellant, BMW Financial Services (SA) (Pty) Ltd (BMW), claimed some R 9.5 million from three individuals and two companies in terms of suretyship agreements. One of the individuals was the respondent, Mr Tabata, an attorney and businessman. In 2006 he had purchased a six per cent shareholding in Amabubesi Motor Trading Group (Pty) Ltd (AMTG), which thereafter changed its name and became VMG. Certain of his defences to BMW's claims differed from those of his co-defendants so the parties sensibly agreed to separate them from the rest. They were tried before Hughes J in the Gauteng Division of the High Court, Pretoria. She upheld one of the defences and dismissed BMW's claim against Mr Tabata. This appeal is with her leave.

The facts

[2] Mr Tabata previously had an involvement in a motor dealership in KwaZulu-Natal. In 2006 he and Mr Ngcuka, whose interest was held in a company called Vuwa Investments Pty Limited (Vuwa), acquired between them a total 55 per cent stake in AMTG. Its business was the operation of four motor dealer franchises in Gauteng and KwaZulu-Natal. Each of the dealerships financed the acquisition of motor vehicles by way of floorplan agreements concluded with the appellant, BMW. As security for the indebtedness of AMTG and the dealerships under the floorplan agreements BMW required personal suretyships from, inter alia, Mr Tabata and three other individuals involved in the business, as well as certain related companies. In those circumstances Mr Tabata came to sign the three deeds of suretyship on which BMW based its claim against him.

[3] Although Mr Tabata and Vuwa injected fresh capital into the businesses by way of loans, the motor dealerships were relatively unsuccessful. By 2007 Messrs Tabata and Ngcuka were disillusioned with their investment and wished to extricate themselves. Other investors were found and in May 2007 Mr Tabata and Vuwa sold their shares and loan accounts in VMG to these investors. Clause 8.2 of the sale agreement provided that:

'the Purchasers undertake in favour of the Sellers to procure the written release of Vuwa and/or Tabata from all guarantees/deeds of suretyship contemplated above and to deliver such written releases to the attorneys by the date and in the manner contemplated in clause 7.2.3 of this contract.'

The guarantees or deeds of suretyship referred to were given in favour of the Standard Bank of South Africa Limited, First Rand Bank t/a Wesbank and BMW and any other creditors whose claims they had guaranteed. In

fact there were no such other creditors. The agreement did not identify the parties in favour of whom Vuwa and Mr Tabata had executed such documents or how many there were. It simply made it a term of the sale agreement that they would be released from all and any such obligations.

[4] Mr Roger Dixon, an attorney, as well as a shareholder and director of VMG, was entrusted with the task of securing Mr Tabata's and Vuwa's release from any guarantees and deeds of suretyship. On 8 May 2007 he wrote identical letters to the Standard Bank, Wesbank and BMW. The heading to the letters referred to the sale by Vuwa and Mr Tabata of their shares in VMG and a copy of the signed agreement was attached to each letter. The letters then went on as follows:

'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.'

[5] The letter to BMW was addressed to a Mr Clive Steyn, with whom Mr Dixon had had dealings in October 2006, when requiring a similar release of sureties at the time Vuwa and Mr Tabata acquired their interests in AMTG. Mr Steyn in turn forwarded the request to Ms Anne Humphries, who had recently taken on his job of dealing with such matters. The dispute between the parties and the basis for Mr Tabata's defence arises from what happened thereafter.

[6] Mr Dixon testified that shortly after sending the letters he telephoned the individuals to whom he had written to ascertain the process that would have to be followed in order to secure the releases from any suretyships or guarantees. According to him, when he phoned

Mr Steyn they had a brief conversation in which Mr Steyn told him that BMW held no suretyships from Vuwa or Mr Tabata. He said he accepted this and told Mr Tabata that this was the position. Mr Tabata confirmed that in his evidence. In October 2007, after a release had been obtained from Wesbank and when one was anticipated from Standard Bank, Mr Dixon prepared an addendum to the contract of sale. It recorded that the requirements of clauses 8 and 9 in regard to securing the release of Vuwa and Mr Tabata from any suretyships or guarantees had been satisfied and the sale contract had accordingly become unconditional. The parties duly signed this addendum on 12 October 2007 and the sale proceeded on that basis.

[7] Mr Steyn was initially not inclined to accept that there had been any telephone conversation between him and Mr Dixon. But, when he was asked in cross-examination whether he was saying that Mr Dixon had invented the telephone call, he equivocated and said that he thought 'the content of the call was more of an issue because I would not have just said there was no surety'. Ms Humphries to whom he referred Mr Dixon's letter was not called as a witness, although it appears that she was available for that purpose. Both parties submitted that the other should have called her.

[8] Mr Tabata's case was that Mr Steyn told Mr Dixon that BMW did not hold a suretyship from him and must have been aware that Mr Dixon would communicate this to him. That amounted to a representation to him that he had not signed a deed of suretyship in favour of BMW. He said that he acted upon the representation to his prejudice in proceeding with the contract of sale of his shares in VMG without taking further steps to ensure that BMW did not hold any deed of suretyship from him or had

released him from any that existed and thereby ensured that he was not at risk of being held liable to BMW for any claims, existing or future. Had the representation not been made he would not have proceeded with the sale until the purchasers had secured his release from all suretyships held by BMW.

[9] Hughes J accepted that a telephone conversation had taken place between Mr Dixon and Mr Steyn and that its contents were in accordance with Mr Dixon's evidence. She accepted that Mr Tabata had acted upon the representation to his prejudice and on that basis upheld the plea of estoppel. In the light of that conclusion it was strictly speaking unnecessary for her to deal with a further defence that the deed of suretyship was subject to a tacit term that, in the event of Mr Tabata withdrawing from any involvement in the business of VMG and disposing of his interest in the company, BMW would release him from any suretyships he had executed in their favour. She did, however, consider that defence briefly and held that it was not established.

The appeal

[10] BMW contended that the trial court erred in accepting Mr Dixon's evidence in regard to the telephone conversation and its contents. It said that in any event it should not have accepted that Mr Tabata was unaware of the fact that he had executed deeds of suretyship in favour of BMW. If he was so aware then he could not have been misled by anything that Mr Steyn said to Mr Dixon. In other words, it submitted that there was no reliance on any representation that Mr Steyn may have made.

[11] Mr Tabata supported the trial court's factual findings and submitted it was correct in upholding the plea of estoppel. In addition he submitted that it had erred in rejecting his defence based on a tacit term. BMW initially contended that it was not open to Mr Tabata to rely upon this further defence in the absence of a cross-appeal. In order to ensure that the appeal was fully argued the presiding judge directed that BMW should deliver supplementary heads of argument dealing with this issue and this was done.

Discussion

[12] The outcome of the appeal turned principally upon a single narrow issue, namely, whether the trial judge was correct to accept the evidence of Mr Dixon in regard to the contents of the telephone conversation with Mr Steyn. We were asked to overturn the trial judge's findings and to hold that no such conversation had taken place, or that any conversation that took place did not contain the statement to which Mr Dixon testified. In approaching the arguments I bear in mind the traditional reluctance that courts of appeal have to overturn findings of fact, and especially credibility findings, by a trial court. I also bear in mind the well-established approach to the weighing of evidence and especially the need to test the oral evidence of witnesses against the documents and the inherent probabilities.[1]

[13] I deal first with whether the alleged telephone conversation between Messrs Dixon and Steyn occurred. BMW submitted that cumulatively the following features rendered this improbable. When Mr

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[1] *Stellenbosch Farmers' Winery Group Ltd and Another v Martell et Cie and Others* 2003 (1) SA 11 (SCA) at para 5.

Dixon wrote his letter, Mr Steyn was no longer the person responsible for dealing with these matters as that responsibility had passed to Ms Humphries. He forwarded Mr Dixon's letter to her and said that thereafter he had nothing more to do with the matter. His evidence was that

'If Dixon had called me and had asked me that, I didn't have the information at hand to give him the answer.'

He also said that he had no authority to release a surety and that the process for doing this would have involved the legal department and the credit committee. He did not embark on any such process nor did he go into the walk-in safe to look for any deeds of suretyship. Finally he said that his practice, if he had attended to such a request would have been to check and respond the same day by fax and email. There was no reason for him to 'sit on the information' until he received Mr Dixon's call.

[14] Most of this had little or no bearing on the issue. Mr Steyn's conduct was entirely explicable on the footing that this was no longer his responsibility, but Ms Humphries. The case did not depend on his having released Mr Tabata from the three deeds of suretyship, but on his having told Mr Dixon that BMW did not hold any such suretyships. There is no reason to believe that any such statement made by him would have arisen from his own investigations. The obvious source was the person who was responsible for dealing with it, namely, Ms Humphries. He evidently had a friendly relationship with her as appeared from the terms of his email message when forwarding Mr Dixon's request to her. It read:

'Just when you thought you had enough work …

This fax came in today regarding the sale of shares in the VUWA group.

Have fun.'

All that was required for Mr Steyn to be in a position to tell Mr Dixon, in response to the latter's call, that BMW held no suretyships from Vuwa

and Mr Tabata was for Ms Humphries to have said to him, by way of a general report, or in passing, or in response to a casual enquiry, that there were no suretyships.

[15] From Mr Dixon's perspective he had dealt with Mr Steyn before over the selfsame issue when Mr Tabata became a shareholder in the group. They were on first name terms and it was not suggested that he was aware of Mr Steyn's change of position within BMW. For him to address his letter to Mr Steyn was entirely natural. It was also entirely natural for him to follow up by telephoning Mr Steyn. Telephone records produced by BMW showed that there were attempts to telephone Mr Dixon between 8 and 28 May 2007, although only one identified the caller, a lady in the credit department. No witness was called in that regard, but it did show that there was nothing extraordinary about Mr Dixon communicating telephonically with BMW. It was not suggested that the phone logs were complete or that they excluded the possibility of his having telephoned Mr Steyn.

[16] Mr Dixon's evidence was that he made the telephone call on about 15 May. This came about because he was following up the letters he had written to Standard Bank, Wesbank and BMW. He accordingly telephoned the three individuals to whom the letters had been addressed, all of whom he identified by name. Mr Steyn was the person he telephoned at BMW. The purpose of the calls was to expedite the release of Mr Tabata and Vuwa from any suretyships or guarantees, which had to be done by 27 May. No-one suggested that this was a fabrication and it is unlikely that it was, as any falsehood in regard to the calls having been made could easily have been exposed by approaching the two individuals at Standard Bank and Wesbank.

[17] Then there was Mr Steyn's equivocation over this issue. He was asked directly whether Mr Dixon was making up the call. His answer was:

'I don't know. I think the content of the call is probably more of an issue because I would not have just said there was no surety.'

Later in his evidence he said:

'I know there wasn't a call that I gave him that answer.'

It is unclear from these answers whether he was denying the possibility of such a call or accepting that it might have happened but with different content.

[18] If there were no telephone call then all of the evidence of Mr Dixon about the BMW suretyships was a fabrication. On that supposition the following picture emerges. On 8 May 2007 Mr Dixon wrote to Standard Bank, Wesbank and BMW and enquired about the existence of suretyships and guarantees. He followed this up with telephone calls to Standard Bank and Wesbank, but not to BMW. He pursued for some time thereafter attempts to procure the requisite releases from Standard Bank and Wesbank. I point out in this regard that Vuwa's suretyship in favour of Standard Bank was for R35 million. Having that discharged was far more likely to create difficulties than obtaining a release from BMW in respect of any suretyships. Nonetheless on this version Mr Dixon did nothing to secure a release from BMW to procure fulfilment of this contractual obligation, but set off on a path of falsehood.

[19] Any such pattern of deceit would then have started in May 2007 when Mr Dixon told Mr Tabata that BMW held no suretyships from him. It continued whenever the original contract was extended thereafter as

occurred on two occasions. It was reflected in an email to Mr Tabata's representative on 31 July 2007 that dealt with the suretyships in favour of Wesbank and Standard Bank, but did not mention BMW. Finally, when on 9 October 2007 he was asked directly by Mr Tabata's attorney about the situation with Standard Bank, Wesbank and BMW he drafted an addendum to the contract recording that the conditions in regard to procuring releases had been fulfilled and accordingly the contract had become unconditional. Three years later when Mr Tabata was sued he gave instructions to the firm of attorneys representing Mr Tabata that he had had a conversation with a representative of BMW who had told him that there were no suretyships from Mr Tabata.

[20] Why would Mr Dixon have behaved in this fashion? Why, having set out to procure releases from all three institutions, would he have decided not to pursue that course with BMW and instead lie about it? No plausible reason was proffered for his behaving in that fashion. It is not as if BMW's case was that they had informed him that they refused to release Mr Tabata, which might have imperilled the sale. Had that been the case no doubt BMW would have called the witness, presumably Ms Humphries, or someone working with her, to say as much.

[21] Counsel's attention was drawn to the fact that on 9 October 2007 Mr Tabata's attorney had asked for confirmation of the written releases from all three institutions. Mr Dixon's response had been to prepare and have executed the addendum to the agreement reflecting that all requirements in that regard had been fulfilled. By this stage the new investor was committed to the project so there was no apparent reason for there to be a problem with BMW. Counsel was pointedly asked to suggest a plausible reason why Mr Dixon would at this stage of events

have lied and said that there were no suretyships from which BMW could release Mr Tabata, rather than making endeavours to secure his release from any that existed. The answer was that 'given the evidence, Mr Dixon knew, or there was a likelihood that he knew, that he wouldn't receive a release from BMW so he took a chance'. When asked to identify the passage in the record where this was put to Mr Dixon he was unable to do so because it was not put to Mr Dixon. The impermissibility of suggesting that a witness was dishonest without having put that proposition squarely to the witness to enable it to be refuted is a cardinal principle in litigation.[2]

[22] I have outlined this supposed course of deception on the hypothesis that there was no telephone conversation. If there was, however, but as Mr Steyn said it did not follow the course that Mr Dixon described, the difficulties are compounded. In that event either Mr Steyn fobbed Mr Dixon off saying that the matter was no longer his business, or he told him who was now dealing with it, or he said that there were suretyships and that they would need to be cancelled. Any of these possibilities would have made Mr Dixon's position worse, because he would have known that matters were not settled so far as BMW were concerned. That would have posed obvious risks when BMW followed up on his request, but one of the curious features of BMW's case is that there is no evidence that it followed up on the request that Mr Dixon undoubtedly made in relation to possible suretyships. Why not? There was no reason for it not to do so in the usual way in which such requests were dealt with.

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[2] *President of the Republic of South Africa and Others v South African Rugby Football Union and Others* 2000 (1) SA 1 (CC) paras 61-65.

[23] In my view there is little likelihood that Mr Dixon embarked on this course of deception and no reason why he should have done so in relation to BMW and not the two banks. No personal benefit would have accrued to him as a result and it would have exposed him to potential claims and perhaps even criminal charges or charges of professional misconduct. A far simpler explanation for what occurred would be that Mr Steyn told him there were no deeds of suretyship by either Vuwa or Mr Tabata and he accepted and acted on this. There would have been nothing surprising about Mr Steyn saying that BMW held no suretyships from Vuwa, as it is common cause that this was the position. As to the potential source of this information the obvious answer would be an exchange between him and Ms Humphries. BMW's failure to call her as a witness did not assist its case. Nor was that case helped by Mr Steyn's frankly improbable evidence that he did not know and had never asked her what she had done after he sent her Mr Dixon's letter on 8 May 2007.

[24] There is no merit in BMW's contention that Mr Tabata should have called Ms Humphries as a witness. His case was clear, namely, that the conversation between Mr Dixon and Mr Steyn had involved a representation to him that BMW did not hold his personal suretyship. Mr Dixon was his witness in that regard. Calling Ms Humphries would have served no purpose, and there were obvious dangers in doing so without consulting her or in consulting someone who was primarily a potential witness for BMW. She could not have assisted Mr Tabata's case. On the other hand she was the one person who could have explained what happened to Mr Dixon's request after Mr Steyn had forwarded it to her. She could, if that were the case, have rebutted any notion that she or her staff had undertaken an inadequate search for the suretyships or conveyed

to Mr Steyn that none existed. Instead she was not called. Her silence speaks volumes.

[25] The inference that the relevant officials of BMW were under the impression that there were no deeds of suretyship executed by Mr Tabata, is strengthened by reference to various credit reports prepared by BMW's staff during 2008 relating to the extension of further facilities to the group of retail outlets constituting the overall business of what had by then become the Zamindlela Motor Group. The application for a facility recorded that BMW 'hold the sureties of John Pascoe and Roger Dixon'. There was no mention of Mr Tabata.

[26] The report said that Treacle Investments (Pty) Ltd and Treacle Trust, the new investors said to have the backing of the Public Investment Corporation, were to sign sureties. The motivation for the extension of credit commented on the financial strength of the incoming shareholders. It said that the financial statements of the group were weak, but added:

'But the strength of the sureties reduces our risk exposure with John and Roger's combined NAV[3] worth R78mio signing unlimited sureties and Treacle Inv (Pty) Ltd willing to sign company surety.'

The credit review was approved subject to the condition: 'Surety as proposed required.' That was in April 2008. In May 2008 Ms Humphries approved a group credit for used cars. It required suretyships from Treacle Investments (Pty) Ltd and Treacle Trust. In all of this there was no mention of Mr Tabata.

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[3] Net Asset Value.

[27] These documents are not conclusive, but they provide some further support for the proposition that BMW did not believe that it was holding Mr Tabata's suretyship. Had it been doing so one would have expected there to be some mention of that fact given that BMW was aware that he was no longer a shareholder in the company or a participant in the business of the Zamindlela Motor Group.

[28] For all those reasons, which express with some amplification the reasons of the trial judge, her finding that the conversation between Mr Dixon and Mr Steyn occurred and its contents were as testified to by Mr Dixon cannot be faulted. That left only, as the second string to BMW's bow, the argument that Mr Tabata must have known that he had in fact signed suretyships in favour of BMW so that he could not have believed or relied on Mr Steyn's statement. There is no merit in this. Mr Tabata testified that he was uncertain what he had signed and the judge found him to be a credible witness. A businessman involved in several enterprises can be forgiven for not recalling a year later precisely what documents were signed and what commitments were made when entering upon a new venture. That was Mr Tabata's case and the judge believed him. We were not shown anything to say that this was an impermissible finding on the evidence.

[29] The appeal must accordingly fail. Mr Morison SC on behalf of Mr Tabata urged us as a sign of disapproval of the attack on Mr Dixon's and Mr Tabata's credibility to order BMW to pay the costs of the appeal on an attorney and client scale. While there is some force in this we cannot overlook that the trial judge was of the view that her assessment of the witnesses may have been incorrect. In those circumstances BMW should not be penalised for pursuing an appeal, given the substantial amounts

involved in this case. Costs must follow the result and include those consequent upon the employment of two counsel.

[30] One final comment should be made. Whatever the trial judge's assessment of the possibility that another court might differ from her assessment of the evidence, it did not warrant her directing that the appeal be heard by this Court instead of the full court as required by s 17(6)*(a)* of the Superior Courts Act 10 of 2013. This was an appeal on fact that should have been dealt with by the full court.

[31] The appeal is dismissed with costs, such costs to include those consequent upon the employment of two counsel.

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M J D WALLIS

JUDGE OF APPEAL

Appearances

For appellant:	F J Becker SC (with him W H J van Reenen)
Instructed by:	Smit, Jones & Pratt, Pretoria
	Symington & De Kok, Bloemfontein
For respondent:	L J Morison SC (with him F J Ferreira)
Instructed by:	Ramsay Webber Inc, Pretoria
	Lovius Block, Bloemfontein.