IN THE SOUTH GAUTENG HIGH COURT

(JOHANNESBURG)

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: YES/NO.

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

(3) REVISED.

DATE 18/4/2009 SIGNATURE

CASE NO: 09/26823

In the matter between:

ABSA BANK LIMITED Applicant

and

ZURICH RISK FINANCING SA LIMITED Respondent

JUDGMENT

BLIEDEN, J:

[1] By way of motion proceedings ABSA Bank Ltd (ABSA) sues Zurich Risk Financing SA Ltd (Zurich) for R50 million as a guarantor in respect of the indebtedness of Teejay Motors (Pty) Ltd (in liquidation) (Teejay).

[2] ABSA's case is based on a document which is common cause between the parties. The document is Annexure FA1 to ABSA's founding papers. It is at page 26 of the record and is reproduced below; (emphasis added)

"**FUSION**
Guarantee Underwriting Agency

Z
ZURICH

POLICY NUMBER: CONSAE50019JHB
GUARANTEE NUMBER: ZUR500185JHB

LETTER OF GUARANTEE No. ZUR500185JHB FOR R50 000 000.00 ON BEHALF OF TEEJAY MOTORS (PTY) LTD.

We, Ilse Becker and Eugene Louis Becker in our capacities as Directors of Valuline 155 (Pty) Ltd t/a Fusion Guarantee Underwriting Agency (Registration number 2006/027372/07) (hereinafter referred to as the 'Guarantor') acting with full binding authority for and on behalf of Zurich Risk Financing SA Limited (Registration number 1997/006545/06) (hereafter called 'Zurich'), do hereby guarantee and bind the Guarantor to ABSA Bank Limited (Registration number 1986/004794/06) (hereafter called the 'Company') jointly and severally as surety and co-principal debtor with Zurich for the due payment by TEEJAY MOTORS (PTY) LTD (Registration number 2000/028910/7) (hereafter called the 'Customer') of all amounts due and payable or which may become due and payable by the Customer to the Company from any cause whatsoever and/or in terms of any agreement(s) between the Customer and the Company, provided that the total amount to be recovered from the Guarantor hereunder shall not exceed the whole sum of R50 000 000.00 (Fifty Million Rand Only).

We hereby renounce the benefits of the exceptions of division and excussion, non numeratae pecuniae, non causa debiti, errors in calculation and revision of accounts, de duobus vel pluribus res debendi with the meaning, effect and significance whereof we declare ourselves to be fully acquainted. We agree that any amount claimable from the Guarantor hereunder will be payable on demand on receipt of a Certificate from the Company that such amount is payable by the Customer to the Company.

This guarantee is neither negotiable nor transferable and must be returned to the Guarantor upon payment or expiration whichever event occurs first.

This guarantee will expire on the 7th April 2009.

This done and signed at Alberton on this 8th DAY OF April 2008 for and on behalf of Valuline 155 (Pty) Ltd t/a Fusion Guarantee Underwriting Agency (Registration number 2006/027372/07).

(Sgd) Mrs. Ilse Becker

(Sgd) Mr Eugene Louis Becker

As witnesses:

1. (Sgd) *2. (Sgd)*

[3] It is common cause between the parties that prior to the execution of FA1, S A Eagle Financing Ltd of which Zurich is the successor-in-title had provided Valuline 155 (Pty) Ltd t/a Fusion Guarantee Underwriting Agency (Fusion) with the following document which is FA4 to the papers and which is reproduced below.

"*SA Eagle Risk*
Financing Limited
Registration No. 1997
Authorised Financial Services Provider No.

SA EAGLE

Head Office
5th Floor SA Eagle House
70 Fox Street
Johannesburg 2001
PO Box 61489
Marshalltown 2107

Telephone 011 370 9111
Facsimile 011 370 9610

Our reference

Your reference

Date 22 June 2007

TO WHOM IT MAY CONCERN

We hereby confirm that Fusion Guarantee Underwriting Agency has a Cell Captive Facility with SA Eagle Risk Financing Limited, and is duly authorized to issue guarantees on behalf of SA Eagle Risk Financing Limited to a maximum limit of R50 000 000 on any one guarantee, any one facility. Share Reference No.: A57.

Trust you find this to be in order.

Yours faithfully.

(Sgd) pp
STEPHEN ANDERSON
EXECUTIVE MANAGER – MARKETING

cc. Ilse Bekker
Fax: (011) 867-2745

Directors: NV Beyers (Chairman), DM Burton, C Schmidt, PJ Stols
Company Secretary: I Mabutha

A member of the Z Zurich Financial Services Group

INSURANCE
FRAUDLINE
0850 002526"

[4] It is not in dispute that the two Beckers who signed FA1 on behalf of Fusion were authorised to do so on behalf of that entity. It is also not in issue between the parties that as at the date the present application was launched and as at today's date Teejay is liable to ABSA in an amount in excess of R50 million and is not in a position to pay any portion of this amount to it, as it has been wound up in the hands of the Master of this Court.

[5] The real issue in the case between the parties is whether Zurich is liable to ABSA for R50 million in terms of FA1. In this regard the nature of the liability created by FA1 as regards Zurich, turns not on what the document is named or styled as. Its label is unimportant. What matters is the kind of liability sought to be created by the parties, as evidenced by the language they elected to employ in the context in which their wording appears.

[6] The first issue to be decided is whether FA1 can be said to impose any liability on Zurich as opposed to Fusion, and if so what is the nature of this liability.

[7] On behalf of Zurich it was submitted that it is only Fusion that has attracted any liability in terms of FA1. Counsel's argument in this regard can be summarised as follows:

7.1 All linguistic *indiciae* are that Annex FA1 is intended to impose liability on Fusion alone. These *indiciae* are:

7.1.1 Annex FA1's only signatories (the Beckers) are said to act "*as directors of Fusion*" not Zurich.

7.1.2 The Beckers append their signatures at the foot of FA1 "*for and on behalf of Fusion*".

7.1.3 According to FA1, the Beckers "*do hereby guarantee and bind the guarantor to ABSA*" (emphasis added). Fusion – only Fusion – is defined as "*the guarantor*". Zurich is separately defined as "*Zurich*". So the instrument does not make Zurich a guarantor of any obligation. It founds no claim against Zurich *qua* guarantor – the only capacity on which ABSA places any reliance. Hence the significance of the definition of "*the guarantor*" cannot be overstated.

7.1.4 In seeking to cap any liability "*hereunder*" (i.e. based on Annex FA1) the language envisages recovery from, and only from, "*the guarantor*". There is no contemplation in the wording of Annex FA1 of any recovery from Zurich. At least there is no contemplation of any recovery under Annex FA1.

7.1.5 The Beckers acknowledge that any amount "*claimable from the guarantor hereunder*" is payable on demand. The instrument is thus about what can be claimed from Fusion; and when. There is no suggestion that Annex FA1 imposes any other liability on any other person. Certainly there is no indication in the language of the instrument that Zurich is liable under a "*demand guarantee*" – the very foundation of ABSA's case.

7.1.6 There is stipulated that Annex FA1 is to be returned to Fusion (not Zurich) on "*payment or expiration*".

[8] The above argument loses sight of the explicit wording in FA1 that Fusion (as opposed to the Beckers) binds Zurich as surety and co-principal debtor for the due payment by Teejay to ABSA of all amounts due to it. As such Zurich is bound by its undertaking if Fusion's authority is proved. The words in FA1 underlined by me make it plain beyond doubt that Fusion was acting "*for and on behalf of Zurich*". FA1 is a hybrid between a "*demand guarantee*" and a "*suretyship*". What is said in [5] above is apposite. On a reading of FA1 Zurich, represented by Fusion, is bound to honour the obligation contained in FA1 when called on to do so, as has occurred in this case, if Fusion had authority to bind it.

[9] It is Zurich's further argument that such authority has not been proved. In this regard counsel has argued that as ABSA relies on Zurich being a guarantor and not a surety as I have found, it is confined to proving a guarantee on the part of Zurich and not a suretyship. In my view there is no substance in this argument in the present case.

[10] The Appellate Division in *List v Jungers* 1979 (3) SA 106 at 117D-G dealt with the meaning of the word "*guarantee*" in a document. Diemont JA speaking for the court said the word "*guarantee*" was:

> *"... a word which had several meanings but it was commonly and most properly used in the sense of an undertaking to stand surety for the performance of, or to make good, someone else's obligation. For this there was ample authority, both in the case law and in standard lexicons, such as the Shorter Oxford English Dictionary (at 840 of the 1934 edition). Almost a century ago the Privy Council had held in The Heirs Hiddingh v De Villiers, Denyssen and Others (1887) 5 SC 298 at 311 that:*
>
> > *'The very notion of a guarantee requires that there shall be two sources of security to the creditor, the original source and the guarantor.'*
>
> *Coming to more recent times STRATFORD CJ had stated in Hazis v Transvaal & Delgoa Bay Investment Co Ltd 1939 AD 372 at 384 that:*
>
> > *'The word (guarantee) is usually and more properly employed by a surety who promises to saddle himself with an obligation if the principal obligator defaults.'*
>
> *It was further submitted that the ordinary meaning of a word was an important factor in determining what was meant by its use and there should not be a departure from the sense in which it was commonly used without cogent reason."*

[11] On page 118 of *List v Jungers* (*supra*) the learned Judge added the following dangers in placing too much emphasis on the meaning of particular words. The *dictum* in this regard is in paragraph D-H, it reads:

> *"It is, in my view, an unrewarding and misleading exercise to seize on one word in a document, determine its more usual or ordinary meaning, and then, having done so, to seek to interpret the document in the light of the meaning so ascribed to that word. Apart from the fact that to decide on the more usual or ordinary meaning of a word may be a delicate task – so for example STRATFORD CJ and GREENBERG J gave differing 'ordinary meanings' to the word 'guarantee' in the cases noted above – it is clear that the context in which the word is used is of prime importance. I find the words of Kriek J as reported in Hermes Ship Chandlers (Pty) Ltd v Caltex Oil (SA) Ltd 1973 (3) SA 263 (D) at 267 apposite:*
>
> > *'The passages from the various judgments I have mentioned deal with the popular or ordinary meaning of the word 'guarantee', but it seems to me that they demonstrate only that the word is capable of bearing different meanings depending upon the context in which it is used. It seems to me also that when the meaning of the word in a particular document is being considered, it is undesirable to commence the enquiry on the basis that any one of its possible meanings predominates, and that the proper approach to the question is to be alive to the various meanings which it can bear and by a consideration of the context in which it is used (together with such other circumstances as may be permissible) to decide which meaning must be attributed to it in that context.'*
>
> *More recently RUMPFF CJ emphasised that, in seeking to interpret a contract, words must not be examined in isolation and divorced from the context in which they are used:*
>
> > *'Wat natuurlik aanvaar moet word, is dat, wanneer die betekenis van woorde in 'n kontrak bepaal moet word, die woorde onmoontlik uitgeknip en op 'n skoon stuk papier geplak kan word en dan beoordeel moet word om die betekenis daarvan te bepaal. Dit is vir my vanselfsprekend dat 'n mens na die betrokke woorde moet kyk met inagmening van die aard en opset van die kontrak, en ook na die samehang van die woorde in die kontrak as geheel.'*
>
> *(Swart en 'n Ander v Cape Fabrix (Pty) Ltd 1979 (1) SA 195 (A) at 202)."*

[12] One should further bear in mind that the modern dictionary meaning of the word "*guarantee*" is "*a formal promise or assurance especially that an obligation will be fulfilled ...*" (Concise Oxford Dictionary 10th edition). In Chambers 20th Century Dictionary (Revised Edition) the word is defined as a contract in which a person agrees to see performed what another has undertaken – a surety or warrant.

[13] A reading of FA1 makes it plain that Fusion, duly authorised, acts on behalf of Zurich in this context and has bound Zurich as a surety and co-principal debtor for the indebtedness of Teejay, being payment of R50 million to ABSA.

[14] Zurich's further argument is that if it is found that FA1 constitutes a suretyship undertaking, as I have found, it was not signed by or on behalf of Zurich and therefore falls foul of the requirements of section 6 of General Law Amendment Act, Act 50 of 1956 which reads:

> "*No contract of suretyship entered into after the commencement of this Act shall be valid, unless the terms thereof are embodied in a written document signed by or on behalf of the surety ...*"

As has already been stated Fusion signed for and on behalf of Zurich in FA1, and this submission is therefore without merit. One must bear in mind that it was Fusion, represented by the Beckers, who signed on behalf of Zurich, as it claimed it was authorized to do. This authority is confirmed by Zurich in FA4, which is an undisputed letter of authority.

[15] The next contention raised by Zurich is that Fusion had no authority to bind Zurich as it did. A great deal was made of the relationship between Fusion and Zurich. However, as there is no suggestion that ABSA was privy to this relationship, the only relevant document in this regard is FA4. This document, which is addressed "*TO WHOM IT MAY CONCERN*" makes it plain that Fusion acting on behalf of Zurich is "*duly authorized to issue guarantees ... to a maximum limit of R50 000 000 on any one guarantee, any one facility*". It was submitted on behalf of Zurich, that there was a dispute of fact in regard to this authority, as the authority given to Fusion did not include suretyships for bank overdrafts, as ABSA's present claim is.

[16] In my view, without deciding whether FA4 constitutes a statement of actual authority, ABSA is entitled to rely on the principle of ostensible authority in this regard. This principle was explained by Denning MR in *Hely-Hutchinson v Brayhead Ltd and Another* [1968] 1 QB 549 (CA) at 583A-G as follows:

> "*Ostensible or apparent authority is the authority of an agent as it appears to others. It often coincides with actual authority. Thus, when the board appoint one of their number to be managing director, they invest him not only with implied authority, but also with ostensible authority to do all such things as fall within the usual scope of that office. Other people who see him acting as managing director are entitled to assume that he has the usual authority of a managing director. But sometimes ostensible authority exceeds actual authority. For instance, when the board appoints the managing director, they may expressly limit his authority by saying he is not to order goods worth more than £500 without the sanction of the board. In that case his actual authority is subject to the £500 limitation, but his ostensible authority includes all the usual authority of a managing director. The company is bound by his ostensible authority in his dealings with those who do not know of the limitation. He may himself do the 'holding-out'. Thus if he orders goods worth £1,000 and signs himself 'Managing*

Director for and on behalf of the company', the company is bound to the other party who does not know of the £500 limitation. ..."

[17] The above *dictum* has been accepted as being part of our law in *NBS Bank Ltd v Cape Produce Co (Pty) Ltd and Others* 2002 (1) SA 396 at 411F-412B (paragraph [25], where Schutz JA speaking for the court described the position as follows:

"[25] As Denning MR points out, ostensible authority flows from the appearances of authority created by the principal. Actual authority may be important, as it is in this case, in sketching the framework of the image presented, but the overall impression received by the viewer from the principal may be much more detailed. Our law has borrowed an expression, estoppel, to describe a situation where a representor may be held accountable when he has created an impression in another's mind, even though he may not have intended to do so and even though the impression is in fact wrong. Where a principal is held liable because of the ostensible authority of an agent, agency by estoppel is said to arise. But the law stresses that the appearance, the representation, must have been created by the principal himself. The fact that another holds himself out as his agent cannot, of itself, impose liability on him. Thus, to take this case, the fact that Assante held himself out as authorized to act as he did is by the way. What Cape Produce must establish is that the NBS created the impression that he was entitled to do so on its behalf. This was much stressed in argument, and rightly so. And it is not enough that an impression was in fact created as a result of the representation. It is also necessary that the representee should have acted reasonably in forming that impression: Connock's (SA) Motor Co Ltd v Sentraal Westelike Ko-operatiewe Maatskappy Bpk 1964 (2) SA 47 (T) at 50A-D. Although an intention to mislead is not a requirement of estoppel, where such an intention is lacking and a course of conduct is relied on as constituting the representation, the conduct must be of such a kind as could reasonably have been expected by the person responsible for it, to mislead. Regard is had to the position in which he is placed and the knowledge he possesses."

[18] More recently the Supreme Court of Appeal in *South African Broadcasting Corporation v Coop and Others* 2006 (2) SA 217 at 234-235 repeated its acceptance of the above *dictum* as being part our law.

[19] The unchallenged evidence adduced by ABSA is that its representative, Lawrence Booysen, relied on FA4 as a document which authorized Fusion to represent Zurich in a guarantee or suretyship undertaking as described in FA1. In my view this reliance was justified. There can be no question but that ABSA was entitled to look to Zurich for payment of the R50 million referred to in FA1.

[20] In the circumstances of this case the meaning of the word "*guarantee*" that is whether it be an original undertaking, or an accessory one such as a suretyship is not relevant. FA1 is a document which binds Zurich to pay the debt of Teejay to ABSA in an amount which is limited to R50 million. It authorized Fusion in writing to bind its credit to this effect in FA4, which was published *inter alia* to ABSA. It cannot now be heard to rely on limitations of this authority which were privy to it and Fusion. It is therefore liable to pay ABSA what it claims.

[21] Counsel for both parties in this matter were in agreement that each of their clients was entitled to employ two counsel to represent them in this matter because of its importance to them. I agree. The following order is made:

There will be judgment for the applicant against the respondent in the following terms:

1. The respondent is ordered to make payment of the sum of R50 million to the applicant.

2. The respondent is ordered to pay interest *a tempore morae* on the said sum of R50 million at the rate of 15,5% per annum from date of demand being 17 October 2008 to date of payment.

3. The respondent is ordered to pay the applicant's costs, such costs are to include the costs of two counsel.

P BLIEDEN
JUDGE OF THE HIGH COURT

COUNSEL FOR APPLICANT	ADV P N LEVENBERG SC ADV G KAIRINOS
INSTRUCTED BY	JAY MOTHOBI INC
COUNSEL FOR RESPONDENT	ADV A E BHAM SC ADV R PEARSE
INSTRUCTED BY	BELL DEWAR & HALL c/o R G ROBINSON ATTORNEY
DATE OF HEARING	
DATE OF JUDGMENT	