IN THE SUPREME COURT OF SOUTH AFRICA

(APPELLATE DIVISION)

In the matter between:

KENNETH JOHN PIZANI	First Appellant
COMREST PROPERTIES (PROPRIETARY) LIMITED	Second Appellant

and

FIRST CONSOLIDATED HOLDINGS (PROPRIETARY) LIMITED	Respondent

Coram: RUMPFF, C.J., et RABIE,
MULLER, MILLER, DIEMONT, JJ.A.

Heard: 14 September 1978

Delivered: 26 September 1978

J U D G M E N T

MILLER, J.A. :-

This is an appeal against an order made by Eloff, J., in the Witwatersrand Local Division,

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upholding exceptions to a plea and directing that certain paragraphs therein be struck out.

The respondent company, to which I shall refer as the plaintiff, sued the two appellants and another, who is not a party to the appeal, for payment of certain sums of money for which they were said to be jointly and severally liable by virtue of separate deeds of suretyship entered into by each of them. The appellants were, respectively, the second and third defendants in the Court a quo. The principal obligations in respect of which each of the appellants stood surety were

> "For the due payment of any moneys or the performance of any other obligations now or which may hereafter be owing by Grinding Wheels (Pty.) Ltd., ('the debtor') arising out of or connected with any agreement of lease entered into between the debtor and creditor".

/The .....

The "creditor" thus referred to was the lessor of certain equipment in terms of three written agreements of lease concluded with the abovementioned "debtor". Such lessor was named as the creditor in each of the deeds of suretyship, which in terms bound the sureties not only to such creditor but also to its (the creditor's) "successors or assigns". In its declaration, plaintiff alleged that it sued as cessionary, the lessor under the agreements of lease having ceded to it in writing "all the right, title and interest in and to the above Agreement(s) of Lease and all rights of ownership in and to the equipment referred to above". Plaintiff alleged further that (upon an unspecified date) the deeds of suretyship were also "duly ceded" to it by the creditor. It appears from the declaration that the principal debtor, Grinding Wheels (Pty.) Ltd., was placed in liquidation and that as a result thereof the agreements of lease were terminated and the plaintiff

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placed in possession of the subject matter of the leases. What was claimed by the plaintiff in respect of each of the leases was payment of arrear rental owing, interest thereon and damages, after taking into account the value of the equipment of which plaintiff had taken possession.

The appellants filed a joint plea in which they admitted, inter alia, that they had respectively signed the deeds of suretyship but denied liability to the plaintiff upon several grounds. It was to certain of such grounds that the plaintiff excepted, averring in its notice of exception that the relevant paragraphs in the plea did not contain the averments necessary to sustain a defence or that such paragraphs did not contain a defence to the plaintiff's claims. The grounds upon which it so contended were set out in the exception.

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The first of the defences attacked by the exception is contained in paragraph 10 of the plea. After pleading that they had no knowledge of any of the cessions upon which plaintiff relied, the appellants went on to plead

> "10 (ii) ..... that in any event they were released from all liability under the said deeds of suretyship signed by them in consequence of the alleged cessions".

The gist of the argument advanced on appeal in support of the alleged efficacy of that defence was that not= withstanding that the sureties bound themselves to the named creditor and "its successors or assigns", their liability under the deeds of suretyship would fall away upon cession by the creditor of its rights under the leases, unless cession of the deeds of suretyship were effected simultaneously with cession of the rights under the leases; and, so it was contended, it did not appear

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from the plaintiff's declaration that the cessions of the leases and of the suretyship agreements occurred simultaneously. A similar argument was apparently advanced in the Court below; the learned Judge assumed in favour of the appellants that cession of the deeds of suretyship was not effected simul ac semel with cession of rights under the leases but nevertheless decided, mainly on the authority of Inter-Union Finance Ltd. v. Dunsterville, 1956 (4) S.A. 280 (D), that cession of a creditor's rights against sureties could effectively be made subsequently to cession of the principal debt. On appeal it was contended by Mr. Duke, for appellant, that Dunsterville's case was wrongly decided in so far as it was held therein that a cession of rights under the surety deed subsequently to cession of rights under the leases, was an effective cession rendering the surety liable to the cessionary.

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Were it not for the argument advanced on behalf of the appellants and the ratio of the decision of the Court a quo, I would have been disposed to deal with this defence simply on the basis of the wording of the deeds of suretyship, in which the appellants bound themselves as sureties not only to the named creditor but also to its "successors or assigns". Unless there were contrary indications elsewhere in the deeds (which there are not), the words "successors or assigns" would include any cessionary of the creditor's rights under the leases. The effect of Counsel's contention, however, is that the rights of a creditor against one who has gone surety for the debtor can in no circumstances go over to any other person, to whom the principal debt has been ceded, except by way of a formal cession to such other person of the creditor's rights under the suretyship agreement and then only if such cession was effected simultaneously with cession

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of the principal debt. If the cessions were not simultaneously effected, so it was contended, the surety would be released upon cession of the principal debt because of a change in the specific debt in respect of which the surety guaranteed payment. It is not clear on the pleadings whether cession of rights under the surety deeds occurred simultaneously with or after cession of the leases. The primary question that arises, then, is whether according to our law formal cession of the rights flowing from a deed of suretyship is necessary at all in order to render liable to the cessionary of the principal debt a surety in respect of such debt whose surety undertaking was in force at the time of cession of the debt.

In Friedman v. Bond Clothing Manufacturers (Pty.) Ltd., 1965 (1) S.A. 667 (T) at p. 677, Trollip, J., said:

"Generally .....

> "Generally, when a debt is ceded the right of suing the debtor and any surety for the debtor passes to the cessionary. (See Voet 18.4.12. (Gane vol. 3 p. 324); Sande, Cession of Actions (Anders' translation pp. 170, 174, 186, 187); McNeil v. Robertson's Trustee, 3 N.L.R. 190 at p. 193; Inter-Union Finance Ltd. v. Dunsterville, 1956 (4) S.A. 280 (D)). It is not clear from those authorities whether the cedent's rights against the surety pass automatically and simultaneously to the cessionary with the cession or whether the latter merely thereby becomes entitled to obtain a cession of those rights from the cedent but again I shall assume in favour of the appellant that the former is the position."

There is no dearth of support for the general proposition enunciated in the first sentence of the above extract, though there are some commentators who take the opposite view. In a note by J.E. Scholtens, published in 74 S.A.L.J. 130, detailed references (which I need not

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repeat) are made to the opinions expressed by both schools of thought. The view obviously held by the author of such note is that the rights against a surety pass to the cessionary of the principal debt by virtue of such cession, without the necessity of going through with the "senseless formality" of effecting a special cession of the accessory rights against the surety. Although the reasons of those writers who support that view are not always specifically stated by them it is obvious that the reasons stem from the juristic concept of cession and the effects of an outright cession of rights. Such effect is that the cessionary veritably steps into the shoes of the cedent. Whatever claims could, but for the cession, have been enforced by the cedent may after cession be enforced only by the cessionary. This is of the essence of cession. De Wet and Yeats (Kontraktereg en Handelsreg, 4th ed., p. 230) thus state the effect of cession of a right of action:-

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> "Die vordering gaan by sessie in sy hele omvang met die voorregte daaraan verbonde op die sessionaris oor."

And in a footnote to that statement, the learned authors observe that Dunsterville's case, supra, ought to have been decided, (with the same result) on that basis; i.e., that the cedent's rights against the surety passed to the cessionary upon and together with cession of the principal debt. In J. McNeill v. Estate of R. Robertson, 1882 N.L.R. 190 at p. 193, Connors, C.J., said that

> "by the cession the entire right of the ceder, with every ground for claim, and all incidents - cum omni causa et accessionibus - is transferred to the cessionary ....."

And Jansen, J.A., somewhat more recently, has observed:

/"A .....

> "A cession is now considered to be a bilateral juristic act (agreement) whereby the cedent transfers his right of action to the cessionary, the latter taking the place of the former as creditor ....."

(L.T.A. Engineering Co. Ltd. v. Seacat Investments Ltd., 1974 (1) S.A. 747 at p. 762 A; see also The Law of South Africa, (Joubert) Vol. 2, paras 360 and 365; Susan Scott, Sessie in die Suid-Afrikaanse Reg, (a thesis) at pp. 220 - 1.) It should be noted that although Voet, in the first paragraph of 18.4.12, apparently supports the view that the main action "as well as accessory actions, such as those for ..... the suing of sureties" (Gane's translation, Vol. 3, p. 324) have to be ceded to enable the purchaser (cessionary) to sue, he appears clearly to accept, later in the same section, that privileges attached to the right ceded or rights which cleave to the action

/ceded .....

ceded, pass to the cessionary by the cession of the main right. (See also 18.4.15 and Sande, De actionum cessione, 8.31 - the passage referred to in the abovementioned note by J.E. Scholtens - and also 9.7.)

This being the result of a cession of rights in our law, there does not appear to be justification for the view that without simultaneous, separate cession of the rights under the suretyship agreement, the surety is discharged upon cession of the principal debt. The debt, payment of which the surety guaranteed, remains unaffected by the cession. All that has happened is that the original creditor can no longer claim payment from the principal debtor, or from the surety, because the right to do so has passed to one who has, with effect in law, stepped into his shoes by acquiring his rights. Looking at the situation, after cession, of the principal debtor (and of the surety), the principal debt which the

/surety .....

surety guaranteed remains payable on due date and if either the principal debtor or the surety is sued by the cessionary, he may raise against the claim each and every defence which, but for the cession, he could have raised against the cedent. Looking at the cessionary's position, what he acquired by the cession was not simply the cedent's rights as against the principal debtor (which would have been the case had the principal debt not been secured by the surety) but the cedent's rights in respect of a secured debt, which necessarily, as I see it, embrace the right to sue the principal debtor and the right to sue the surety. The severance of the cedent's rights against the surety from the totality of his rights (and it is the totality of his rights in respect of the specified debts or obligations that he ceded) appears to me to be artifi= cial in the extreme and I am not aware of any

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principle of our law which requires such artificial severance. The very fact that the cessionary in such a case is entitled to claim a separate cession by the cedent of his rights against the surety (cf. Friedman v. Bond Clothing Manufacturers (Pty.) Ltd., supra, at p. 677 B -C), (and which I did not understand Mr. Duke to contest) neces= sarily implies recognition of the fact that the cessionary, by reason of cession of the principal debt or obligation, acquires rights in respect of the surety agreement as well. When that is realized, it becomes apparent that insistence upon a separate, formal cession of the rights against the surety would simply be to require compliance with what appears to be a wholly unnecessary formality of a procedural nature. (Different considerations might arise in respect of certain other forms of security where, by law, prescribed formalities and procedures, e.g., registration, are to be observed). The contention that, as a matter of law, the cessionary cannot acquire rights against the surety without a separate cession of such rights, must in my view be rejected.

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This does not mean, however, that a cessionary in all cases necessarily acquires rights against the surety upon cession of the principal debt or obligation. Faber, Codex, 4, 29, Def. 20, while supporting the view that cession of an action against the principal debtor includes the action against the surety, points out that whether the action against the surety also passes to the cessionary might depend upon the wording of the cession, for the cession might be confined in scope. This is undoubtedly correct. It is not only the cession, however, that has to be looked at in that regard, but also the terms of the suretyship agreement, for there might be a limitation therein relating to the surety's liability; it might, for example, appear from the surety deed, properly construed, that the surety undertaking was given solely and exclusively in favour of the creditor named therein as a delectus personae

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and in favour of nobody else. But in the absence of any contrary indications in the cession or in the deed of suretyship, it appears to me that the cessionary of rights acquires the cedent's rights against both the principal debtor and the surety and that he may sue the surety without the necessity of a separate cession in respect of the rights against the surety.

I would add that the views which I have expressed regarding the passing of rights against the surety appear to be consistent with the approach of Courts in the U.S.A. where, as in our law, cession of a debt carries with it "every remedy or security that is incidental to the subject matter of the assignment ....." (6 Am. Jur. 2d, sect. 121 at pp. 302 - 3.) Later in that section (at p. 303) it is said:

/"As an .....

> "As an application of the general principle that an assignment of a chose in action carries with it all incidental rights, it has been held that a guaranty passes with the principal obligation and is enforceable by an assignee thereof."

In vol. 74 of the same work (sect. 100, at p. 73), after mention of the general rule that a material change in the obligation not assented to by the surety will discharge him, it is said:-

> " ..... Where a bond is given to guarantee the performance of the obligations of a lease, and the lease by its terms is assignable, but the bond contains no provision relieving the surety in the event of assignment, the surety is not discharged by an assignment made without its consent. However, it has been said that for a change in the identity of the obligee to terminate the obligations of a guarantor or surety, the agreement must be one which is not assignable, negotiable, or transferable."

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On the facts of this case, not only is there nothing in the terms of the cession or the deeds of suretyship to indicate that the rights against the surety were not to pass, but there are, as I have already mentioned, explicit provisions in the deeds of suretyship to the effect that the sureties were bound to the creditor's successors and assigns and it was clearly contemplated that rights under the leases could be ceded. The terms of the cession to the plaintiff, moreover, are wide and all-embracing. It follows that regardless of whether cession of the rights under the deeds of suretyship occurred simultaneously with cession of the leases, and even if there was no separate, formal cession at all of the rights under the surety agreements, such rights, in the absence of any other reason pointing to a contrary conclusion, passed to the cessionary.

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It is necessary briefly to mention two further submissions on behalf of the appellant in support of the defence raised in para. 10 (ii). The first, as I understood it, was that since the name of the creditor is an essential term of a suretyship agreement and must therefore be contained in writing (Fourlamel (Pty.) Ltd. v. Maddison, 1977 (1) S.A. 333 (A.D.) at pp. 344 - 5), and since by cession of the principal debt a new creditor (not the one named in the deeds of suretyship) was created, the sureties were not bound because they had not agreed in writing to the substitution of a new creditor and hence the deeds fell foul of sect. 6 of Act 50 of 1956. Some reliance for this contention was placed on J.P.S. Nominees (Pty.) Ltd. v. Kruger, 1976 (1) S.A. 89 (W), but that case dealt with entirely different circumstances. Here, as I have pointed out, the sureties bound themselves in writing also to the successors or assigns of the

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creditor. The identity of such creditor's cessionary may validly be established by extrinsic evidence of the cession. (Cf. Sapirstein and Others v. Anglo African Shipping Co. Ltd., 4 July 1978, A.D., not yet reported.) The second of the further submissions was that the agree= ments of lease had already been terminated at the time of the alleged cession of the rights thereunder and that therefore the plaintiff could obtain no rights against the surety, although it was conceded that despite termination of the leases, the plaintiff could still sue the principal debtor for the relief now claimed. But the argument entirely overlooks the terms of the deeds of suretyship, by which the sureties bound themselves as such in respect of any money then or at any later time owing by the principal debtor, "arising out of or connected with" the said agreements of lease. In the face of those very wide provisions the appellant's contention is of no avail.

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I conclude, then, that para. 10 (ii) of the plea was rightly ordered to be struck out.

The second of the defences raised and in issue on appeal, is contained in para. 12 (ii) of the plea, which reads as follows:

> "(ii) The Second and Third Defendants aver that the deeds of suretyship executed by them as aforesaid, are of no legal force and effect by virtue of the fact that the said deeds of suretyship were inchoate, the chosen domicilium citandi et executandi referred to in Clause 6 having been omitted, and the provisions of Clause 9 thereof not having been completed."

And as an alternative thereto, the appellants pleaded as follows in para. 12 (iii):

> "(iii) Alternatively to sub-paragraph (ii) hereof, the Second and Third Defendants plead that the deeds of

/suretyship .....

> suretyship executed by them are of no legal force or effect by virtue of the fact that two material terms and/or conditions were not contained in writing therein, namely the chosen domicilium citandi et executandi referred to in Clause 6 thereof and the limitation of liability referred to in Clause 9 thereof."

The deeds of suretyship signed by the appellants were printed forms obviously designed for general use, each containing nine clauses, in some of which blank spaces were left with the apparent intention that such spaces would be completed as might be agreed by the parties who chose to use the forms for purposes of their particular agreement. Clause 6 reads: "I/We hereby choose 'domicilium citandi et executandi' for all purposes hereunder at " (and then follows a blank space). The blank space was not completed in the deed signed by

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first appellant, nor was clause 6 deleted. In the deed signed by second appellant, however, the blank space was completed by insertion of an address. (The defences raised in paras. 12 (ii) and (iii), therefore, in so far as they relate to the "domicilium" clause were obviously, in respect of second appellant, based upon a misconception of fact.) Clause 9 of the deeds reads as follows: "Notwithstanding the aforegoing, the amount of this guarantee will be limited to R " (and then follows a blank space). Clause 9 is marked with an asterisk which is to be read with the following legend at the foot of the printed deed:- "To be deleted if the amount is not to be limited". The blank space was not completed on the deeds signed by the appellants, nor was clause 9 deleted.

In Blundell v. Blom, 1950 (2) S.A. 627 (W) at p. 633, Millin, J., said:

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> "The principle that difficulties caused by blanks in written instruments may be resolved by construction is to be found, I think, in all the books (see, e.g., Burrows, Interpretation of Documents, at p. 50) ....."

That principle has been approved and applied in this Court in Miller and Miller v. Dickinson, 1971 (3) S.A. 581 (A.D.) at p. 589 F - H; a case in which, also, a "domicilium" clause was left blank. The instrument in question in that case was a deed of sale and the clause relating to "domicilium citandi ....." for purposes of a notice calling upon the purchaser to remedy any default, was held clearly to have been designed for the benefit of the seller. The inference drawn from the written instrument as signed by the parties was that the seller, by not completing the blank, chose to waive "the benefit contemplated by the draftsman". (At p. 589 G). That seems to me also to be the

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irresistible inference to be drawn from the deed of suretyship signed by the first appellant. The "domicilium citandi" clause was clearly designed for the benefit of the creditor. The surety did not trouble to complete that provision by inserting an address of his choice; and the creditor, by accepting the deed in that form, signified his assent to the surety not choosing a "domicilium citandi".

The provision contemplated by the printed words in clause 9 is, of course, of far more weighty and significant import. It goes directly to the extent of the surety's liability. If it were to appear that it was intended by the parties that the maximum extent of the surety's liability was still to be agreed, and hence the non-completion of the blank, the deed would no doubt be inchoate. (Cf. O.K. Bazaars v. Bloch, 1929 W.L.D. 37). It was contended by Mr. Duke that if the matter were to go to trial,

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evidence might reveal that that was indeed the intention of the parties and that therefore the Court a quo ought not to have decided this point against the appellants on exception. The difficulty in the way of acceptance of that contention is that para. 12 (ii) in no way predicates or foreshadows such a defence. What is pleaded in that para. is simply that the deeds are inchoate because of the omission to complete or delete clause 9. In effect, the Court is asked to draw an inference, from the mere fact of the omission to complete the clause, that the intention of the parties was that the maximum amount for which the sureties were to be liable was still to be agreed.

The provision contemplated in clause 9 was clearly designed for the benefit of the surety. In the case of each of the appellants the deed of surety= ship was signed without completion of the clause and

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delivered to the creditor, duly signed, in its existing form. It is true that the incomplete clause was not deleted, but it does not follow therefrom that not only the draftsman of the printed form contemplated the possible fixing of a limit to the extent of the surety's liability by whomsoever might use such form, but that also the parties to these particular deeds intended or contemplated the fixing of such a limit. (Cf. the observations of Lord Herschell, L.C., in The Baumwoll Manufactor von Carl Scheibler v. Christopher Furness, 1893 A.C. 8 at pp. 15 - 16, with reference to provisions in a printed document "not specially prepared" for the purpose of the parties to a particular transaction.) As it stands, clause 9 is meaningless. In the circumstances which I have described the inference is irresistible (as in the case of the "domicilium citandi" clause)

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that the signing and delivery, without qualification, of the deeds in their existing form signified, in lieu of deletion of the clause, its inapplicability to the transactions thereby concluded. I might add that each of the deeds of suretyship is expressly stated to be in respect of "any moneys" which might be owing and that clause 1 thereof provides unequivocally that the surety's liability shall be "a continuing and standing one" and be in force until all moneys (without any limitation as to amount) have been paid. When such unlimited nature of the surety's liability in the preceding clauses is borne in mind, the signing of the deed by a surety without completion of clause 9, which would serve to limit his liability, is all the more indicative of an intention that clause 9 was not to be applicable at all.

I turn now to the alternative defence pleaded in para. 12 (iii), as set out above. Mr. Duke

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experienced some difficulty in explaining what precisely was intended thereby. The allegation that material terms of the suretyship undertaking "were not contained in writing" is difficult to understand in the absence of an allegation that (referring for convenience only to clause 9) there was actual agreement as to the amount beyond which the sureties would not incur liability. Counsel asked us to read such an allegation into para. 12 (iii), contending that it was implied by the words "material terms and/or conditions". Para 12 (iii) does not support such a construction. I cannot read that paragraph as raising a defence that the terms of the actual agreement were not properly recorded and that the deeds, in effect, stand in need of rectification. There is no allegation as to the circumstances attendant upon failure to record actually agreed "material terms or conditions", nor is there an allegation as to what the agreement was; e.g., what amount was agreed for

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purposes of clause 9. It appears to me that the alternative "defence" in para. 12 (iii) was inserted on the hypothesis that if the deeds were not inchoate, as alleged in para. 12 (ii), then the parties must be presumed or deemed to have intended, but per incuriam omitted, to complete the terms in question, because of the failure to delete the printed words in clauses 6 and 9. But as I have shown when dealing with the argument that the deeds are inchoate, no such presumption can be made, for the relevant uncompleted clauses are to be read as being wholly inapplicable to the instant transaction. There is no substance in the defence sought to be raised by para. 12 (iii).

The last of the defences in issue in this appeal is contained in para. 13 (iii) of the plea. In effect, that defence is that because of the liquidation of the principal debtor and the consequential termination

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of the leases, sect. 37 (1) of the Insolvency Act, 24 of 1936, (which is applicable in the case of winding up of a company) operated to create a liability to the creditor which was different from that for which the appellants went surety. Consequently, so it was contended, the appellants were released from their liability, as sureties, to the creditor or his cessionary. The decision in Strydom v. Goldblatt, 1976 (2) S.A. 852 (W) was invoked in support of that contention. Mr. Slomowitz, for the plaintiff, contended that Strydom v. Goldblatt was wrongly decided. It is unnecessary to express any opinion on that contention for I am satisfied that on the assumption that the decision in that case was correct, it is of no assistance to the appellants because of the provisions contained in the deeds of suretyship with which this case is concerned and which differ profoundly from the suretyship agreement upon

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which the decision in Strydom v. Goldblatt was given. The deeds of suretyship signed by the appellants abound with provisions which indicate very clearly that sequestration or liquidation of the principal debtor was contemplated and that provision was made for such an eventuality, relative to the rights of the creditor and the obligations of the sureties. I have already referred to clause 1 of the deeds, which provides that the suretyship is to be a continuing one and to remain in force until all moneys due to the creditor have been paid. Clause 2 (a) provides that in the event of liquidation of the principal debtor, any dividends which the creditor may receive in respect of money owing to him shall not operate to prejudice his right to recover from the surety any balance which might remain owing in respect of the leases. Clause 2 (e) provides that the suretyship shall cover not only all the debtor's obligations in respect of the leases but also "any claim for damages arising by reason of

any cancellation or rescission of the contract whether by reason of breach, misrepresentation or otherwise" . (My underlining.) Clause 3 makes further provision, which I need not describe, regarding the obligations of the surety in the event of liquidation of the principal debtor.

It is obvious that the question whether the advent of liquidation and subsequent cancellation of the leases created an obligation different from that which the sureties guaranteed, depends upon the terms and scope of their suretyship undertaking. (See the cases referred to in Strydom v. Goldblatt, supra, at pp. 854 - 5.) In the light of the exceedingly wide scope of the suretyship obligations undertaken by the appellants in this case, there is no justification for a finding that the obligation which came into being upon liquidation and cancellation of the leases

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fell beyond the scope of their undertaking and para. 13 (iii) of the plea therefore does not disclose a defence.

The appeal is dismissed with costs, which shall include costs in respect of two Counsel.

S. MILLER

JUDGE OF APPEAL

RUMPFF, C.J.)
RABIE, J.A.)
MULLER, J.A.) CONCUR
DIEMONT, J.A.)