198/93

CASE NO 288/92

IN THE SUPREME COURT OF SOUTH AFRICA

APPELLATE DIVISION

In the matter between:

AFRICAN LIFE PROPERTY HOLDINGS (PROPRIETARY) LIMITED Appellant

and

SCORE FOOD HOLDINGS LIMITED Respondent

CORAM: CORBETT CJ, SMALBERGER, KUMLEBEN, NIENABER JJA et VAN COLLER AJA

DATE HEARD: NOVEMBER 4, 1993

DATE DELIVERED: DECEMBER 1, 1993

J U D G M E N T

NIENABER JA:

The appellant, the cessionary of a landlord, sued the respondent, a surety for its tenant, for the payment of arrear rentals, eventually calculated to be R282 333,40. The claim failed before Levy AJ sitting in the Witwatersrand Local Division. The court in effect held that the tenant in terms of the lease was not the principal debtor in terms of the deed of suretyship. Absolution from the instance was granted with costs. This is an appeal, with leave of the court a quo, against that judgment.

The principal issues in the appeal are whether the deed of suretyship, one of a cluster of interrelated agreements between sundry parties, was legally effectual when executed by the respondent as surety; if not, whether it was subsequently validated by a series of amendments to several of the agreements forming part of the conglomeration of transactions.

The legal issues may be comparatively simple,

their factual setting is not.

One Jacob Joel Isaac Motlogeloa, a prominent black businessman in Soweto with extensive interests in the liquor trade, was the kingpin in a project to develop an ambitious business and entertainment centre, comprising a supermarket, a bottle store, a restaurant, a discotheque, a drycleaner and laundromat and several smaller retail outlets, to be named "Centre 'A'", on stand 11902, Orlando West. He had the financial and entrepreneurial backing of a number of white commercial concerns, including the appellant and the respondent. Motlogeloa was the sole shareholder in and director of a company, Mamotsha Investments (Pty) Ltd (hereinafter referred to as "MI"). MI held, or was about to acquire, the 99 year leasehold of the property on which the complex was to be developed. The appellant was to advance the funds required to enable MI to do so. Because Group Areas legislation then in force precluded the appellant from

owning shares in MI, Motlogeloa retained all the shares on the understanding that once the laws of the land permitted it to do so, the appellant would obtain a share in MI. As security for the loan advanced by the appellant to MI the latter was to pass a bond in favour of the appellant over the property. The actual building of the complex would be undertaken by another company, Lonrho Projects Procurement Ltd ("Lonrho"). Once completed the entire property was to be leased by MI to another company, styled Ramodutoana Investments (Pty) Ltd (hereinafter referred to as "RI") of which Motlogeloa was again the sole shareholder and director. RI would operate a supermarket in the centre through another concern of his, Afro Sun (Pty) Ltd, and, as head tenant, would sublet the remaining premises to various commercial outlets. The respondent, a company experienced in the business of running supermarkets, would equip and manage the supermarket for Afro Sun (Pty) Ltd and supply it with

provisions and commodities. It was part of the arrangement between Motlogeloa and the respondent that the respondent would bind itself as surety in favour of MI for the rental obligations of RI. And it was part of the arrangement between Motlogeloa and the appellant that MI would cede its claims to rentals and revenues accruing from the agreement of lease to the appellant. In addition RI would indemnify the respondent against liability incurred in respect of the suretyship and Motlogeloa, in his personal capacity, would bind himself as surety in respect of such indemnification.

To implement this scheme a number of agreements were formally concluded on 31 October 1986. These were:

A. The main agreement between the appellant, MI, RI (described with reference to its company registration no. 68/10537/07) and Motlogeloa, contemplating the launching of the project and providing, inter alia, for the acquisition by the appellant of 49% of the

shareholding in MI when such acquisition were to be allowed. Clause 2.4 of the preamble to this agreement reads: "Ramodutoana [RI] is willing and able to enter into the lease in terms of annexure B hereto." For reasons presently to be discussed this statement was wrong. (The lease referred to is the one described in D hereunder.)

B. The development agreement between the appellant, MI and Lonrho. It provided for the actual construction of the complex.

C. The loan agreement between the appellant and MI providing for the financing of the project and the registration of a first bond over the property in the appellant's favour.

D. The lease agreement between MI and RI (once again referred to by its company registration no. 68/10537/07), providing for a 10 year lease of the premises by MI, as landlord, to RI, as tenant. Clause

2.1 reads as follows:

> "2.1 This entire agreement is subject to:
>
> 2.1.1 the landlord taking transfer into its name of the leasehold of the property with conditions permitting the erection of the building and with a zoning consistent with the use for which the tenant intends to hire the premises, ...;
>
> 2.1.2 all the tenant's obligations hereunder being guaranteed by a party who is acceptable to the landlord and in a form of deed which is also acceptable to the landlord, such deed to be executed prior to the execution of this lease;"

E. The deed of suretyship, central to this case, which was executed (in pursuance of clause 2.1.2 of D) by the respondent in favour of MI as creditor

> "for the payment on demand of all sums of money which RAMODUTOANA INVESTMENTS (PROPRIETARY) LIMITED (hereinafter styled "the debtor") may now or from time to time hereafter owe or be indebted to the creditor from whatsoever cause arising out of the attached lease agreement ..."

(The attached lease agreement was D.)

Clause 9 of the deed of suretyship provides as follows:

> "Should the creditor cede the creditor's claim against the debtor to any third party/ies (which we agree the creditor shall do only if all shareholders and mortagees of the creditor consent in writing to

such cession), then this suretyship shall be deemed to have been given by us to such cessionary/ies, who shall be entitled to exercise all rights in terms of this deed of suretyship as if such cessionary/ies were the creditor."

F. The indemnity given by RI (again described by its company registration no. 68/10537/07) in favour of the respondent in respect of any liability incurred by the respondent under its suretyship in favour of MI.

G. The deed of suretyship executed by Motlogeloa in favour of the respondent for any liability which RI might incur towards the respondent under the indemnity referred to in the previous paragraph.

H. On 9 December 1986 the first bond, foreshadowed in the loan agreement (C), was registered on behalf of MI as mortgagor in favour of the appellant as mortgagee for the sum of R2 700 000,00. Clause 13 thereof contains a cession in the following terms:

"The Mortgagor hereby grants a full and sufficient cession, transfer and assignment to the Mortgagee of all the Mortgagor's right, title and interest in and to all rents and other revenues which may accrue from the mortgaged property as additional security

for such sums as may be claimable at any time under this Bond with the express right in favour of the Mortgagee irrevocably and in rem suam to take proceedings against tenants in default for the recovery of the rent and/or ejectment, to cancel or renew or enter into leases in such manner as the Mortgagee shall think fit, provided, however, that such cession, transfer and assignment shall not be acted upon without the consent of the Mortgagor while the conditions of this Bond have been and are being fully complied with."

Except for the two suretyship agreements, whenever RI was mentioned in any of these documents there was a reference to its company registration no. 68/10537/07. During December 1986 it was discovered by Motlogeloa's advisers that there was in fact no company in existence bearing the name Ramodutoana Investments (Pty) Ltd. The registration no. 68/10537/07 belonged to a company named Portia Moira Hairdressing Salon (Pty) Ltd ("Portia"). Portia was a dormant company. Motlogeloa had in mind to take it over and to re-style it as Ramodutoana Investments (Pty) Ltd, but (as it was stated in a letter from Motlogeloa's attorney to the

respondent):

> "... following Jackie Motlogeloa's return from the USA in early December, we discovered that due to a misunderstanding between him and his auditors, the shares in Portia Moira Hairdressing Salon (Pty) Ltd (which would have changed its name to Ramodutoana Investments (Pty) Ltd) were never transferred to Jackie."

The agreements referred to above (A-G) were all concluded in the belief that RI was the name of a company with registration no. 68/10537/07, duly controlled by Motlogeloa. If the name was right but the company registration number was wrong, no such company existed; if the name was wrong but the company registration number was right, such a company (Portia) did exist but Motlogeloa had no authority to represent it. Either way the tenant identified in the lease was not legally bound to the landlord.

The other agreements were likewise concluded on the basis that RI was a pre-existing but re-styled company, duly controlled by Motlogeloa. The entity which

purported to sublet the premises to various sublessees, and to collect and to pay rental to MI accordingly lacked the legal capacity to do so. Since Portia was not bound in contract to MI, there was no one whom MI could have held liable for payment of rent.

In an endeavour to retrieve the situation Motlogeloa caused a new company to be incorporated on 12 December 1986, shortly after the cession by MI to the appellant of its rights against the reputed tenant. Its name was Ramodutoana Investments (Proprietary) Ltd and its company registration no. was 86/05069/07. A series of addenda to most of the agreements referred to above were also drafted.

These addenda were concluded to cater for two previously unforeseen eventualities, first, that the capital outlay needed for the the completion of the project exceeded the initial estimation by some R250 000,00 and second, that the entity referred to in

the agreement as RI was an alien company. The following further agreements were thus concluded:

I. The first addendum to the main agreement (A): It was signed by all the parties who professed to sign the main agreement and in addition by the respondent. The dates of such signatures are not without significance viz: MI, the new RI, Motlogeloa, Lonrho on 1 September 1987; the respondent on 14 September 1987; and the appellant on 15 September 1987.

By 15 September 1987 it had not yet been revealed to the appellant what Motlogeloa and the respondent had known since December 1986, namely, that the company now known as RI was a completely different entity from the one reflected in the previous set of agreements. Nowhere in the document is there a reference to the new RI's 1986 company registration number.

The tenor of this addendum, according to its terms, was to provide for an increase of the amount of the

appellant's loan to MI to R2 867 000,00 and to make a corresponding adjustment to each of the other agreements affected thereby. The respondent's deed of suretyship (E) was singled out in clause 4. It reads:

> "4. That Score Food Holdings Limited acknowledges and agrees:
> (i) that its liability under the Suretyship is increased by virtue of the increase in the rental payable under the Lease Agreement arising from the amendments to the Loan Agreement and the Development Agreement as detailed in paragraphs 1 and 2; and
> (ii) that in paragraph II (a) on page 2 of the Suretyship the amount of R8,70 (eight rand and seventy cents) is to be deleted and substituted with the amount of R9,50 (nine rand and fifty cents)."

J. The second addendum to the main agreement (A):

The parties and the respective dates of their signatures were as follows:

MI, the new RI and Motlogeloa on 17 December 1986 and the appellant on 27 November 1987. (The document was not signed by the respondent.)

It was shortly before its signature of this

agreement that the appellant was informed of the substitution of the new RI for Portia. The purpose of this addendum, prepared by Motlogeloa's attorneys, was to regularise the interposition of the new RI in the new scheme of things. The preamble to the agreement contained a recital of the history and clause 3 then proceeded:

"3. Ratification

3.1 The parties hereby record that notwithstanding anything to the contrary contained in the Main Agreement, it was the intention of Motlogeloa at the date of signature of the Main Agreement, to conclude the Main Agreement in his own name as Trustee for a company to be formed on the basis of a common law contract for the benefit of a third party (stipulatio alteri).

3.2 Ramodutoana (reg. no. 86/05069/07) hereby ratifies and confirms the Main Agreement signed by Motlogeloa as Trustee for a company to be formed on 31 October 1986, and undertakes to carry the Main Agreement into effect with all the rights and obligations thereunder, with retrospective effect from the date of signature of the Main Agreement.

3.3 Any reference in the Main Agreement to Ramodutoana Investments (Proprietary) Limited, reg. no. 68/10537/07, shall be deemed to be a reference to Ramodutoana Investments (Proprietary) Limited, reg. no. 86/05069/07."

The averment that Motlogeloa concluded the main agreement as trustee for a company to be formed was of course untrue. Regrettably the appellant neglected to insist on the respondent's signature to this document. The respondent could scarcely have refused to sign it since it had already appended its signature to a number of other documents, I, L and M in particular, signifying its preparedness to be liable as a surety for the rental obligation of the new RI. (L and M are referred to below.)

K. The first addendum to the lease agreement (D): The parties were MI, the new RI and Motlogeloa. All signed the agreement on 17 December 1986. It contained the identical erroneous preamble recited in the second addendum to the main agreement (J) and proceeded:

"3.3 Any reference in the Lease Agreement to Ramodutoana Investments (Proprietary) Limited, reg.no. 68/10537/07 shall be deemed to be a reference to Ramodutoana Investments (Proprietary) Limited, reg.no.

86/05069/07."

Neither the respondent nor the appellant was invited to sign this document.

L. The first addendum to the Portia indemnity (F): The parties were the new RI, Motlogeloa and the respondent. According to the document itself all of them signed it on 17 December 1986. It consisted of a preamble and a clause 3.3 identical to the first addendum (K) to the lease agreement. In addition Motlogeloa indemnified the other parties to the Portia indemnity (F) against any loss, damage or costs which each of them might incur as a result of the new circumstance. The significance of this document, according to counsel for the appellant, is that it demonstrated the respondent's knowledge of, and hence its willingness to be liable for the rental obligations of the new RI.

M. The first addendum to Motlogeloa's suretyship in favour of the respondent (G). The parties were

Motlogeloa who signed it on 17 December 1986 and the respondent who signed it on 12 January 1987. It followed the same pattern and wording as the previous documents (K and L) with Motlogeloa indemnifying the respondent for any losses, damage or costs it might incur or sustain "by virtue of the circumstances set out above".

N. A second bond for the additional R250 000,00 which contained a cession clause identical to the one in the first bond (H), was registered by MI in favour of the appellant on 24 February 1988.

Meanwhile the complex was completed in August 1987, the premises were occupied, the supermarket and other outlets commenced trading and RI, in its new guise, effected payment of the rental to the appellant as the cessionary. But due to an economic slump and unfavourable trading conditions it was unable to maintain its payments after August 1988. The new RI defaulted in terms of the lease, MI defaulted in terms of the bond and

the appellant turned to the respondent, as a surety, for the payments due in terms of the lease. Extended negotiations between the parties proved to be fruitless and the trial in due course commenced.

In order to succeed in its claim as pleaded the appellant had to prove a valid lease, a valid suretyship and a valid cession.

Prior to the various addenda it would have failed in all three respects.

The intitial lease (D), annexed and referred to in the main agreement (A), the development agreement (B) and the respondent's suretyship agreement (E), was between MI and Portia, wrongly described as RI. Motlogeloa's understanding was that RI was the erstwhile Portia and that he was competent to represent it. In that belief he was mistaken. In the absence of due authority, initially bestowed or subsequently ratified, Portia never became a party to the lease. The situation is comparable

to a landlord concluding a lease, through an agent, with a non-existing tenant. The landlord's redress is against the professing agent, not against the professed principal (cf Van der Merwe et al: **Contract: General Principles** 182-183; **1 Lawsa** (first re-issue) par 139, 143). The lease attached to the suretyship was accordingly incomplete and unenforceable. Neither MI as cedent nor the appellant as cessionary had a claim against Portia. In short there was no enforceable debt for the rental. Absit debt, absit cession, absit surety.

It was for that very reason that the addenda were concluded. The issue is whether they saved the day for the appellant.

The first addendum to the lease agreement (K) was concluded between MI and the newly incorporated RI. Counsel for the respondent argued that MI, having ceded its claim, relinquished its standing to enter into this addendum. The submission was founded on the wording of

the cession, clause 13 of the bond (H): since the bond empowered the appellant

> "to take proceedings against tenants in default for the recovery of the rent and/or ejectment, to cancel or renew or enter into leases ...",

it follows, so it was contended, that only the appellant, and not MI, was competent to cancel any existing lease or to enter into a new one. I do not agree that it does so follow. As a matter of interpretation MI ceded to the appellant merely its rights to the rental, together with certain rights ancillary to the recovery thereof in the event of non-payment. The appellant did not in terms succeed to all MI's powers as landlord. MI, in particular, retained its competence to agree to a re-definition of the terms of the lease with the tenant. (Whether such an action would constitute a breach of the obligationary agreement between the cedent and the cessionary is not at issue in this case.) Such a consequence does not offend against the principle that a

cedent cannot unilaterally apportion a single debt amongst a multiplicity of cessionaries (cf **Evins v Shield Insurance Co Ltd** 1980 (2) SA 814 (A) 827B-C). But it goes further. As a matter of substance the initial lease (D) was unenforceable for want of a tenant. At that stage there was accordingly nothing to cede and hence no cession. MI was consequently not disqualified by the cession in the bond from entering into the first addendum to the lease agreement (K) with the new RI incorporating, **mutatis mutandis**, the wording of the earlier document (D).

The appellant has accordingly succeeded in proving a valid agreement of lease, being the addendum indicated as K.

The appellant has likewise succeeded in proving a valid cession to it of the right to rentals accruing to MI from that lease. The wording of clause 13 of the bond (H), being a cession of all MI's "right, title and

interest in and to all rents and other revenues which may accrue from the mortgaged property ...", is wide enough to encompass MI's rights to the rental in terms of the later lease (K). MI's right to the rent from that lease and, concurrently, any rights MI might have against the respondent as surety for its payment (clause 9 of the deed of suretyship (E); **Pizani and Another v First Consolidated Holdings (Pty) Ltd** 1979 (1) SA 69 (A) 77H-78C) accordingly will have passed to the appellant.

The sole remaining issue is therefore whether the appellant has succeeded in proving a valid suretyship.

As a matter of form the deed of suretyship (E) complied with the statutory requirements enacted by section 6 of the General Law Amendment Act 50 of 1956 as amended by section 34 of Act 80 of 1964: it identified a creditor (MI), a debtor (Portia, identifiable by reference to its company registration number in "the attached lease"), a principal debt ("all sums of money

which [the debtor] may now or from time to time hereafter owe or be indebted to the creditor from whatsoever cause arising out of the attached lease agreement ..." (being D)), and a surety (the respondent) which assumed liability as such. (See **Fourlamel (Pty) Ltd v Maddison** 1977 (1) SA 333 (A); **Sapirstein and Others v Anglo African Shipping Company (SA) Ltd** 1978 (4) SA 1 (A); **Jurgens and Others v Volkskas Bank Ltd** 1993 (1) SA 214 (A) 219D-E).

As a matter of substance, however, the deed of suretyship was ineffectual since the debtor identified therein would never be indebted to the creditor and the principal debt which the deed of suretyship sought to secure would never come into existence. Guaranteeing a non-existent debt is as pointless as multiplying by nought.

But it was argued by counsel for the appellant that the difficulty was removed when the new RI was

incorporated. What MI as creditor and the respondent as surety had in mind when the suretyship was initially concluded was an entity which would be the tenant, was a company named Ramodutoana Investments (Pty) Ltd and would be controlled and represented by Motlogeloa as its director. Portia did not conform to those characteristics. RI, upon its incorporation, did. Once so incorporated the situation accorded with what MI and the respondent had intended from the outset. With the coincidence of intent and event the suretyship became enforceable at the instance of the appellant, as MI's successor in title, in line with what its authors had in mind. That, if I understood it correctly, was the argument.

I am afraid that I cannot agree with it. The principal debt is fixed in the deed of suretyship by reference to "the attached lease" (D) and the principal debtor is fixed in the attached lease by reference to

Portia's company registration number. The parties accordingly had a specific principal debtor in mind. A different debtor (the new RI with a different company registration number) and a different debt (the new RI's rental obligations) could not be imposed on the surety externally i.e. by the creation, **ex post facto** by someone else, of a new entity which should have figured as the debtor in the first place but did not. Such a change could only be effected internally i.e. by means of an appropriate amendment, in due form, of the deed of suretyship.

For all that a deed of suretyship is to be signed by the surety alone, suretyship remains a bilateral juristic act (cf **Jurgens and Others v Volkskas Bank Ltd supra** 218J), requiring for its formation the consent of the surety communicated to the creditor of the principal debt (cf **Bouwer v Lichtenburg Co-operative Society** 1925 TPD 144, 148; **Federated Timbers (Pretoria) (Pty) Ltd v**

Fourie 1978 (1) SA 292 (T) 297A-E); **Volkskas Spaarbank Bpk v Van Aswegen** 1990 (3) SA 978 (A) 985H-986E). Once formed the terms of the deed of suretyship can only be amended by an agreement in the ordinary course between the surety and the then creditor of the secured debt. Such an amendment to the deed of suretyship must itself comply with the formalities required for its initial formation (**Ferreira and Another v SAPDC (Trading) Ltd** 1983 (1) SA 235 (A) 238H; 245F-247C; **Morgan and Another v Brittan Boustred Ltd** 1992 (2) SA 775 (A) 782I). The mere intention of the parties, unexpressed in a document to that effect, that the suretyship is to have a particular meaning at odds with the written record, can accordingly have no validity. That MI and the respondent may have been in accord (assuming that to be so) that the new circumstance (the incorporation of the new RI) was more in conformity with what they had in mind initially than the document they had drafted, cannot serve to alter the

face or the content of the suretyship. A written agreement between the creditor and the surety, signed by the latter, amending the deed of suretyship, was required. Yet the deed of suretyship is the one document in the entire series that was never amended. In any event any such amendment would have had to be effected between the appellant, not MI, and the respondent. The creditor, after all, was no longer MI, it was the appellant. The suretyship related to the right to rent accruing from the mortgaged property. That right was ceded to the appellant even before the new RI had been incorporated. Once incorporated, and once a new lease (K) had been entered into, the right to rental from that lease vested in the appellant by virtue of the cession (cf Van der Merwe et al, Contract, General Principles, 337). Thereafter MI lacked the standing to agree to an amendment of the deed of suretyship. MI's state of mind therefore became irrelevant.

Nor can the mere signature by a surety to a different document, which is not an amendment to the deed of suretyship but is either a unilateral declaration of intent to be bound for someone else's debt or is an agreement between the surety and such debtor that the surety is prepared to be so bound (cf Caney's **Law of Suretyship**, fourth edition, 55 note 6), create a new suretyship. In the instant case the respondent was informed of the Portia error and the incorporation of the new RI by letter, late in December 1986, and it signed the two addenda to Motlogeloa's indemnity and his suretyship (L and M) which recounted the Portia history. As it appears from the latter two documents, read with its signature to the first addendum to the main agreement (I), the respondent was aware of the incorporation of the new RI and prepared to assume responsibility as surety for its rental obligations. But that fact alone cannot suffice. None of these three documents purports to

create a new suretyship, independent of the earlier deed of suretyship (D). And in any event that was never the case pleaded.

The mere incorporation of the new RI, either on its own or in conjunction with the respondent's expressed willingness to assume liability for its debts, cannot therefore render the respondent liable in terms of the deed of suretyship (E) in its pristine form.

It was argued in the alternative that the first addendum to the main agreement (I) constituted the required amendment to the deed of suretyship (D). That addendum was signed by all the parties concerned - by MI as cedent, by the appellant as cessionary, by the respondent as surety and by the new RI as principal debtor. At that point the new RI had already been incorporated and the respondent, by signing the addenda, L and M above, had already signified its willingness to stand good for the new RI's rental obligations. All the

parties, so it was submitted, had accordingly agreed that the new RI would henceforth be the new debtor for all practical purposes, including the suretyship (E).

The argument cannot prevail, for two reasons in particular. The first is that the document was not in terms concerned with the intrusion of the new RI; it dealt with an increase of the amount of the capital loan by the appellant to MI and the repercussions of such an increase on the interrelated agreements. The issue of the substitution of the new RI for Portia was not addressed in the agreement at all which, unlike all the other addenda, contains no preamble recapitulating the history of the Portia error. One cannot, from the terms of the first addendum to the main agreement (I) alone, conjure up or assemble, as it were by implication, an amendment to the deed of suretyship (E). Secondly, there is an even more fundamental reason why the first addendum to the main agreement (I) is not the solution to the

appellant's dilemma. On the evidence the appellant's representatives were only informed of the changed circumstances shortly before the appellant signed the second addendum to the main agreement (J) on 27 November 1987. On 15 September 1987, when it signed the first addendum to the main agreement (I), it was accordingly unaware that the new RI which had signed it was not the entity described in the agreement of lease (D) and hence in the deed of suretyship (E). Being ignorant of its existence, the appellant could not have intended to agree to its interposition as the new principal debtor.

By the time the appellant signed the second addendum to the main agreement (J) it had been advised of the true position. The second addendum was designed to regularise the position between the parties. Had the respondent also signed that document an argument could no doubt have been advanced that the document, so signed, would have amounted to the amendment of the deed of suretyship by

the substitution of a current debtor for an indifferent outsider. But, sadly for the appellant, the document did not provide for the signature of the respondent and it was not so signed. Nor could it be argued, in the light of the evidence and the state of the pleadings, that an offer by the respondent can be distilled from the terms of the first addendum to the main agreement (I) (dated 14 September 1987 when the agreement was signed by the respondent), to introduce the new RI as the new principal debtor; and that the appellant accepted that offer when it signed the second addendum to the main agreement (J) on 27 November 1987. The first addendum to the main agreement contains nothing capable of interpretation as an offer of any kind and the second addendum to the main agreement, which does not even refer to the deed of suretyship, cannot remotely be read as an acceptance of any such offer, assuming one to have been made. It is true, as was pointed out by counsel for the appellant,

that a suretyship need not be contained in a single document and it may be that, by the time action was instituted, there could no longer have been any doubt in the minds of either the respondent or the appellant that the principal debtor was the new RI and not Portia - but in the absence of a document, duly signed by the respondent, to the effect that the deed of suretyship was amended accordingly, the respondent cannot be held liable qua surety.

The conclusion is inevitable that the court a quo was right in granting absolution from the instance with costs. But I reach it reluctantly since the appellant's predicament was not of its own making and the respondent is evading a liability which it was plainly prepared to assume.

In the result the appeal is dismissed with costs,

which are to include the costs of two counsel.

P M Nienaber JA

Corbett CJ)
Smalberger JA) Concur
Kumleben JA)
Van Coller AJA)