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Module 3: Lexis® Library Advanced Legal Research

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Module 3: Lexis® Library Advanced Legal Research

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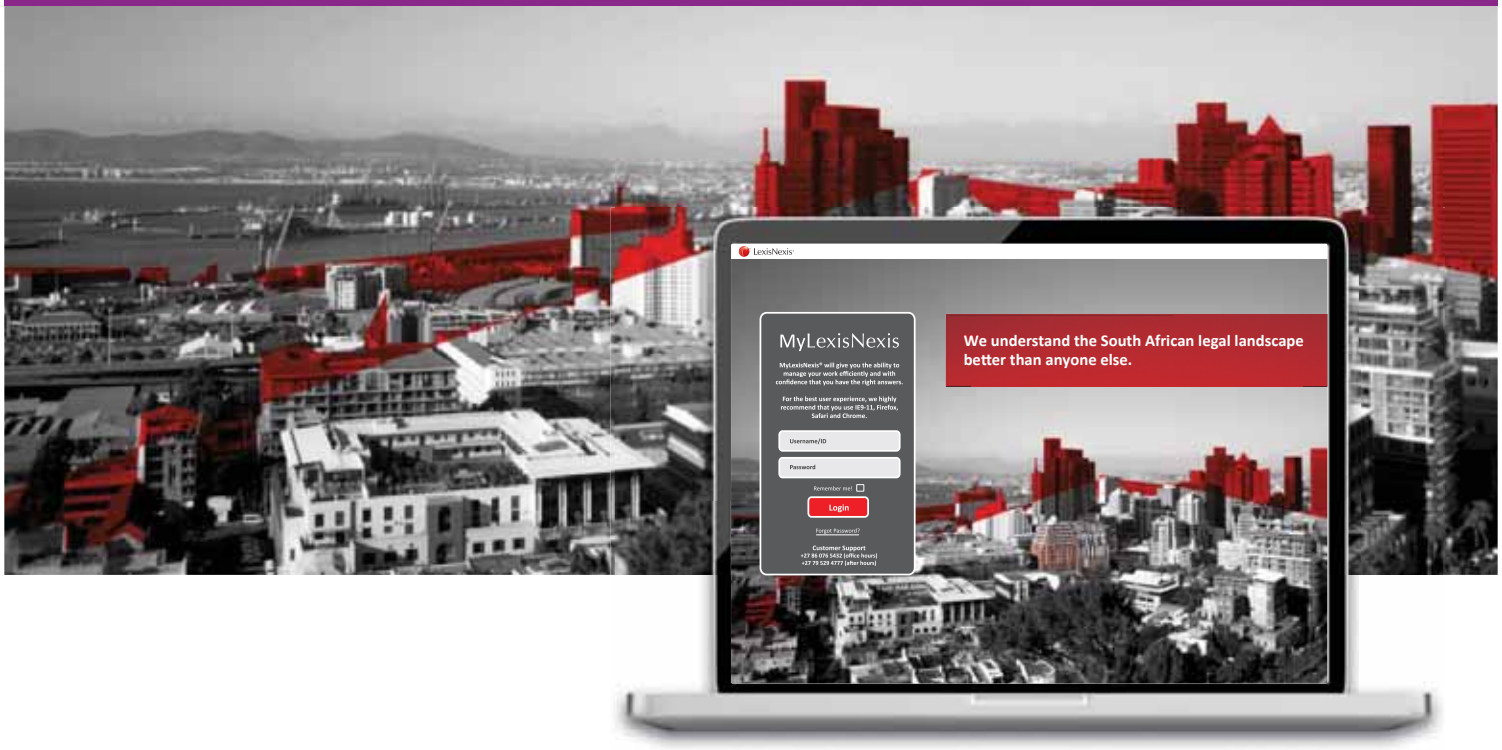

ABOUT MYLEXISNEXIS

My LexisNexis is the go-to online hub for legal research, guidance and regulatory compliance. One online platform, three game-changing, customisable solutions.

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ABOUT THIS TRAINING

There are three modules in the LexisLibrary training series.

Module 1: LexisLibrary Basic Skills
This module will assist a first time user or beginner in learning the navigation methods necessary to get the most out of LexisLibrary. In addition, a basic overview of Law Reports, Legal Citator, Legislation and search techniques is provided.

Module 2: LexisLibrary Legal Research
This module will equip you with the fundamental tools and skills required to get the most out of your LexisLibrary research experience.

Skills you will acquire in this module:
- Locating resources to answer specific questions
- Utilising secondary sources
- Refining search results
- Using secondary sources to identify primary sources
- Creating folders and saving research

Module 3: LexisLibrary Advanced Legal Research
This module introduces how LexisLibrary will assist you to answer more complex legal questions.

Skills you will acquire in this module:
- Strategies for resolving complex legal questions
- Identifying entry points into networks of legal resources
- Searching using keywords
- Finding primary sources of law
- Using Legal Citator as a research tool

1. Research Methodology

The key to effective legal research is developing the ability to break down a complex question into smaller, more manageable parts and to then frame those questions as points, or questions, of law.

In the majority of situations a research problem can be rephrased as a series of questions requiring "yes" or "no" answers which, when the answers to each of them are put together, will provide the overall answer to a problem. This may seem to be a formulaic method, but it is very useful in devising an argument and identifying both the weak areas of an argument and where the real dispute lies.

Example 1:
A (a political party) and B (a printing company) conclude an agreement in terms of which B agrees to produce 10 000 electoral posters for A at a price of R15.00 per poster. B duly produces the posters and delivers them to A. Upon delivery of the posters A objects that the quality of posters which have been produced is not what was agreed, the material is of a lower quality and some are very faint, although still legible when viewed up close.

A therefore tenders payment to B of R8.00 per poster, accepts the delivery and causes the posters to be displayed in various constituencies, time being of the essence in this instance.

B sues A for the balance of the original agreed price, claiming that A is in breach of the agreement by failing to make full payment, having accepted delivery of the posters.

This set of facts raises the question of the possible application of the contractual remedy of a *quantum meruit* (reduction of contract price) or of other remedies for incomplete performance.

The questions which would arise in this instance are:

1. What kind of contract is this?
   a. Is it one of sale? (Yes/No); or
   b. Is it one for the letting and hiring of services? (Yes/No)

   (which ever you decide to argue will have implications for the defence you may raise)

2. Does the *exceptio non adimpleti contractus* apply here?
   a. Is the agreement a reciprocal agreement / does the principal of reciprocity apply? (Yes/No)
      i. Was A obliged to do anything under the agreement? (Yes/No)
      ii. Was B required to do anything under the contract? (Yes/No)

      (if both the answers to 2(a)(i) and (ii) are Yes, then the answer to 2(a) is Yes too)
   b. Was the common intention of A and B that neither of them would be entitled to enforce the contract unless they had performed or were ready to perform their own obligations? (Yes/No)
      i. Could B demand payment without tendering delivery? (Yes/No)
      ii. Could A accept delivery without tendering payment? (Yes/No)

      (In this instance if the answers to 2(b)(i) and (ii) are No, then the answer to 2(b) is Yes)

      (If the answers to both 2(a) and (b) are Yes then the answer to 2 is also Yes.)

And so you would continue to do your analysis of the problem[1].

The question now though becomes, how did we know that the issue we were going to deal with was incomplete contractual performance? The answer lies in doing a fact and issue analysis of the problem.

1.1 FACT AND ISSUE ANALYSIS

The generally accepted method for answering a legal question is the FIRAC method[2]:
F: Facts
I: Issue/s
R: Relevant law
A: Application
C: Conclusion

1 To answer the questions of law raised in this example reference was made to The Law of Contract in South Africa, Christie, p 437-438.
2 As explained in Introduction to Law and Legal Skills, Maisel and Greenbaum, p 97-102.

1.1.1 FACTS[3]

When confronted with a research scenario you will inevitably have a series of disorganised facts laid out before you, either by an examiner or by a client. You need to be able to sift through those facts to isolate only those which are relevant to the situation at hand. It is for this reason that it can be more useful to start at the end and work your way back.

Ask yourself, "What does this person want?" or, "what relief do they need me to obtain for them?" Is it: an interdict; payment of money; a divorce; an acquittal on a criminal charge? And so on. This is generally a useful guide to beginning your task of identifying relevant facts and eliminating irrelevant ones.

Example 2: If a person consults you and says:

"My landlord has shut off my electricity!"

This statement is relevant if they want you to obtain an order directing the landlord to restore their electrical connection. However it is irrelevant if they have actually come to see you about their unfair dismissal from work and it is just part of a long line of complaints that they say have come about as a result of their dismissal.

Once you have isolated the relevant facts from those presented to you, you should be able to formulate your cause of action.

1.1.2 ISSUES

Identify what issues or legal questions these facts raise. This is really the beginning of your legal research process as, if you can accurately identify all the legal questions, you will be able to hone in on specific areas of law that you need to look to for answers.

The most important aspect is identifying the law governing the issue. Take your time at this stage, and if necessary ask for assistance because, if you identify the wrong law now then nothing else you do will matter, and you will inevitably come to the wrong conclusion. Everything you do after identifying the law governing the issue is aimed at achieving a better understanding and refining the meaning of the law on the topic and how it should be implemented.

The first stage requires assessing whether you are dealing with a procedural or substantive issue of law (this was also covered in Module 2: LexisLibrary Basic Research).

Procedural questions relate to the mechanisms for the enforcement of substantive law, for example civil or criminal procedure and the law of evidence. Substantive law is the rules that govern conduct and interactions between persons, it is "the main body of legal norms"[4].

The second stage is identifying into which discipline of law your issues fall (for example, Administrative Law, Constitutional Law, Law of Contract, Criminal Law, Delict, Family Law, Law of Property, Law of Persons, Civil Procedure, Criminal Procedure or the Law of Evidence).

Example 3: An example of the conclusion of above process is the following extract from the judgment of Harms DP in Le Roux and others v Dey [2010] 3 All SA 497 (SCA):

Page 501 of [2010] 3 All SA 497 (SCA)

Identifying the facts

"The claims arose from these facts: the first defendant, who then was fifteen and a half and in grade 9, one evening searched the internet for pictures of gay bodybuilders. He found one. It showed two of them, both naked and their legs astride, sitting next to each other in a rather compromising position – a leg of the one was over a leg of the other – and the position of their hands was indicative of sexual activity or stimulation. He manipulated the photograph by pasting a photo of the plaintiff's face on the face of the one bodybuilder and the face of the principal of the school onto the other. He also covered the genitals of each with pictures of the school's badge.

[3]

He sent the manipulated photo to a friend who, in turn, sent it by cell phone to the second defendant, who was in grade 11 and 17 years old. The picture spread like fire amongst the scholars. A few days later, the second defendant showed the picture to a female teacher during class and later decided to print the photo in colour and showed it around on the playground. At his behest and because he did not have the necessary "guts" the third defendant, who was in the same grade and of the same age, placed the photograph prominently on the school's notice board. A teacher saw it quite soon and removed it.

3 Also referred to in these notes as the essential facts.
4 Law of Evidence, 1.2 Classification and scope of the law of evidence, CWH Schmidt.

[4]

Identifying the issues

As a result, the plaintiff instituted an action against them based on the actio iniuriarum, claiming damages for defamation as well as for his humiliation. The facts are fairly uncontentious and the main issues raised by the appeal and cross-appeal concerned (a) wrongfulness; (b) the presence of fault in the form of animus iniuriandi; (c) the quantum of damages; and (d) the appropriate costs order. There is, however, another fundamental question relating to splitting of causes of action that will be dealt with in the course of the judgment. It may be pointed out at this early stage that the first two issues are essentially related to the evidence of the defendants that the publication of the picture was intended as a joke and was perceived as such and that, accordingly, they could not be liable under the actio iniuriarum because their actions were not wrongful and because they did not have the intent to injure the plaintiff (a lack of animus iniuriandi)."

Identifying the law

1.1.3 RELEVANT LAW

Having established the essential facts and identified what legal issues arise from those facts, you now need to begin to research the applicable law.

1.1.3.1 Methods of research

The temptation with research can be to just start typing words into the search fields and hoping that results will pop up, without giving too much thought to the process. This should be avoided as it is really just a hit and miss methodology which will either produce few accurate results or a mass of results which will never be able to be processed.

What you should be looking for in any research is an entry point into the subject matter. The legal system has developed into a large network where resources are connected to one another by the references that exist between them. The purpose of identifying an entry point is that when one resource is found which deals with the issue being researched, it will be connected via references made by it and references made to it to a mini-network of resources that deal with the same issue. The result of this effect on research conducted on legal resources means that when you locate your entry point you can use the various tools on LexisLibrary to find other resources in the mini-network that will assist your research.

Example 4: A simple example of locating an entry point is:

You are asked to sue based on a suretyship agreement containing blanks where the name of the principal debtor should be. The suretyship forms part of a credit application, and both are included in one booklet. The suretyship also refers to a credit application signed on the same day as the suretyship, without specifically saying that it is the credit application contained in the same booklet.

Remembering the method from the Module 2: LexisLibrary Legal Research, you should start with looking for an entry point via a textbook. Here the best choice is *The Law of Contract in South Africa* by Christie. In the index, "suretyship" indicates that the topic, "blanks in document" is dealt with at page 132. On that page the following appears:

"Blanks in printed contracts of suretyship can sometimes be dealt with either on the basis that they could be filled in from another document incorporated by reference,[215] or that the clause containing the blank was designed solely for the benefit of one party who, by leaving the blank, has elected not to take the proffered benefit.[216]

Footnotes

215 Trust Bank of Africa Ltd v Sullivan 1978 3 SA 795 (T); FJ Mitrie (Pty) Ltd v Madgwick 1979 1 SA 232 (D). But see Ellis v Trust Bank of Africa Ltd 1981 1 SA 733 (N).

216 First Consolidated Holdings (Pty) Ltd v Bissett 1978 4 SA 491 (W) 495–496; Pizani v First Consolidated Holdings (Pty) Ltd 1979 1 SA 69 (A) 81C–82E.

The most important part of this is not that it provides you with two statements which may be answers to your question, but that it substantiates those statements with footnotes which contain references to five other sources, in this instance five cases, but they may be references to other textbooks, journals, legislation or the common law which you can use to continue your research.

From one source you now have five!

In this instance, page 132 of Christie, and particularly footnotes 215 and 216, are your entry points into the network of resources and law that apply to the question which you are trying to answer (ie the mini-network of law dealing with blanks in suretyship agreements).

Applying the above method you would be able to trace the concept right back to its inception and then forward to the most recent pronouncement on it via the connections that exist between the resources. (This is a fairly simplified demonstration of what is known in bibliometrics as "bibliographic coupling" and "co-citation analysis". See the section under Application for a discussion of how to use LexisLibrary to do so.)

The way you go about finding the entry point into the network is very important. You have several options:

1. The method outlined in the Module 2: LexisLibrary Legal Research for starting your research is the best and generally most efficient way to do so. That method requires that you always look to a secondary source (principally a text book) on the area of law you have identified which will point you to primary sources, or to other secondary sources (i.e. the secondary source is your entry point).
   * A compilation of some of the secondary sources available in the LexisLibrary is provided at the end of these notes.

2. The difficulty which arises is when the issue you are searching for has not been dealt with in a secondary source or you cannot find a secondary source which has dealt with it (or it has been dealt with, but only in passing, or without referencing any authority).

   You will then have to go directly to the primary sources concerned. The best result here is if you can find a reported case which has dealt with the same or a similar, factual scenario to that with which you are confronted. (There would normally be two stages to this process, the first being locating a case which is factually similar to yours to assist you in identifying the law that you should be looking at, and the second, once you have established what the relevant law is, to locate other cases which may not be factually similar to yours, but have dealt with the applicable law.)

   a. We will deal first with the scenario where you have been unable to identify a secondary source that deals with the issue via the method set out in Module 2: LexisLibrary Legal Research. The method which will be suggested here is using keywords in the General and Advanced search forms in LexisLibrary.
      i. You must select resources in the TOC which you think may have addressed the issue. Include in this search journals and general works. When selecting keywords to search for work on the principal of starting broad and refining down to specifics. Try and get into the mind of an author (or judge) and think of words or phrases which might appear closely together, or at least in the same document, and use Boolean operators, or the Advanced form, accordingly.

Example 5:
For example, a liquid document is a requirement in provisional sentence or summary judgment proceedings. If you are proceeding via summary judgment, you may not want any documents that include provisional sentence, so you would exclude them as follows:

"liquid document" AND "summary judgment" NOT "provisional sentence"

It can also increase the effectiveness of your search if you include the area of law as one of your keywords, particularly when searching law reports, as this will always be included in the keywords or fly note. So the above becomes:

"civil procedure" AND "summary judgment" AND "liquid document" NOT "provisional sentence"

Text base searches are most effective when the search terms are kept brief and precise. You should therefore think carefully and distill your question down to its bare essentials – the words or phrases which must be in the document for it to have dealt with your question (remember that you are dealing here with probabilities not absolutes, so it may take a few attempts before you find the right combination of keywords). You should also consider that some documents will be written in Afrikaans or other languages and so translations of your keywords should also be considered.

a. The next question is how to find a primary source without the guidance of a secondary source.
   i. The first option is to follow the method outlined above for searching for keywords but just select law reports, legislation, gazettes, regulations or any one or combination thereof in the TOC or use a focus search form;
   ii. The second (for Law Reports) is to use an index. A compilation of the indexes available on LexisLibrary is provided at the end of the notes. Indexes will generally cover the following:
      - Cases Reported
      - Noter-up
      - Table of statutes
      - Rules of court
      - Words and Phrases
      - Subjects

An index is simply a collection of data organised by specified categories which make it easier for you to find cases that have referenced other sources. They function as follows:

- Cases which have been referenced by other cases are listed in a Noter-up by citation or alphabetically by case name.
- Legislation which has been referenced by cases is listed in the table of statutes, by Act name or number and then by section, together with the referencing case.
- The subject matter of cases is identified, categorised and sub categorised into groups in an alphabetical subject index. These are a mixture of facts, causes of action and legal issues which culminate in individual cases which have dealt with those subjects. For example:

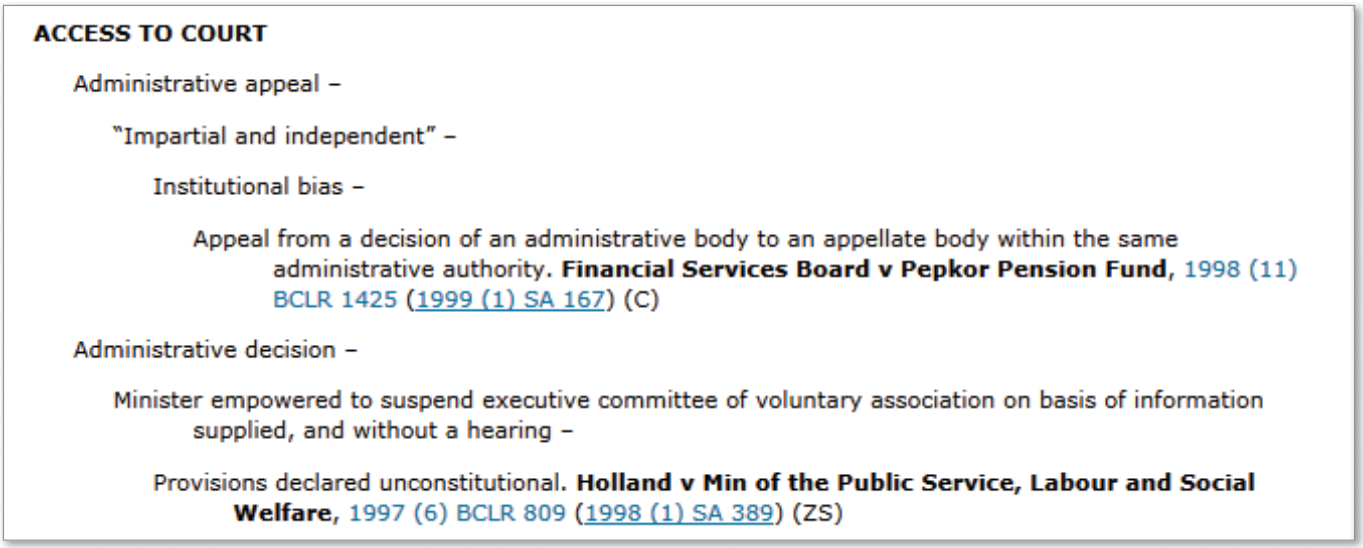


Figure 1: Screenshot from the Constitutional Law Reports Subject Index

- Meanings which have been ascribed to particular words and phrases by cases are listed alphabetically in a Words and Phrases Index together with the referencing case.
- Rules which have been referenced by cases are listed in a Rules of Court index, together with the referencing case.

Indexes allow you to use the piece of information that you have and identify other primary sources which will move your research on. For example, if you know:

- a subject (similar to a keyword search) you can identify a case or cases which were concerned with that subject and explained the law pertaining to it.
- the section of an Act, you can use that to identify cases which have interpreted the section and understand how to interpret it.

If you have done either of these and now have a case that is of assistance to you, or you are starting the process having already identified a case, you can use a Noter-up to find later cases that have referenced your case to see if the interpretation of the law in that instance has been developed, applied, criticised or overruled.

iii. The other main primary source which you will need to access is Legislation. Determining whether your issue is governed by legislation is best done via a secondary source, although in many instances it is obvious which statutes govern particular areas of law, for example the Labour Relations Act 66 of 1995, the Criminal Procedure Act 51 of 1977 or the Companies Act 71 of 2008.

1. Keyword searches, as explained above, will also locate legislation in the same way as other resources.
2. Specialised commentary works on some Acts are also available and are a further resource to point you to case law which will provide guidance on how the section should be interpreted and applied.

3. When relying on legislation it is important to remember that the application of legislation is determined from a bottom up approach, so for instance it is impermissible to rely directly on a right contained the Constitution of the Republic of South Africa, 1996, where there is legislation that exists on that right.

1.1.3.2 The Legal Citator's role in finding an entry point to the network

The Legal Citator will assist you in the research method that we have discussed above by helping you to find the entry point into the network, it is a tool which is designed to answer the question, "is this case good law." It does this by indicating to you via a series of signals (white, blue, green, red and black) how courts have treated a case at a provincial, national and appellate level.

There are two avenues through which a case may receive treatment; the first is if it is appealed against, the second is if other courts reference it.

If a case is overruled on appeal (thereby attracting a Red signal), you should be wary of using the case as it could be regarded as being bad in law.

Where other courts have referenced a case you should use the signals as guides to your research. The context of your research will determine whether you will be looking at cases that attracted specific signals, or just cases in general. For instance a red signal may be of assistance to you in building an argument to show why a similar case to the one that received the negative treatment should not be followed. The context in which the signal was assigned is also important, the fact that a case has a green or red signal assigned to it by references made by other cases should not be the basis on which you decide whether or not to read a case.

Two features of Legal Citator in particular will assist you in the research method that we have discussed above by either helping you to find the entry point into the network, or, once you have a case law entry point, you can use it to move backwards or forwards in time to see the cases the court used to come to its decision (Cases cited by Court) or how it has been treated subsequently (Judgment treatment). It also facilitates the process of collecting a group of cases together that have dealt with a particular subject matter.

You can also use the Legal Citator to identify possible entry points into the network by searching via the Subject search form in Legal Citator.

Example 6:

If we go back to the facts in Example 4, we would begin by searching for "suretyship" in the keyword field.

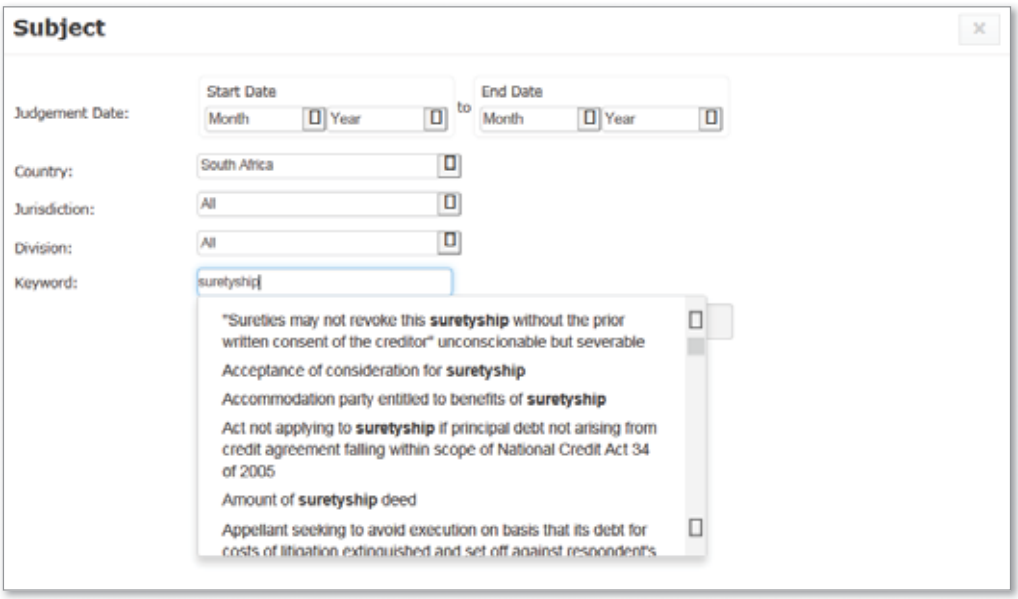


Figure 2: Search for "suretyship" in subjects

After searching for suretyship, you need to find a topic under which your issue should be, in this instance the most likely results will be under something like "deed", "contracts of" or "requirements". Here the topic that has been selected is contracts. The results under this topic show that there is a case which matches our issue: Industrial Development Corporation of SA (Pty) Ltd v Silver [2002] 4 All SA 316 (SCA) (herein after referred to as "IDC").

Figure 3: Results of search, select "contracts"

Once you have opened the case in the Legal Citator you should read the judgment to make sure that it does provide you with material which you can use (select one of the hyperlinked citations to view the text of the judgment).

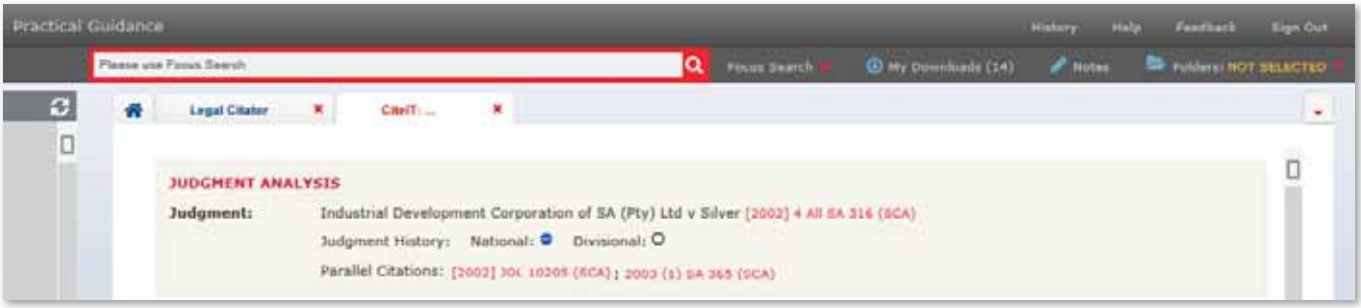


Figure 4: Legal citator view of the case

Figure 5: Text of judgment

This case is therefore confirmed as dealing with the issue.

Figure 6: Judgment treatment screen

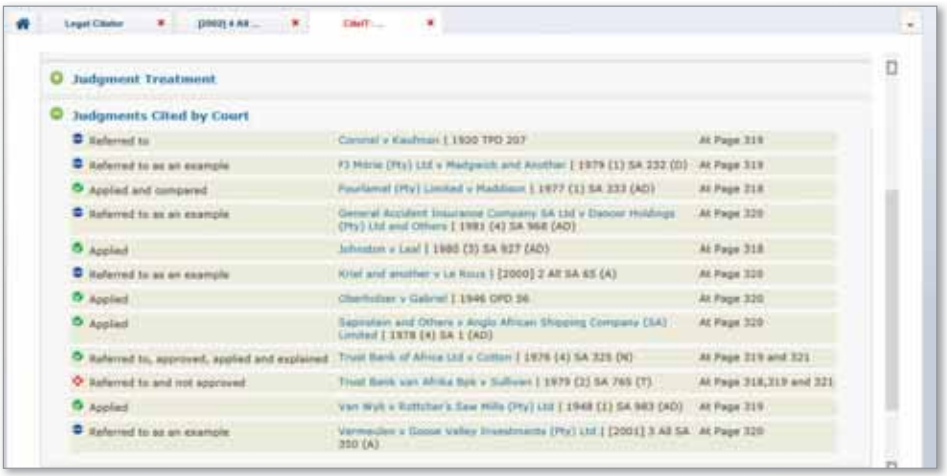


Figure 7: Judgments cited by court screen

These two screens (Figures 6 and 7) form the basis for your subsequent research. The best method is to start with the judgment treatment screen and check whether the case has any red or yellow signals assigned to it. If it does, read those cases to see why they gave those treatments and whether the part of the case which you need to rely on is affected. It is also important to determine whether the case has been affirmed, approved or applied by any subsequent courts, particularly if that court is the Constitutional Court or the Supreme Court of Appeal.

The case which does distinguish the IDC judgment we are looking at reads as follows in that respect:

Page 16 of [2007] JOL 20464 (W)

[31] In my opinion, the facts of the *IDC* case are very different from the facts of the present case. In that case, extrinsic evidence was permissible to identify a written instrument which in its turn identified the debtor. To put it another way, the principal debtor was identified in a written instrument.

Figure 8: Paragraph 31 of Wallace v 1662 G&D Property Investments CC

What is clear here is that it was a factual distinction that was drawn by the judge in this instance, not a legal one, so we can still rely on it.

The next step is to identify the area of the judgment in IDC which we are going to make use of, and to see what cases were relied on by the court, this will assist in building up a bank of authority to draw on should it be necessary (do so by looking at any cases with a green signal at that page reference in the Legal Citator).

In this instance the relevant pages of IDC are 318 – 322. Cases which should be considered first are:

- **Trust Bank of Africa Ltd v Cotton 1976 (4) SA 325 (N)**
- **Fourlamel (Pty) Limited v Maddison 1977 (1) SA 333 (AD)**
- Van Wyk v Rottcher's Saw Mills (Pty) Ltd 1948 (1) SA 983 (AD)
- Johnston v Leal 1980 (3) SA 927 (AD)
- Oberholzer v Gabriel 1946 OPD 56
- Sapirstein and Others v Anglo African Shipping Company (SA) Limited 1978 (4) SA 1 (AD)

The two cases highlighted in bold are placed at the top of the list as they have received the most extensive treatment according to the Legal Citator. This process should be repeated with the cases that are found to be relevant until you have a body of case references on which you can build a defendable argument.

1.1.3.3 Some things you should always keep in mind when using primary sources:

- Try and find law reports with a set of facts as close to yours as possible, even if the finding is against you, these cases will be the best guide to what law applies to those facts. Your task is then to explain why the case should be followed when interpreting the facts, or why it should be distinguished from your set of facts.
- Make sure to pay attention to the hierarchy of the courts, use decisions from the Constitutional Court and Supreme Court of Appeal before the High or other courts.
- Make sure that you rely on majority decisions and use concurring or minority decisions for persuasion.
- Always check any case you want to rely on with the Legal Citator or Noter-up.
- Keep track of the specific paragraphs of cases which are most relevant to your issue and build up your argument making sure to use the most persuasive of these paragraphs supported by the other cases.
- If your set of facts is governed by legislation make sure you read the section carefully and check the definitions section (usually section 1 of the Act) for phrases or words used in the section. Also check whether there are any regulations passed in terms of the Act which you should comply with.

1.1.4 APPLICATION AND CONCLUSION

The application of the relevant law to the issues which you identified at the outset ties in with the Yes/No process outlined above. Using a Yes/No system makes the process simpler at this stage as you have already done the majority of the work usually done in the Application part of the FIRAC system. You will probably have added more questions to those which you initially identified, and refined your original set as you have done your research. It is important to note that you should try not to treat the FIRAC system as an absolute, moving mechanically from one point to the next.

Your research should be a dynamic process and you should feel free to move back and forth within the suggested structure, adding and refining along the way, as your understanding of the issues and insight into the law on the topic grows.

Application requires you to set out any tests that you have identified in your research and test the essential facts that you identified at the outset against the specified requirements.

Example 7:
For example, the most well-known legal test is that for negligence established in the delictual case of: Kruger v Coetzee [1966] 2 All SA 490 (A):

"For the purposes of liability culpa arises if-
(a) a diligens paterfamilias in the position of the defendant-
(i) would foresee the reasonable possibility of his conduct injuring another in his person or property and causing him patrimonial loss; and
(ii) would take reasonable steps to guard against such occurrence; and
(b) the defendant failed to take such steps."

We see here a very similar approach to the Yes/No system set out above. Here the questions become:

"Was the defendant negligent?" (Yes/No)

"Was the defendant in a position where a *diligens paterfamilias* would foresee harm arising from his/her conduct?" (Yes/No)

"Would a *diligens paterfamilias* in the defendant's position take reasonable steps to prevent the anticipated harm?" (Yes/No)

"Did the defendant fail to take those steps?" (Yes/No).

If, when you review your essential facts against these questions, the answers to all three of the sub-questions are "Yes" then negligence will have been shown on the part of the defendant.

The result of your Application is the Conclusion you will then present to your client, lecturer or the court in argument.

2. Research Scenario

The following research scenario should be answered using the guidelines provided in Section 1: Research Methodology.

Landlord and Tenant Scenario:

A tenant enters into a lease agreement for a specified time with a landlord for commercial premises.

As security for the tenant's obligations the landlord requires sureties. The sureties are duly signed and they bind themselves as sureties and co-principal debtors, jointly and severally in solidum with the tenant for the due and proper fulfillment of all the obligations of the tenant arising from, or out of, or in terms of the lease.

After some time, but before the expiry of the lease, the tenant breaches the lease agreement by failing to pay the rental. The landlord successfully applies to the High Court to have the tenant evicted and for judgment for the unpaid rental, being at this stage R550 000,00 against the tenant and the sureties. Orders are further granted perfecting the landlord's tacit hypothec over the movable property on the premises, for the ejectment of the tenant and a declaratory order is granted in terms of which the lease is cancelled.

Before having had writs issued in terms of the order granted by the High Court, the tenant approaches the landlord and informs it that he has a new investor who will cover his expenses until the end of the lease period. The parties therefore conclude an agreement, in the form of a settlement agreement, which permits the tenant to remain in occupation of the premises (to "hold over" in the words of the agreement) until the same date on which the lease would have expired. It further specifically records that the lease was cancelled, specifies that the new agreement does not novate the judgment already granted and incorporates the same terms and conditions into the new agreement as existed under the lease agreement (including the terms relating to rental).

The new agreement further requires the tenant and the sureties to pay damages to the landlord in the amount set out in the judgment in monthly amounts of R45 000,00 per month. The landlord agrees that it will hold execution on the orders granted in abeyance while the agreement is in force. In the event of the tenant or sureties breaching the new agreement the landlord would be entitled to all amounts then owing and would further be entitled to have the tenant ejected from the premises.

The new agreement stipulates that it was not itself a lease, but that after the tenant and sureties had paid off the judgment debt (plus interest and costs), the original lease agreement would be re-instated.

The tenant subsequently defaults on the payments and is ejected by the landlord who then sues him and the sureties for arrear rental, the rental owed from the date of the breach to the expiry date of the new agreement and various other amounts which were due under the lease.

The sureties admit that they are liable to the landlord in respect of the judgment that was granted and tender payment to the landlord. They however deny liability for any other amount, arguing that their obligations were only in respect of the lease, which was cancelled by the court order, and any subsequent agreement had no effect on them as sureties in respect of the lease.

You act for the landlord and need to establish whether the claim against the sureties should be pursued or not.

Applying the principles set out above to this scenario should look like this (this is a suggested method, other methods could vary in the products used, but the answer should be consistent).

RESEARCH

Essential Facts

In respect of the claim against the tenant:

- The landlord and tenant concluded a new agreement, which permits the tenant to remain in occupation of the premises.
- Tenant required to pay damages and rental for the remaining lease period.
- In the event of breach of the new agreement the landlord would be entitled to all amounts then owing and would be entitled to have the tenant ejected from the premises.
- Tenant fails to make payment (in breach) and is ejected by the landlord.

In respect of the claim against the sureties:

- The sureties bound themselves as sureties and co-principal debtors, jointly and severally in solidum with the tenant for the due and proper fulfillment of all the obligations of the tenant arising from, or out of, or in terms of the lease.
- The landlord and tenant concluded a new agreement, which permits the tenant to remain in occupation of the premises.

Issues

Did the sureties' accessory obligations in respect of the first lease agreement also attach to the new agreement?

Was the new agreement a lease? (Yes/No)
Does it meet the requirements / formalities of a lease? (Yes/No)
Was there agreement on that the tenant would have the use and enjoyment of the premises (Yes/No)
Was there agreement on the payment of rental (Yes/No)
Can parties specify that an agreement which satisfies the formalities of a lease is not a lease? (Yes/No)
Can a surety's obligations created under one agreement be transposed onto another agreement in the absence of words to that effect? (Yes/No)

Relevant Law

This set of facts has some different possible starting points – interpretation of contracts, validity of a lease, obligations of sureties etc – and, depending on your preferences you could begin with any of them.

We are however going to start, by reminding ourselves of the elements of a lease and a surety. We can get this information from a variety of places in LexisLibrary or in LexisNexis products (the subject matter indices, Amlers, Silverburg and Schoeman's the Law of Property, Christies' The Law of Contract in South Africa or Kerr's The Law of Sale and Lease) but we will start with LAWSA, as it is a convenient place to locate both answers:

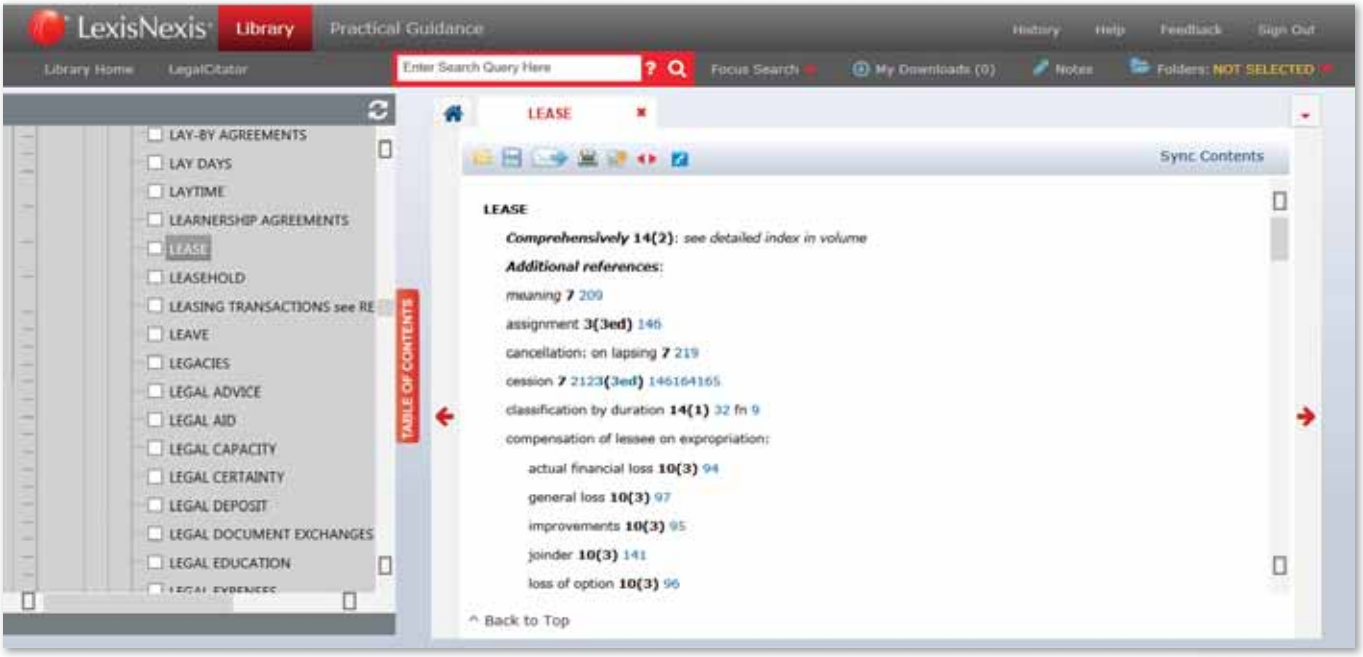


Figure 9: Lease in LAWSA

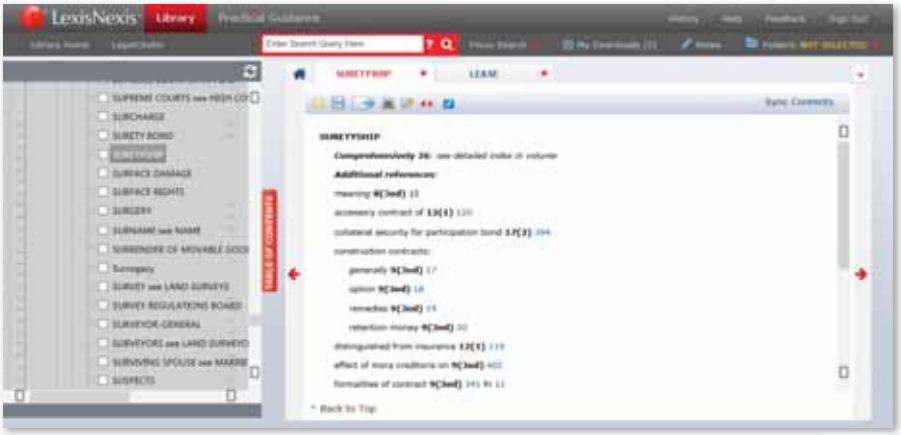


Figure 10: Suretyship in LAWSA

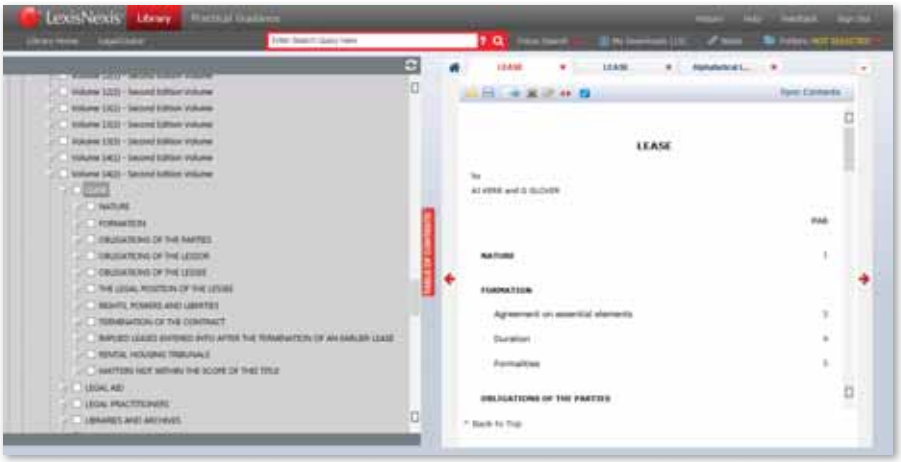


Figure 11: "Lease" in LAWSA

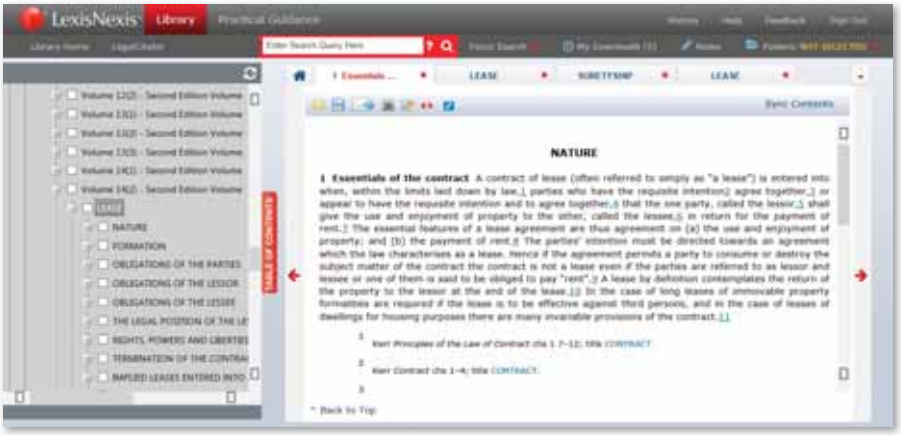


Figure 12: Essentials of a lease, LAWSA

Having looked at the list of topics covered by the authors under "lease" you will notice a topic called "IMPLIED LEASES ENTERED INTO AFTER THE TERMINATION OF AN EARLIER LEASE"[1] (it is always a good idea to see what topics and subtopics are covered in close proximity to areas you are researching as they may provide some guidance or even answers to questions you may not yet have asked yourself, as is the case here.)

Selecting the topic shows the following:

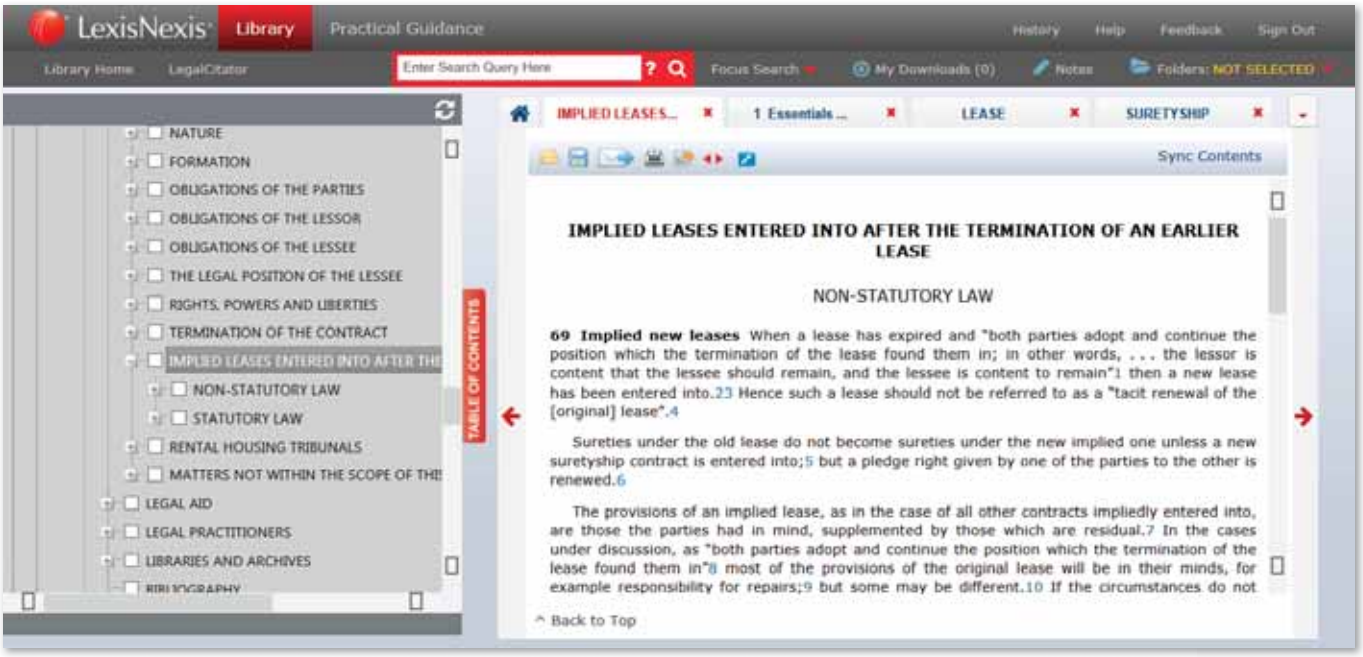
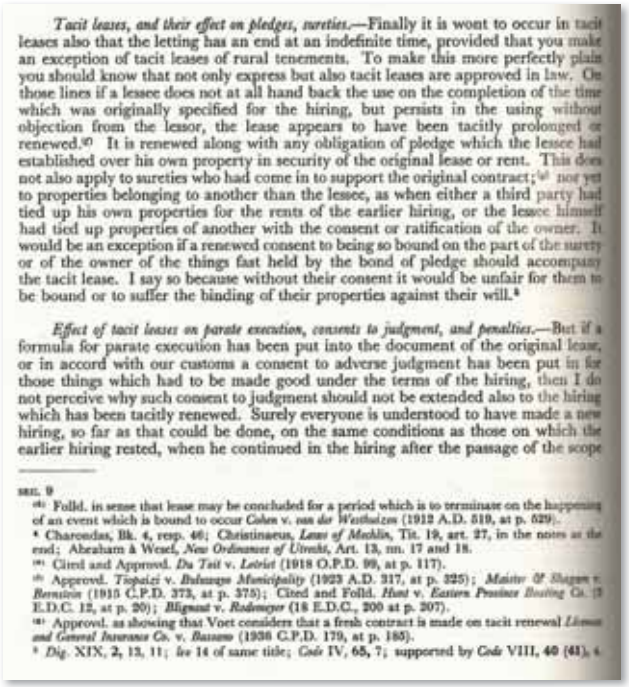


Figure 13: Implied leases entered into after the termination of an earlier lease, Lease, LAWSA

The relevant line is:

> "Sureties under the old lease do not become sureties under the new implied one unless a new suretyship contract is entered into;[5]"
> Joubert et al, LAWSA, volume 14(2) at para 69

Footnote five of this article indicates that the authority for this proposition lies in "Voet 19.2.9;" and "Pothier Letting and Hiring par 366." Neither of these two are available online, however Gane's translation of Voet was published by Butterworths (now LexisNexis), and the relevant portion reads as follows:



Tacit leases, and their effect on pledges, sureties.—Finally it is wont to occur in tacit leases also that the letting has an end at an indefinite time, provided that you make an exception of tacit leases of rural tenements. To make this more perfectly plain you should know that not only express but also tacit leases are approved in law. On those lines if a lessee does not at all hand back the use on the completion of the time which was originally specified for the hiring, but persists in the using without objection from the lessor, the lease appears to have been tacitly prolonged or renewed.[d] It is renewed along with any obligation of pledge which the lessee had established over his own property in security of the original lease or rent. This does not also apply to sureties who had come in to support the original contract;[e] nor yet to properties belonging to another than the lessee, as when either a third party had tied up his own properties for the rents of the earlier hiring, or the lessee himself had tied up properties of another with the consent or ratification of the owner. It would be an exception if a renewed consent to being so bound on the part of the surety or of the owner of the things fast held by the bond of pledge should accompany the tacit lease. I say so because without their consent it would be unfair for them to be bound or to suffer the binding of their properties against their will.[f]

Effect of tacit leases on parate execution, consents to judgment, and penalties.—But if a formula for parate execution has been put into the document of the original lease, or in accord with our customs a consent to adverse judgment has been put in for those things which had to be made good under the terms of the hiring, then I do not perceive why such consent to judgment should not be extended also to the hiring which has been tacitly renewed. Surely everyone is understood to have made a new hiring, so far as that could be done, on the same conditions as those on which the earlier hiring rested, when he continued in the hiring after the passage of the scope

SEC. 9

[d] Folld. in sense that lease may be concluded for a period which is to terminate on the happening of an event which is bound to occur *Cohen* v. *van der Westhuizen* (1912 A.D. 519, at p. 529).
[e] Charondas, Bk. 4, resp. 46; Christinaeus, *Laws of Mechlin*, Tit. 19, art. 27, in the notes at the end; Abraham à Wesel, *New Ordinances of Utrecht*, Art. 13, nn. 17 and 18.
[f] Cited and Approved. *Du Toit* v. *Lévist* (1918 O.P.D. 99, at p. 117).
[g] Approved. *Tiopaizi* v. *Bulwaqa Municipality* (1923 A.D. 317, at p. 325); *Master Of Slagan* v. *Bernstein* (1915 C.P.D. 373, at p. 375); Cited and Folld. *Hunt* v. *Eastern Province Boating Co.* (3 E.D.C. 12, at p. 20); *Bligaut* v. *Rademeyer* (18 E.D.C., 200 at p. 207).
[h] Approvd. as showing that Voet considers that a fresh contract is made on tacit renewal *Lisman and General Insurance Co.* v. *Bassano* (1936 C.P.D. 179, at p. 185).
[i] *Dig.* XIX, 2, 13, 11; *lex* 14 of same title; *Code* IV, 65, 7; supported by *Code* VIII, 40 (41), 4.

1 See figure 11

What we have located here is perhaps a partial answer, but still no entry point. We now know that if this new arrangement is regarded as an implied lease, then we have the answer.

So, having diverted from our original path we will return to the question of what are the elements of a lease:

> "The essential features of a lease agreement are thus agreement on (a) the use and enjoyment of property; and (b) the payment of rent." Joubert *et al*, LAWSA, volume 14(2) at para 1

Further on in the same paragraph it states:

> "The parties' intention must be directed towards an agreement which the law characterises as a lease. Hence if the agreement permits a party to consume or destroy the subject matter of the contract the contract is not a lease even if the parties are referred to as lessor and lessee or one of them is said to be obliged to pay "rent". A lease by definition contemplates the return of the property to the lessor at the end of the lease. In the case of long leases of immovable property formalities are required if the lease is to be effective against third persons, and in the case of leases of dwellings for housing purposes there are many invariable provisions of the contract." Ibid

From this we adduce the following:

1. We need agreement on the use and enjoyment of property;
2. We need agreement on the rental;
3. Even if the agreement says it is a lease, it may not be – conversely then, if the agreement says that it is not a lease, may it be one anyway?

At present we have answers to points 1 and 2: the landlord permitted the tenant to remain on the premises (point 1 satisfied) if he paid the rent, as set out under the cancelled lease (satisfies point 2) and paid off the judgment debt at R45 000,00 per month (goes beyond point 2 and possibly outside the question of rental).

Questions which we now need answers for:

a. Is the new agreement an implied lease entered into after the termination of the cancelled lease?
   i. In adding the requirement of payment of R45 000,00 per month to the rental as a requirement for continued occupation, did the landlord move the agreement outside of the realm of a lease agreement. (The reason we ask this is that the right to eject the tenant would arise if he failed to pay the rent, or failed to pay under the agreement, or both.)

What is an implied lease?

Reading the paragraph in LAWSA on implied leases referred to earlier, one picks up that the situation described is of a new lease, not a renewal of the previous lease, and we are referred to several authorities, both from the common law and cases, on this point.

What we now have to decide is where to go from here. Do we delve into the authorities at footnotes 2 and 3 in the LAWSA volume to more fully understand what an implied lease is? Or should we go back to the original thought of understanding the formalities of suretyship (having now done so for lease). There are many rabbit holes and red herrings which we may encounter on the way which will distract us from the central question – "Can we hold the sureties liable for the obligations of the tenant under the new agreement?" – and so it is wise to think carefully of the best way forward.

Possible conclusions on the information we have:

- If the new agreement is a lease, and is so because of an implication arising from the conduct of the parties, then the sureties are not liable as their obligations ended with the cancellation of the lease. Pursuing this line of research then will only serve to confirm the sureties' defence.
- The other conclusion which has become seemingly apparent (but will need to be confirmed) is that if there is a new lease at all, whether implied or overt, the sureties are not bound to it. Again, a conclusion not helpful to our claim.
- The only way forward then is to find a way to argue that the original lease continues, despite its cancellation, or that if the lease does not, then the sureties' obligations survive alone, divorced from the lease and incorporated into the new agreement.

From a research perspective then it is probably a waste of time and effort to continue to look at the question of an implied new lease. We will then turn our attention or original plan, to look at the requirements of a suretyship:

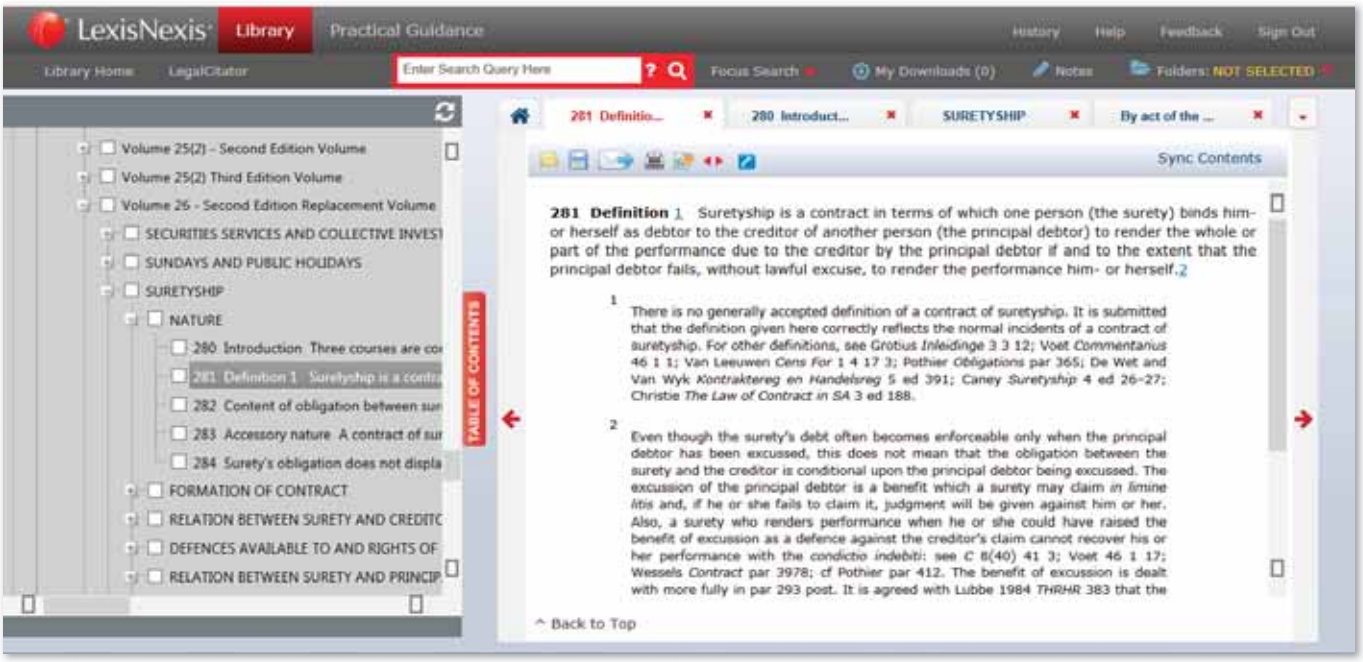


Figure 14: LAWSA definition of suretyship

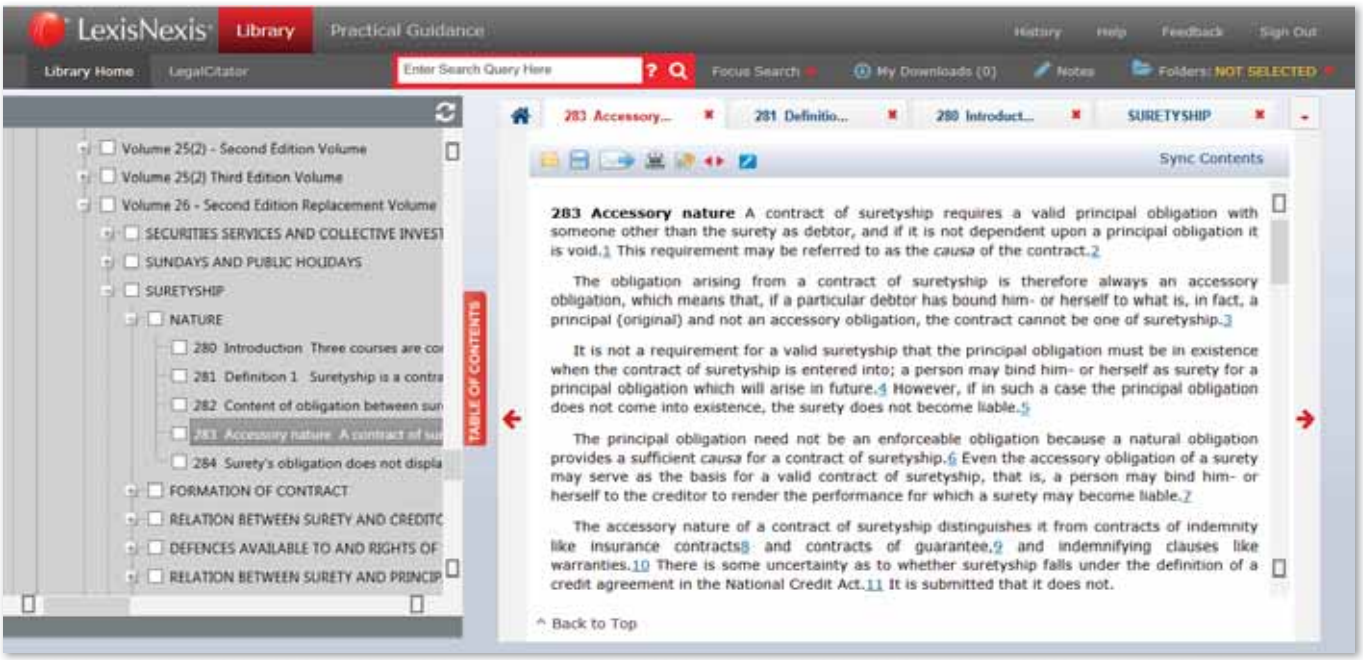


Figure 15: LAWSA on accessory obligations

"The principal obligation need not be an enforceable obligation because a natural obligation provides a sufficient causa for a contract of suretyship. Even the accessory obligation of a surety may serve as the basis for a valid contract of suretyship, that is, a person may bind him- or herself to the creditor to render the performance for which a surety may become liable."

Grotius 3 3 22; Voet 46 1 9; Pothier pars 376 395. It must be doubted, however, whether an unenforceable betting transaction can provide the basis for a valid suretyship having regard to the fact that the reason for the unenforceability of betting debts is that they are tainted with turpitude: Gibson v Van der Walt 1952 2 All SA 1 (A); 1952 1 SA 262 (A); cf Voet 46 1 9; Pothier pars 376 395; and see title OBLIGATIONS.

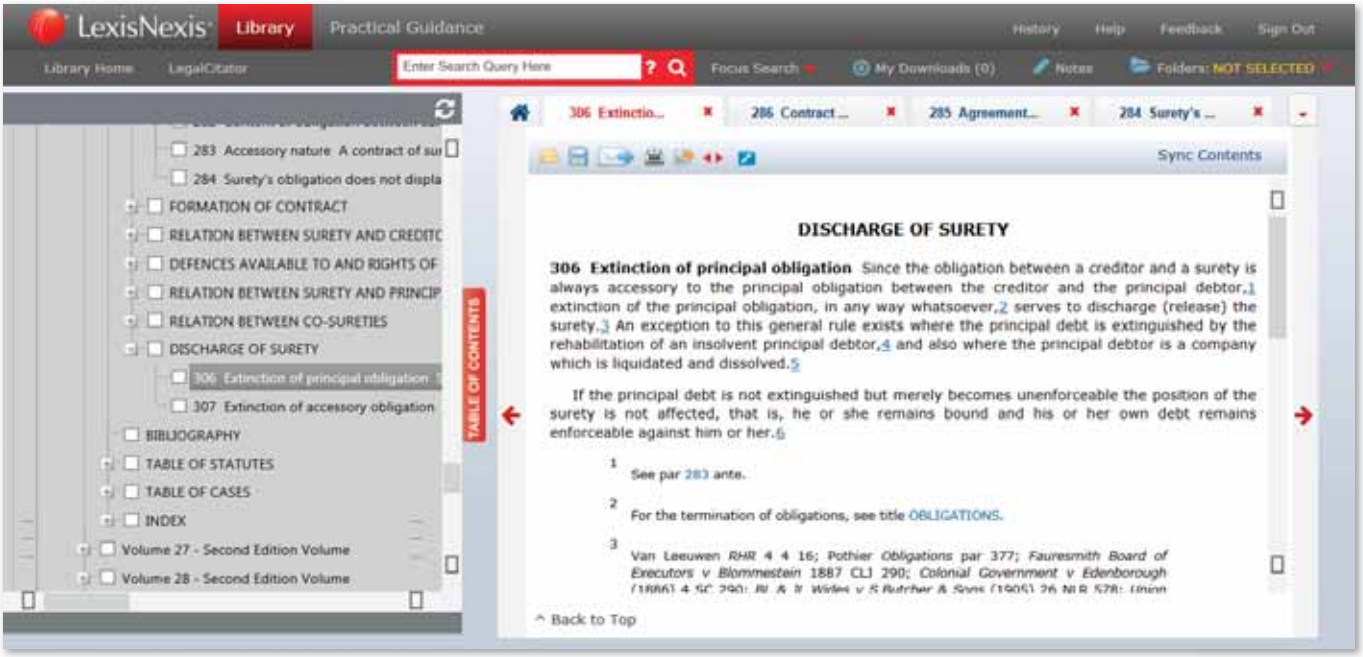


Figure 16: LAWSA on discharge of a suretyship

So the law is against us on this point!

Our last chance may be to find a case that has some similarity to our facts in order to salvage a claim against the sureties. The principal ways to find this will be via the Subject matter index, the Legal Citator or by searching the law reports.

We will start by searching law reports:

The way to ensure accurate results is to understand how the search works and what you want to get out of it. We are looking for cases, so we must exclude everything else from the search. Specifically we are dealing with something that will most likely be from the common law so we will also exclude the specialist law reports. It is a good idea to select only law reports in the TOC and make sure that you haven't selected any indexes or other products listed under law reports.

We will search All SA (1996 – present); All SA 1947 – 1995, 1828-1946 All South African Law Reports, Constitutional Law Reports (on the off-chance) and Judgments Online – table of cases.

You next need to formulate you search query. It needs to be both specific enough to eliminate unwanted results and broad enough not to miss anything. A search works by running though the text of cases and isolating those documents which contain the words you have asked for. So you need to think about how a judgment is structured and the words or phrases which may surround the facts of the case you are dealing with. A good method is to include the area of law as a terms, so in our case "lease" (landlord and tenant may also be useful, especially in the older cases), "surety", or "suretyship" will also have to be used. A search for just these terms though will be very broad and return any cases containing them. This is where we need to get specific terms that will sift out

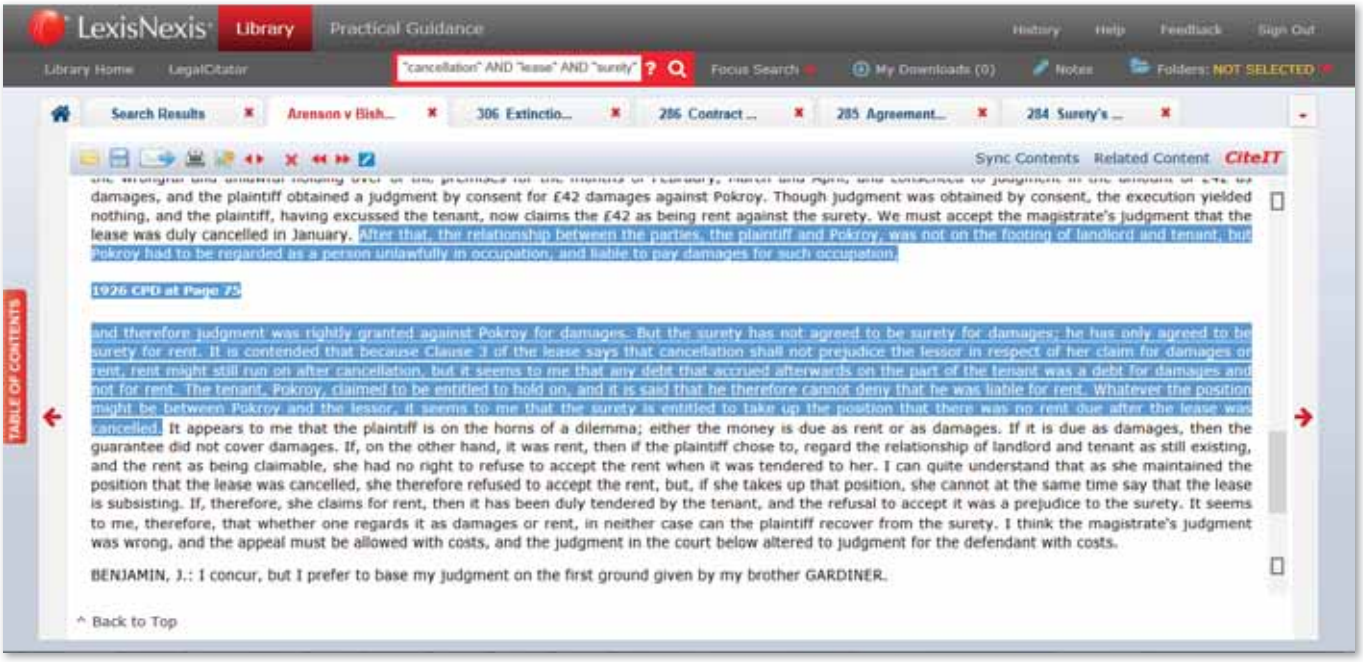
the unwanted results. So something like "obligations continuing after termination" may get us somewhere. You can do so by either using the general terms to start with and then refining the results via the "Search Within Results" form on the search results page, or by adding all the terms to the original query.

The query "lease" AND "surety" AND "obligations enduring after termination" returns no results.
Adding "lease" AND "surety" AND "obligations enduring after termination" OR "continuing after termination" likewise produces no results.

If we remove the obligations phrases and replace them with "holding over", and use "lease cancelled" with "surety", there may be something we can use.

The query "cancellation" AND "lease" AND "surety" and "Holding over" gives five results.

The first of these is the case: Arenson v Bishop 1926 CPD 73 which states:



This case supports what we have come to see from the other sources, namely that the surety's liability is limited to the obligation which he or she has undertaken – where that obligation ceases or where the primary obligation to which the surety is accessory is cancelled, the surety ends too.

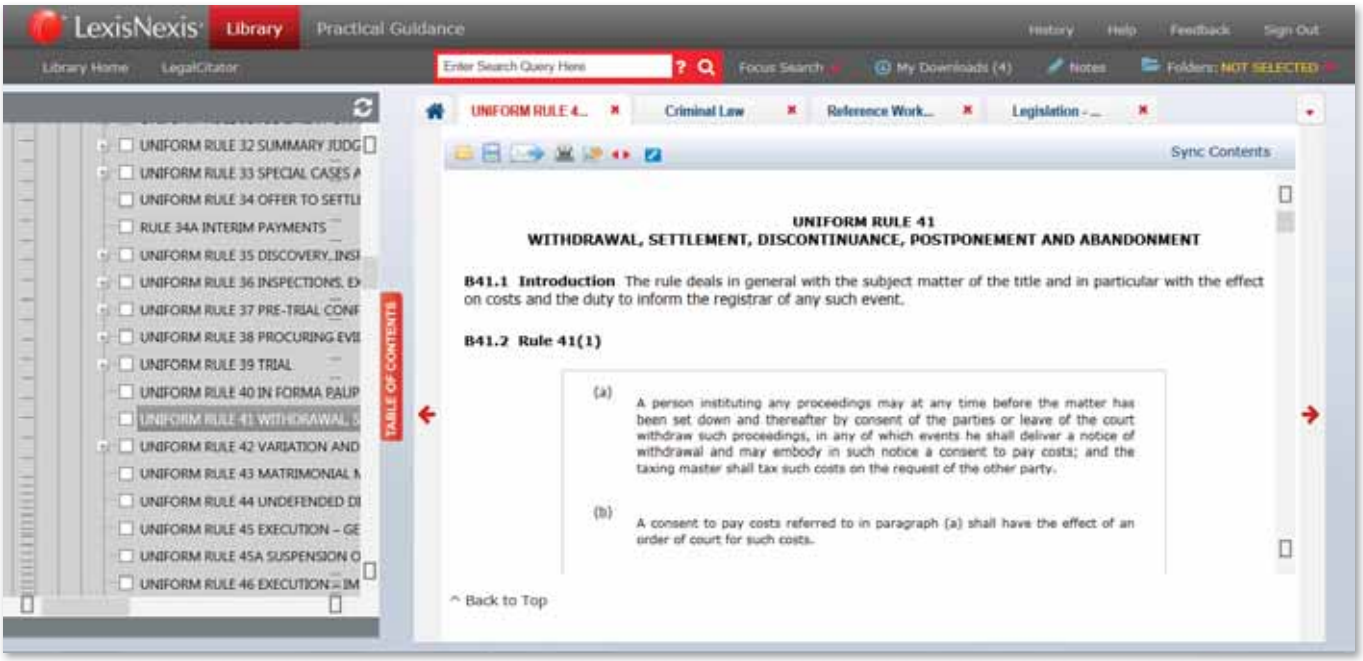
Another one of the cases from our search is is Shell South Africa (Pty) Ltd v Bezuidenhout and others [1978] 3 All SA 744 (N), which has comparable facts, but is unfortunately distinguishable based on the suretyship agreement – the suretyship in that case being a surety for, "all such sum or sums of money which may at any time be or become owing by or claimable from the debtor to or by the company from any cause or debt whatsoever."

The answer to our question then must be that the landlord's claim against the surety should be withdrawn.

However, having instituted this action against the sureties there are consequences for your client. You are now required to see exactly what the consequences are.

As we have discussed in the previous module the starting point is to identify the area of law we are dealing with. Here it is a question of procedural law, specifically procedural law applying to actions.

In the TOC there is a section dedicated to Civil Procedure, selecting that heading and then Harms' Civil Procedure in the Superior Courts takes to the commentary on the Superior Courts Act (10 of 2013) and the Uniform Rules of the various divisions of the High Court. Scrolling through the rules will bring you to the one you need (in this instance Rule 41(1)).



Therefore you are required to deliver a notice to the sureties and landlord informing them that your client's claim against the sureties will be withdrawn, with a tender to pay the costs of the sureties.

Application and Conclusion

Was the new agreement a lease? (Yes/**No**)

Does it meet the requirements/ formalities of a lease? (**Yes**/No)

Was there agreement on that the tenant would have the use and enjoyment of the premises (**Yes**/No)

Was there agreement on the payment of rental (**Yes**/No)

Can parties specify that an agreement which satisfies the formalities of a lease is not a lease? (**Yes**/No)

Can a surety's obligations created under one agreement be transposed onto another agreement in the absence of words to that effect? (Yes/**No**)

An accessory obligation (in this instance a surety) is tied to the principal obligation. Where the principle obligation (here a lease} is terminated, the accessory obligation is also terminated.

Once the lease was terminated, so was the suretyship, it cannot continue without the lease.

3. Selected Secondary Sources available on LexisLibrary

a. ALL AREAS OF LAW: Law of South Africa (LAWSA) – this is a work which you could consult for any area of law. As the name states it is a comprehensive compilation of texts on the Law of South Africa.

b. ADMINISTRATIVE LAW: LAWSA

c. BANKING: Banking Law and Practice Author: J Moorcroft Assisted by: ML Vesso

d. CIVIL PROCEDURE:
   i. Civil Procedure in Magistrates' Courts Editors: DR Harms SC;
   ii. Civil Procedure in the Superior Courts Author: Derek Harms, SC;
   iii. High Court Motion Procedure Authors: MM Joffe, B Neukircher SC; HR Fourie BLC LLB; LC Haupt
   iv. Summary Judgments - A Practical Guide Author: SJ van Niekerk, HF Geyer
   v. Amlers Precedents of Pleadings Author: LTC Harms
   vi. Becks Theory and Principles of Pleadings in Civil Actions Author: H Daniels

e. CRIMINAL PROCEDURE:
   i. Hiemstra's Criminal Procedure Author: Albert Kruger
   ii. The Guide to Sentencing in South Africa Author: SS Terblanche

f. CRIMINAL LAW: Criminal Law Author: CR Snyman

g. CONSTITUTIONAL:
   i. South African Constitutional Law: The Bill of Rights Author: MH Cheadle BA, DM Davis, NRL Haysom
   ii. Bill of Rights Compendium
   iii. Human Rights: Fundamental Instruments and Documents Author: Essop M Patel; Chris Watters

h. CORPORATE LAW:
   i. Henochsberg on the Companies Act 71 of 2008 Author: The Late Hon Mr Justice PM Meskin. Authors: Professor Piet Delport Professor Quintus Vorster. Contributors: Professor David Burdette, Professor Irene-marie Esser; Dr Sulette Lombard
   ii. Henochsberg on the Companies Act 61 of 1973 Author: Formerly edited by: The Late Hon Mr Justice PM Meskin. Consulting Editor: The Hon Mr Justice B Galgut Edited by: Jennifer A Kunst; Professor Piet Delport; Professor Quintus Vorster
   iii. Henochsberg on the Close Corporations Act Author: PM Meskin; B Galgut; JA Kunst
   iv. Corporate Law Author: HS Cilliers; ML Benade; JJ Henning; JJ Du Plessis
   v. Beuthin's Basic Company Law Author: RC Beuthin

i. CREDIT AGREEMENTS:
   i. Guide to The National Credit Act Author: JW Scholtz; JM Otto; E van Zyl BCom; CM van Heerden
   ii. The National Credit Act Explained Author: JM, Assisted by R-L Otto
   iii. Credit Law Commentary Author: JM Otto

j. CONTRACT: The Law of Contract in South Africa Author: RH Christie

k. DELICT: Law of Delict Author: Neethling; Potgieter, Visser (text book not available online)

l. EVIDENCE:
   i. The South African Law of Evidence Author: DT Zeffertt; AP Paizes
   ii. Essential Evidence Author: DT Zeffertt
   iii. Law of Evidence Author: CWH Schmidt; H Rademeyer

m. ENRICHMENT: Unjustified Enrichment in South African Law Author: Prof JC Sonnekus

n. FAMILY:
   i. Family Law Service Author: Brigitte Clark
   ii. Casebook on South African Family Law Author: DSP Cronjé; J Heaton
   iii. Handbook of the South African Law of Maintenance Author: Lesbury van Zyl
   iv. Practical Guide to Patrimonial Litigation in Divorce Actions Author: PA van Niekerk

o. INSOLVENCY: Insolvency Law Author: PM Meskin; B Galgut; PAM Magid; JA Kunst; A Boraine; DA Burdette

p. INCOME TAX:
   i. Silke on South African Income Tax Author: AP de Koker; RC Williams
   ii. Silke: South African Income Tax Author: Professor Madeleine Stiglingh (volume editor); Professor Alta Koekemoer; Professor Linda van Zyl; Professor Jolani S Wilcocks; Redge de Swardt. Assisted by: Wessel Smit, Karen Stark, Rudi Oosthuizen, Pieter van der Zwan, Evádne Bronkhorst, Riaan de Lange, Liza Coetzee, Annelize Oosthuizen, Lizelle Bruwer, Herman Viviers
   iii. Silke on Tax Administration Author: Managing Author: Stiaan Klue; Co-authors: Professor JA (Jackie) Arendse; Professor RC (Bob) Williams

q. INTELLECTUAL PROPERTY:
   i. South African Law of Trade Marks Author: GC Webster; NS Page; CE Webster; GE Morley
   ii. Burrells South African Patent and Design Law Author: TD Burrell

r. LABOUR LAW:
   i. Labour Relations Law - A Comprehensive Guide Author: D du Toit; D Bosch; D Woolfrey; S Godfrey; C; G Giles; J Rossouw
   ii. Labour Law through the Cases Author: D du Toit; T Cohen; W Everett; G Giles; S Godfrey; A Steenkamp; M Taylor; P van Staden
   iii. Principles and Practice of Labour Law Author: SR van Jaarsveld, BA LLB LLD, Emiritus Professor of Labour Law, University of Pretoria, Advocate of the High Court of South Africa; JD Fourie, Blur LLB, Former Professor of Labour Law, University of Pretoria, Extraordinary Professor, University of Pretoria, Advocate of the High Court of South

s. LEASE:
   i. LAWSA
   ii. Law of Sale and Lease Author: J Kerr (text book not available online)

t. MARITIME LAW:
   i. LAWSA

u. NEGOTIABLE INSTRUMENTS: Malan on Bills of Exchange, Cheques and Promissory Notes in South African Law Author: FR Malan; JT Pretorius; SF Du Toit

v. PERSONS:
   i. Law of Children and Young Persons Author: JA Robinson
   ii. Casebook on South African Law of Persons Author: DSP Cronjé; J Heaton

w. PROPERTY:
   i. Silberberg and Schoeman's: The Law of Property Author: PJ Badenhorst; Juanita M Pienaar; Hanri Mostert
   ii. Eviction and Rental Claims: A Practical Guide Author: CP Smith

x. SALE:
   i. Norman's Law of Purchase and Sale in South Africa Author: RH Zulman; G Kairinos

y. SUCCESSION:
   i. Administration of Estates Author: NJ Wiechers; I Vorster
   ii. Wills and Trusts Author: RP Pace; WM van der Westhuizen

z. TAXATION:
   i. Taxation of Employees Author: David Clegg
   ii. Concise Guide to Employee Taxation Author: David Clegg
   iii. Silke on International Tax Author: AP de Koker
   iv. Silke on Tax Administration Author: Managing Author: Stiaan Klue; Co-authors: Professor JA (Jackie) Arendse; Professor RC (Bob) Williams
   v. Capital Gains Tax – Stein Author: M Stein

4. Selected Indexes available on Lexis® Library

1. The Index and Noter-up to the All South African and South African Law Reports
2. The consolidated indexes to the 1996 to 2016 - All South African Law Reports
3. The indexes to the 1828 to 1946 - All South African Law Reports
4. The consolidated indexes to the Constitutional Law Reports
5. The consolidated indexes to the Labour Law Reports
6. The consolidated indexes to the Competition Law Reports
7. The indexes to the South African Tax Cases Reports
8. The consolidated indexes to the Pensions Law Reports