



**THE SUPREME COURT OF APPEAL OF SOUTH AFRICA
JUDGMENT**

Not Reportable

Case No: 405/2021

In the matter between:

IMBUKO WINES (PTY) LTD

APPELLANT

and

REFERENCE AUDIO CC

RESPONDENT

Neutral citation: *Imbuko Wines (Pty) Ltd v Reference Audio CC* (405/2021) [2022]
ZASCA 110 (15 July 2022)

Bench: DAMBUZA, MAKGOKA, NICHOLLS and CARELSE JJA and MUSI
AJA

Heard: 19 MAY 2022

Delivered: 15 July 2022.

Summary: Cession – whether oral cession established – whether debtor aware of the cession.

ORDER

On appeal from: Gauteng Division of the High Court, Johannesburg (Windell, Keightly and Siwendu JJ sitting as a court of appeal):

- 1 The appeal is upheld with costs.
 - 2 The order of the full court is set aside and replaced with the following:
'The appeal is dismissed with costs'.
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JUDGMENT

Makgoka JA (Dambuza, Nicholls and Carelse JJA and Musi AJA concurring):

[1] Pursuant to a trial, the Gauteng Division of the High Court, Johannesburg (the high court), ordered the respondent, Reference Audio CC (Reference Audio) to pay R602 866.22 to the appellant, Imbuko Wines (Pty) Ltd (Imbuko). Reference Audio appealed against that order to the full court, which, by majority, upheld the appeal. This is an appeal by Imbuko against the order of the full court, with the special leave of this Court.

[2] The dispute between the parties concerned an alleged cession between Imbuko (as a cessionary) and a third party, Dipole CC (Dipole) (as a cedent). Dipole and Reference Audio, represented respectively by their sole members – Dr Lahl Batho Santa Singh (Dr Singh) and Mr Michael Hoffman (Mr Hoffman) – had concluded an oral agreement during 2012 in terms of which over a period of time, Dipole supplied certain audio equipment (the goods) to Reference Audio. In terms of the agreement, Reference Audio was obliged to pay Dipole within 30 days of receipt of the statement of account from Dipole in respect of each consignment of the goods. The relevant period for Imbuko's claim against Reference Audio is January to April 2013.

[3] In its combined summons, Imbuko alleged that during December 2012, Dipole had ceded to Imbuko its right to claim payment from Reference Audio for the goods supplied. Imbuko attached to its particulars of claim, nine tax invoices it had sent to Reference Audio during the period between January and April 2013. The invoices, on Imbuko's letter-head, tabulated the goods sold and delivered by Dipole to Reference Audio, and certain payments, allegedly made by Reference Audio to Imbuko in response to some of the invoices. Also attached to the particulars of claim, was a statement of account by Imbuko to Reference Audio, dated 11 December 2013, setting out transactions for the period 9 January 2013 to 21 May 2013, between Dipole and Reference Audio. In essence, this was a summary of the sales invoices, the credit notes and payments Reference Audio had allegedly made to Imbuko. These invoices and the statement of account reflected Imbuko as the creditor and Reference Audio as the debtor. The balance reflected on the statement of account was R602 866.22, which is what Imbuko claimed from Reference Audio.

[4] In its plea, Reference Audio denied the existence of the cession or any knowledge of it. It admitted that it had made two payments to Imbuko, but denied any indebtedness to Dipole, and averred that it had discharged its payment obligations to Dipole for goods supplied. Apart from this, Reference Audio's plea largely constituted a denial of Imbuko's averments. In a pre-trial minute, the parties agreed that the onus to prove the cession was on Imbuko, while Reference Audio bore the onus to prove the payments it allegedly made to Dipole.

[5] During the trial, Mr Sudhir Manmohan Singh (Mr Singh), a director of Imbuko and its sole witness, gave the following factual background. Before the alleged cession occurred, there was an already existing business relationship between Imbuko, Reference Audio and Dipole. Imbuko sourced the goods from a supplier in the United States of America (USA). Dipole was initially the sole distributor of the goods. Later, Reference Audio replaced Dipole in this role. Dipole acquired the goods from Imbuko and was liable for whatever price Imbuko charged it. Dipole, in turn, supplied the goods to Reference Audio, as the sole supplier. Reference Audio thus became Dipole's debtor. Dipole's profit from that arrangement was the difference between what it paid to Imbuko for acquiring the goods, and the price at which it sold them to Reference Audio.

[6] Dipole experienced difficulties in rendering effective and regular invoices to Reference Audio. As a result, the latter could not make regular and prompt payments to Dipole. This caused frustration for both entities. Mr Singh further testified that as a result of this, during December 2012, Dr Singh, the sole member of Dipole, and his uncle, decided to cede to Imbuko Dipole's claims against Reference Audio. Mr Singh described his discussion with Dr Singh as follows:

'In 2012 December I met with [Dr Singh] at Johannesburg. He picked me up from the airport and told me the problems he is having with invoicing the goods to Reference Audio. His son was not able to maintain it. His son was irritated by the time of running [around] for money ... His son was quite irritated [by] running and collecting money that was never available to paying on, for terms of the invoices he supplied them and goods, and in turn he said to me, "you take over the invoice thing and we will be the warehouse and that we will arrange for Mike to pick the goods from there and you invoice the goods". The sale was always done by Dipole. We were just to take over the invoicing side.'

[7] Mr Singh also testified that on 21 February 2013, Mr Hoffmann, on behalf of Reference Audio, wrote to him, and expressed frustration about not receiving invoices from Dipole, which, according to Mr Hoffmann, had been an issue since August 2012. Mr Hoffmann requested him to 'treat [the problem about invoices] as a priority'. On 3 April 2013, Mr Hoffmann, on behalf of Reference Audio, requested him, on behalf of Imbuko, to 'credit Dipole with the last couple of orders taken and invoice through Imbuko' as he needed the invoices for VAT purposes._

[8] Finally, Mr Singh testified about the transactions reflected in the invoices and the statement of account. He confirmed each of the sales, the amount thereof, and the payments reflected in those documents. With regard to the payments, there were nine of them, all of which appeared in the statement of account. They were reflected as being payments received by Imbuko from Reference Audio. Mr Singh testified that those were interim payments received from Reference Audio in response to some of Imbuko's invoices.

[9] On behalf of Reference Audio, Mr Hoffmann testified that two of those payments, made on 9 and 11 January 2013, respectively, were made to Dipole, and

not to Imbuko. The remaining seven payments were indeed made to Imbuko. However, the last one, for R20 000 on 21 May 2013, Mr Hoffmann explained, was paid to Imbuko in error by his wife, as the payment was meant for Dipole. As to the reason why the admitted payments were made to Imbuko, Mr Hoffmann explained that this occurred at a time when Reference Audio needed to import goods from USA, but it could not get invoices from Dipole, as there was no one from Dipole to place the order. It was thus arranged between himself and Mr Singh, on behalf of Imbuko, that the latter would create the invoices, upon receipt of which Reference Audio would make payment to Imbuko. Imbuko and Dipole would later sort out the payment between themselves.

[10] This arrangement, Mr Hoffmann testified, was made purely to avoid making payments to Dipole without the corresponding invoices, which could have adverse tax implications. Imbuko was ready and willing to provide such invoices, hence the payments to it. As a result, he placed the order through Imbuko, which then raised an invoice against Reference Audio, which the latter paid. Thereafter the two entities never had any further dealings with each other. He denied that the payments were made by Reference Audio pursuant to a cession.

[11] Asked why he did not, on behalf of Reference Audio, object to the invoices from Imbuko between January to April 2013, Mr Hoffmann testified that at that stage, his relationship with Mr Singh had deteriorated to the point that he no longer wished to do any business with Imbuko. As a result, he simply discarded the invoices.

[12] According to Mr Hoffmann, Reference Audio had paid all monies it owed to Dipole for the relevant period, and at the time summons was issued, Reference Audio owed only about R38 000 to Dipole. To buttress his assertion that Dipole never ceded its right to claim against Reference Audio to Imbuko, Mr Hoffmann pointed to the on-going business relationship between the Dipole and Reference Audio, in terms of which Reference Audio continued to make purchases from Dipole, and paid to Dipole directly. In this regard, Reference Audio relied on the testimony of Mr Wesley Beyers (Mr Beyers) of Dipole, who testified that there was no agreement of cession between Dipole and Imbuko.

[13] The high court (Matojane J) concluded that Imbuko had discharged its onus to establish the cession, on a balance of probabilities. In respect of the payments by Reference Audio to Dipole, the high court found that Reference Audio had failed to prove any. The high court also made adverse credibility findings against Mr Hoffmann. It accordingly granted judgment in favour of Imbuko. As mentioned already, on appeal, the majority of the full court arrived at a different conclusion. On the existence of the cession, the majority (Siwendu J with Windell J concurring) concluded that the evidence did not sufficiently establish a cession, but at best, a tripartite arrangement. In this regard, the majority found that the failure to call Dr Singh to confirm the cession was fatal to Imbuko's case. It also found that the cession (if established) was not brought to the knowledge of Reference Audio. Consequently, the majority reversed the order of the high court. The minority (Keightley J) would have dismissed the appeal.

[14] As was the case before the high court and the full court, there are two issues for determination in this Court. First, the existence of a cession between Dipole and Imbuko. Second, whether Reference Audio had discharged its obligation to Dipole by paying what it owed.

[15] With regard to the agreement of cession, Mr Singh's testimony about his conversation with Dr Singh in December 2012, could not be gainsaid. The only issue was whether the conversation constituted cession of Dipole's right to claim payment from Reference Audio, to Imbuko. To consider this question, the following broad principles about cession should be borne in mind. Cession is a bilateral juristic act whereby a right is transferred by mere agreement between a cedent and a cessionary.¹ Whether the act of cession has been finalised is an issue of fact to be determined on proof of the intention of the parties,² which is to be established on a balance of probabilities.³ Although it entails a triangle of parties, ie the cedent,

¹ *LTA Engineering Co Ltd v Seacat Investments (Pty) Ltd* 1974 (1) SA 747 (A) at 762A.

² *Portion 1 of 46 Wadeville (Pty) Ltd v Unity Cutlery (Pty) Ltd and Others* 1984 (1) SA 61 (A); *Hippo Quarries (Tvl) (Pty) Ltd v Eardley* 1992 (1) SA 867 (A) at 873; *Roman Catholic Church (Klerksdorp Diocese) v Southern Life Association Ltd* 1992 (2) SA 807 (A) at 816.

³ *Jeffery v Pollak & Freemantle* 1938 AD 1 at 25; *Johnson v Incorporated General Insurances Ltd* 1983 (1) SA 318 (A) at 331; *Gaffoor and Another v Vangates Investments (Pty) Ltd* 2012 (4) SA 281 (SCA).

cessionary and debtor, the cession takes place without the concurrence of the debtor.⁴

[16] Mr Singh's evidence should be considered in the context of the relationship between the parties at that stage, especially that between Dipole and Reference Audio. As mentioned already, both were frustrated with each other – Reference Audio was not receiving invoices for goods purchased, and Dipole was not receiving regular payments. Viewed in this light, it is clear that a cession would have been beneficial to both Dipole and Reference Audio. The interposition of Imbuko as the party to issue the invoices, and to whom payment was to be made, alleviated the problem which Dipole and Reference Audio had, vis-à-vis each other.

[17] To my mind, the high court correctly accepted that Imbuko had established a valid cession on a balance of probabilities. The decision by the majority of the full court to non-suit Imbuko because Dr Singh was not called to confirm the cession on behalf of Dipole, cannot be supported, especially given that the threshold to establish cession is not stringent. An act of cession may be entered into orally or tacitly or by conduct.⁵ The conduct of Dipole and Imbuko after December 2012 points to a new arrangement in respect of invoices to Reference Audio.

[18] It is common cause that during the relevant period, January to April 2013, Reference Audio purchased goods from Dipole. But there is no suggestion that Dipole ever raised invoices against, or demanded payment from, Reference Audio, for those goods. The only entity which claimed the moneys due by raising invoices in respect of the goods sold, was Imbuko as per agreement between itself and Dipole. This ineluctably points to a cession. In the light of these objective facts, the evidence of Mr Weyers that there was no cession cannot be correct. Besides, he was not part of the discussion between Mr Singh and Dr Singh in December 2012. He could therefore not, like Mr Hoffmann, gainsay that discussion. He provided no meaningful basis for his assertions. The high court was therefore correct to conclude that Imbuko had established cession on the balance of probabilities.

⁴ 2 *Lawsa* 2 ed para 6.

⁵ *Grobbelaar and Others v Shoprite Checkers Ltd* [2011] ZASCA 11 para 18.

[19] Lastly, on this issue, the fact that there was an on-going relationship between Dipole and Reference Audio after the relevant period, does not detract from the validity of the cession for the period in respect of which invoices were raised by Imbuko against Reference Audio. As Keightly J correctly pointed out in her minority judgment, it was never Imbuko's case that the cession was indefinite.

[20] That brings me to the question whether Reference Audio had knowledge of the cession. This has no bearing on the validity of the cession, as notice to the debtor is not a prerequisite for the validity thereof. It is 'but a precaution to pre-empt the debtor from dealing with the cedent to the detriment of the cessionary'.⁶ As explained in *Lynn & Main Incorporated v Brits Community Sandworks CC* [2008] ZASCA 100; [2009] 1 All SA 116 (SCA); 2009 (1) SA 308 (SCA) para 12, a cession of rights is ineffective as against a debtor until such time as he or she has knowledge of it and that payment by him or her to the cedent, without knowledge of the cession, renders the debtor immune to a claim by the cessionary.

[21] I therefore consider the issue solely because Reference Audio claimed that, unaware of the cession, it made payments to Dipole. Actual knowledge may be proved in a number of different ways. It may be inferred from the facts proven: the facts and circumstances may be such that the only reasonable inference to be drawn is that the person whose conduct is in issue had actual knowledge of a matter – in this case, of the existence of the cession.⁷

[22] The high court had to consider this issue on the basis of the objective facts and the testimonies of Mr Singh and Mr Hoffman. I preface this discussion with the observation that Mr Hoffmann was a particularly poor witness. He was garrulous, argumentative, obtuse and evasive. He failed to provide straight-forward answers to simple questions. The high court's adverse credibility finding against him was therefore justified. On the other hand, Mr Singh was lucid and candid in his testimony.

⁶ *Lawsa* fn 4 above.

⁷ *Stannic v Samib Underwriting Managers (Pty) Ltd* [2003] ZASCA 61; [2003] 3 All SA 257 (SCA) para 17.

[23] To consider whether, on a balance of probabilities, Reference Audio knew of the cession, it is necessary to refer to the terms of the cession, and determine whether the parties conducted themselves consistently with them. According to Mr Singh, the terms of the cession were as follows. When Reference Audio ordered goods from Dipole, Reference Audio would make a list of such goods and furnish it to Imbuko. The latter would confirm with Dipole that the list was correct and that the goods had been collected from Dipole's warehouse. Imbuko would then raise an invoice against Reference Audio, and credit Dipole with the same amount of the invoice. Reference Audio would pay the invoice amount to Imbuko, upon which Imbuko would pay to Dipole its profit margin. The same process would be followed where Reference Audio returned goods except that Imbuko would make a credit note in Reference Audio's favour.

[24] I now consider whether the parties conducted themselves along these terms after the date of cession, ie December 2012. Mr Singh confirmed that: (a) each of the tax invoices raised by Imbuko against Reference Audio for goods purchased and collected by Reference Audio for the period January – April 2013; (b) the tax invoices and the credit notes rendered to Reference Audio, were a result of the process agreed with Reference Audio and pursuant to the cession; (c) the amounts reflected in the tax invoices and the credit notes were furnished to him by Mr Hoffmann pursuant to the cession; and (d) each of the payments reflected on Imbuko's statement dated 11 December 2013, had been made by Reference Audio to Imbuko, through the electronic funds transfer (EFT) method.

[25] It is instructive that Imbuko sent the invoices to Reference Audio from January 2013, immediately after the cession came into existence in December 2012. Despite Mr Singh pertinently testifying that the information used to compile the invoices was provided to him by Mr Hoffmann, this was not disputed during cross-examination. As mentioned already, in those invoices, Imbuko clearly identified itself as a creditor and Reference Audio as a debtor, and demanded payment from Reference Audio. If Mr Hoffman indeed wanted nothing to do with Mr Singh and Imbuko at that stage, this was more the reason to repudiate the invoices, not to disregard them. But in any event, the assertion that he did not accept that the money was due to Imbuko, can

simply not be true because, in addition to the 'disputed' payment of R20 000 on 21 May 2013, Reference Audio made another payment on 16 April 2013.

[26] As mentioned already, a total of nine invoices were sent to Reference Audio between January and April 2013 reflecting Reference Audio as the debtor of Imbuko in respect of goods purchased from Dipole. Not once did Reference Audio dispute the contents, as would have been expected from a person who bore no knowledge of what was being asserted in the invoices. As trenchantly observed in *McWilliams v First Consolidated Holdings (Pty) Ltd* 1982 (2) SA 1 (A) at 10E-F:

'...[I]n general, when according to ordinary commercial practice and human expectation firm repudiation of ... an assertion would be the norm if it was not accepted as correct, such party's silence and inaction, unless satisfactorily explained, may be taken to constitute an admission by him of the truth of the assertion, or at least will be an important factor telling against him in the assessment of the probabilities and in the final determination of the dispute.'

[27] In my view, from the objective factors, and the conduct of the parties, it can safely be concluded that Reference Audio was not only aware of the cession, but conducted itself consistently in terms thereof. It is inconceivable that Reference Audio would have made the interim payments it did, if it did not consider the moneys to be due to Imbuko. Reference Audio's attempt to explain away its payment of R20 000 to Imbuko is unconvincing. If indeed this was payment in error, one would have expected Reference Audio to take steps to recover the money by means of the *condictio indebiti*. This did not happen, at least up to the time when the trial took place and there was no suggestion in Mr Hoffmann's testimony that there were plans to recover this amount. The high court's conclusion that Reference Audio had knowledge of the cession was therefore correct.

[28] It remains to consider whether Reference Audio discharged its onus to prove payments to Dipole. It simply did not. Mr Hoffmann presented not an iota of evidence to the court to prove payments by Reference Audio to Dipole. Instead, he referred to a schedule of payments for the period 2014 to 2015. This was irrelevant, as the period in issue was for January to April 2013.

[29] In all the circumstances, the appeal must succeed.

[30] The following order is made:

1 The appeal is upheld with costs.

2 The order of the full court is set aside and replaced with the following:

'The appeal is dismissed with costs'.

T MAKGOKA
JUDGE OF APPEAL

APPEARANCES:

For appellant:

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