

# Are verbal cessions enforceable in court?

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A cession is a bilateral act whereby a right is transferred by agreement between two consenting parties. Although this act effectively involves three parties (ie. including the debtor), the cession can take place without the agreement of the debtor.



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In the recent unreported matter of *Imbuko Wines (Pty) Ltd v Reference Audio CC* [2022] (15 July 2022), the Supreme Court of Appeal considered a verbal cession entered into between two consenting parties and ruled decisively on its enforceability.

## Pertinent background

Pursuant to a verbal cession, the High Court of Johannesburg ordered Reference Audio to pay R602,866.22 to Imbuko Wines.

Reference Audio appealed this order to the full court in Johannesburg and the appeal was upheld. Imbuko then appealed the full court order to the Supreme Court of Appeal.

During 2012, Dipole and Reference Audio concluded a verbal agreement in terms of which Dipole supplied audio equipment to Reference Audio.

Imbuko alleged that during December 2012, Dipole verbally ceded to Imbuko its right to claim payment from Reference Audio for the audio equipment. Apparently, this verbal cession arose from Dipole's difficulties in rendering regular invoices to Reference Audio.

Consequently, during December 2012, Dipole decided to cede Dipole's claims against Reference Audio to Imbuko in order that Imbuko could invoice Reference Audio on time. After each collected payment, Imbuko agreed to pay Dipole the amount owing to it.

Reference Audio denied that it had any knowledge of the cession but nonetheless admitted that it had made two payments to Imbuko. Thereafter, Reference Audio denied that these payments were made pursuant to a verbal cession.



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To justify this assertion, Reference Audio referred to the on-going business relationship between Dipole and Reference Audio, in terms of which Reference Audio continued to make purchases from Dipole (paying Dipole directly). Notably, this ongoing relationship was post the payments which formed the subject of this matter.

## The law

Generally, parties conclude an out and out cession or a cession in *securitatem debiti*. An out and out cession is the cession in question in this particular matter, whereby Dipole ceded its rights as against Reference Audio to Imbuko.

In contrast, a cession in *securitatem debiti* is a form of pledge where the debtor pledges its rights as against its own debtors (its book debt) to another party as security for an obligation owed to that party.

A cession may be entered into either verbally or in writing. As is generally the case with any type of verbal contract, the terms of a verbal cession must be expressly agreed.

## Application to the facts

As set out at paragraph 12 of *Lynn & Main Incorporated v Brits Community Sandworks CC [2009]* (SCA), a cession of rights is ineffective as against a debtor until such time as he or she has knowledge of it.

To consider whether Reference Audio knew about the cession, it is necessary to refer to the terms of the cession to determine whether the parties conducted themselves consistently and in accordance with such terms.

Nine invoices were sent to Reference Audio between January and April 2013 reflecting Reference Audio as a debtor of Imbuko in respect of goods purchased from Dipole. Reference Audio did not dispute the invoices, as would have been expected from an entity that bore no knowledge of what it was being billed for in the invoices. In fact, it paid two of these invoices.

During the relevant period, the only entity which claimed any amount from Reference Audio was Imbuko (as per the agreement between itself and Dipole). This points to some form of cession having been concluded.



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The relationship between Reference Audio and Dipole was strained. Reference Audio was not receiving invoices for goods purchased on time, and Dipole was not receiving regular payments as a result.

In these circumstances, it is clear that a cession (verbal or otherwise) benefitted both parties. The external involvement of Imbuko as the party to issue the invoices and receive payment on Dipole's behalf improved the relationship between the parties. So much so that their relationship continued for some time without difficulty.

Nevertheless, 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.

Given the conduct of the parties, the Supreme Court of Appeal concluded that it can safely be accepted that Reference Audio was not only aware of the cession, it conducted itself consistently in terms thereof.

The Supreme Court accordingly found that the High Court was correct to order that Imbuko had established a verbal cession on a balance of probabilities.

### Key takeaways

Verbal cessions, while legally binding, may lead to a great degree of uncertainty and corresponding disputes. It is accordingly advisable when entering into any form of agreement, to reduce the agreement to writing. This reduces the doubt that often arises from a verbal agreement.

Had Reference Audio entered into a written agreement at the inception of the relationship with Dipole, it could have included a *pactum de non cedendo* in this agreement (effectively, an agreement not to cede without the permission of the debtor). This would have avoided the litigation that arose entirely, together with the corresponding costs that accompanied it.

### ABOUT THE AUTHOR

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