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It's settled: The SCA confirms the legal position on verbal contracts of cession

The concept of proof has become increasingly ingrained in our society. This is evidenced by the new social norm that simple things like meals are presumed fictitious until proven by way of post on social media platforms like Instagram. Although failing to post an event does not equate to it not having occurred, it is easier to prove if there is evidence of said event. Similarly, while our law still recognises verbal and tacit contracts as valid, written contracts are preferred for, among other things, evidentiary and enforcement purposes.

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The concept of proof has become increasingly ingrained in our society. This is evidenced by the new social norm that simple things like meals are presumed fictitious until proven by way of post on social media platforms like Instagram. Although failing to post an event does not equate to it not having occurred, it is easier to prove if there is evidence of said event. Similarly, while our law still recognises verbal and tacit contracts as valid, written contracts are preferred for, among other things, evidentiary and enforcement purposes.

In the case of *Imbuko wines (Pty) Ltd v Reference Audio CC* (405 of 2021) [2022] ZASCA 110 (15 July 2022), the Supreme Court of Appeal (SCA) considered whether or not rights established under a verbal contract could in turn be ceded verbally. To answer the question, the court relied on the jurisprudence it has developed over the years and confirmed the following established principles of cession:

- it is a bilateral juristic act whereby a right is transferred by mere agreement between a cedent and a cessionary;
- whether a cession has been finalised is an issue of fact to be determined on proof of the intention of the parties, which is to be established on a balance of probabilities; and
- although it entails three parties, i.e., the cedent, cessionary and debtor, the cession takes place without the concurrence of the debtor.

The SCA confirmed the existing legal position relating to verbal contracts. They are indeed valid contracts capable of creating rights which can in turn be ceded verbally. The SCA held that an agreement between the cedent and cessionary, regardless of its form, is an essential element of cession. According to the court, the existence of an agreement of cession is a matter of fact to be determined by proof of the parties' intentions, on a balance of probabilities. In this case, the parties had agreed during their pre-trial conference that the cessionary would bear the onus of proof in respect of the existence of the cession. Although this was not a specific requirement discussed by the court, market practice is that a cessionary intending to enforce a contract of cession bears the burden of proof in respect of the existence of such contract. This is aligned with existing legal principles relating to the onus of proof and it is something for cessionaries to keep in mind when concluding agreements of cession. While it might be lawful and even commercially expedient to have *"gentlemen's agreements"* among business partners known to each other and/or with long-term business arrangements, the evidentiary burden indicates that a written contract is still the preferred method of expressing commercial arrangements.

Although the SCA acknowledged the role of the debtor in a contract of cession, it confirmed that neither notice of cession to the debtor nor their acquiescence are prerequisites for the validity of the contract. However, the SCA noted that while it is unnecessary for validity, notice of cession safeguards the position of a cessionary in that it prevents *"the debtor from dealing with the cedent to the detriment of the cessionary"*. In support of this, the SCA referred to its earlier decision in *Lynn & Main Incorporated v Brits Community Sandworks CC* 2009 (1) SA 308 (SCA) where it held that, *"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*

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cedent, without knowledge of the cession, renders the debtor immune to a claim by the cessionary". Thus, while written notice of cession is not a requirement for the validity of an agreement of cession, it is recommended that cessionaries require it in any event. This is to avoid circumstances where a cedent seeks to exercise the ceded rights without the knowledge or consent of the cessionary. Additionally, for purposes of enforcement, it is best practice to have a written acknowledgment of cession from third party debtors. An exception would be where requiring such acknowledgment would result in negative administrative consequences. For instance, in the case of cession of book debts where it would be near impossible to have written acknowledgments of cession from each of the debtors of a business. Although the court confirmed that it is unnecessary for the third party debtor to concur to, or confirm the cession, it is clear that notice and acknowledgment of cession protect the cessionary's rights and aid in their enforcement.

Notwithstanding the validity of verbal contracts, this case illustrates a few important points. First, that it is best practice to have written agreements in place. This is because a cessionary who obtains rights by way of a verbal contract of cession will have to meet the high burden of proof in relation to the existence of the contract. Secondly, a cessionary may potentially face difficulties in enforcing a verbal contract of cession which an obligation debtor has not been made aware of. Accordingly, it is recommended that parties conclude written agreements that evidence the existence of their commercial arrangement and clearly indicate the intention of the parties. Moreover, it is best practice to have written notice of cession to, and acknowledgment of cession from, the debtor where possible.

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Our BBBEE verification is one of several components of our transformation strategy and we continue to seek ways of improving it in a meaningful manner.

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