IN THE HIGH COURT OF SOUTH AFRICA
NORTH WEST DIVISION, MAHIKENG

Not reportable

Case no:1573/18

In the matter between:

ERITHACULA INVESTMENTS CC	**PLAINTIFF**
and	
RUSTENBURG LOCAL MUNICIPALITY	**DEFENDANT**

Coram: Wessels AJ

Judgment reserved: 11 March 2026

Delivered: This judgment was handed down electronically, circulated to the parties' representatives via email, uploaded to CaseLines, and released to SAFLII. The date and time for the handing down of the judgment are deemed to be 14h00 on 23 March 2026.

Summary:

Cession— Nature and effect of — Cessionary acquires no greater rights than cedent possessed — *Nemo plus iuris* principle — Where final account under main contract establishes that cedent is indebted to debtor, no monies are owing upon which cession can operate — Defences available against cedent may be raised against cessionary — Condition precedent — Clause requiring certification of invoices by engineer and cedent — Failure to comply with certification requirement fatal to claim — Such certification constitutes condition precedent to debtor's payment obligation.

Practice — Absolution from the instance — Test at close of plaintiff's case — Whether there is evidence upon which a court, applying its mind reasonably, could or might find for the plaintiff — *Claude Neon Lights (SA) Ltd v Daniel* 1976 (4) SA 403 (A) applied.

Municipality — Contracts — Oral agreements — Municipality bound by constitutional and statutory procurement framework — Section 217 of Constitution — Municipal Finance Management Act 56 of 2003 — Oral agreement unenforceable in absence of compliance with procurement requirements — Non-variation clause in written agreement precludes oral supplementation.

JUDGMENT

Wessels AJ

Introduction

[1] This is an action in which the plaintiff, a close corporation that conducted business as a subcontractor, claims payment from the defendant upon a contract of cession concluded between the plaintiff, the defendant, and the main contractor, Makgotamishe Building Construction (Pty) Ltd ("Makgotamishe").

[2] The plaintiff's claims are threefold. Claim A is for payment in the sum of R4,441,887.16 in respect of two invoices (invoices 10A and 11A), allegedly due and payable by the defendant to the plaintiff in terms of the cession agreement. Claim B is for payment of retention monies in the amount of R1,534,926.19, representing 10% withheld from payments due to the plaintiff under the subcontract agreement with Makgotamishe, which the plaintiff contends became payable upon termination of the main contract and should have been paid by the defendant in terms of the cession agreement. Claim C is for payment of R39,666.67 in storage fees allegedly due under an oral agreement with the defendant for the storage of materials destined for the project.

[3] At the close of the plaintiff's case, the defendant applied for absolution from the instance. I have had the benefit of comprehensive heads of argument from both counsel, for which I am grateful. This judgment concerns that application.

[4] This Court notes that following the hearing of the matter for absolution from the instance, the matter was stood down to 24 October 2025, specifically for the filing of the plaintiff's heads of argument. While those heads of argument were evidently filed with the Office of the Registrar by that date, they were not

brought to the attention of this Court at that time. The delay in finalising this matter was resolved only when my secretary contacted the plaintiff's attorneys directly to obtain the documents. Upon the heads of argument being furnished to my secretary, I immediately engaged with the evaluation of the submissions and the writing of this judgment.

Parties' contractual relationship

[5] Before addressing the evidence, it is necessary to delineate the contractual framework within which this dispute arises. The evidence established that three interrelated agreements governed the parties' legal relationships.

[6] First, there was the main construction agreement between the defendant and Makgotamishe, concerning the construction of certain elements of the Rustenburg Rapid Transport System ('principal agreement'). The plaintiff was not a party to this agreement.

[7] Second, a subcontract agreement was concluded between Makgotamishe (as the contractor) and the plaintiff (as the subcontractor), under which the plaintiff undertook to provide glazing, aluminium, steel, and related services. The defendant was not a party to this subcontract.

[8] Third, a tripartite cession agreement was concluded between the defendant, Makgotamishe, and the plaintiff. It is this agreement upon which the plaintiff's claim is founded. A proper understanding of the relevant legal principles governing cession and their application to the terms of this particular cession agreement is essential to the determination of the plaintiff's claims.

Principles of cession

[9] A party relying on a cession must allege and prove the contract of cession, that is, a contract in terms of which a personal right against a debtor is transferred from the creditor as cedent to a new creditor as cessionary. The purpose of a cession agreement is to divest the cedent of the cedent's rights against the debtor and to subject the debtor to another creditor[1].

[10] A fundamental principle, rooted in the common-law maxim *nemo plus iuris ad alium transferre potest quam ipse haberet*, is that a person cannot cede something that does not belong to them and to which they have no right[2]. The trite position is that the cessionary obtains the rights transferred, subject to all defences and exceptions that could have been asserted against the cedent. This principle is reflected in the recognised defences available to a debtor sued by a cessionary, which include any defence (except defences of a personal nature) that the debtor would have had against the cedent.

[11] These principles, applied to the present matter, yield the following propositions. Firstly, the plaintiff, as cessionary, must prove the existence and terms of the cession agreement. That much is not in dispute, as the agreement was admitted into evidence. Secondly, and critically, the plaintiff can claim no greater rights against the defendant than Makgotamishe itself possessed. If Makgotamishe had no claim against the defendant, or if its claim was extinguished or reduced by counterclaims properly raised in a final account, the plaintiff cannot assert a claim that Makgotamishe did not have. Thirdly, the defendant may raise against the plaintiff any defence that it could have raised

---

[1] *Cf: Lief NO v Dettmann* 1964 (2) SA 252 (A) and *Johnson v Inc General Insurances Ltd* 1983 (1) SA 318 (A).
[2] *Brayton Carlswald (Pty) Ltd and another v Brews* 2017 (5) SA 498 (SCA) para 12.

against Makgotamishe, including the defence that no monies are owing under the main contract or that the final account establishes an indebtedness by Makgotamishe to the defendant.

[12] With these principles in mind, I turn to consider the specific terms of the cession agreement upon which the plaintiff relies.

The Cession Agreement

[13] The cession agreement is structured to achieve a particular purpose, which is to ensure that the plaintiff, as subcontractor, receives payment directly from the defendant for work performed under its subcontract with Makgotamishe. However, this direct payment mechanism is circumscribed by specific conditions and operates within the limits of the underlying contractual relationships.

[14] In terms of paragraph 4.1 of the cession agreement, Makgotamishe ceded to the plaintiff '…all its title and interest to claim and receive from [the defendant] payment of all and any monies owing or which may in future become owing by [the defendant] to [Makgotamishe]…'. This clause establishes the scope of the cession. Notably, it does not create an independent obligation on the part of the defendant to pay the plaintiff; rather, it transfers to the plaintiff Makgotamishe's right to claim payment from the defendant. The corollary of this, applying the *nemo plus iuris* principle, is that if no monies are owing by the defendant to Makgotamishe, there is nothing upon which the cession can operate. The plaintiff stands in the shoes of Makgotamishe and can claim no greater rights than Makgotamishe itself possesses.

[15] Clause 4.2 of the cession agreement records the defendant's undertaking to pay the plaintiff. Still, this undertaking is limited to payments.'…due for the

above supply and delivery of materials' and is subject to a maximum amount. This clause must be read together with clause 4.1 and cannot be construed as creating an independent obligation to pay, apart from the defendant's underlying indebtedness to Makgotamishe.

[16] Clause 4.3 of the cession agreement is of particular importance. It provides that the defendant 'will pay the plaintiff within 30 days of receipt of an invoice, duly invoiced to [the defendant], and certified by the consulting engineer and [Makgotamishe] that the materials are acceptable and the amount may be paid.' This clause performs two functions. Firstly, it establishes a payment timeline, requiring payment within 30 days of receipt of an invoice. Secondly, and more significantly, it imposes a condition precedent to the defendant's payment obligation in that the invoice must be certified by both the consulting engineer and Makgotamishe, certifying both the acceptability of the materials and that the amount may be paid. The certification requirement serves an important purpose. It ensures that, before the defendant is obliged to pay, confirmation is obtained from both the professional team overseeing the project and the Makgotamishe that the work has been properly performed and that the amount claimed is indeed due. Without such certification, the defendant has no means of knowing whether the plaintiff's claim is legitimate or whether it corresponds to work that has been approved and accepted under the main contract.

[17] Clause 4.8 of the cession agreement contains a warranty by Makgotamishe that, as at the date of the agreement (October 2016), there were no counterclaims that might extinguish the claims that form the object of the cession. This clause implicitly recognises the principle that the operation of the cession depends on the existence of enforceable claims that are not subject to set-off or counterclaim. It also foreshadows the possibility that subsequent events might give rise to counterclaims that could affect the position.

[18] Clause 7 of the cession agreement provides that the plaintiff and the defendant accept the cession 'subject to the terms and conditions of this agreement'. This clause reinforces that the terms of the cession agreement govern the parties' rights and obligations and cannot be asserted independently thereof.

[19] Clause 8 is a standard non-variation clause. It provides that the agreement constitutes the entire agreement between the parties and that no amendment, alteration, variation, or addition shall have any force or effect unless it is in writing and duly signed. This clause has particular significance for the plaintiff's third claim, which is founded upon an alleged oral agreement for storage fees. The clause precludes any oral variation or supplementation of the parties' contractual relationship. It requires that any binding agreement between the plaintiff and the defendant be reduced to writing and properly signed.

[20] The cession agreement must also be understood in the context of the main contract and the subcontract. The main contract between the defendant and Makgotamishe incorporated the principal agreement. The principal agreement provides for the defendant's termination of the contract in the event of Makgotamishe's default.

[21] It further provides that, upon termination, the principal agent shall timeously commence and complete a final account, and that, after termination, the principal agent shall continue to issue interim payment certificates in a nil amount until the quantum of damages has been determined and the final account has been completed. The principal agent is the professional person or firm appointed by the defendant to oversee the principal agreement.

[22] Only then will the final payment certificate be issued. The effect of these provisions, as emerged during cross-examination, is that upon termination,

further payments are effectively frozen pending the completion of the final account. Any entitlement to payment must ultimately be determined in the final account.

[23] The termination of the principal agreement has significant implications for the operation of the cession agreement. If the principal agreement is terminated, Makgotamishe's rights to payment from the defendant are no longer governed by the interim payment certification process but become subject to the final account process. More fundamentally, if the final account reveals that Makgotamishe is indebted to the defendant rather than the converse, then there are no monies owing by the defendant to Makgotamishe upon which the cession can operate. Applying the principles set out above, the defendant may raise this as a defence to any claim by Makgotamishe and, by extension, to any claim by the plaintiff as a cessionary.

[24] It is against this contractual backdrop that the plaintiff's claims must be evaluated.

The Evidence

[25] At the commencement of the trial, counsel for the defendant indicated that the expert notice that had been served would not be relied upon during the plaintiff's case. The plaintiff then proceeded to lead the evidence of its sole witness, Mr Baloyi, the plaintiff's director.

[26] Mr Baloyi testified that the plaintiff had provided goods and services to Makgotamishe in terms of the subcontract agreement. He confirmed that the

principal agreement had been terminated. In response to questions from his own counsel, he stated that he had no knowledge of any amount of R8 million allegedly owed by Makgotamishe to the defendant, and that he only became aware of this during the litigation.

[27] Under cross-examination, Mr Baloyi was taken through the various sections of the agreements referred to above. He confirmed that the principal agreement was between the defendant and Makgotamishe, and that the plaintiff was not a party thereto. He similarly confirmed that the subcontract was between the plaintiff and Makgotamishe, and that the defendant was not a party thereto. He agreed that the cession agreement constituted the contractual foundation for his claim, and that, in terms of clause 4.3 thereof, payment by the defendant was conditional upon the invoice being certified by the consulting engineer, the materials being acceptable, and the amount being payable. When confronted with the two invoices relied upon, Mr Baloyi ultimately agreed that they had not been so certified. He acknowledged that the main agreement between the defendant and Makgotamishe had been terminated on or about 12 July 2017, as pleaded by the plaintiff.

[28] Mr Baloyi was referred to clause 36.5.10 of the principal agreement, which provides that upon termination, the principal agent shall continue to issue interim payment certificates in a nil amount until the quantum of damages has been determined and the final account has been completed. Mr Baloyi initially expressed disagreement with the defendant's counsel's interpretation, but ultimately accepted the wording of the clause. When referred to the final accounts prepared by the principal agent, which indicated that Makgotamishe owed the defendant the amount of R12,148,344.16. Mr Baloyi stated that he could not comment on these documents, as they concerned matters between the defendant

and Makgotamishe, which he was not a party to, and which involved matters beyond his knowledge.

[29] He furthermore confirmed that the invoices upon which his claim was based (in particular Invoice 11A) were rendered not by the plaintiff, but by 'Erita EDW, a division of Erita Holdings Pty Ltd', being a different legal entity than the plaintiff.

[30] Regarding the storage fees claim (Claim C), Mr Baloyi explained that this arose from an instruction to keep goods on site. Still, he acknowledged that no written agreement had been concluded and that he was not aware of any procurement process having been followed.

The test for absolution from the instance

[31] The legal principles governing an application for absolution at the close of the plaintiff's case are well established. In *Claude Neon Lights (SA) Ltd v Daniel*[3] the court articulated the test, as has consistently been applied by our courts, as follows:

'…when absolution from the instance is sought at the close of plaintiff's case, the test to be applied is not whether the evidence led by plaintiff establishes what would finally be required to be established, but whether there is evidence upon which a Court, applying its mind reasonably to such evidence, could or might (not should, nor ought to) find for the plaintiff.'

[32] At this stage, a court does not weigh competing inferences or assess credibility. A court assumes that the plaintiff's evidence is true[4]. The enquiry is

[3] *Claude Neon Lights (SA) Ltd v Daniel* 1976 (4) SA 403 (A) at 409G-H.

[4] *Atlantic Continental Assurance Co of SA v Vermaak* 1973 (2) SA 525 (E) at 527C-D.

whether, on that assumption, there is evidence upon which a reasonable court might grant judgment in the plaintiff's favour.

[33] However, as was cautioned in *Claude Neon Lights* (at 409G), the test remains whether there is evidence upon which a court 'could or might (not should or ought to)' find for the plaintiff. A court must still be satisfied that the plaintiff has adduced evidence on all the elements necessary to establish a prima facie case.

Evaluation of plaintiff's case on claims A and B

[34] Applying the above test to the evidence led, and having regard to the relevant principles of cession and the terms of the cession agreement as set out above, I am unable to conclude that a reasonable court might find for the plaintiff on claims A and B. Several insurmountable difficulties confront the plaintiff's case.

[35] Firstly, the cession agreement itself, upon which the plaintiff's claim is founded, contains a clear condition precedent to payment. Clause 4.3 requires that invoices be certified by the consulting engineer and Makgotamishe, confirming that the materials are acceptable and that payment may be made. Mr Baloyi ultimately conceded, under cross-examination, that neither of the invoices had been so certified.

[36] The certification requirement is not a mere formality. It is the mechanism by which the defendant obtains assurance that the work claimed for has been properly performed and approved under the main contract. Without such certification, the defendant has no independent means of verifying the plaintiff's entitlement to payment. The plaintiff's failure to lead any evidence of

certification, and indeed Mr Baloyi's concession that no certification occurred, means that the plaintiff has not established that the condition triggering the defendant's payment obligation has been fulfilled. The evidence adduced establishes the opposite: the invoices were not certified as required.

[37] Secondly, and more fundamentally, the plaintiff's claim is premised upon the existence of monies owing by the defendant to Makgotamishe. The cession agreement, by its very nature, can only operate to transfer existing rights. Clause 4.1 thereof refers to monies owing or which may in future become owing by the defendant to Makgotamishe. The plaintiff, as cessionary, stands in the shoes of Makgotamishe and can claim no greater rights than Makgotamishe itself possesses. This is the direct application of the *nemo plus iuris* principle.

[38] If no monies are owing by the defendant to Makgotamishe, there is nothing upon which the cession can operate, and the defendant cannot be obliged to pay the plaintiff. Furthermore, the defendant may raise against the plaintiff any defence that would have been available against Makgotamishe. If Makgotamishe has no claim against the defendant, the defendant may raise that defence against the plaintiff.

[39] The final accounts presented to Mr Baloyi in cross-examination indicate not only that no monies were owing by the defendant to Makgotamishe, but that Makgotamishe was indebted to the defendant in a substantial amount. The final account reflects that Makgotamishe owes the defendant R12,148,344.16. Mr Baloyi conceded that he could not dispute these documents, as they concerned matters between the defendant and Makgotamishe to which he was not privy.

[40] The plaintiff bore the onus of proving that the defendant owed money to Makgotamishe at the time of the termination of the principal agreement, or that

such monies became owing thereafter. No evidence was led to this effect. Mr Baloyi's testimony was confined to the work performed by the plaintiff under the subcontract. He did not know the financial position between the defendant and Makgotamishe arising from the main contract. In the absence of any evidence establishing the underlying debt, the plaintiff cannot succeed on a claim based on a cession of that debt.

[41] Thirdly, the evidence established that the principal agreement was terminated on or about 12 July 2017. The principal agreement provides that upon termination, the principal agent shall continue to issue interim payment certificates in a nil amount until the quantum of damages has been determined and the final account has been completed.

[42] The effect of this clause, as Mr Baloyi ultimately accepted, is that further payments are frozen pending the final account. The termination of the principal agreement fundamentally alters the basis upon which payments are to be made. Any entitlement to payment must ultimately be determined in the final account. The final accounts, having now been completed, reveal that Makgotamishe is indebted to the defendant rather than the converse. The defendant is therefore entitled to raise this as a defence against any claim by Makgotamishe and, by extension, against the plaintiff as a cessionary.

[43] The invoices upon which the plaintiff relies bear dates well after the termination. Even assuming, in the plaintiff's favour, that invoice 10A (dated 4 July) might have been rendered prior to termination, there was no evidence that it had been certified, nor that the 30-day period referred to in that clause had elapsed prior to termination.

[44] Fourthly, a further difficulty arises from the identity of the entity that rendered the invoices. Bearing in mind that the plaintiff is cited herein as Eritacula Investments CC, Invoice 11A reflects 'Erita EDW, a division of Erita Holdings Pty Ltd', a private company with a different registration number from that of the plaintiff. Mr Baloyi's explanation that this was merely a matter of a logo being used does not, in my view, cure the evidentiary impasse.

[45] The cession agreement was concluded with the plaintiff. A different legal entity issued the invoices upon which the plaintiff relies for payment. The plaintiff led no evidence to explain its relationship with Erita Holdings Pty Ltd, nor to establish that the plaintiff was entitled to payment for invoices issued by that entity. This raises the fundamental question that if the invoices were issued by a different entity, on what basis can the plaintiff claim payment in respect thereof. The plaintiff did not seek to amend its particulars of claim to reflect that the claimant was a different entity, nor did it lead evidence to establish that it was the alter ego of or entitled to claim through the entity that issued the invoices.

[46] Fifthly, and finally, the plaintiff's claim for retention monies (included within Claims A and B) is founded upon clause 10.5 and 10.12 of the subcontract agreement. As Mr Baloyi correctly conceded, that agreement governed the release of retention and was an obligation of Makgotamishe, not the defendant. The retention mechanism operates within the subcontract relationship. Clause 10.5 of the subcontract provides for the deduction of retention from interim payments due to the subcontractor. Clause 10.12 sets out the mechanism for the release of retention, which is triggered upon completion of the subcontract works and the expiry of the defect notification period. It places the obligation to pay retention on the contractor (Makgotamishe).

[47] The defendant, not being a party to the subcontract, cannot be liable for the release of retention monies in terms thereof. The cession agreement, properly construed, cedes rights to payment under the main contract, not rights arising under the subcontract. While the cession agreement references retention in clause 4.2, this reference must be understood in context, in that it records that retention will apply to invoices issued by the plaintiff, reflecting that the plaintiff's entitlement to payment from Makgotamishe under the subcontract was subject to retention. It does not create an independent obligation on the defendant to pay the retention, nor does it transform the defendant's obligation under the cession into an obligation to pay amounts that the defendant is not owing to Makgotamishe under the main contract.

[48] Taking the plaintiff's evidence as true, and applying the test in *Claude Neon Lights*[5], I am satisfied that no reasonable court could or might find for the plaintiff on claims A and B. The evidence establishes the absence of the very foundation upon which those claims rest.

Claim C: The storage fees

[49] The plaintiff's claim for storage fees in the amount of R39,000.00 faces similar, if not more pronounced, difficulties.

[50] Mr Baloyi testified that this claim arose from an instruction to keep goods on site. He acknowledged that no written agreement was concluded. Clause 8 of the cession agreement provides that the contract constitutes the entire agreement between the parties and that no amendment, alteration, or variation shall have any force or effect unless reduced to writing and duly signed. The cession agreement

[5] *Op cit* fn 3.

is not merely an agreement between the plaintiff and Makgotamishe. It is a tripartite agreement to which the defendant is a party. Clause 8 accordingly binds the plaintiff and the defendant and precludes any oral variation or supplementation of their contractual relationship.

[51] The plaintiff seeks to enforce an oral agreement allegedly concluded with the defendant. It is trite that a municipality, as an organ of state, is bound by the constitutional and statutory framework governing public procurement. Section 217 of the Constitution requires that contracts for goods and services be concluded in accordance with a system that is fair, equitable, transparent, competitive, and cost-effective. The Municipal Finance Management Act[6] and the applicable supply chain management regulations prescribe the manner in which municipalities may procure goods and services. These provisions exist to ensure that public funds are expended in a manner that is lawful, regular, and transparent, and to prevent abuses arising from informal or undocumented arrangements.

[52] Mr Baloyi confirmed that he was not aware of any procurement process having been followed in respect of the alleged storage agreement. In the absence of compliance with the statutory procurement framework, any agreement purportedly concluded with the municipality would be invalid. The plaintiff led no evidence to establish that the alleged oral agreement complied with the applicable legal requirements. Indeed, Mr Baloyi's evidence suggested that the arrangement was informal and arose from an *ad hoc* instruction.

[53] Moreover, clause 8 of the cession agreement expressly precludes any oral variation or supplementation of the parties' contractual relationship. The plaintiff

[6] Municipal Finance Management Act 56 of 2003.

cannot rely upon an oral agreement that is inconsistent with the written agreement upon which its entire case is founded. The cession agreement governs the contractual relationship between the plaintiff and the defendant. If the parties intended to enter into a separate agreement for storage fees, they were obliged to do so in writing and to comply with the applicable procurement requirements.

[54] I am satisfied that no reasonable court could or might find for the plaintiff on Claim C. The evidence establishes that no valid agreement was concluded and that any purported oral agreement would be unenforceable for non-compliance with statutory procurement requirements and in light of the non-variation clause in the cession agreement.

Conclusion

[55] In view of the foregoing conclusions, the defendant's application for absolution from the instance must succeed on all the claims.

Costs

[56] The general rule is that costs follow the result. The defendant has successfully applied for absolution from the instance, and there is no reason to depart from the general rule.

Order

[57] In the result, I make the following order:

1. The defendant's application for absolution from the instance is granted.

2. The plaintiff is ordered to pay the defendant's costs of suit on Scale B.

[redacted]

M WESSELS

ACTING JUDGE OF THE HIGH COURT

NORTH WEST DIVISION, MAHIKENG

Appearances

For plaintiff	:Adv GK Seleka
Instructed by	:Mogau Attorneys
	:Rustenburg
	:c/o GA Mokaa Attorneys
	:Mahikeng
For defendant	:Adv NG Laubscher
Instructed by	:AB Scarrott
	:c/o Tlou Attorneys
	:Mahikeng