

## **The general principles of cession**

### ***Introduction***

The legal concept of cession, in terms of South African law, was defined in *Johnson v Incorporated general insurance Ltd* as:<sup>1</sup>

*“an act of transfer to enable the transfer of the right to claim to take place.<sup>2</sup> Accomplished by means of an agreement of transfer entered into between the cedent and the cessionary and arising out of a justa causa, from which the intention of the cedent to transfer the right to claim<sup>3</sup> appears or can be inferred and from which the intention of the cessionary to become the holder of the right appears or can be inferred”.<sup>4</sup>*

In simple terms, according to the online Oxford dictionary, cession is “the formal giving up of rights, property, or territory by a state”<sup>5</sup> and in terms of the Free dictionary “the act of relinquishing one’s right”<sup>6</sup>

Thus, cession is clearly distinguishable from contracts, in that it does not create obligations<sup>7</sup> and further from delegation and subrogation which do not involve the actual transfer of rights.<sup>8</sup>

### ***The legal requirements for valid cession***

According to van der Merwe et al 2002,<sup>9</sup> the following requirements must be met in order to affect valid cession:

1. “A right inhering to the cedent,
2. agreement between the cedent and the cessionary to give and accept transfer of the right,
3. compliance with any formalities set by the law.”<sup>10</sup>

#### ***1.1. A right inhering to the cedent***

#### ***Existing rights versus a spes***

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<sup>1</sup> 1983 (1) SA 318 (A) and [http://en.wikiversity.org/wiki/Cession\\_in\\_South\\_African\\_Law:\\_Classification\\_of\\_cession\\_-\\_3](http://en.wikiversity.org/wiki/Cession_in_South_African_Law:_Classification_of_cession_-_3): accessed 21/09/2010 and *FNB v Lynn* 1996 2 SA 339 A.

<sup>2</sup> Also known as *translatio juris*.

<sup>3</sup> Also known as *animus transferendi*.

<sup>4</sup> Also known as *animus acquirendi*.

<sup>5</sup> [http://oxforddictionaries.com/view/entry/m\\_en\\_gb0134890#m\\_en\\_gb0134890](http://oxforddictionaries.com/view/entry/m_en_gb0134890#m_en_gb0134890): accessed 22/09/2010.

<sup>6</sup> <http://legal-dictionary.thefreedictionary.com/cession> : : accessed 21/09/2010.

<sup>7</sup> *Uxbury investment Pty Ltd v Sunbury Investments Pty Ltd* 1963 1 SA 747 C.

<sup>8</sup> Van der Merwe, van Huyssteen, Reinecke, Lube, and Lotz, *Contract general principles*, Eighth edition, Juta 2002: 323. Hereafter referred to as Van der Merwe et al 2002.

<sup>9</sup> Van der Merwe, van Huyssteen, Reinecke, Lube, and Lotz, *Contract general principles*, Eighth edition, Juta 2002. Hereafter referred to as Van der Merwe et al 2002.

<sup>10</sup> Van der Merwe et al 2002: 327.

To date our courts have followed the approach that only existing rights may be ceded, and not rights which amount to nothing more than an expectation or *spes*.<sup>11</sup> The determining factor in terms of this approach is whether or not the right falls within the estate of the cedent at time of the cession.<sup>12</sup>

There is, however, another theory that completely deviates from the above approach and warrants mention. In terms of the doctrine of *cession in anticipando*, cession of a *spes* may happen, provided that the cedent and cessionary conclude both a contract (obligatory agreement) as well as a transfer agreement to affect cession.<sup>13</sup> Upon the materialization of the right (when the right actually comes into existence) cession may take place.<sup>14</sup> However, there is no formal objection to this approach and our courts have not indicated that they are completely adverse thereto. Nevertheless, to date there is no precedent to guarantee the enforceability of cession based on this common law doctrine.

### **Personal right**

Accordingly, any personal right may be ceded provided it already falls within the cedent's estate and is capable (in law) of being ceded.<sup>15</sup> Thus, even rights which have not yet come into force or effect, such as vested rights, e.g. the rights of the beneficiaries of a family trust before its dissolution or rights which are subject to a condition (contingent rights), and/ or the right to receive your pension payout upon reaching the age of 65 years<sup>16</sup>

#### **1.2 *Justa causa (or intent)***

A *causa* or reason,<sup>17</sup> for the cession taking place essentially determines the nature and extent to which the right is transferred between the cedent and the cessionary.

In the case of out and out cession (normal cession) the right is usually transferred to the cessionary while the cedent has a reversionary right to cancel the cession and (re)claim the right, should it become necessary.<sup>18</sup>

Whether or not total transfer of rights takes place in the case of security cession, or cession in *securitatem debiti*, has been widely debated for some time now, yet to a certain extent legal uncertainty prevails. The question remains as to whether security cession is only a "sue do" or "theoretical cession", where the cession is treated like a pledge<sup>19</sup> of the right, in which case no actual transfer of the right takes place<sup>20</sup>. The only logical explanation for this theory is that the cedent retains ownership but only relinquishes his ability to exercise or enforce his rights.<sup>21</sup> Although the courts have in fact

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<sup>11</sup> FNB v Lynn 1996 2 SA 339 A.

<sup>12</sup> van der Merwe et al 2002: 336 and FNB v Lynn 1996 2 SA 339 A.

<sup>13</sup> van der Merwe et al 2002: 338.

<sup>14</sup> Muller v Trust Bank 1981 2 SA 117 N.

<sup>15</sup> van der Merwe et al 2002: 336.

<sup>16</sup> FNB v Lynn 1996 2 SA 339 A.

<sup>17</sup> Causa is roughly translated as the cause of, the motive or ground for doing something.

<sup>18</sup> Picardi Hotels Ltd v Thkweni property 2008 ZASC 128.

<sup>19</sup> Means binding oneself to someone's credit.

<sup>20</sup> National Bank of South Africa Ltd v Cohen's trustee 1911 AD 235.

<sup>21</sup> Van der Merwe et al 2002: 351 - 353.

confirmed that this construction may be theoretically unsound, some continue to apply this model based upon the notion of an already established legal precedent which has been applied for over 70 years.<sup>22</sup> This was confirmed again in *Grobler v Ootshuizen*<sup>23</sup> where the Supreme Court of Appeal held that security cession is nothing more than a pledge.

An opposing view again exists wherein this type of cession, regardless of the difference in *causa*, is treated as a out and out cession and transfer of rights.<sup>24</sup> This theory is further supported by the case of *Picardi Hotels v Thkweni Property*,<sup>25</sup> where the court held that a cedent who has not exercised his reversionary rights lacks *locus standi* in the enforcement or exercise of the right so ceded.

## **2. The agreement**

Although an agreement for cession need not be in writing it is always preferable. The only requirement set according to *Botha v Fick*<sup>26</sup> is that "mere consensus is sufficient to effect a cession."

Moreover, the cession must in addition hereto also be lawful and the rights of debtors not prejudiced. This does not imply that the debtor must be notified or that the debtor will become a party to the cession.<sup>27</sup>

### **Formalities**

In most cases no formalities need to be complied with to affect cession. In some instances however, certain formalities are prescribed by law such as, in the case of a mortgage bond there must be registration thereof in the Deeds Office.<sup>28</sup>

### **Conclusion**

It is thus of the utmost importance that an attorney advises the both the cedent and cessionary regarding the legal nature and consequences of their transaction, or cession, prior to entering into an agreement. It is further important that an attorney who is able to observe all the relevant legal requirements drafts the agreement.

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<sup>22</sup> *Leyds v Noord-Wstelijke Kooperatiewe Landboumaatskappy BPK* 1985 2 SA 769 A.

<sup>23</sup> 2009 ZASCA 51.

<sup>24</sup> *Van der Merwe et al* 2002: 351.

<sup>25</sup> 2008 ZASC 128.

<sup>26</sup> 1995 (2) SA 720 (A).

<sup>27</sup> *Van der Merwe et al* 2002: 336.

<sup>28</sup> *Van der Merwe et al* 2002: 330 - 331.