IN THE HIGH COURT OF SOUTH AFRICA
KWAZULU-NATAL DIVISION, PIETERMARITZBURG

Case No: 11082/2015

In the matter between:

UBUNZIMA TRADING ENTERPRISES CC PLAINTIFF

and

UTHUKELA DISTRICT MUNICIPALITY DEFENDANT

ORDER

(i) The defendant is ordered to pay the plaintiff the sum of R 1 039 355.53, plus interest at the legal rate from 10 September 2014 to date of payment;

(ii) The defendant is ordered to pay the plaintiff the sum of R604 394.92 plus interest at the legal rate from 29 December 2013 to date of payment;

(iii) Costs of suite, such costs to include costs consequent upon the employment of senior counsel.

JUDGMENT

Delivered on 12 March 2019

Poyo Dlwati J:

[1] The question to be answered in this matter is whether the deed of cession, which the plaintiff is relying upon in its claim against the defendant, is valid and can be interpreted in any other way than the way the plaintiff suggests it be interpreted.

[2] The plaintiff, a close corporation duly incorporated in terms of the Close Corporations Act 69 of 1984, launched an action against the defendant, a municipality structured in terms of the Local Government : Municipal Structures Act 117 of 1998 ('the municipality'), for payment of retention moneys held by the municipality against the plaintiff's payments. These payments constituted two claims, claim A and B. As the facts and principles to these claims were similar, I will deal with them simultaneously. In support of its claims, the plaintiff called four (4) witnesses, whilst the municipality did not call any witness.

[3] The evidence of Sabeliwe Mkhize ('Mrs Mkhize') was key to this matter, and provided the necessary background. Even though she was called by the plaintiff, she was the manager of the Project Management Unit ('PMU') at the municipality from 2008 to 2011. From time to time she also acted as the head of the Technical Infrastructure Unit at the municipality under which the PMU fell. Because of her position, she was in charge of various new infrastructure projects within the municipality.

[4] During 2009, Lashes Investments CC / Kuyizikhindi Contractors CC Joint Venture ('Lashes') was awarded two contracts by the municipality. The first was the Inkanyezi Community Water Supply Scheme Project with contract number 04/2008 ('Inkanyezi Project'). The second was the Bergville Bulk Water Scheme with contract number 05/2008 ('Bergville Project'). Lashes was not performing to the satisfaction of the municipality, and Willcocks, Reed and Kotze (Pty) Ltd ('the engineers'), who were appointed as engineers by the municipality to manage the projects on its behalf. It was common cause that this was due to the financial difficulties that Lashes had. According to Mrs Mkhize, two options were available to the municipality in order to ensure the completion of the projects. The first was to terminate Lashes' contracts, and the second was to get someone who could be able to assist Lashes with its financial needs.

[5] According to Mrs Mkhize, the termination of the contracts would delay the timeous completion of the projects and this would have had a negative impact on service delivery. She then had discussions with Mr Thokozani Dladla ('Mr Dladla') who represented Lashes on how the situation could be resolved. It became evident that Lashes required someone with the necessary financial muscle to assist it in its situation. Mr Dladla then introduced the plaintiff as the entity that would bail out Lashes in that situation. According to Mrs Mkhize, arrangements of this nature were common occurrence and the municipality knew about them. She then prepared the deeds of cession for the parties.[1] These are the documents that are the subject of this matter.

[6] According to Mrs Mkhize, she had the template of these cessions in her office as they were commonly used by the municipality. After preparing them, she took Lashes and the plaintiff through the documents, and explained their effects. According to her, the main aim of the documents was for the plaintiff to

[1] Exhibit A36-39 and A39-41

take over the project from Lashes, with Lashes ceding all its rights to payments to the plaintiff. She approved of the cessions, on behalf of the municipality, as they would assist in the completion of these projects. The cessions were also approved by the management of the municipality, as she would have presented the cession to them - either before or after the signing of the agreements. Nobody in the management of the municipality took issue with her about these cessions.

[7] As a result of these cessions, the plaintiff did all the work in these two projects, and the municipality paid the plaintiff in accordance with the cessions. According to Mrs Mkhize, the cessions were not limited to one invoice but to all the invoices that the plaintiff submitted, as long as they attached a copy of the cession. For payment to be made, the following steps would be followed: the engineers would prepare their payment certificate and forward it to the municipality, the plaintiff would then attach its invoice with the cession together with a nil invoice from Lashes, and the municipality would then effect the necessary payment to the plaintiff.

[8] Mrs Mkhize testified that prior to her resignation at the municipality in 2011, there was never an issue about payments to the plaintiff on the two projects. Had she still been at the municipality, she would have authorised payment of the plaintiff's invoices, once she had been in receipt of the certificate of completion from the engineers. She did not know, nor understood why the municipality was refusing to pay the plaintiff.

[9] Under cross-examination, Mrs Mkhize made it clear that even though there was a cession in place, the contractual obligations were still between Lashes and the municipality. She denied that she had awarded, or purported to award, the contract to the plaintiff after it was put to her that she had no

authority to award the contract to the plaintiff. She emphasised that the whole contract value was ceded to the plaintiff, and not a portion thereof as suggested by Mr Goddard SC who represented the municipality in the trial. Mr Goddard put to her that the word 'portion' in paragraph 3 of page 36 of the cession meant that only a portion of Lashes' claim was ceded to the plaintiff. This was disputed by Mrs Mkhize. She testified that whatever was due to the cedent (Lashes) was to be paid to the cessionary (the plaintiff).

[10] When it was suggested to her that 'the payment' referred to in the cession related to a particular invoice, her evidence was that there was no invoice attached to the cession, as the cession related to all the invoices that would be submitted by the plaintiff from time to time. According to Mrs Mkhize, it was understood between the parties and the municipality that it was not necessary for a new cession to be signed for each invoice submitted. In fact, her evidence was that 'as an author of this cession, I meant that each time a claim was submitted, this cession must be attached.' She was adamant that Lashes was not contractually replaced by the plaintiff.

[11] In any event, her view was that as the retention moneys had been withheld from the plaintiff, they would have had to be paid to the plaintiff at the completion of the project. To her knowledge, after the cession was signed, all payments were made to the plaintiff and not to Lashes. When it was suggested to her that the municipality was not a party to the cession, her response was that her signature on the cession meant that she acknowledged the cession on behalf of the municipality. She also accepted that the municipality would pay the plaintiff in accordance with the cession. If she had not signed the cession, it would have been null and void. All this was done after she had spoken to the whole management of the municipality.

[12] Mr James Nkosinathi Madondo ('Mr Madondo'), who was the chief financial officer at the municipality from July 2007 to May 2013, corroborated Mrs Mkhize's evidence in all material respects regarding the cessions. He confirmed that he was aware of the cessions between the plaintiff and Lashes, as they had been reported to the then management of the municipality and had been approved. He further confirmed that they relied on those cessions for all payments made to the plaintiff. He also reiterated that had he still been employed by the municipality, he would have paid the plaintiff on the basis of the cession. He would also have paid the plaintiff, as the retention moneys had been withheld from the plaintiff's payments during the course of the project.

[13] Mr Madondo testified that up until his departure from the municipality in 2013, nobody had questioned him about the validity of the cession between the plaintiff and Lashes. The cessions were never even questioned by the Auditor General during the yearly audits for that matter. He testified that once the engineers had issued the payment certificate, he would have paid the plaintiff when it submitted its invoice together with the copy of the cession. When he was asked by Mr Goddard whether he would have continued to pay the plaintiff if it had been discovered that the cession was invalid, his answer was that he would have stopped paying.

[14] Mr Dladla, who was one of the members of Lashes, also corroborated Mrs Mkhize's evidence that after Lashes had experienced financial difficulties, he approached the plaintiff for assistance. He confirmed that after discussions with Mrs Mkhize and the plaintiff, the cessions were signed. His understanding of the cession was that the plaintiff would do all the work on the two sites, and the municipality would pay the plaintiff as per the invoices and the payment certificates. He confirmed that all the retention moneys were due to the plaintiff, and nothing was due to Lashes. When asked under cross-examination whether

the municipality was aware that the retention moneys were not to be paid to Lashes, Mr Dladla's response was that they ought to have been aware as the retention moneys had not been deducted from Lashes but from the plaintiff.

[15] Mr Dladla was adamant that the plaintiff did not replace Lashes as the contractor, but it was agreed between them that the plaintiff would complete the projects for Lashes, and that the plaintiff would be paid in accordance with the cession. He confirmed that after the cessions were signed, the municipality paid the plaintiff directly and nothing was owed to Lashes. At all times Lashes would issue nil invoices and the municipality would pay the plaintiff's invoices. He confirmed Mrs Mkhize's evidence that no particular invoice was attached to the cessions at the time of signature. This was as the cessions were relied upon for all future payments to the plaintiff. He further confirmed that he had never demanded payment of retention moneys from the municipality on behalf of Lashes, as they were never due to Lashes in the first place. He was never asked by the municipality whether the moneys should be paid to the plaintiff or not.

[16] The final witness was Mr Denis Kotze ('Mr Kotze'), a professional engineer employed by Willcocks, Reed & Kotze (Pty) Ltd. He confirmed that they had been appointed by the municipality to plan, design and supervise both the Inkanyezi and Bergville projects. He testified that he became aware of the cessions when the plaintiff was introduced to him and his team. He confirmed that the plaintiff performed all the work, and at various times he would issue payment certificates which were honoured and paid by the municipality in accordance with the cession agreements between the plaintiff and Lashes. He confirmed that after all the work was completed by the plaintiff, an inspection was carried out by his team. The representatives of the plaintiff, the municipality and Lashes were present. As they were all satisfied with the work that was done, a completion certificate was issued at that stage.

[17] After a period of 12 months had elapsed since completion, once all the snags and defects had been attended to, a final inspection was held by the same team as mentioned in paragraph 16. Everyone was happy with the completion of the project and they signed off on the projects. This enabled the release of retention moneys and any bond guarantees that were in place. It was then that the final completion certificate was issued and, as per the usual arrangements, he asked the plaintiff to do an invoice equivalent to the payment certificate. He knew that the plaintiff would be paid by the municipality due to the cession agreements in place between the plaintiff and Lashes, which the municipality knew about. In any event, the plaintiff had done the work, and the retention moneys were due to it anyway.

[18] Mr Kotze testified that the retention moneys would not have been due to anyone else if one had regard to the payment certificates. He confirmed that there were no retentions for specialist services and suppliers of material. He was adamant that the retentions in the two payment certificates were due to the plaintiff and no one else. He confirmed that in his email of 13 May 2015[2] he advised Barbah Mkhize of the municipality that the retention moneys could be released to the plaintiff. He did not know why the municipality was refusing to release the retention moneys to the plaintiff.

[19] Under cross-examination, he testified that at all times the contracts were between the municipality and Lashes. It was for this reason that contractually the retention moneys were due to Lashes, but the cessions had to be taken cognisance of when payments were made. He testified that this was why he worded his email to the municipality in that fashion.[3] He testified that he

[2]Exhibit 'A' at 10.
[3] Exhibit 'A' at 94 and 119-121.

believed that the cessions were valid as the municipality had paid all the plaintiff's previous invoices in accordance with the cession. He was also adamant that the retention moneys had to be released to the plaintiff, as it had done all the work, and the money had been retained from it in the first place. He concluded his evidence by saying that the fair and reasonable solution was that the person who did the work ought to be paid, hence he told the municipality to pay the plaintiff. That, in a nutshell was the plaintiff's case.

[20] As alluded to earlier, the municipality did not call any witness and instead closed its case. Mr Padayachee SC, counsel on behalf of the plaintiff, argued that as the municipality had not called any witnesses, this meant that the plaintiff's evidence remained unchallenged. He submitted that the municipality had not raised any proper defences or produced evidence to discredit the plaintiff's case, hence I ought to find for the plaintiff. He argued that the cessions were prepared by Mrs Mkhize on behalf of the municipality, and were approved by her in that capacity. This, according to her evidence, was to ensure that the projects were completed timeously. In any event, as the municipality had paid the plaintiff for all the previous payment certificates that had been submitted to it, there was no reason to withhold the retention moneys, so went the argument.

[21] Mr Padayachee further submitted that Lashes had transferred its rights to payments for the two projects to the plaintiff in terms of the cessions, which were accepted and approved by the municipality. Therefore, as the municipality had done previously, it had to comply with the cessions and pay the plaintiff. In the alternative, Mr Padayachee argued that the municipality must be estopped from raising technical defences as it benefited from the work performed by the plaintiff in accordance with the cessions. He argued that if there was anything wrong with the cessions, then the blame lay at the door of the municipality as it

had prepared the cession documents. He argued that even if one had to apply the '*ubuntu*' principle, it demanded that the plaintiff be paid.

[22] Mr Goddard, on the other hand, argued that having regard to the content of the cessions, it was impossible to determine what was ceded. This was exacerbated by the fact that even though the cessions stated that the right, title and interest ceded was as per the attached detailed invoice, there was however no invoice attached to the cession. Furthermore, since the cessions seemed to only cede a portion of the claim, it was therefore impossible to determine how much money would have to be paid to the plaintiff, thereby making the cession uncertain which was impermissible. He further argued that the cessions had to be interpreted objectively from the language used in the documents, as it was irrelevant to consider how the parties interpreted them. He also argued that because he believed that Mr Dladla testified that Lashes had been replaced by the plaintiff (which is incorrect), yet Mrs Mkhize and Mr Kotze knew that Lashes had not been replaced, then the parties were not *ad idem* as to what agreement was actually reached.

[23] Furthermore, as the plaintiff had not led any evidence about the enrichment claim, then this meant that it had abandoned that alternative cause of action. In any event, so went the submission, because the plaintiff was a subcontractor to Lashes, it could not have had an enrichment claim against the municipality but Lashes could. In as far as the argument and claim about estoppel was concerned, it was submitted that it was not clear from the evidence what representation of fact the plaintiff relied on to make such a claim. With regard to claim 3, it was argued that any costs awarded against the municipality should take into account the fact that the municipality had overpaid the plaintiff in that claim. For all these reasons Mr Goddard argued that the plaintiff's claim should be dismissed.

[24] A 'cession has been defined as a bilateral juristic act in terms of which a right is transferred by agreement between the transferor (cedent) and transferee (cessionary). Generally, no formalities are required for the antecedent obligatory agreement or the act of cession. The parties may agree on the formalities with which the cession is to comply. A cession may thus be either express or tacit, or may be inferred from the conduct of the parties. While the cession does not have to be reduced to writing, the parties may agree that the cession will only be valid if reduced to writing.'[4]

[25] Mrs Mkhize and Mr Dladla's evidence in this regard was that there were discussions prior to the cessions being signed. Their evidence was clear that it was agreed between the parties (including the municipality) that for all intents and purposes, Lashes would remain the contractor. The plaintiff would do all the work onsite, and Lashes was ceding all payments to the plaintiff in respect of all that work. In other words, the municipality did not want to terminate the contract with Lashes, as this would affect the time frame for the completion of the projects. That was why it was agreed that Lashes would get someone, being the plaintiff in this case, to complete the projects. It was on this basis that the cessions were entered into.

[26] In this case therefore there was both the antecedent obligatory agreement (the agreement to cede) as well as the act of cession. Contrary to Mr Goddard's submission, the deeds of cession made it quite clear what was being ceded. The heading itself made it abundantly clear that it was a 'Deed of Cession for Direct Payment.' Furthermore, it was common cause that the contract prices were R20 385 391.65 and R11 498 121.05 respectively. This meant, according to Mrs

[4] *Brayton Carlwald (Pty) Ltd and Another v Brews* 2017(5) SA 498 (SCA) para 9; see also *LTA Engineering Co Ltd v Seacat Investments (Pty) Ltd* 1974(1) SA 747 (A) at 762A.

Mkhize who prepared and approved the cessions on behalf of the municipality, that the plaintiff could submit claims not exceeding the contract price.

[27] Mrs Mkhize's evidence was supported by paragraph 3 of the deeds of cession which read: 'And whereas the cedent has agreed to grant to the cessionary the cedent's right, title and interest in and to a portion of the said claim equal to the amount due to the cessionary by the cedent stated here in above.' Paragraph 1, titled cession on page 2 of the deeds of cession, read as follows: 'In execution of the abovementioned contract of hire/sale/services rendered the cedent hereby cedes to the cessionary the cedent's right, title and interest in and as detailed in the attached invoice from the cessionary.'

[28] Mr Dladla and Mrs Mkhize's evidence in this regard was that there was no invoice attached to the cessions. What was envisaged, and in fact agreed to, and done for almost all the invoices, except the final ones was that each time the engineers prepared the payment certificates, invoices from the plaintiff together with a copy of the cession would be attached to the payment certificates and payment would then accordingly be made by the municipality. This was never questioned by the municipality until the final payments. Since there was no evidence presented from the municipality, we do not know what caused it not to pay the final invoices.

[29] One can only assume that the municipality relied on what was stated in paragraph 4(a) of their plea namely:

'the cession relied on by the plaintiff (annexure M) does not create any contractual nexus between plaintiff and defendant, alternatively does not substitute the plaintiff as the contractor in contract 04/2008 but merely entitled the plaintiff to be paid certain amounts which might have become owing by the defendant to Lashes Investments CC (Lashes) in terms of contract 04/2008 between Lashes and the defendant.'

[30] However, all this was negated by Mrs Mkhize's evidence when she testified that the municipality had approved and consented to the cessions. Not only did she sign the cession acknowledging them, but she also obtained consent and approval from the entire management of the municipality, including the municipal manager. Her evidence in this regard was uncontroverted. She also confirmed that the plaintiff was never substituted for Lashes. Lashes contractually remained the contractor. So, there was a contractual nexus between the plaintiff, Lashes, and the municipality. In any event, if one considers their evidence in this regard, the cession was a juristic act upon which the cession was executed.

[31] The puzzling issue in this matter was that from the time that the cessions were signed, the plaintiff was paid all its invoices in accordance with those cessions. Only the last invoices were not paid. There is no explanation provided by the municipality for this nonpayment. Even their own engineers, in their email of 13 May 2015 to Barbah Mkhize, advised them to pay the plaintiff. This was because the work had been done and completed. Everyone, including the municipality, was happy with the work as it was done to their satisfaction, hence the final completion certificates being issued. It was for these reasons that Mr Kotze believed that perhaps the plaintiff was not paid due to personal grudges.

[32] It was also surprising that the municipality had never enquired nor consulted with Mrs Mkhize and Mr Madondo in preparation for its defence against the plaintiff's claims. It was common cause that the claims were for retention moneys. It was also not disputed that these would have been moneys which were withheld from all the plaintiff's invoices previously submitted and which would be equal to 10 per cent of the total contract price. In essence, the money belonged to the plaintiff as it was withheld from its payments. Mrs

money belonged to the plaintiff as it was withheld from its payments. Mrs Mkhize, Mr Kotze and Mr Dladla testified that much. They further confirmed that Lashes had no claim over those retention moneys nor had it ever claimed or tried to claim them. Mr Dladla testified that the money was due to the plaintiff and it ought to be paid to it.

[33] There was therefore no confusion or misunderstanding between the plaintiff and Lashes, and the municipality for that matter, of what was ceded and how much was to be ceded. It was therefore not open to the municipality to try and create some confusion about the contents of the cessions. Having taken into account the cession documents and the evidence of Mrs Mkhize, Mr Madondo and Mr Dladla, I am satisfied that Lashes ceded its rights to payments on contracts 04 and 05 of 2008 to the plaintiff, in accordance with invoices and payments certificates that would be submitted by the plaintiff from time to time to the municipality. This was the contract that the parties entered into, and to interpret it otherwise would be making a new contract for the parties.[5]

[34] The municipality is therefore estopped from denying the truth about the contents of the deeds of cession, and the purposes for which they were entered into. The representation made by Mrs Mkhize to the plaintiff and Lashes was that the plaintiff would be paid directly by the municipality, once the plaintiff performed the remaining work on the Inkanyezi and Bergville projects, and once the municipality had received the necessary invoices and the payment certificates. Accordingly, the plaintiff's claims must succeed. Because of this finding, I do not have to deal with the alternative claim of unjust enrichment. With regard to claim 'C' in the plaintiff's particulars of claim, no evidence was presented by either of the parties relating to this claim. In fact, at the

[5] *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 (4) SA 593 (SCA) para 18

commencement of the trial, it was submitted that the claim had been settled between the parties. I will therefore not say any further with regard to it.

[35] Finally, there was an issue about when interest ought to start running if I found for the plaintiff. The plaintiff pleaded, and it was submitted that much, for the interest to start running from the date when the payment certificates were issued, being 10 September 2014 and 29 December 2013 respectively. Mr Goddard submitted that interest should start running from the date that the summons was issued, being 21 August 2015. There was no reason furnished by the municipality as to why the plaintiff was not paid when the payment certificates were received by it. I have no reason not to order that interest should run from the date that the payment certificates were issued.

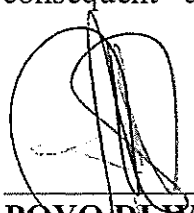
Order

[36] Accordingly, I make the following order:

(i) The defendant is ordered to pay the plaintiff the sum of R 1 039 355.53 plus interest at the applicable legal rate from 10 September 2014 to date of payment;

(ii) The defendant is ordered to pay the plaintiff the sum of R604 394.92 plus interest at the applicable legal rate from 29 December 2013 to date of payment;

(iii) Costs of suite, such costs to include costs consequent upon the employment of senior counsel.



POYO-DLWATI J

APPEARANCES

Date of Hearing	:	20 February 2019
Date of Judgment	:	12 March 2019
Counsel for Applicant	:	Adv Padayachee SC
Instructed by	:	Carlos Miranda Attorneys
Respondent	:	Adv Goddard SC
Instructed by	:	Shepstone & Wylie Attorneys