IN THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

Case number : 488/99

In the matter between :

Milner Street Properties (Pty) Ltd **Appellant**

And

Eckstein Properties (Pty) Ltd **Respondent**

CORAM :	NIENABER, SCHUTZ, SCOTT, NAVSA JJA and NUGENT AJA
HEARD :	30 AUGUST 2001
DELIVERED :	21 SEPTEMBER 2001

Summary: Value Added Tax Act 89 of 1991 - sale of immovable property by and to registered vendor as a going concern - formalities for zero rating prescribed by 1994 amendment to s 11(1)(e) not complied with- parties unaware of amendment - rectification of agreement.

JUDGMENT

NIENABER JA/

NIENABER JA :

[1] If the contentions advanced on behalf of the appellant (a registered vendor in terms of the Value Added Tax Act 89 of 1991 ('the Act')) are sound, the appellant will have managed, unwittingly as it happens, to foist on the respondent (also a registered vendor in terms of the Act) a value-added tax ('VAT') liability of R429 824.56, to which the appellant can now lay claim as a refund from the Commissioner for Revenue Services ('the Commissioner'). Such will be the anticipated end-result. To understand those contentions it is necessary to consider both the statutory and the factual backdrop to the claim for a declarator, alternatively, damages, which the appellant instituted against the respondent in the Natal Provincial Division.

[2] The statutory setting may conveniently be summarised in the form of a series of broad propositions.

(a) Section 7(1)(a) of the Act provides generally that VAT shall be levied on the supply by a vendor (as defined) of goods or services (as defined) in the course or furtherance of any enterprise (as defined) carried on by him, calculated at the rate of 14 per cent on the value of the goods or services so supplied.

(b) When the contract is silent as to the inclusion of VAT in the agreed price it is deemed to be so included (s 64(1) of the Act).

(c) When a taxable supply of goods is made by, say, a manufacturer to a wholesaler, by a wholesaler to a retailer and by a retailer to an end-user, VAT is levied at each stage of the distribution chain. Each vendor (or supplier) is accountable in turn to the Commissioner for the payment of VAT which he is required to collect from his recipient. But because VAT is in principle only levied on the 'value added on', each recipient may, on the production of a tax invoice from his supplier, deduct his 'input tax' i.e. the amount for which his supplier was accountable to the Commissioner (and which was chargeable against him) from his 'output tax' i.e. the amount for which he is accountable to the Commissioner (and which is chargeable against his recipient). The excess is payable to the Commissioner. Over a relevant tax period a vendor would therefore be entitled to deduct from the totality of the output tax levied against his recipients the totality of the input tax levied against him. Since the end-user can make no deduction the end-result is that the burden of VAT ultimately falls on him.

(d) In terms of s 20(1) of the Act each supplier who is a registered vendor making a taxable supply is obliged to provide his recipient, at the latter's request, with a tax invoice reflecting, *inter alia*, the amount of VAT charged against him.

(e) In like manner that the Commissioner is entitled to the excess when the output tax exceeds the input tax, the recipient vendor is entitled to claim a refund from the Commissioner when his input tax over a tax period exceeds his output tax (s 15(8), 16(5) and 44(1) of the Act).

(f) The Act provides for exemptions (in which case no VAT is raised) and in certain instances for zero rating (in which case VAT is raised but charged at a rate of zero per cent, for which a tax invoice to that effect is nonetheless to be supplied).

(g) Section 11(1)(e) of the Act provides for zero rating when the taxable supply is by one registered vendor to another of an enterprise which is disposed of as a 'going concern'.

(h) The central issue in this case is whether the transaction between the respondent and the appellant complied with s 11(1)(e) of the Act, as amended, so as to qualify for zero rating.

(i) In terms of s 9(15) of the Transfer Duty Act 40 of 1949 no transfer duty is payable in respect of a sale of property which 'is a taxable supply of goods' where 'such supply was subject to the said tax at the rate of zero per cent.'

[3] The factual background is as follows. Until January 1995 the respondent, a company, was the registered owner of a property in Pietermaritzburg described as Remainder of Lot 3043, Pietermaritzburg, with its street address at 37

Willowton Road ('the property'). On the property was a factory. The property was leased by a company, Amalgamated Shoes Limited ('Amshoe') which used the factory to manufacture shoes. The brothers Roy and Edward Eckstein were the shareholders and directors of the respondent. Roy Eckstein was also a shareholder in and, at one time, the chief executive officer of Amshoe. The holding company of Amshoe was a company with its premises in the Western Cape, Lenco Holdings Limited, ('Lenco'), the chief executive officer of which was a certain Mr D de Jager. Amshoe, as tenant, had a long term lease on the property. When the lease eventually expired Amshoe continued to occupy the property on a monthly tenancy. Towards the end of 1993 Lenco bought out Roy Eckstein's shareholding in Amshoe. He decided to sever his relationship with Amshoe. Lenco was anxious to obtain some security of tenure on the property for Amshoe. Amshoe was intent on continuing its operations on the property which Lenco would either purchase or continue to occupy in terms of a new long term lease.

[4] Lenco eventually resolved to purchase the property and on 4 July 1994 it made a written offer to the respondent which Roy Eckstein duly accepted in writing on its behalf. It was short, to the point and read:

> 'We hereby offer to acquire the above property from your company for an amount equal to R3,5 million (three million five hundred thousand rand). This offer is open for acceptance within a period of 21 days from date hereof. The purchase price will be payable free of commission, and will be paid on or before the date of transfer.'

[5] Before the agreement could be implemented and on 29 August 1994 Lenco requested the respondent to accept one of its subsidiary companies, Hendler & Hendler Properties (Pty) Ltd ('Hendler'), as the purchaser in substitution for Lenco and on 11 November 1994 the respondent agreed to do so.

[6] It is necessary to interrupt this résumé of the factual history at this stage by interposing an item of legislative history. It was during this period that s 11(1)(e) of the Act was amended in a manner that eventually underlay the burning issue between the parties in this litigation.

[7] The section, prior to its amendment, read as follows:

> '11(1) Where, but for the provisions of this section, a supply of goods would be charged with tax under section 7(1)(a), such supply of goods shall, subject to compliance with subsection (3) of this section, be charged with tax at the rate of zero per cent where -
>
> (e) the supply is to a registered vendor of an enterprise or part of an enterprise which is capable of separate operation, where such enterprise or part, as the case may be, is disposed of as a going concern.'

[8] Section 11(1)(e) was amended, with effect from 25 November 1994, by s 13(a) of Act 20 of 1994 which substituted a new s 11(1)(e) reading as follows:

> '(e) the supply is to a registered vendor of an enterprise or of a part of an enterprise which is capable of separate operation, where the supplier and the recipient have agreed in writing that such enterprise or part, as the case may be, is disposed of as a going concern: Provided that -
>
> (i) such enterprise or part, as the case may be, shall not be disposed of as a going concern unless-
>
> (aa) such supplier and such recipient have, at the time of the conclusion of the agreement for the disposal of the enterprise or part, as the case may be, agreed in writing that such enterprise or part, as the case may be, will be an income-earning activity on the date of transfer thereof; and
>
> (bb) …'

[9] The amendment did not add to the substance of the section but it introduced several formal requirements, more particularly, that certain provisions had to be 'agreed in writing' as a prerequisite for the application of zero rating. What had to be 'agreed in writing' was (a) that the enterprise (or part thereof) 'is disposed of as a going concern'; (b) that the enterprise 'will be an income-earning activity on the date of transfer thereof'; and (c) that 'at the time of the conclusion of the agreement' the consideration agreed upon is inclusive of tax at the rate of zero per cent.

[10] At the time both the appellant and the respondent and their respective advisers were unaware of the amendment to the subsection.

[11] On 29 November 1994, after the amendment took effect, the respondent's attorney forwarded the necessary documentation to the appellant in order to effect a substitution of Hendler for Lenco as the new purchaser. This included a new agreement which followed the wording of the first agreement and thus did

not take account of the new requirements introduced by the amendment. The covering letter concluded:

> 'Please would you arrange for signature in black ink and return to us. Please would you also forward us the VAT number for the Purchaser so that we may claim a zero rating provision under section 11(1)(e) of the VAT Act and exempt the transaction from transfer duty.'

[12] On 2 December 1994, and before the new substitution could be implemented, the respondent was once again requested to substitute another of Lenco's subsidiaries, the present appellant, as the purchaser. The respondent was again prepared to accommodate Lenco and a new set of documents, identical to the earlier documents (except for the change in the identity of the purchaser), was prepared by the respondent's attorneys.

[13] Amongst the draft documents forwarded to Cape Town was a new agreement, drawn in the form of an offer by the appellant to the respondent in the following terms:

> 'We hereby offer to acquire the above property from your company for R3,5 million. The purchase price shall be payable free of commission and

> will be paid on or before the date of transfer which shall take place as soon as possible after signature hereof.'

This document was signed on behalf of the respondent by Edward Eckstein (in the temporary absence of Roy Eckstein) on 7 December 1994 and forwarded to the appellant in Cape Town under cover of a letter dated 9 December 1994, containing the same supporting documents as before, to be completed by Hendler, Lenco and the appellant, with the request:

> 'Please would you also forward us the VAT number for the purchaser so that we may claim a zero rating provision under s 11(1)(e) of the VAT Act and exempt the transaction from transfer duty.'

[14] The agreement and its supporting documentation were completed, signed and returned, together with the appellant's VAT number, to the respondent's attorneys on 3 January 1995. The purchase price was thereafter duly paid and transfer was effected to the appellant on 7 February 1995.

[15] What is abundantly clear from the above account is (a) that both parties through their legal representatives were alive to the VAT legislation; (b) that the respondent, through its attorneys, was firmly of the belief that the transaction

was zero rated; (c) that the appellant and its advisors gave no indication that it disagreed with that view; and (d) that both parties were unaware of the changes to the legislation which had come into effect after they had reached agreement on the sale but before the substitution of a new purchaser had been finalised.

[16] And that is where matters rested until 4 August 1995 when Lenco wrote to the Commissioner in the following terms:

> 'We enclose an additional VAT 201 for February 1995 where we failed to claim input VAT on the purchase of 37 Willowton Road from Eckstein Properties (Pty) Ltd for R3 500,000.00. We subsequently sold this property which had been accounted for in our April return with a net settlement of R2 008 625,55 for that period.'

In the VAT 201 form an amount of R429 824,56 (the amount now in dispute between the parties) was claimed as a 'return for remittance of value-added tax'.

[17] On 10 June 1996 the appellant wrote to the respondent:

> 'We refer to the purchase of 37 Willowton Road Pietermaritzburg by Milner Street Properties (Pty) Ltd and advise that we have still not received a VAT invoice covering the transaction in spite of previous requests.
> Kindly supply the required invoice per return of post so that this matter can be finalised.'

The respondent's attorneys thereupon supplied a VAT invoice which stated:

> 'This consideration is exclusive of Value Added Tax, and the sale is zero rated.
> ' - amount of Value Added Tax charged - Nil.'

(It was common cause that the word 'exclusive' should have read 'inclusive'.)

[18] Both Mr Stubbs and Mr Whyte who gave evidence on behalf of the appellant confirmed that it was the appellant's external auditors who alerted it to the prospect of claiming a refund on the transaction. Implicit in such a claim by the appellant was the demand that the respondent, in order to produce a tax invoice reflecting the amount claimed, should first effect payment thereof to the Commissioner. The respondent refused to supply a VAT invoice to that effect since it persisted in its attitude that the sale was zero rated.

[19] The appellant thereupon instituted proceedings against the respondent in which it sought relief in the following terms:

> '(a) an order declaring that the defendant is obliged in terms of the provisions of section 20(1) of Act 89 of 1991, to deliver to the plaintiff a tax invoice in respect of the sale by the defendant to the

plaintiff of the property, Remainder of Lot 3043 Pietermaritzburg and having the street address 37 Willowton Road which:

(i) reflects the consideration for the supply in the amount of R3 500 000,00;

(ii) the amount of the tax charged in the said sum of R429 824,56,

and otherwise complying with the requirements of section 20(4) of the Act;

(b) directing the defendant to deliver to the plaintiff forthwith a tax invoice as referred to in paragraph (a) above;

(c) Alternatively to paragraph (b) above, damages in the sum of R429 824,56;

(d) Damages calculated at the prescribed rate of 15,5% per annum on the said sum of R429 824,56 from 25 October, 1996 to the last day for the rendering by the plaintiff of its return for remittance of value added tax for the tax period in which the said tax invoice is so delivered, alternatively to the date of payment to the plaintiff of the said sum of R429 824,56;

(e) Costs of suit;

(f) Alternative relief.'

[20] The respondent raised a number of defences, *inter alia*, that the exchange of correspondence between the parties satisfied the newly introduced formal requirements of s 11(1)(e) of the Act, failing which, that the respondent was in any event entitled to have the written agreement rectified in the manner set out in its conditional counterclaim, by the introduction of the following words:

> "It is recorded that the abovementioned sale will be the sale of an enterprise which is a going concern and that such enterprise will be an income-earning activity on the date of transfer and will consist of the property duly leased to a tenant."

[21] The matter came before Thirion J who dismissed the appellant's claim and granted the respondent's counterclaim, both with costs. This is an appeal, with the leave of the Court *a quo*, against the orders so made.

[22] To qualify for zero rating where both the supplier and the recipient were duly registered vendors in terms of the Act, the enterprise, or part thereof, had to be disposed of as a going concern and had to be 'an income-earning activity' on the date of transfer thereof. In the instant case the property was obtained by the appellant in order to continue the subsisting tenancy of Amshoe for the foreseeable future and certainly beyond the date of transfer. As such the transaction, but for the failure to spell out these facts in the written agreement, qualified, according to the respondent, for zero rating. Notwithstanding certain reservations expressed by the appellant's witnesses about it, I did not understand appellant's counsel to contend to the contrary. The argument for the appellant

was twofold: since neither the statutory preconditions for zero rating nor the common law preconditions for rectification had been satisfied, it was not competent for the respondent to rely on either the correspondence or on rectification; that being so, the transaction was not zero rated; and if it was not zero rated, the appellant was entitled to payment of R429 824,56, either indirectly via a refund from the Commissioner or directly via a claim for damages.

[23] Before this Court the argument was largely confined to the effect of the non-compliance of the written agreement of sale with the newly prescribed statutory formalities. It was common cause between the parties that the written agreement of sale did not comply with the formalities introduced by the amending legislation. In particular, the agreement did not stipulate that the enterprise or part thereof 'is disposed of as a going concern' (the legislation being silent as to when this was to be so stated) nor did it specify 'at the time of

the conclusion of the agreement' that the enterprise or part thereof 'will be an income-earning activity at the date thereof'.

[24] It was contended on behalf of the appellant that, just like an agreement, invalid for want of compliance with formalities prescribed by statute, cannot be validated by rectification (*Intercontinental Exports (Pty) Ltd v Fowles* 1999 (2) SA 1045 (SCA) at 1051C-I; *Greathead v SA Commercial Catering & Allied Workers Union* 2001 (3) SA 464 (SCA) at 469H-J), so rectification in this instance could likewise not circumvent non-compliance with the formalities prescribed for zero rating. The proposition is sound; the analogy is not.

[25] Central to the contention was a dictum of Hoexter AJA in *Magwaza v Heenan* 1979 (2) SA 1019 (A) at 1029B-C:

> ' … [I]t seems to me that as a matter of principle that proposition ["… you cannot, by rectification, invest a document which, on the face of it is null and void, with legal force" - 1026A] is legally correct. In my judgment any departure from the legal position as stated by Dowling AJ in *Dowdle's* case [*Dowdle's Estate v Dowdle and Others* 1947 (3) SA 340 (T)] is in theory subversive of the statutory formalities prescribed by the statute; and in practice such departure must inevitably prove emasculatory of them.'

In the instant case, so counsel contended, rectification would equally be 'subversive of the statutory formalities prescribed by the statute' and 'prove emasculatory of them'. The argument, in my opinion, loses sight of several relevant considerations.

[26] In the first place the dictum of Dowling AJ, on which Hoexter AJA placed the *imprimatur* of this Court, was not in point. That dictum, and indeed the subsequent dictum of Hoexter AJA, dealt with a situation which differs fundamentally from the present one, in that the sanction for non-compliance with the stipulated formalities was nullity. In the present case non-compliance with the formalities prescribed by s 11(1)(e) concerns not the conclusion and hence the formal validity of the transaction but a fiscal consequence thereof, the rate at which VAT is to be levied. In the first class of case, where compliance with the statutory formalities is a prerequisite for the actual formation of an agreement, a failure to comply means that nothing is constituted and consequently there is by definition nothing that can be rectified, just as the

cipher zero cannot be added or subtracted, multiplied or divided. The underlying non-conforming agreement is legally irrelevant, also for the purpose of rectification. One cannot, it has been said, rectify out of formal invalidity. The very point is made in a dictum in *Spiller and Others v Lawrence* 1976 (1) SA 307 (N) at 312B-C, quoted with approval in *Magwaza's* case at 1027E-F, where the Court, in contrasting voidness for want of compliance with essential formalities with other forms of invalidity, said:

> 'It does not support the much wider proposition that there can never be rectification if the agreement, although in fact valid, wrongly appears from the documentary evidence of it to be invalid for some other reason. Nor does this follow logically. The two situations are fundamentally different. In the one like the present, when the question of validity relates to the substance of the transaction and not its form, nullity is an illusion produced by a document testifying falsely to what was agreed. In the other, that envisaged in the *obiter dictum,* the cause of nullity is indeed to be found in the transaction's form.'

[27] Secondly, it is important to bear the respective purpose and function of the prescribed formalities in mind when comparing the two classes of cases. In the class of case (such as alienation of land, suretyship, and executory

donations) where the sanction is nullity, the objective of the legislature has been said to be 'to prevent litigation and to remove a temptation to perjury and fraud' (*Wilken v Kohler* 1913 AD 135 at 142) or to avoid 'uncertainty, disputes and possible malpractices' (*Clements v Simpson* 1971 (3) SA 1 (A) at 7A) or 'to achieve certainty as to the true terms agreed upon and thus avoid or minimize the possibility of perjury or fraud and unnecessary litigation' (*Fourlamel (Pty) Ltd v Maddison* 1977 (1) SA 333 (A) at 343A). To permit rectification in such cases would open the door to the potential areas of dispute which the legislation sought to exclude. In the instant case the reason for the introduction of the formalities in s 11(1)(e) is different. It was put thus by Thirion J in the Court *a quo*:

> "Now, it would appear to me that the object of the requirement regarding writing in the amended section 11(1)(e) is to obtain certainty that the parties to a supply of an enterprise as a going concern, were *ad idem* when they concluded this agreement, that the enterprise was disposed of as a going concern and that they contemplated at that stage that the enterprise would be an income-earning activity on the date of transfer thereof. Having these matters stated in writing would tend to eliminate disputes and uncertainty occurring afterwards as to the nature of what was

> disposed of in the agreement and as to what was in the contemplation of the parties when they concluded their agreement. I would think that the requirement that these matters be stated in writing was inserted in the section largely for the benefit of the Commissioner to enable him to determine whether what was supplied was indeed an enterprise which was supplied as a going concern and to satisfy him that the parties, when they concluded the agreement, did indeed contemplate that the enterprise would be an income-earning activity at the date of its transfer."

I agree with this analysis. What the Commissioner wants is formal proof eliminating disputes emerging after the conclusion of the contract which he must then resolve. Once the document has been rectified, having been vetted by a court, the need for such formal proof would have been satisfied. And if that is the correct approach there is no reason why rectification in this class of case, unlike the other where the sanction is nullity, should not in principle be competent. The formalities in this case are not constitutive but probative: the underlying purpose of the legislation will be enhanced, not undermined, if rectification is granted.

[28] That the Commissioner himself did not regard non-compliance as preclusive appears from VAT Practice Note No. 14, which he issued on 20

January 1995. It provides *inter alia*:

> 'Where an agreement for the sale of an enterprise as a going concern was concluded before, on or after 25 November 1994, but the parties did not agree in writing that the enterprise is disposed of as a going concern (as they were unaware of the amendment to section 11(1)(e)) they may enter into a separate agreement - based on the original contract - regarding this aspect'

The Commissioner was, patently, aware that some transactions were concluded and recorded in ignorance of the amendment to the legislation. It was to provide for that very eventuality that the practice note was issued. The mere fact that the formalities had not been complied with at the time the agreement was entered into, was not, in his view, necessarily fatal. This of course was not a case where the parties by subsequent agreement supplemented what they had previously omitted. The significance of the practice note is nevertheless that it shows that from the Commissioner's perspective no policy reasons existed which precluded a subsequent correction of a prior omission; and if that is so, there can likewise be no policy reasons for not allowing rectification.

[29] The purpose of rectification in circumstances such as the present is not to

avoid the payment of a tax which would otherwise be due to the Commissioner. Nothing would prevent the Commissioner, even if the document should be rectified, from going behind its terms to determine for himself whether the supply of the goods was to be charged with VAT at zero per cent. The Commissioner accordingly had no financial interest in the outcome of the current proceedings. The issue of non-joinder was in fact raised by the respondent but at a pre-trial conference it was recorded, admittedly in a slightly different context,

> ‘that the fiscus has no financial interest in the outcome of the action because, whatever the facts thereof, no nett tax accrues to the Receiver of Revenue. The matter is one dealing with the legal effect of the Value Added Tax Act as between the plaintiff and the defendant.’

The Commissioner in fact filed a document stating ‘the South African Revenue Services hereby confirms that it will abide by the decision in this matter.’

[30] The intention of the legislature is that a transaction will be zero rated if the supply is to a registered vendor of an enterprise or part thereof which is disposed of as a going concern. Those are the substantive requirements for zero

rating. To promote form above substance, where it can be shown and is accepted by the Commissioner that those requirements have been fulfilled, would be subversive of the true intention of the legislature. Rectification, it has been said, is an equitable remedy (*Intercontinental Exports (Pty) Ltd v Fowles, supra*, 1051H-J). A court should not be miserly in granting it where the substantive preconditions for its invocation are present. To deny rectification in such circumstances would facilitate rather than discourage duplicity.

[31] There being no principial reasons why rectification should not be granted, the next question is whether the factual preconditions for its invocation have indeed been satisfied. That question must in my opinion also be answered in the affirmative. Counsel for the appellant conceded that, but for the failure to comply with the prescribed formalities, the respondent would on the facts be entitled to an order of rectification. De Jager not having been called to contradict the testimony of the witnesses for the appellant, that concession was properly made. The exchange of correspondence between the parties makes it

abundantly clear that they were in agreement amongst themselves (a) that a zero rating would apply to the sale; (b) that the consideration of R3 500 000 would be the full purchase consideration that the appellant would pay and the respondent would receive; and consequently (c) that it should not be reduced by a tax factor of R429 824.56. The document signed in early December 1994 was simply an extension, at the behest of Lenco and to accommodate it, of an agreement that was initially concluded in July 1994 before the amending legislation was enacted. As the legislation and the agreement then stood it would have had the effect (subject to the Commissioner's ultimate assessment) that the transaction would have been zero rated and that the stipulated purchase price would have represented the net proceeds to the respondent of the sale. That is what the parties, experienced businessmen who were alive to the Act if not to its later amendment, had in mind in July as well as in December 1994. Their common assumption was that their written agreement complied with the prerequisites for zero rating. Had they been aware, at the time the agreement was signed in December 1994, that the Act had been amended they would as a matter of course have redrafted the terms thereof to maintain the status quo as far as the zero rating was concerned. The appellant's representatives only appreciated the significance of the manner in which the agreement was drafted when this was pointed out to them by its external auditors. It was only during June 1996 that the appellant demanded a tax invoice from the respondent on the supposition that the latter was liable to the Commissioner for VAT. That the point was only discovered by the appellant's external auditors and conveyed to the respondent some fifteen months after the event is in itself proof that it was never the parties' own understanding that the appellant should enjoy a tax bonanza of R429 824.56 at the respondent's expense.

[32] Unlike cases such as *Mouton v Hanekom* 1959 (3) SA 35 (A) and *Brits v Van Heerden* 2001 (3) SA 257 (C), this was not a case where parties deliberately omitted an agreed term from the written record of their agreement. The mistake in this instance was the failure of the parties, due to their ignorance of the

existence of the amending legislation, to appreciate that certain facts underlying their agreement and which were themselves not even the subject matter of discussion and consent, had to be formally recorded in writing to qualify the transaction for zero rating. Compared to *Mouton v Hanekom, supra,* and *Brits v Van Heerden, supra,* this is an *a fortiori* case (cf *Tesven CC and Another v South African Bank of Athens* 2000 (1) SA 268 (SCA) at 275C-E).

[33] There are accordingly in my opinion no obstacles, legal or factual, to allowing the respondent to meet the appellant's case by a plea of rectification. Rectification, once granted, operates *ex tunc,* as if the document at its inception read as it has now been reconstructed to read. Rectification does not alter the terms of the agreement, it perfects the written memorial so as to accord with what the parties actually had in mind. Far from emasculating the subsection of the Act, as has been claimed on behalf of the appellant, rectification restores the agreement to full potency in terms thereof: by the interpolation of a term as formulated in the counterclaim the agreement complies *ex post facto* with the

formal requirements of s 11(1)(e). This latter consequence also disposes of another suggestion raised in the course of argument, namely, that the parties must have agreed in writing *at the time of the conclusion of the agreement* that the enterprise will be an income-earning activity on the date of transfer. Having been rectified with retroactive effect, the agreement is deemed to have so provided at the time of its conclusion.

[34] In the light of the above conclusion it is not necessary to examine the other ground on which the respondent sought to rely in the appeal, i e that it is evident from the exchange of correspondence between the parties' respective legal representatives that the transaction in fact complied with s 11(1)(e) in its amended form. In that context the phrase 'at the time of the conclusion of the agreement' which appears in subsection 11(1)(e)(i)(aa) (but nowhere else) may have featured rather more prominently than in the context of rectification.

[35] It follows that the respondent was entitled to rectification and that the Court *a quo* was right in so ordering it. The following order is made:

The appeal is dismissed with costs.

....
P M NIENABER
JUDGE OF APPEAL

Corcur:

Schutz JA
Scott JA
Navsa JA
Nugent AJA