THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

Case number : 358/02

In the matter between :

THE COMMISSIONER FOR THE SOUTH AFRICAN REVENUE SERVICE — APPELLANT

and

SA SILICONE PRODUCTS (PTY) LIMITED — RESPONDENT

CORAM : HOWIE P, MARAIS, ZULMAN, CLOETE, HEHER JJA

HEARD : 16 FEBRUARY 2004

DELIVERED : 5 MARCH 2004

JUDGMENT

CLOETE JA/

CLOETE JA:

[25] I have had the benefit of reading the judgment of my brother Heher. I agree with the order proposed, but I consider that this result can be achieved by a consideration of the facts alone. In my respectful view it is unnecessary to embark on an interpretation of s 11(gA)(iii) of the Income Tax Act and I would prefer not to do so.

[26] Two fundamental submissions were made on behalf of the respondent in this Court. One was that information relating to the customer network of the seller, DB Silicones CC, was an asset sold in terms of the sale of business agreement to the respondent taxpayer; and that the amount of R14,5 million paid to the seller by the respondent, or part of that amount, fell under the section as it was paid in respect of property covered by the phrase 'any other property of a similar nature'. I shall assume, without deciding, that both of these propositions are correct. But the problem which faces the respondent is that the amount of R14,5 million in respect of which the respondent claims an allowance in terms of the section, was not, to use the words of the section, 'expenditure… actually incurred by the taxpayer… in acquiring' the information relating to the customer network of the seller. The amount of R14,5 million was paid for the rights of the seller in terms of the agreement between the seller and a third party, Dow Corning; and as counsel representing the respondent was obliged to concede, that agreement did not include information relating to the customer network of the seller. There is accordingly no factual foundation for the respondent's reliance on

the section so far as the customer network is concerned.

[27] The other submission made on behalf of the respondent was that the amount of R14,5 million, or part of that amount, was paid for the licence D B Silicones CC had from Dow Corning to use the Dow Corning trade mark when repackaging products supplied by Dow Corning. But DB Silicones CC did not have the right to assign that licence to the respondent or anyone else. The agreement between the seller as licensee and Dow Corning provided in terms in Article III *inter alia* that:

'Dow Corning hereby grants to Licensee a non-assignable … right to use the Trademarks ....'

I am content to accept at face value the following evidence of Engelbrecht, the managing director of the respondent's holding company:

'[W]e believed we needed the licence agreement to sell these trademark ─ to sell the products with these trademarks in the territory.'

That means that the sale of business agreement would not fall foul of s 103 of the Income Tax Act. But *non constat* it fell under s 11(gA)(iii). The test is objective, not subjective; and unless there are facts which show that the amount in respect of which a deduction is claimed under the section was 'expenditure … actually incurred by the taxpayer … in acquiring' property etc., the section is not applicable. In the present matter, the respondent could not acquire rights the seller did not have and the subjective belief of one or both of the parties to the sale of business agreement is irrelevant.

[28] It is for these reasons that I concur in the order made by my brother Heher.

_____
T D CLOETE
JUDGE OF APPEAL