

MARIANE SABETA  
versus  
COMMISSIONER GENERAL  
ZIMBABWE REVENUE AUTHORITY

HIGH COURT OF ZIMBABWE  
MATHONSI J  
HARARE 3 & 22 FEBRUARY 2012

### **Opposed Court Application**

*A. Muchandiona* for the applicant  
*S.P. Musitu* for the respondent

MATHONSI J: This is an application for an order compelling the respondent to assess capital gains tax payable in respect of the sale of stand 965 Mabelreign Township Harare and to receive such tax from the Deputy Sheriff for Harare on the pain of costs of the application. The said property is currently registered in the name of a company known as Ellseck Investments ( Private) Ltd.

The genesis of the matter is that the applicant concluded a sale agreement with Ellseck Investments (Pvt) Ltd for the purchase of stand 965 Mabelreign Township for US\$48 000-00 on 14 January 2010. She says she paid the full purchase price to the seller through mortgage finance from ZB Building Society. Conveyancers, Danziger & Partners were instructed to attend to the transfer of the property into the applicant's name.

The applicant states that before purchasing the property aforesaid, she had diligently conducted a deeds office search and satisfied herself that indeed the property was registered in the name of the seller and was not encumbered in any way.

It turns out that the seller did not co-operate in the process of transfer of the property to the applicant resulting in the applicant approaching this court in case No. HC6737/10 for an order compelling the seller to perform its obligations in terms of the agreement of the parties and the law.

On 8 December 2010, this court, per MAVANGIRA J, issued an order against Ellseck Investments ( Pvt) Ltd in favour of the applicant which reads as follows:-

“ IT IS HEREBY ORDERED THAT:

1. The Respondent shall, within ten (10) days of service of this court order upon it, provide *Messrs Danziger & Partners* Legal Practitioners with all the information and documents necessary for the registration of transfer of stand 965 Mabelreign Township, Harare into the name of the applicant.
2. The Respondent shall, also within ten (10) days of service of this court order upon it, appoint a representative and execute all the necessary legal documents authorizing such representative to do everything necessary for the purpose of effecting transfer of Stand 965 Mabelreign Township, Harare into the name of the applicant including complying with all the administrative requirements of the registration of the transfer.
3. In the event of the Respondent failing to comply with paragraphs 1 and 2 above, the Deputy Sheriff for Harare shall be authorized to carry out all the acts required of the respondent to enable transfer of stand 965 Mabelreign Township, Harare to be registered into the name of the applicant.
4. The Respondent shall bear the costs of this application on the legal practitioner and client scale.”

One of the acts required to enable transfer of the property to the applicant is payment of capital gains tax assessed by the respondent in this case in terms of the Capital Gains Tax Act [*Cap 23:01*].

It would appear that Ellseck Investments ( Pvt) Ltd did not comply with the court order issued by MAVANGIRA J. forcing the applicant to fall back on the alternative term of the order, that of the Deputy Sheriff performing the acts necessary to give transfer to the applicant. When the Deputy Sheriff approached the respondent’s office for assessment and payment of Capital Gains Tax, he did not get any joy. The respondent refused to perform his statutory duties According to the Deputy Sheriff’s return of 20 April 2011;

“ Attempted to obtain assessment of capital gains tax in the presents ( sic) of instructing attorney, Mrs Dzangare advised that they could not comply with

the requirements since there were outstanding payments.”

In a letter written to the Conveyancer on 21 March 2011 on behalf of the respondent, his position on the matter was set out thus:-

“ We wish to draw your attention to the fact that the initial transfer of the above mentioned stand from Clyde Chitsinde to Ellseck Investments Private Limited was done fraudulently as no capital gains tax was paid as is required by the law. The Zimbabwe Revenue Authority is therefore not in a position to accept payment of capital gains tax from Ellseck Investments Private Limited or to issue a capital gains clearance certificate in respect of the transfer from Chivhu Property Limited to your client as the initial transfer was tainted with illegality. Thus, the original seller of the property that is, Clyde Chitsinde should first come and pay capital gains tax in respect of the sale of the property to Ellseck Investments Private Limited before capital gains tax in respect of the sale in question.”

It was not explained why the sins of the previous seller should be visited upon the doorsteps of the current seller, or indeed the applicant who, for all intents and purposes, is the only interested party to the whole exercise. Neither was it explained what prejudice would be suffered by the collector of taxes if capital gains tax was assessed and paid by or on behalf of Ellseck ( Pvt) Ltd, which tax is now due, the property having been sold to the applicant.

In his opposing affidavit the respondent also, made reference to the fact that his investigations have revealed that the applicant purchased the same property from Clyde Chitsinde and he wondered why she had to buy the same property again from Ellseck. In support of that claim he attached handwritten office notes of interviews whose author is not disclosed.

He did not explain why an affidavit could not be obtained from the author to buttress his case especially as those notes have no evidentiary value whatsoever. I therefore reject those notes.

Counsel for both parties are agreed that the only issue to be determined is whether the respondent is empowered by the legislation that he administers to refuse to assess and receive capital gains tax on the basis that it has come to his attention that the previous

owner of the property sold did not pay capital gains tax when he sold the property himself.

*Mr Muchandiona* for the applicant argued that neither the Revenue Authority Act [*Cap 23:11*] or the Capital Gains Tax Act [*Cap 23:04*] empower the respondent to refuse to assess and collect capital gains tax. He further submitted that the respondent has both criminal and civil remedies to deal with tax defaulters without resorting to the Unorthodox actions he has employed in this matter. He is aware of the particulars and whereabouts of the defaulter, Clyde Chitsinde, and should pursue those remedies against him.

On the other hand, *Mr Musitu* for the respondent strongly argued that the respondent is not obliged to issue a tax clearance certificate to the applicant because she is not a person entitled to it in terms of section 34 ( c) of the Revenue Authority Act and is not covered by section 6 of the Capital Gains Tax Act, which is the charging section. He took the view that only the seller, Ellseck was entitled to be issued with the clearance certificate. In terms of the court order referred to above, it is the Deputy Sheriff who is entitled to the clearance certificate.

When his attention was drawn to the Deputy Sheriff's return of service to the effect that the respondent still refused to issue the clearance certificate to him, Mr Musitu could not explain that.

In my view there is a court order clothing the deputy sheriff with authority to enter the shoes of Ellseck Investments and pay Capital Gains Tax on its behalf in order to facilitate transfer of the property to the applicant. That court order is still binding and must be complied with. The respondent has refused to let the Deputy Sheriff satisfy the terms of that order. For him to then argue that the applicant is not entitled to a clearance certificate is redherring.

The Zimbabwe Revenue Authority which the respondent heads, is established in terms of s 3 of the Revenue Authority Act, [*Cap 23:11*] and its functions and authority are set out in section 4 (four) as read with the 2<sup>nd</sup> schedule thereof. Its main function is to act as an agent of the state in assessing, collecting and enforcing the payment of all revenues.

In respect of capital gains tax *section 6* as read with s 22B of the Capital Gains Tax [Cap 23:01] provides for the charging, levying and collection of it against any person receiving a capital gain. As a creature of statute ZIMRA is required to act in terms of the enabling statute. The relevant statutes enjoin it to assess and collect the tax that is due. On the face of it, it cannot set conditions for the performance of its statutory obligations.

Regarding proof of title to immovable property, section 14 (a) of the Deeds Registries Act [Cap 20:05] provides;

“ Subject to this act or any other law the ownership of land may be conveyed from one person to another only by means of a deed of transfer executed or attested by the registrar.”

*Section 8 (1)* of the same Act provides:

“ Save as is otherwise provided in this Act or in any other enactment, no registered deed of grant, deed of transfer, certificate of title or other deed confirming or conveying title to land, or any real right in land other than a mortgage bond, and no cession of any registered bond not made, as security, shall be cancelled by a registrar except upon an order of court.”

It is common cause that Ellseck Investment holds title to stand 965 Mabelreign Township which is registered at the deeds office. The registrar is the custodian and keeper of such titles. It must therefore be accepted that the title deed held by Ellseck Investment is *prima facie* proof of ownership and an announcement to the whole world to deal with the title holder in accordance with the deed of transfer.

The registrar of deeds had not questioned the validity of that deed which, in any event, cannot be cancelled without a court order in terms of s 8 (1).

What we have here in a case in which the applicant has relied on the records at the deeds office to purchase the property. She has gone ahead to obtain an order authorizing the Deputy Sheriff to pay capital gains tax. The respondent has refused to assess the tax thereby frustrating the execution of a court order. His reasons for doing so are that the applicant may have colluded with a previous owner to avoid tax. I have already said that the respondents' claim is not only unsubstantiated but premised on the inadmissible evidence, the notes of an unnamed officer, and have rejected that claim.

Therefore all that remains is evidence of a *bona fide* purchaser who is entitled to take transfer upon assessment and payment of tax. I do not agree with Mr *Musitu* that the respondent is entitled to refuse to assess and receive tax in the circumstances of this matter.

I agree with Mr *Muchandiona* that, if the respondent has proof that a previous owner avoided paying capital gains tax, he has the latitude that in terms of the Capital gains tax Act, to pursue the defaulter and recover that tax as he has both Criminal and Civil remedies in that regard. The respondent should, in the meantime collect capital gains tax from the current seller.

The issues arising out of this dispute are such that it would not have been obvious that the respondent could not contest the application. I am of the view that he was entitled to bring his argument before the court for adjudication and cannot be said to have acted unreasonably. For that reason this is a case in which each party should bear its own costs.

In the result, I make the following order; that:-

1. The respondent shall, within ten days of service of this order upon him assess the capital gains tax payable in respect of the sale of stand 965 Mabelreign Township, Harare by Ellseck Investments ( Pvt ) Ltd to the applicant.
2. The respondent should receive payment of the capital gains tax payable by Ellseck Investment ( Pvt) Ltd from the Deputy Sheriff for Harare and issue a Capital Gains Tax withholding Tax Certificate to the Deputy Sheriff upon receipt of the payment.
3. Each party shall bear its own costs.

*Danziger & Partners*, applicants' legal practitioners