CRESCENCE MAPFUMO
versus
ASTON ALOIS MUSUNGA
and
ZIMBABWE REVENUE AUTHORITY

HIGH COURT OF ZIMBABWE
MANYANGADZE J
HARARE, 14 March and 29 September 2022

Opposed Matter

Advocate E Donzvambeva, for the applicant
Advocate *T Mpofu*, for the 1st respondent
T Marange, for the 2nd respondent

MANYANGADZE J: This is an application for a declaratur, in which the applicant seeks an order that the capital gains tax liability the second respondent wants to enforce against her be declared null and void.

The specific terms of the order she seeks are drafted as follows:

"**IT IS ORDERED THAT**:

1. The Notices of Assessment numbers 020000867948 and 020000867949 dated 23rd October 2020 issued by 2nd respondent to 1st respondent be and are hereby declared unlawful and of no legal effect and are accordingly set aside.
2. The decision to charge Tax liability for properties known as Lot 2 of Lot 443 Highlands Estate of Lot 22 of Greendale held under Deed of Transfer 6126/11 and 50% share in property known as Stand 386 Bluffhill Township held under Deed of Transfer 7437/89 be declared unlawful.

Alternatively,

3. 1st respondent be and is hereby declared liable to pay tax liability as per notices of assessment numbers 020000867948 and 020000867949.
4. Respondents pay costs of suit."

To put the matter into perspective, a brief summary of the factual background is necessary.

The applicant and the first respondent were married in terms of the Marriage Act [*Chapter 5:11*]. Following divorce proceedings instituted by the applicant under Case No HC 1163/18, a decree of divorce was granted based on a consent paper signed by the applicant and the first respondent.

In terms of the consent paper, applicant was granted *inter alia*:

(i) 50% of the first respondent's share in a property known as Stand 386 Bluffhill Township, held under Deed of Transfer 7437/89.

(ii) An immovable property known as Lot 2 of Lot 443 Highlands Estate of Lot 22 Greendale held under Deed of Transfer 6126/11 (hereinafter collectively referred to as "the properties" and individually as the "Bluffhill property") and the "Greendale property", respectively.

The applicant applied for Capital Gains Tax Clearance Certificate for the properties, an essential requirement for transfer of the properties to her name. The applicant thought this was going to be a mere formality, it being transfer of property between spouses following a decree of divorce. Contrary to her expectations, the second respondent issued two assessments in first respondent's name, wherein he was ordered to pay ZWL116 900.00 for the Bluffhill property and ZWL167 000.00 for the Greendale property. To use the applicant's expression in reacting to this development, as stated in para 14, of her founding affidavit:

> "I was flummoxed to receive an assessment by 2nd respondent which directed that Capital Gains Tax is payable by 1st respondent in the sum of 116 900RTGS and 167 000RTGS."

Applicant then lodged an objection to the said assessments. Second respondent declined the objection on the basis that applicant lacked the necessary *locus standi* for such an objection. The reason for lack of *locus standi* was that it was not to her that the assessment was issued, but to the first respondent.

The applicant engaged the first respondent with a view that the latter either pays the assessment or lodges the objection himself. She again expected this to sail through. Contrary to her expectations, the first respondent neither objected nor paid the assessed tax. Instead, he insisted that the applicant pays for the assessment as she agreed in terms of clause 9 of the consent paper, to pay all the expenses for the transfer of the properties.

Placed in this predicament, she then approached this court for a declaratory order.

The basis of her application is that in respect of the Bluffhill property, it is her principal private residence. It was the property she and the first respondent regarded as their matrimonial home during the subsistence of their marriage.

In respect of the Greendale property, the applicant avers that it should be exempted from tax liability since it was awarded to her pursuant to a divorce order. Added to that, she and the first respondent are above 59 years of age.

The applicant contends that she did not dispose of any of the properties but was awarded the properties in terms of a divorce order.

The first respondent's opposition to the assessments is that he has no liability towards the second respondent in respect of the properties. The properties were given to the applicant by virtue of an order of court. He did not acquire any capital gains that should give rise to capital gains tax. In this regard, reference was made to ss 6 and 8 of the Capital Gains Tax Act [*Chapter 23:01*].

Further to that, the first respondent avers that the applicant agreed in para 9 of the consent order, to meet transfer expenses. This paragraph reads:

"Plaintiff shall meet the costs involved in the transfer of all properties awarded to her."

The second respondent insists that capital gains tax is due and payable. The applicant can only obtain the Clearance Certificate upon payment of the tax.

The second respondent contends that the properties are not exempt as have they have not been proven to be the applicant's principal private residence.

The second respondent agrees with the first respondent that para 9 of the consent paper obliges applicant to pay capital gains tax as part of the costs of transfer of the property.

At the hearing of the matter, a development took place that led to the withdrawal of the claim against the first respondent.

Counsel for all the parties agreed that the tax assessments were not compliant with the authority of *Nestle Zimbabwe (Pvt) Ltd* v *ZIMRA* SC 148/21. In that case, the Supreme Court upheld a point *in limine* to the effect that the assessments done by the respondent (ZIMRA)

were null and void as they were issued contrary to the provisions of s 2 of the Income Tax Act [*Chapter 23:06*]. Consequent to this, the first respondent was released from the proceedings.

However, the second respondent insists that its claim to charge tax liability for the properties, as against applicant, should stand. This means that para 2 of the relief sought by the applicant still faces opposition from the second respondent. Paragraphs 1 and 3 against the first respondent fell away as the two notices of assessment were agreed to be non-compliant with provisions of the Income Tax Act.

It is not clear how para 2 remained as between the applicant and the second respondent if the basis of the tax liability, being the assessment notices cited in para 1, were agreed to be not in compliance with the law.

Be that as it may, Mr *Donzvambeva* for the applicant, has contended that the provisions of the Capital Gains Tax Act make it untenable to demand the tax from the applicant.

To begin with, contended Mr D*onzvambeva*, for there to be capital gains tax, there must first be accrual of a capital amount. This point is in fact made in the first respondent's heads of argument, para 3.2., which reads:

> "3.2. Capital gains tax is only chargeable in respect of capital gains received or accrued to or in favour of a subject of the state. The receipt and accrual is defined in s 8 and attention will only be had to those circumstances that could be thought to be of application in this matter."

In this regard, reference was made to s 8(1)(c) Capital Gains Tax Act; which defines capital gain as follows:

> "Capital gain" means the amount remaining after deducting from the capital amount of any person all the amounts allowed to be deducted from a capital amount under this Act."

Further reference was made to s 10 of the Income Tax Act which lists the special circumstances in which income is deemed to have accrued. Mr *Donzvambeva* contends that none of the circumstances listed apply to the facts of this matter.

Indeed, a look at the facts already outlined, does not show the gaining of income or an amount. No disposal of an asset is involved, for which the applicant gained income from which capital gains tax is leviable.

There was no meaningful rebuttal of this fundamental averment. Mr *Marange* for the second respondent contended that in terms of s 10 of the Income Tax Act, there has to be an exemption from tax obligations for the applicant to lawfully avoid capital gains tax. Applicant has not shown that she is exempted.

Mr *Donzvambeva* argued, correctly in my view, that *there has to be capital gain first before one even talks of an exemption*. In the circumstances of the instant case, no capital amount has been gained in respect of which exemption must be sought.

In the circumstances, imposition of capital gains tax on the applicant is not justifiable. The applicant has made out a case for the granting of para 2 of the Draft Order. Consequently, the application succeeds in so far as the relief in para 2 is granted.

In the result, **IT IS ORDERED THAT**:

1. The decision to charge tax liability for properties known as Lot 2 of Lot 443 Highlands Estate of Lot 22 of Greendale held under Deed of Transfer 6126/11 and 50% share in property known as Stand 386 Bluffhill Township held under Deed of Transfer 7437/89 be and is hereby declared unlawful.
2. The second respondent bears the applicant's costs.

Mazhande Legal Practice, applicant's legal practitioners
Mushonga & Associates, 1st respondent's legal practitioners