1. RICHCLOVER (PVT) LTD
   versus
   EARNEST TAURAI RAMBAYI
   and
   THE REGISTRAR OF DEEDS

2. EARNEST TAURAI RAMBAYI
   versus
   ROYAL HOME FURNITURE

HIGH COURT OF ZIMBABWE
MUTEVEDZI J
HARARE, 28 June 2024

1. **Court application for a declaratur**
2. **Court application for *rei vindicatio***

D. Tivadar, for applicant in case 1 and respondent in case 2
R.H. Goba, for first respondent in case 1 and applicant in case 2
No appearance for second respondent in case 1

MUTEVEDZI J: In 1996, Mr Earnest Taurai Rambayi (whom I will from now on call Taurai) made a ludicrous decision. He sold his land in the prime location of Harare Central Business District. He must have immediately regretted his decision because soon after the sale he attempted to resile from it. Among other reasons for his repudiation of the contract he alleged that his wife had chided him and refused to approve the sale. When the purchasers of the property held him to the agreement Taurai remained intransigent. Unfortunately, his wife's name did not appear on the title deed of the property. Their matrimonial arrangements, blissful or acrimonious therefore did not matter. Aggrieved by that attempt, the purchasers ran to court seeking an order for specific performance. In a scathing decision, in the case of *ENPA (Pvt) Ltd* v *Earnest Rambayi Taurai* HH 5/98 CHATIKOBO J was unapologetic that the purchasers had met all the sale conditions including making adequate payment for the property. His LORDSHIP directed Taurai to sign all documents needed to facilitate transfer. In the alternative, he directed the Sheriff to sign all such papers if Taurai failed to do so. It appears that Taurai was defiant because it was the Sheriff who ultimately executed the transfer documents. The property was duly transferred to the purchasers and registered under title deed No. DT 10698/99 in favour of Oztanir Investments (Pvt) Ltd (Hereinafter called Oztanir).

[1] In August 2015, Oztanir sold the property to a company called Richclover (Pvt) Ltd (Richclover). The property was duly transferred and Richclover obtained title under deed No. DT 276/16. Damning as CHATIKOBO J's decision was to his cause, Taurai did not challenge it in any way.

[2] I have deliberately decided to describe the parties by their Christian and corporate names. The contestations are labyrinthine. The background of all the cases is better understood without ascribing litigation statuses to contestants. It serves no purpose to describe one or the other of them as the applicant or the respondent before getting to each of the three applications at issue here and the several others that were instituted and determined earlier.

[3] In November 2016, about two decades after the initial sale, Taurai filed an application in this court seeking an order cancelling Oztanir's title to the property. In it, he cited nine respondents who included Miriambai Oztanir a director in Oztanir Investments which was the second respondent; Chikumbirike and Associates; Estate Late George Chikumbirike; Richclover; The registrar of deeds; the Master of the High Court and the Sheriff. When he failed to prosecute his application Richclover which was the sixth respondent in the initial application, approached the court with a motion for the dismissal of the application for want of prosecution. The court obliged. On 22 June 2017, TSANGA J made the following order:

> i. "The application initiated by the respondent in case No. 11656/16 be and is hereby dismissed for want of prosecution
> ii. The respondent pays the applicant's costs in case No. 11656/16 on the legal practitioner and client scale"

[4] The application for cancellation of Oztanir's title therefore stood dismissed. But some two years later on 3 July 2019, in a strange turn of events and for reasons that appear inexplicable, Taurai suddenly obtained and began waving an order granted by MUSHORE J in the following terms:

> 1. "Default judgment be and is hereby entered against the respondents
> 2. The third respondent cancels Deed of transfer No. DT 10698/99 held over a certain piece of land situate in the District of Salisbury called stand No. 993 Salisbury Township measuring 892 square metres in favour of the 1st and 2nd respondents
> 3. The 3rd respondent revives Deed of Transfer No. 2874/91 held over a certain piece of land situate in the District of Salisbury called stand No. 993 Salisbury Township measuring 892 square metres in favour of the applicant
> 4. Costs of suit on ordinary scale."

[5] Throughout the current proceedings, Richclover protested that the above order must have been granted either erroneously or in circumstances which were not entirely above board. I pause here to comment on those allegations because they relate to the integrity of processes

of this court. In my analysis, I am not insinuating that the order was obtained or granted through clandestine means because there is no evidence to prove that. All that I observe is that if the discrepancies apparent from it were overlooked then some litigants can certainly be lucky. To begin with Taurai's application for cancellation of Oztanir's title cited nine respondents. But strangely, when the order was granted only five of the respondents appeared on it. Richclover which held the extant title to the disputed property was conspicuous by its absence from the order. If it may be remembered, I observed earlier that in 2017, the same application had actually been dismissed by TSANGA J. The record of proceedings leading to the grant of the 2019 order does not show that any application for reinstatement or rescission of the 2017 order had been initiated and granted. At the hearing Mr *Goba* who appeared for Taurai was at pains to explain that anomaly. He urged the court to assume that such reinstatement had been applied for and granted. I cannot accept that. If it had, Taurai was required to plead it and attach proof. But to show that such explanation was not fathomable, in 2020, Taurai mounted another application which was purportedly for the rescission of the 2017 order by TSANGA J. To me, it did not make sense to seek to overturn an order which he knew had been reversed sometime earlier. In addition, and as appears in the draft order to the 2017 application, a cancellation of Richclover's title No. 276/16 had also been sought. The order ultimately granted omitted that. All those indiscretions just betray the disingenuity and incredulity of Taurai's explanations. To date the application for rescission of TSANGA J's order has not been prosecuted.

[6] Armed with the order cancelling Oztanir's title, Taurai proceeded to the registrar of deeds and demanded that the cancellation be effected. Despite it not appearing on the court order, he also wanted the registrar to cancel Richclover's title on DT 276/16. The registrar agreed to cancel DT 10698/99 but and rightly so, indicated that he could not cancel DT 276/16 without its express inclusion on the court order. The parties haggled back and forth. Despite having remained resolute in the beginning, the registrar at some stage purported to have cancelled DT 276/16 before turning around to confirm that it had not been cancelled. That must have infuriated Taurai because in 2023 he mounted the current application seeking as he put it, to vindicate his property from unlawful occupation by a supposed entity called Royal Furniture. From that, the application in case No. HCH 6324/23 in which Earnest Taurai Rambayi is the applicant was born. He sought the following relief:

1. "An order under the *rei vindicatio* is hereby granted to the applicant

2. The respondent and all those claiming occupation through it, be and are hereby evicted from the property situate in the District of Salisbury called stand No. 993 Salisbury Township measuring 892 square metres also known as No. 155 Samora Machel Avenue, Harare forthwith, failure of which the sheriff of the High Court, or his lawful assistant be and is hereby authorised and directed to evict them
3. The respondent be and is hereby ordered to pay the costs of suit on an attorney client scale"

[7] Before the above application could be heard, Richclover filed its own court application under case No HCH 238/24 in which it sought the following relief:

a. "It is hereby declared that there is no order of this Honourable Court against the applicant and there is accordingly no basis for the cancellation of the applicant's Deed of Transfer in terms of s 8 of the Deeds Registries Act [*Chapter 20:05*]
b. The second respondent cancels the revived Deed of Transfer No. DT 2874/91 held over certain piece of land situate in the District of Salisbury called stand No. 993 Salisbury Township measuring 892 {otherwise known as No. 155 Samora Machel Avenue, Harare held in favour of the first respondent
c. The second respondent revives the cancelled Deed of Transfer No. DT 276/16 held over certain piece of land situate in the District of Salisbury called stand No. 993 Salisbury Township measuring 892 {otherwise known as No. 155 Samora Machel Avenue, Harare held in favour of the applicant
d. The first respondent's legal practitioners, being Messrs C. Mpame and associates pay the applicant's costs on an attorney client scale *de bonis propriis*."

[8] On 7 March 2024 my brother DEME J ordered that the two applications be consolidated and be heard together. As will be shown, that decision was not only logical but that it may be the panacea to the never-ending dispute. As a result, the two applications were set before me. I set them for hearing on 28 May 2023. Before the hearing I requested counsel for the parties to attend a prehearing case management meeting in chambers. At that meeting we streamlined the matters and agreed on how the hearing would proceed. Having read the papers, it was clear the issues revolved around the question of title to the property. Mr *Tivadar* and Mr *Goba* both agreed that the applications were Siamese. As such the disposal of one would necessarily lead to the disposal of the other. For instance, if the court determined that Richclover in its application for a declaratory order was the rightful holder of title to the disputed property and therefore the owner it followed that Taurai's application for *rei vindicatio* was meritless and vice versa.

[9] It was on the above basis that I decided, with the consent of the parties, that case No. HCH 238/24 (the declaratur) would be argued first. As such from henceforth it becomes more convenient and would add clarity to refer to Richclover as the applicant and Taurai as the first respondent. The second respondent being of course the registrar of deeds who was cited in his official capacity.

[10] I have already chronicled the history of the case and the arguments that each of the parties advanced to support their positions. In summary and for completeness, on one hand, the applicant's case is that: -

a. "It purchased the property from Oztanir in 2015 and got title to it in 2016. Its deed of transfer was No. DT 276/16.
b. It has enjoyed the ownership and use of the property since then
c. Sometime after it acquired the property, the first respondent sought to challenge the acquisition of the property by Oztanir. The applicant was included in the challenge as a respondent. That application failed after it was dismissed for want of prosecution in June 2017 as already narrated. In not so clear circumstances, the first respondent later obtained an order cancelling Oztanir's title registered on DT 10698/99 in July 2019. That order neither cited the applicant as a party nor included its deed of transfer in its substance despite the applicant having been cited in the previously dismissed motion.
d. The applicant's title was therefore never cancelled by this court as required by law."

[11] On the other hand, the first respondent's case which appears not only from his opposing papers but also from the founding papers in the *rei vindicatio* application is that:

a. "Admittedly he sold the disputed property in 1996 but contends that the purchaser did not meet the conditions of the sale. He contended that he was not paid the purchase price. Oztanir was therefore not entitled to transfer of the property into its name.
b. In vindication of his rights, he sought an order for the cancellation of that title in 2016. He admits that the application was dismissed for want of prosecution in 2017.
c. Without explaining how it happened, the first respondent said he later obtained an order cancelling Oztanir's title and reviving his own title in 2019. That cancellation and revival was acknowledged and effected by the second respondent.
d. On the basis of its revived title, it followed that the applicant was in unlawful occupation of his property. The applicant had no right to the property and could not therefore succeed in its effort to obtain a declaratory order that its title was extant."

[12] At the hearing Mr *Goba* alleged that there was a third application. He said the first respondent, in his opposition to the declaratur had also made a counter application in which he sought the declaration that its title on DT 2874/91 had been revived. It was a long shot and a futile attempt. To begin with a court application must conform to the requirements set out in rule 59 of the High Court Rules, 2021. It must be in Form No 23; be supported by one or more affidavits specifying the facts upon which the applicant relies and must contain a draft order showing the prayer which the applicant craves. The first respondent's purported counter application is nowhere near complying with any of those basic requirements. It merely comprises of the averments made in opposition of the applicant's case. That cannot be the basis of a counter application. I therefore find without further ado that there is no counter application by the first respondent to talk of.

The issues for determination

[13] In spite of the numerous and convoluted arguments which were advanced and the copious bundles of papers which came with the applications, to me the issues for resolution appear very narrow. Broadly, they are simply:

a. whether the applicant is entitled to the declaratur that it seeks
b. whether the first respondent has satisfied the requirements for obtaining an order for *rei vindicatio* that he prayed for in his own application.
c. I also had regard to the many arguments advanced by the parties in these applications. My view, which was accepted by both counsels is that all the questions can be answered by a resolution of the even narrower issue of who holds title to stand number 993 Salisbury Township also known as 155 Samora Machel Avenue, Harare.

[14] I adopt the above course in resolving this matter with support from the Supreme Court decision in the case of *Longman Zimbabwe (Pvt) Ltd v Midzi & Ors* 2008 (1) ZLR 198 (S) where it held that it is proper for a court to decide only one of the issues raised by a party when such issue is capable of disposing of all the contestations between the parties.

[15] Further the parties agreed to drop all but one of the preliminary objections raised in the papers. Richclover insisted that I determine whether or not Taurai must be heard in both applications because he was coming to court with dirty hands. I turn to deal with that objection *in limine.*

The dirty hands argument

[16] At the hearing, Mr *Tivadar* took the view that the first respondent was barred from participating in the proceedings on account that he was approaching the court with dirty hands. In his order of 7 March 2024, DEME J ordered the first respondent to pay the applicant's wasted costs in the sum of USD $4000. Counsel said the first respondent consented to that order but despite demand, he has refused or neglected to pay the costs. Counsel was also of the firm belief that such a litigant must not be given audience by the court until and unless he has washed his hands clean. He referred the court to the cases of *Sadiq* v *Muteswa* CCZ 14/21 and *Chiyangwa v Apostolic Faith Mission* CCZ 8/23.

[17] On his client's part Mr Goba admitted that the costs had not been paid but that it was not out of the first respondent's unwillingness to pay but because was in the process of

sourcing the funds to pay. He argued that the dirty hands doctrine only applies in committal proceedings where a litigant is facing allegations of contempt of court. The proceedings before the court were not for contempt. He further argued that the first respondent had already paid something into Messrs *C. Mpame* and Associates' trust account and when the funds were sufficient, they would be paid to the applicant. On that basis and as required by s 69 of the Constitution, the first respondent could not be deprived of his right of access to the courts. To support his arguments, he referred the court to age old South African cases of *Clement* v *Clement* 1961(3) SA T; *Els* v *Weideman* 2011 (2) SA 126 SCA; *Protea Holdings Ltd* v *Wriwt and Anor* 1978 (3) SA p. 865 (W); *Cats* v *Cats* 1959 (4) SA 375 (C); and the Zimbabwean cases of *In re Chinamasa* 2001(2) SA 902 SCZ and *Makoni* v *Pauline Mutsa Makoni* SC 7/2018.

The law on dirty hands

[18] The dirty hands principle simply means when a litigant appears before a court, he/she/it mustn't do so when their hands are unclean. The rationale for the principle is the preservation of the integrity of the court itself. The court is an institution which must detest aiding and lending assistance to people who look at it contemptuously. If it does, it lowers itself to the same level as such litigants. In explaining dirty hands, I can do no better than restate the remarks of this court in the case of *Deputy Sheriff, Harare* v *Mahleza & Anor* 1997 (2) ZLR 425(H) where it said:

> "People are not allowed to come to court seeking the court's assistance if they are guilty of a lack of probity or honesty in respect of the circumstances which cause them to seek relief from the court. It is called, in time-honoured legal parlance, the need to have clean hands. It is a basic principle that litigants should come to court without dirty hands. If a litigant with unclean hands is allowed to seek a court's assistance, then the court risks compromising its integrity and becoming a party to underhand transactions."

[19] That failure to obey a previous order of the court constitutes dirty hands is an open secret. In *Mafoshoro Farm (Pvt) Ltd* v *Hubert Nyanhongo & Tendai Mbereko* HH-32-09, this court said:

> "Civil contempt is basically the wilful or *mala fide* failure to comply with an order of court. There are three basic requirements for contempt procedure that need to be proved, namely: -
>
> 1. That an order was granted by a competent court.
>
> 2. That the respondent was indeed served with the said order or that it was brought to his attention; and

3. That respondent has either disobeyed it or has neglected to comply with it."

[20] As such an allegation that a litigant failed to obey a court order standing on its own is not sufficient to trigger the application of the dirty hands principle against that litigant. There are requirements which must be satisfied. It must be proved that the order was not only followed but that the non-compliance was deliberate/wilful on the part of the transgressing party. In addition, the default must be found to be in bad faith. Some authorities have however held that once an applicant proves that the defaulting party failed to obey the court order which was brought to his/her attention an inference that the default was both wilful and *mala fide* must automatically follow. See the cases of *Scheelite King Mining Co. (Pvt) Ltd.* v *Mahachi* 1998 (1) ZLR 173 (H) and *Haddow* v *Haddow* 1974 (1) RLR 5 at 7H-8A.

[21] In my view, a court order does not only relate to the substantive issues but extends to aspects such as the directive to one party to pay the other party's costs. There can be no argument therefore that failure to pay costs as directed in a court order constitutes failure to obey that court order.

[22] In this case, the first respondent was ordered to pay the applicant's costs by an order of this court dated 7 March 2024. The order stated the specific amount which had to be paid. There was therefore no need and no requirement for the costs to be taxed. The order was made in the presence of the first respondent or at least his legal practitioner. The question whether it was brought to his attention does not come into play. The only issue is whether he disobeyed the order or neglected to pay and if he did whether his failure was *mala fide*.

[23] The applicant believed he was. The first respondent however said he was willing to pay and had initiated the process of pooling funds to settle the costs. He argued that the order had been made about six weeks prior to the date of this hearing and the sum he had to pay was by no means insignificant.

[24] I was prepared, in the interests of justice, to accept Taurai' long tale. He however appeared to be in the habit of not honouring costs orders. There were unverified allegations that he had previously dragged the applicant into unnecessary litigation but disappeared soon after he was ordered to pay costs. I remark that the allegations were unverified because they were simply made and were refuted. No evidence was adduced either to substantiate the allegations or the denial. I am therefore left without enough to determine the deliberateness and *mala fides* of the first respondent's actions. I cannot however close this

segment before commenting on the implication of s 69 of the Constitution which Mr *Goba* sought to rely on. In fact, I only need to reemphasise that I am bound by the interpretation of that provision by PATEL JCC in the case of *Sadiqi* v *Muteswa* CCZ 14/21 at p. 9 where he said:

> "Section 69 of the Constitution enshrines and protects the right to a fair hearing. It guarantees that the courts are open to every person. However, this is subject to the rules put in place to regulate court proceedings and bring order to the justice delivery system. **When the dirty hands doctrine is applied to refuse to entertain a litigant who is in violation of a court order, he is not being denied the right to a fair hearing.** This is actually a measure that is necessary to preserve the dignity and the authority of the courts so that the citizenry at large can continue to enjoy the right to a fair hearing. It is an essential part of the inherent power that the courts enjoy so as to protect their own processes."

[25] I say it once more that I have condoned the first respondent's failure to obey this court's order of 7 March 2024 not because of his s 69 rights but because I am not convinced that his failure was deliberate and *mala fide*. For that reason, I am unable to uphold the applicant's contention that the first respondent's hands are dirty and that he therefore must not be heard.

Who owns the disputed property

[26] I have already said that a determination of the question of the ownership of stand No. 993 Salisbury Township will inevitably lead to the resolution of all the allegations of breach of proprietary rights which the parties traded against one another. The law regarding ownership of titled immovable property in this jurisdiction is fairly straight-forward.

[27] In the case of *Chido Erica Matewa (In her capacity as Executrix Dative of the estate late Judith Matewa) V City of Harare* SC 61/23, the Supreme court remarked that a title deed is *ex facie* proof of ownership. In *Ishemunyoro (nee Mandidewa)* v *Ishemunyoro & Ors* SC 14/19 GWAUNZA DCJ also cited with approval the dicta in the case of *Fryes (Pty) Ltd* v *Ries*, 1957 (3) SA 575 at 582, where it was held that;

> "Indeed, the system of land registration was evolved for the very purpose of ensuring that there should not be any doubt as to the ownership of the persons in whose names real rights are registered. Generally speaking, no person can successfully challenge the right of ownership against a particular person whose right is duly and properly registered in the Deeds Office."

HER LADYSHIP went on to emphasise that the right of ownership to immovable property must be registered with the Registrar of Deeds and that a title deed

raises the rebuttable presumption that the holder enjoys real rights over the immovable property defined in the deed.

The point was further emphasised in the case of CBZ *Bank Limited* v *Moyo* and *the Deputy Sheriff, Harare*, SC 17/18 where it was stated as follows:

> "In any event, the registration of transfer in the Deeds Registry … does not always reflect the true state of affairs. A title deed … is therefore *prima facie* proof of ownership …which can be successfully challenged. When the validity of title … is challenged, it is the duty of the court to determine its validity in order to make a ruling which is just and equitable."

[28] It is from the above understanding, that the law lays the rule that the holder of a title deed to immovable property only has prima facie rights. In an earlier decision, the Supreme Court in *Takafuma* v *Takafuma* 1994 (2) ZLR 103 (S), made the point that the registration of rights in immovable property must neither be regarded as a mere form nor simply as a device to shake off creditors or to evade payment of tax. Rather it must be viewed as a matter of substance because it grants real rights to those in whose name(s) the property is registered.

[29] My understanding of the above law is that it is not unheard of that there are two title deeds for the same exact property. It is a possibility but if and when that happens and it is shown that the two deeds speak to the same property, it becomes the function of a court to determine which deed accurately shows the owner of the property in dispute.

Application of the law to the facts

[30] In this case, there supposedly are two title deeds to stand number 993 Salisbury Township otherwise known as No. 155 Samora Machel Avenue, Harare. The first deed is number DT 2874/91 allegedly made in favour of Taurai. The second deed is number DT 276/16 held by Richclover. The history of the registration of the two titles has already been explained.

[31] What is clear is that title DT 2874/91 ceased to exist when the property was transferred from Taurai to Oztanir in 1999. The new title to the property became DT 10698/99. Taurai however, alleges that the title was revived in 2017 by MUSHORE J's order which he obtained in default of the applicant in this case. Whilst the revival of DT 2874/91 is marked by periods of discreditable incidents the registration of DT 276/16 was fairly uneventful. Richclover bought the property from Oztanir in 2015. It sought and obtained registration

of its title in 2016. It is clear therefore that Richclover and Taurai each claims to hold title to the disputed property on completely different bases.

[32] My interrogation of the applications *in casu* leaves me without a doubt that their resolution is predicated on a few provisions of the Deeds Registries Act [Chapter 20;05] (the Act). For instance, section 8 thereof provides as follows: -

> "8. **Registered deeds not to be cancelled except upon order of court**
>
> (1) 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 conferring 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.**
>
> (2) Upon the cancellation of any deed pursuant to an order of court—
>
> (a) the deed under which the land or any real right in land was held **immediately prior to the registration of the deed which is cancelled shall be revived** to the extent of such cancellation unless a court orders otherwise; and
>
> (b) the registrar shall make the appropriate endorsements on the relevant deeds and entries in the registers. (the bolding is my emphasis)"

[33] Section 8 in my view, speaks to two critical issues. The first is that once registered, a title deed can only be cancelled by a court. Section 2 of the Act defines court to mean the High Court. It is therefore, only the High Court which has power to order the cancellation of a title deed. The registrar of deeds cannot on his own initiative do so. See the case of *Exquisite Marketing (Private) Limited v Godfrey Rujeko Matewa and Others* HH 317/23 for that proposition. The second issue is that the revival of a deed is not random. In fact, although it may happen, the law does not envisage the existence of two title deeds at the same time. It is the reason why it provides for the cancellation of an existing deed to enable the revival of another.

[34] Interestingly, it is not every deed which is revived by the cancellation of another. As shown above, it is only the deed upon which any right in land was founded immediately before the deed which is cancelled was registered which shall be revived. For instance, it may be a futile process to cancel a deed in the hope of reviving another which existed two rungs or more before the one cancelled. As will be demonstrated below, this rule is in existence because of the provisions of section 11 of the Act which presupposes that the

registration of one title deed necessarily signals the extinction of the one preceding it. That section provides as follows:

> "11**. Deeds to follow sequence of their relative causes**
>
> (1) Save as otherwise provided in this Act or as directed by the court—
>
> > (a) transfers of land and cessions of real rights therein shall follow the sequence of the successive transactions in pursuance of which they are made, and if made in pursuance of testamentary disposition or intestate succession they shall follow the sequence in which the right to ownership or other real right in the land accrued to the persons successively becoming vested with such right;
> >
> > (b) it shall not be lawful to depart from any such sequence in recording in any deeds registry any change in the ownership in such land or of such real right unless the registrar is satisfied that the circumstances are exceptional and has consented to such departure."

[35] The haphazard registration of title deeds is therefore not permitted. The rationale for that proscription is apparent. It is intended to achieve orderliness and to prevent double registrations of properties. Following these mandatory preconditions to registration, the sequence of registration of stand 155 Samora Machel Avenue is that it was registered in Taurai's name in 1991 under title number DT 2874/91. That registration was extinguished when the High Court ordered Taurai to transfer the property to the corporation which had purchased it from him in 1996. It resulted in the registration of the property in Oztanir's name in 1999 under DT 10698/99. Oztanir sold the property to Richclover in 2015. Richclover in turn obtained registered title under DT 276/16.

[36] Needless to state therefore, the title deed for Oztanir had been extinguished by operation of law on the day of registration of Richclover's title. It no longer existed. For that reason, the application that was made by Taurai for the cancellation of the title deed DT 10698/99 in the name of Oztanir could only be preposterous. It was illogical for a party to go to court to seek the cancellation of a deed that was no longer in existence. The absurdity becomes more glaring when the consequences of the purported cancellation are considered. The law does not say when a deed is cancelled it equally mothballs the one that succeeded it. In his haste for self-gratification and through his incontinence, Taurai must have forgotten that he needed to challenge Richclover's title, or did he? It may be that he deliberately omitted to do so because the papers are replete with indications that he was aware of the need to do so. In 2016 for example, he filed an application for the cancellation of DT 276/16. He failed

to prosecute that application resulting in its dismissal for want of prosecution. He later 'obtained' an order cancelling DT 10698/99 which as discussed above was inconsequential because he had not only excluded Richclover from the proceedings but had also dropped his prayer for the nullification of title DT 276/16. For that reason, the purported cancellation of Oztanir's non-existent deed could not and did not affect Richclover's title.

[37] In the end what is indisputable is that there is no order directing the cancellation of Richclover's title deed. Without it, no one could impugn that title. Taurai cannot. The registrar of deeds cannot. The registrar's claim to have done so at Taurai's behest is of no force or effect. Like this court held in the case of *Katetere* v *Chiangwa* HH 122 /11 at p. 11 of the cyclostyled decision:

> "The letter by the Assistant Registrar of Deeds does not constitute cancellation of the Deed of Transfer in favour of the applicant. In my view, it expresses the author's opinion on the matter."

[38] In this case, the registrar's letter that deed DT 276/16 had been cancelled did not only express his opinion but a baseless if not contrived one for that matter. I conclude so because earlier he had chosen to do the right thing by advising Taurai that it was impossible to cancel the deed without an express court order to that effect. He therefore was either wilfully or culpably complicity.

[39] In his heads of argument in the *rei vindicatio* application, Taurai alleges that stand 155 Samora Machel is his property because he neither consented to its sale nor its transfer to Oztanir from whom Richclover obtained title. He is right that he did not consent to either the sale or the transfer. But he did not need to do so to validate the transfer because it was directed through an order of court. The order was given after the court determined that the purchasers of the property had met all sale conditions. That order, which was made more than two decades ago is still extant. As indicated already, Taurai did not do anything to challenge that decision. I am not sure whether Taurai now alleges that MUSHORE J's order upset that decision. If it is the argument, it is a clearly faulty one for the simple reason that a court cannot sit in appeal or possibly review a decision of another judge of equal jurisdiction. The possibility of that having happened is removed if regard is had to that MUSHORE J's 2019 order with all its frailties did not speak to CHATIKOBO J's judgment. In fact, there is no hint that her LADYSHIP was ever made aware of the existence of that judgment. Even if she had, the

impossibility of this court overturning its own judgment delivered after hearing full argument would trash any suggestion that it did. My view therefore is that the 2019 order which Taurai is brandishing and seeks to rely on as reviving his title was an order that not only went against the grain of the court's earlier determination in the same matter in 1997 but was made after the exact same application had already been dismissed by this court in 2017. That can only be irregular although I have no power to declare it so. The issue is worsened by the fact that the order was made in default of appearance of the cited parties and in total absence of Richclover, the party which held title to the property after Taurai deliberately omitted to cite it.

[40] Taurai further made the irreconcilable claim that Richclover was unknown to him; that it had no relationship with or connection to him but had unilaterally and without his knowledge or consent took occupation of his property. That could only be a lie. In several suits such as HC 11656/16; HC 1672/17 and HC 5347/20 which were all filed before this latest one the main protagonists were Earnest Taurai Rambayi and Richclover. The proceedings regarded the same property. He was therefore all along, aware that Richclover was the entity which was occupying number 155 Samora Machel Avenue.

[41] In addition, Taurai also argued that by virtue of the cancellation of DT 10698/99 every subsequent sale and transfer of the property became a nullity because the property was sold in violation of the law. I have already dealt with that argument when I stated that it is incomprehensible. The property was transferred pursuant to an order of this court. A court order cannot violate the law unless it is properly shown that it does. It is the law. Taurai chose not to challenge the judgment which directed the transfer of his property to Oztanir when he had that opportunity. I have equally shown the futility of relying on an order which purported to have cancelled a title deed which was no longer in existence. The same order was impotent and hollow in that even if title deed number DT 10698/99 had been extant its supposed cancellation would not affect DT 276/16 which equally needed an express court order for it to stand cancelled.

[42] When all is said and done, I have no hesitation to state that Taurai's title to the disputed property is not even defective. Rather, it does not exist at all. He lost it during his misadventure to sell the property in 1996.

[43] In the maze of these arguments relating to who owns stand 155 Samora Machel Avenue, I have not lost sight of the applications before me. On one hand, Richclover is seeking a

declaratur that its title deed number DT 276/16 was not cancelled by any order of this court and consequently that the revival of DT 2874/91 is null and void. On the other hand, Taurai prayed for a *rei* vindicatory order for the eviction of the respondent and all those claiming occupation through it, from stand No. 155 Samora Machel Avenue, Harare.

The Declaratory Order

[44] Section 14 of the High Court Act [*Chapter 7:06*] grants the High Court discretionary power to issue declaratory orders. It is couched in the following terms:

> "The High Court may, in its discretion at the instance of any interested person enquire into and determine any existing, future or contingent right or obligation, notwithstanding that such person cannot claim any relief consequential upon such determination."

[45] The requirements for the grant of a declaratory order are apparent from the provision. It can only be obtained by a person with an interest in the subject matter of the dispute, inquiring or seeking a determination of an existing, future or contingent right. The Supreme Court had occasion to define the framework within which a declaratur may be granted in the case of *Johnsen v Agricultural Finance Corp* 1995 (1) ZLR 65 (S). GUBBAY CJ held as follows at p. 72 E-F: -

> "The condition precedent to the grant of a declaratory order under s 14 of the High Court of Zimbabwe Act 1981 is that the applicant must be an 'interested person', in the sense of having a direct and substantial interest in the subject matter of the suit which could be prejudicially affected by the judgment of the court. The interest must concern an existing, future or contingent right. The court will not decide abstract, academic or hypothetical questions unrelated thereto. But the presence of an actual dispute or controversy between the parties interested is not a pre-requisite to the exercise of jurisdiction."

[46] My reading of the above authority is that the applicant must not only have an interest in the subject matter but that the interest must be direct in that it is certain and absolute. It must also be substantial, meaning that it must be strong, consequential or considerable and that such interest could be adversely affected by the decision of the court. In addition, the applicant must illustrate that the interest relates to a prevailing or future right or one that is dependent on the occurrence or fulfilment of certain conditions.

[47] In the case of *Newton Elliot Dongo* v *Joytindra Natverial Naik and Others* SC 52/20 at p. 7 para. 13 of the cyclostyled judgment GWAUNZA DCJ remarked that:

> "The nature of the right that an applicant for a declaratur seeks to protect must clearly be articulated. This was stressed in Electrical Contractors' Association (South Africa) and Another v Building Industries Federation (South Africa) (2) 1980 (2) SA 516 (T) at 519H-520B in the following words: - "A person seeking a declaration of rights must set forth his contention as to what the alleged right is."

[48] On the basis of the above authorities, I harbour no apprehension that Richclover satisfies the prescribed requirements. It holds valid title to the disputed property. I have already shown that this court at no time ordered the cancellation of title deed DT 276/16. I have also found that the purported cancellation of the title by the Registrar of Deeds was a forlorn exercise because he had no power or authority to do that. At best what he did was to offer a misguided opinion. In that regard Richclover therefore has a direct and substantial interest in the property which is the subject matter of the application for the declaratory order. That interest concerns a prevailing right. Needless to state, the right could adversely be affected if the court made a decision on it. I am also convinced that Richclover passes the second rung of the test. It stated in numerous paragraphs of its application and founding affidavit that it holds title to the subject matter property. It therefore could not have articulated the right in any better way than that.

[49] Against the above background, I am satisfied that Richclover has successfully established its entitlement to the grant of the declaratur which it prayed for.

The *rei vindicatio*

[50] In this and other jurisdictions the ownership of property is a venerated principle of law. Because of that reverence the courts carry the burden of protecting the rightful owners of property. As a result, the courts have developed guidelines and frameworks within which such protection can be offered. in the case of *Nyahora* v *CFI Holdings* SC 81/14 ZIYAMBI JA put it as follows:

> "*Actio rei vindicatio* is based on the principle that an owner cannot be deprived of his property against his will. He is entitled to recover it from any one in possession of it without his consent. He has merely to allege that he is the owner of the property and that it was in the possession of the defendant/respondent at the time of commencement of the action or application."

[51] In the case of *Alspite Investments (Pvt) Ltd v Westerhoff* 2009 (2) ZLR 226 (H) at 237 D-F MAKARAU JP (now JCC) graphically explained the principle. She illustrated the

ruthlessness with which it is applied in a bid to protect property owners. She described it in the following terms:

> "It is a rule or principle of law that admits no discretion on the part of the court. It is a legal principle heavily weighted in favour of property owners against the world at large and is used to ruthlessly protect ownership. The application of the principle conjures up in my mind the most uncomfortable image of a stern mother standing over two children fighting over a lollipop. If the child holding and licking the lollipop is not the rightful owner of the prized possession and the rightful owner cries to the mother for intervention, the mother must pluck the lollipop from the holder and restore it forthwith to the other child notwithstanding the age and size of the other child or the number of lollipops that the owner child may be clutching at the time. It matters not that the possessor child may not have had a lollipop in a long time or is unlikely to have one in the foreseeable future. If the lollipop is not his or hers, he or she cannot have it."

[52] Author R.S. Christie in his work *Business Law in Zimbabwe*, 2nd Edition, Juta & Co Ltd at pp 149-150 makes the point that:

> "An owner whose property has been sold and delivered without his consent remains the owner, as the seller cannot pass ownership that was not his. The true owner can bring a vindicatory action to recover his property from anyone, including a *bona fide* buyer, in whose hands he finds it. The general rule that the seller can give no better title than he has operates in favour of the true owner, unless the purchaser proves that the true owner is estopped from denying the seller's authority to sell."

[53] The authorities therefore show that for an applicant to succeed in a *rei vindicatio* claim, he/she must allege and show that he is the owner of the property which was in possession of the defendant/respondent at the time the proceedings were initiated. If he does, he/she is entitled to recover it. Like with any other claim, there are defences that are available to a defendant/respondent. I will however not belabour this judgment with an exposition of such defences for one reason. It is because Taurai who is the applicant in the *rei vindicatio* motion failed to scale the first hurdle.

[54] It has been shown above that he is not the owner of the property. A past owner who divested himself of the ownership of the property in question isn't the kind of owner envisaged by the law. An owner who lost proprietorship of the property for more than twenty years in a sale that was declared legitimate by the courts cannot be allowed to continue conjuring up tired excuses to harass, not only the corporate to which he sold the property but an innocent third party which had nothing to do with the initial transaction. I do not think that the mere allegation of ownership which the Supreme Court alluded to in *Nyahora v CFI* (*supra*) must be taken literally to mean that anyone can wake up and allege, without any basis, that he/she is the owner of some property in the possession of someone

who he/she has targeted and succeed. It is worse so in instances where the alleged illegal possessor, like in this case, holds title to the property. I stated earlier that a title deed is *prima facie* proof of ownership of immovable property. An applicant who wishes to vindicate his/her property from a possessor with title to that property is therefore required to first rebut the presumption of ownership created by that title.

[55] I deliberately cited the passage from R.H. Christe's work because it is the argument that Taurai made earlier. He contended that he did not consent to the sale of the property or its transfer. I need not repeat that I threw out the argument and deemed it a preposterous claim because both the sale and the transfer were sanctioned by this court. Conversely Richclover illustrated beyond doubt, that it is the owner of stand 155 Samora Machel avenue. The matter must therefore end there.

Disposition

[56] As can be discerned from s 14 of the High Court Act, the court's power to grant a declaratory order is discretionary. After taking into account the issues already discussed above, I elect to exercise my discretion in favour of granting Richclover the order it prayed for. I have also shown that Taurai's bid to wrestle the disputed property from Richclover failed before it even commenced. It is hopeless and must therefore be dismissed.

Costs

[57] On the question of costs, the general rule in this jurisdiction is that costs follow the cause. There were two applications dealt with at once. Taurai lost both. Ordinarily I would have ordered him to pay costs on the ordinary scale. Richclover however claimed punitive cots against Taurai's legal practitioners. That in my view, is not called. The lawyers did not commit any discernible misconduct in this case. Instead, an award of costs on the higher scale may be justified. Richclover accuses Taurai of impropriety in these and previous proceedings. It alleges that he has unnecessarily and even capriciously dragged it to court. It would be remembered that earlier in this judgment, there was an accusation that Taurai had at one time taken Richclover to court, lost the case and was directed to pay costs. Mr. *Goba* admitted that up to now, those costs had not been paid. Undeterred he brought the current application. Earlier he had also filed several other applications including the one dismissed by TSANGA J in 2017 and another one filed in 2020 which is still pending. In the current cases, Taurai also unnecessarily chose to defend Richclover's application for the

declaratory order when he knew or at least ought to have known that he did not have title to the disputed property.

[58] Taurai's conduct is reprehensible to say the least. It is indefensible and approximates an abuse of court processes and undoubtedly saddles Richclover with unnecessary litigation costs. In the case of *Nel* v *Waterbuung Landbouwers Ko-operative Vereenining* 1946 AD 54 the court held that a party who puts another out of pocket by bringing unnecessary proceedings deserves censure by an award of costs on the higher scale. See also *Muduma* v *Municipality of Chinhoyi and Samuriwo* 1986(1) ZLR 12 (HC) *Mutunhu* v *Crest Poultry Group (Pvt) Ltd* HH 399/17.

[59] For the above reasons I am inclined to accede to the request by Richclover that it be awarded costs on the higher scale of client and legal practitioner in both applications.

In the circumstances, it is ordered as follows:

1. The application for *rei vindicatio* on case No. HCH 6324/23 be and is hereby dismissed in its entirety
2. The application for a declaratory order on HCH 238/24 succeeds
3. It is declared that:

a. Deed of Transfer No. DT 276/16 held over certain piece of land situate in the District of Salisbury called stand No. 993 Salisbury Township measuring 892 square metres {otherwise known as No. 155 Samora Machel Avenue, Harare held in favour of the applicant in HCH 238/24 [(RICHCLOVER (PVT) LTD]'s is extant

b. The purported revival of Deed of Transfer No. DT 2874/91 held over certain piece of land situate in the District of Salisbury called stand No. 993 Salisbury Township measuring 892 square metres {otherwise known as No. 155 Samora Machel Avenue, Harare held in favour of the first respondent in case No. HCH 238/24 [EARNEST TAURAI RAMBAYI] is a legal nullity.

4. The first respondent in case No. HCH 238/24 [EARNEST TAURAI RAMBAYI] be and is hereby ordered to pay the applicant's costs on the legal practitioner and client scale.

5. The applicant in case No. HCH 6324/23 [EARNEST TAURAI RAMBAYI] be and is hereby ordered to pay the applicant's costs on the legal practitioner and client scale.

MUTEVEDZI J……

Whatman and Stuart, applicant in case HCH 238/24 and respondent in case HCH 6324/23's legal practitioners
C. Mpame and Associates, first respondent in case HCH 238/24 and applicant in case HCH 6324/23's legal practitioners