LILIAN ALICE MAKIWA – JAKAZI
versus
LYCIAS MUZVONDIWA (1)
and
CITY OF KADOMA (2)
and
CLERK OF COURT, KADOMA CIVIL MAGISTRATES COURT N.O. (3)
and
MASTER OF THE HIGH COURT N.O. (4)
and
SHERIFF FOR ZIMBABWE N.O. (5)

HIGH COURT OF ZIMBABWE
DEMBURE J
HARARE: 27 February & 19 March 2025

Opposed Court Application

C Mbiri, for the applicant
T Matiyashe, for the 1st respondent
No appearance for the 2nd – 5th respondents

DEMBURE J:

INTRODUCTION

[1] This is a court application for a *declaratur* and consequential relief filed in terms of s 14 of the High Court Act [Chapter 7:06]. On 27 February 2025, this court issued an *ex tempore* judgment. The court upheld the point *in limine* that the first respondent was barred and that its opposing papers were fatally defective. The court struck out the first respondent's purported notice of opposition and opposing affidavit and proceeded to deal with the application as unopposed. Resultantly the court issued an order in the following terms:

> "1. The application be and is hereby granted.
> 2. The certificate of heir issued by the 3rd respondent under case number WE4/104/94, in terms of which the 1st Respondent inherited the immovable property known as No. 12 Munda Street, Rimuka, Kadoma, from the estate late Nelson Makiwa, be and is hereby declared null and void, and is, therefore, set aside.
> 3. The 2nd Respondent's registration of the 1st Respondent as owner of the immovable property known as No. 12 Munda Street, Rimuka, Kadoma, on the basis of the

certificate of heir issued by the 3rd Respondent under case number WE4/104/94, be and is hereby declared null and void, and is, therefore, set aside.

4. It is hereby declared that the 1st Respondent has no recognizable or enforceable rights of ownership and possession in the immovable property known as No. 12 Munda Street, Rimuka, Kadoma.
5. The Applicant be and is hereby declared the lawful and rightful owner of the immovable property known as No. 12 Munda Street, Rimuka Kadoma.
6. Consequently, it is hereby ordered that:

6.1. The 2nd Respondent shall recognise the Applicant, and not the 1st Respondent, as the lawful owner of the immovable property known as No. 12 Munda Street, Rimuka, Kadoma.

6.2. The 2nd Respondent shall register the Applicant in its records as the lawful owner of the immovable property known as No. 12 Munda Street, Rimuka, Kadoma.

6.3. The 1st Respondent and all those claiming occupation through him shall vacate the immovable property known as No. 12 Munda Street, Rimuka, Kadoma within ten days of the date of this judgment.

6.4. Failing compliance with the provisions of paragraph 6.3 above, the 5th Respondent be and is hereby ordered, directed and authorised to forcibly remove the 1st Respondent and all those claiming occupation through him from the immovable property known as No. 12 Munda Street, Rimuka, Kadoma.

7. Leave be and is hereby granted to the Applicant to serve this order on the respondents through the Applicant's legal practitioners.
8. The 1st Respondent shall pay the Applicant's costs of suit on the legal practitioner and client scale."

The following are the full written reasons for the court's decision.

FACTUAL BACKGROUND

[2] It is common cause that the applicant and the first respondent are whole siblings. Their dispute concerns an immovable property known as No. 12 Munda Street, Rimuka, Kadoma *("the property").* The first respondent is in occupation of the property. He is also registered as the holder of rights, title and interests in the said property.

[3] The applicant's case is that she is the rightful and lawful owner of the said property. She asserted that she acquired the property from Kuwadzana Secondary School in Rimuka, Kadoma where she was the headmistress. She stated that she was awarded the property together with the other one known as number 68 Mbada Street, Rimuka, Kadoma by the School in July 1981. She went on to pay all the rent arrears due for the properties to the second respondent.

[4] The applicant further stated that in agreement with her brothers Darlington Muzvondiwa and Nelson Makiwa, she had the properties registered in their names for them to hold in custody for her while she remained the owner thereof. At the time her children were still minors. It was also pleaded that Darlington was entrusted with house number 68 Mbada

Street. Upon her request and as agreed Darlington executed a deed of donation resulting in house number 68 Mbada Street being registered in the name of the applicant's adult daughter Ndaizivei Linda Jakazi.

[5] As for the property in *casu*, house number 12 Munda Street, the applicant further produced a memorandum of agreement between her and the late Nelson Makiwa confirming the arrangement that the applicant remained the owner of the property and would recover it upon demand when required. The arrangement stated was that the late Nelson would stay on the property rent-free for an indefinite period while ownership would remain that of the applicant. The applicant further averred that the property was, therefore, registered with the second respondent in the name of the late Nelson Makiwa as per the agreement between the parties.

[6] The applicant's brother Nelson died on 9 August 1993. The applicant stated that she did not immediately seek to take back possession of the property as she had been working in Namibia where she is ordinarily resident to this date. She further said that in February 2024 she came back intending to have the property transferred into her name as she now intends to return home permanently upon retirement. Upon her enquiries, she discovered that the property was registered in the name of the first respondent who had registered Nelson's estate and obtained a certificate of heir from the third respondent under case number WE4/104/94. The ownership of the property was registered in the first respondent's name on 11 October 1994.

[7] On 2 April 2024, the second respondent, in its letter, attached a certificate to the effect that the first respondent was declared as the heir of the estate of the late Nelson Makiwa. It was on this basis that he was awarded the property. The applicant made a police report against the first respondent for fraud in April 2024. She argued that at the time of the purported award, there were still seven blood siblings of the late Nelson including herself. She also alleged that they ought to have participated in the edict meeting for the estate but were fraudulently excluded. She maintained that she remained the owner of the property and the first respondent had no right to inherit the property. It was submitted that the process by which the first respondent caused himself to be declared the sole heir of the late Nelson and inherit the property was fraudulent and a nullity. It was further averred that the whole

process was a fraud and never took place. The applicant argued that the certificate of heir issued by the third respondent under case number WE4/104/94 was, therefore, void *ab initio*.

[8] This application was filed on 27 May 2024 and the relief sought is as outlined above. The applicant claimed that as the lawful owner, she would be entitled under the *rei vindicatio* to recover possession of the property from the first respondent hence the claim for an ejectment order as part of the consequential relief sought.

[9] Only the first respondent opposed this application. He raised points *in limine* which included that the claim had prescribed and that there were material disputes of fact. On the merits, he denied that the property was awarded to the applicant by the School. He contended that the late Nelson was the one who got the house from the second respondent. He further argued that the purported agreement between the applicant and the late Nelson was a forged document. He further alleged that the edict meeting for the estate was attended by himself, Clara Makiwa, an unnamed cousin and sister to both the applicant and the first respondent's father. He also submitted that the registration of the estate, the issuance of the certificate of heir and the award of the property to him were all done lawfully. He also stated that the estate of the late Nelson was wound up and the property was part of the deceased's estate. He prayed that the application must be dismissed with costs on a punitive scale.

[10] There was something quite disturbing in this case. The first respondent attached to his opposing affidavit an affidavit by one Clara Muzvondiwa who is alleged to have stated that the affidavit alleged to be hers attached to the applicant's founding affidavit confirming her ownership of the property was forged. It is said she said she never deposed to such an affidavit. In the answering affidavit, the applicant attached letters exchanged between her legal practitioners and the first respondent's legal practitioners. The applicant took issue with the affidavit alleged to have been done by Clara Muzvondiwa on 3 June 2024 as she said she was in South Africa on that day and had not visited Zimbabwe for a long time. When confronted with this position, the first respondent's legal practitioners in its letter to the applicant's legal practitioners dated 26 July 2024 at p 112 of the record replied saying:

> "…We however acknowledge that the affidavit was not properly commissioned as it was a scanned copy by Clara Muzvondiwa.

> Due to the fact that it was improperly commissioned, we wish to expunge the said supporting affidavit by Clara Muzvondiwa so that it is not used in evidence for purposes of this matter."

The applicant filed a police report for fraud and perjury after this communication. I must say that the above development raised serious ethical issues. Unfortunately, they could not be fully ventilated as the decision turned on another issue but I commented on this while determining the appropriate order of costs.

ISSUES FOR DETERMINATION

[11] The applicant raised two points *in limine* namely:

1. That the first respondent is barred and the purported notice of opposition is fatally defective for non-compliance with rule 59(8) of the High Court Rules, 2021.
2. That the Notice of Opposition is also fatally defective for the violation of mandatory provisions of the court rules by not giving an address for service within ten kilometres of the radius from the registry and not containing an index when it has more than five pages in terms of rule 58(2)(c) and (d) of the court rules.

FIRST PRELIMINARY POINT

WHETHER OR NOT THE FIRST RESPONDENT IS BARRED AND HIS OPPOSING PAPERS FATALLY DEFECTIVE FOR NON-COMPLIANCE WITH RULE 59(8) OF THE RULES

SUBMISSIONS MADE BEFORE THIS COURT

[12] Ms *Mbiri*, counsel for the applicant, submitted that the first respondent is barred in terms of r 59(9). The first respondent's notice of opposition is in want of compliance with rule 59(8). This is because the notice of opposition and opposing affidavit was not served on the applicant and the certificate of service was not filed in terms of the rules. It is a mandatory rule that the notice of opposition must be served. The first respondent merely filed the notice of opposition and did not serve either physically or electronically on the applicant. The IECMS does not take away the requirement to serve and the need to file a certificate of service. Service need not be physical but can be electronic.

[13] It was further argued that the consequence of this non-compliance is that the first respondent is barred. The bar renders the notice of opposition filed a nullity and the court cannot condone a nullity. The issue is not about prejudice but that the pleading before the

court is a nullity. Ms *Mbiri* further submitted that in the case of *Munyorovi v Sakonda* HH 467/21, it was held that rule 4C (now rule 7) cannot be used to condone a fatally defective pleading or a nullity. Further, in the case of *Tamanikwa v Zimbabwe Manpower Development Fund & Anor* SC73/17, it was held that a fatally defective pleading cannot be condoned. The issue of condonation did not arise. The applicant prayed that the first respondent's notice of opposition be struck out and judgment entered in favour of the applicant as an unopposed matter.

[14] *Per contra*, Mr *Matiyashe*, counsel for the first respondent, submitted that it was conceded that the notice of opposition flouted the rules of this court. He argued that is settled that where the party flouted the rules the party raising that must show prejudice. The applicant rightly raised the issues of the non-compliance. It was argued that the applicant did not tell the court what prejudice she would suffer because of the non-compliance. The court must consider the administration of justice. Counsel referred the court to the case of *Agricura (Pvt) Ltd* v *Gwasigalla & Ors* HH 305/24.

[15] It was further submitted that the court has the power to use rule 7 of the High Court Rules which gives this court power to depart from the rules in the interest of justice. Mr *Matiyashe* also argued that the non-compliance raised does not affect the substantial merits of this case and this court is at liberty to use rule 7 so that the dispute between the parties can be resolved. It further submitted that the notice of opposition was uploaded on time and the applicant was automatically served. There is no need for the service. The IECMS is trying to move away from physical service. The point should be dismissed and the court use its powers in terms of rule 7 and allow the matter to be heard on the merits.

THE APPLICABLE LAW

[16] The provisions of r 59(8) and (9) of the High Court Rules, 2021 are undoubtedly clear as to the requirement to file and serve a notice of opposition and an opposing affidavit and the filing of the certificate of service thereof as well as the consequences for the non-compliance. Subrules (8) and (9) of rule 59 read:

> "(8) As soon as possible, in any event not later than seven days after filing a notice of opposition and opposing affidavit in terms of subrule (7) **the respondent shall serve copies of them upon the applicant** and, as soon as possible thereafter, **but not later than forty-eight hours, shall file with the registrar proof of such service** in accordance with subrule (8) of rule 16.

(9) A **respondent who has failed to file a notice of opposition and opposing affidavit in terms of subrule (8) shall be barred."** [My emphasis]

[17] The above provisions are couched in peremptory language with the use of the word "shall". Subrule (9) is very specific as to the consequences for non-compliance; a bar shall automatically fall into place by operation of the law on the non-compliant respondent. In *The Joint Executors of the Estate Late MacDonald Chapfika & Anor v Penniwill (Pvt) Ltd & Ors* HH 545/24 at p 5 the court clearly outlines the position of the law where MUSITHU J had this to say:

> "Rule 59(9) of the Rules states that a respondent who fails to file a notice of opposition and opposing affidavit in terms of subrule (8) shall be barred. **As noted, r 59(8) deals with the service of the opposing papers and the filing of the proof of service. The filing of a certificate of service is not optional, but mandatory just as is the case with the service of a notice of opposition and an opposing affidavit**. The stipulation of the period within which a respondent is required to file proof of service of the notice of opposition was not in my view just done *ex abundanti*, but for a reason. The reason was to promote the expeditious disposition of cases in line with the policy of the law that there should be finality to litigation.
> …To penalize errant litigants who do not wish to prosecute their matters to finality, the drafters of the rules considered it proper to impose deadlines for the service of the notice of opposition and opposing affidavits and the filing of the proof of service. The old High Court Rules, 1971, did not impose such a deadline.
> **It is common cause that a failure to comply with specific timeframes imposed by the rules of court results in the defaulting party being barred**. In terms of r 39(4)(b) of the Rules, a party that has been barred has no right of audience before the court, save for the purposes of applying for the removal of such bar. A party that has been barred must act with dispatch, as a clear demonstration that they are not taking the rules of court and court business for granted." [My emphasis]

ANALYSIS

[18] In *casu*, Mr *Matiyashe* conceded that the first respondent's notice of opposition and opposing affidavit was not served on the applicant as required by the rules. He also accepted that the certificate of service required in terms of rule 59(8) was not filed. The record confirms these clear breaches of the peremptory rules of court. He then argued that this defect is inconsequential as there has to be demonstrated prejudice. He relied on the decision in *Agricura (Pvt) Ltd v Mwasigalla supra* and said the court must consider the interests of justice. In my view, the question of prejudice does not arise to render nugatory the clear peremptory provisions of the court rules. The non-compliance with a peremptory statutory provision means that there is no valid process before the court.

[19] In any case, subrule (9) of rule 59 is very clear as to the consequence of non-compliance with subrule (8). Thus, a respondent who fails to comply with subrule (8) shall be barred. The said subrule (8) provides that after filing a notice of opposition the respondent shall within seven days serve the copies upon the applicant and shall within forty-eight hours after service file a certificate of service with the Registrar. There is no doubt that the first respondent was barred for non-compliance with the peremptory provisions of r 59(8). This position was also confirmed in *Hopgood v The Minister of Lands, Agriculture, Water and Rural Resettlement* HH266/23 where the court said:

> "The respondent filed his notice of opposition through his legal practitioners on 19 January 2022, the day the *dies induciae* was set to expire. The notice of opposition was not served on the applicant's legal practitioners as commanded by r 59(8). The respondent was consequently barred in terms of r 59(9)."

[20] Once barred the first respondent could not file any pleadings except an application for the removal of the bar. He also had no right of audience in terms of r 39(4)(b) save for the purposes of applying for the removal of the bar. The purported notice of opposition and opposing affidavit filed by the first respondent was fatally defective for non-compliance with the rules of court. The law is settled that any process or pleading that is filed in contravention of mandatory provisions of the court rules is fatally defective or a nullity. Condonation to file a complaint pleading and to purge the non-compliance must be sought and granted. This position was supported in *Sammy's Group (Pvt) Ltd v Meyburgh N.O. & Anor* SC 45/15 where the court remarked:

> "It is true, as the learned Judge remarked, that there is no sanction for the late filing of an exception or special plea. However, the provision in the Rules is mandatory and the documents filed in contravention thereof cannot, in the absence of condonation of the non-compliance with the Rules, have any legal validity. The sanction must, in my view be, that the pleading is invalid by virtue of its non-compliance with the Rules. First respondent's exception was filed 15 days out of time. Second respondent's special plea and exception were filed 6 and a half months out of time. Both applications were in violation of the Rules without explanation, without condonation, sought or granted. There was, therefore, no legal basis on which they were entertained by the court *a quo*."

[21] The position of the law is, therefore, clear that failure to comply with the peremptory direction of a statute leads to invalidity or nullity. See *Moyo & Ors v Zvoma & Anor* SC 28/10. Further, it is trite that a nullity cannot be condoned or amended. This has been reiterated in a number of authorities such as *Dombodzvuku v CMED (Pvt) Ltd* SC 31/12 at

p5, *Ahmed v Docking Station Safaris (Pvt) Ltd t/a CC Sales* SC 70/18 at p. 4. At pp 12-13 in *Moyo & Ors v Zvoma & Anor supra* CHIDYAUSIKU CJ (as he then was) made the following remarks:

> "In *Jensen* v *Acavalos* 1993 (1) ZLR 216 this Court held that by use of the word "shall" compliance with the requirement of r 29 was peremptory and that failure to comply with the rule rendered the Notice of Appeal a nullity and that such a notice cannot be condoned or amended…
> **The reason is that a notice of appeal which does not comply with the rules is fatally defective and invalid. That is to say, it is a nullity. It is not only bad but incurably bad,** and, unless the court is prepared to grant an application for condonation of the defect and to allow a proper notice of appeal to be filed, the appeal must be struck off the roll with costs: *De Jctger v Diner & Anor* 1957 (3) SA 567 (A) at 574 C-D.
> In *Hattingh* v *Pienaar* 1977 (2) SA 182 (O) ... at 183, KLOPPER JP held that **a fatally defective compliance with the rules regarding the filing of appeals cannot be condoned or amended**. What should actually be applied for is an extension of time within which to comply with the relevant rule. With this view I most respectfully agree; for if the notice of appeal is incurably bad, then, to borrow the words of LORD DENNING in *McFoy* v *United Africa Co Ltd* [1961] 3 All ER 1169 (PC) at 11721, **'every proceeding which is founded on it is also bad and incurably bad. You cannot put something on nothing and expect it to stay there. It will collapse'."**
> GUBBAY CJ and MANYARARA JA concurred.
> In *Matanhire* v *BP & Shell Marketing Services (Pvt) Ltd* 2004 (2) ZLR 147 (S) MALABA J A (as he then was) expressed the same sentiments when he stated at 149 E-G:
> **"A nullity cannot be amended**. In *Jensen v Acavalos* 1993 (1) ZLR 216 (S) KORSAH JA at 220B said that the reason why a fatally defective notice of appeal could not be amended was that:
> "... it is not only bad but incurably bad'.
> Citing *Hattingh v Pienaar* 1977 (2) SA 182 (O) at 183 for authority, the learned JUDGE OF APPEAL said that what should actually be applied for is an extension of time within which to comply with the relevant rule and condonation of non-compliance." [My emphasis]

[22] Given the above-settled position of the law, it was apparent that the first respondent's purported notice of opposition and opposing affidavit was fatally defective or a nullity. Since it was a nullity nothing can arise from it. The same cannot be condoned. The issue of prejudice, therefore, does not even arise. There is no requirement that there should be no prejudice suffered to salvage a pleading that is a nullity. It is incurably bad and beyond repair. See also *Tamanikwa v Zimbabwe Manpower Development Fund & Anor supra.*

[23] When something is void it is incurably bad that one cannot seek that pleading to be condoned. The proper thing to do is to apply for condonation and seek the removal of the bar in this case. The court cannot simply invoke the provisions of rule 7. As alluded to above, once a pleading is a nullity it cannot be condoned. Rule 7 cannot be used to condone a nullity. Thus, in *Munyorovi v Sakonda supra*, considering the equivalent of r 7 in the old Rules emphatically stated that:

> "Rule 4C cannot be used to condone fatally defective pleadings in either form or substance which are considered a nullity. It was never the intention of the legislature that r4C be resorted to for purposes of condoning fatal defects or nullities and revive pleadings."

[24] In any case, what triggers condonation is an application. Mr *Matiyashe* simply submitted that the court must use its powers under rule 7 in the interest of justice to determine the merits of the dispute. It is a settled position in our law that condonation cannot be granted where it is not sought. See *Forestry Commission* v *Moyo* 1997 (1) ZLR 254 (S). The first respondent did not make an application for condonation and I could not condone that which has not been formally put before me. It was only a submission that the court is at liberty to use rule 7. Again, condonation is not there for the taking. The indulgence may only be granted if the court is satisfied that the established requirements of such an application are alleged and proven. In *casu*, the sanction for the failure to comply with rule 59(8) is also an automatic bar against the first respondent in terms of rule 59(9). Condonation alone would not, therefore, be enough as an application for the removal of the bar must also be made. None was made in this case.

[25] The applicant filed written submissions on this point *in limine* on 17 October 2024. The respondent had ample time to apply for condonation and the removal of the bar to file a valid notice of opposition. This opportunity was not taken up. Even at the hearing, there was no attempt to seek condonation and the removal of the bar. This cavalier approach certainly exhibited a complete disdain for the provisions of the court rules. A party who pays little regard to the provisions of the rules may find himself non-suited. The importance of the court rules cannot be overemphasised. They exist to regulate the court process and are essential for the proper administration of justice. See *Minister of Mines & Mineral Development & Anor v Fidelity Printers & Refiners (Pvt) Ltd & Anor* CCZ 9/22 at p 14. The rules cannot simply be ignored to suit the demands of a litigant who is not vigilant.

The law helps the vigilant and not the sluggard. See *Ndebele v Ncube* 1992 (1) ZLR 288 (S) at 290 C-E.

[26] Such serious lack of diligence was fully explained in *The Joint Executors of the Estate of the Late Macdonald Chapfika & Anor v Penniwill supra* where MUSITHU J remarked that:

> "One of the hallowed ethical duties that is central to the practice of law is the duty to perform one's work with competency and diligence. Legal practitioners are expected to exhibit legal skill, knowledge and thoroughness, which comes with preparation, in the handling of their client's matters. Any failure to exhibit these basic tenets of the practice of law weighs heavily on innocent litigants who rely on the expertise of their counsel to represent them with the expected probity…
> **What makes the respondents' conduct grossly objectionable herein is that at the time the matter was set down for hearing, they were aware or ought to have been aware of their default and the consequences attendant on such default**. A perusal of the record of proceedings shows that the applicant's heads of argument were served on the respondents on 29 May 2024. By that time, the respondents were already barred for their failure to file the proof of service.
> **Having been put on notice that the applicant was going to raise their failure to comply with r 59(8) as a preliminary point, the respondents ought to have taken steps to have the bar uplifted.** … the respondents had already been forewarned that the applicants were not taking their failure to file the proof of service as required by r 59(8) lightly. They had been told that the applicants were going to ask the court to treat the matter as an unopposed because of that transgression. The respondents did not seek the indulgence of the applicants to have the bar removed by consent. It is said forewarned is forearmed. The prior warnings gave the respondents a tactical advantage which they chose not to capitalize on.
> **At the hearing of the matter, the respondents' counsel did not even rise to make an application for the removal of the bar."** [My emphasis]

The above reasoning equally applies to this case. The first respondent did not seize the opportunity arising from the prior warnings of this point *in limine* to seek condonation and the removal of the bar. He made his own bed of thorns and must lie on it.

[27] I must also point out that Mr *Matiyashe*'s argument that the advent of the IECMS has made the rules on service obsolete was misplaced. The rules, as amended by SI 81/2024, retained the requirement for service of a court application and the notice of opposition. Thus "deliver or serve" is defined in rule 2 to mean "to either physically or electronically file a pleading or record with the Registrar and immediately thereafter, serve a copy on the other party by physical means or electronically." The IECMS did not do away with the requirements for service and filing of certificates of service in relation to motion

proceedings. In any case, it is clear service does not necessarily have to be physical. It can also be done electronically. The parties are still required to comply with the court rules.

[28] In *casu,* I had no option but to accept that the first respondent's opposing papers were fatally defective or invalid. I accordingly upheld the point *in limine* that the first respondent was barred. I struck out the invalid notice of opposition and opposing affidavit and proceeded to deal with the application as unopposed. The effect of the bar is also that where a party is barred the court shall deal with the application as unopposed once there is no application to remove the bar. See rule 59(26). Having made the above finding I found it academic to consider the effect of non-compliance of the notice of opposition with rule 58(2)(c) and (d) requiring an address for service within a radius of ten kilometres of the registry and to provide an index where the papers are more than five pages.

THE UNOPPOSED APPLICATION

[29] It is settled law that this court's power to grant a *declaratur* is entrenched in s 14 of the High Court Act. A *declaratur* is by nature a special remedy open to any person who has an interest in any matter who seeks a declaration on the existing or future rights. This remedy flows from the fact that this court has inherent jurisdiction. It trite that the remedy is granted by the court within its discretion and is not shared with any other court with limited jurisdiction. See *Kambarami* v *1893 Mthwakazi Restoration Movement Trust & Ors* SC 66/21.

[30] The requirements for a declaratory order are well settled. In *Johnsen v Agricultural Finance Corporation* 1995 (1) ZLR 65 (H) the court stated as follows:

> "The condition precedent to the grant of a declaratory order under section 14 of the High Court Act of Zimbabwe, 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 is not a prerequisite to the exercise of jurisdiction. See *Ex P Chief Immigration Officer* 1993 (1) ZLR 122 (S) at 129F-G; 1994 (1) SA370 (25) at 376G-H; *Munn Publishing (Pvt) Ltd* v *ZBC* 1994 (1) ZLR 337 (S)".

[31] I was satisfied that the requirements for a declaratory order were met in this case. The applicant established that she was an interested person and the interest concerned an existing right, future or contingent right. The applicant established that she is the lawful holder of rights, title and interest in the property. The property was awarded to her as part of her pension in 1981. Annexures "AA1-AA4" all show that she duly acquired this

property. The receipts attached at p 27 of the record also prove that she paid the arrear rentals due to the second respondent for the property for cession to be registered. There is a copy of the agreement she concluded with the late Nelson Makiwa confirming the arrangement that the applicant retained ownership of the property at pp 32-33 of the record. The same was confirmed by her sister's Clara Muzvondiwa affidavit at pp 38-39 of the record. The property had always been hers and there is no doubt about that from the evidence placed before me.

[32] The applicant further established the fraud committed by the first respondent rendering the purported certificate of heir and the award of the property to him falsely as the sole heir fraudulent and a nullity. Such fraud meant that the first respondent never acquired ownership of the property in the first place. In *Katirawu v Katirawu & Ors* HH 58/07 at p 5 MAKARAU JP (as she then was) had this to say:

> "…Nothing legal can flow from a fraud. His appointment was null and void *ab initio* on account of fraud. It is as if it was never made. It is nothing upon which nothing of consequence can hang."

[33] The above remarks fully apply to this case. The first respondent's fraud did not make him the owner of the property. His appointment as the sole heir was null and void *ab initio*. The same goes for the purported award of ownership of the property. Nothing valid could flow from such a nullity. This was a proper case for the court to exercise its discretion under s 14 of the Act to grant the relief sought in the draft order. The applicant's rights as the legitimate owner were never lawfully taken away from her. The estate of the late Nelson Makiwa also by the common law principle *nemo dat quad non habet* could not transfer more rights than he had. The right of ownership did not pass to the first respondent. As the rightful owner, the applicant was entitled to recover the property from the first respondent who had possession of it without her consent. The applicant was entitled to the remedy of the *rei vindicatio* as against the first respondent. See *Chenga v Chikadaya & Ors* SC 7/13 at p 9.

COSTS

[34] Ms *Mbiri* submitted that the application must be granted with costs on a legal practitioner and client scale. She argued that the first respondent's fraudulence in acquiring the property

is clear. He facilitated the registration of the transfer without an edict meeting and without the knowledge of the other family members. There was a fraudulent affidavit of Clara Muzvondiwa who was outside the country. It was also argued that the first respondent had not been candid with the court. That such conduct deserves an order for costs.

[35] The decision as to whether costs should be awarded to or against a party is made in light of the outcome of a matter or in special circumstances such as the conduct of a party in the course of the litigation. Generally, the principle is that costs follow the cause. See, for example, *Ndewere v President of Zimbabwe and Ors* SC 57/22 at p 23, para 66; *Mbatha v Ncube and Anor* SC 109/22 at p 13, para 31, and *Marange Resources (Pvt) Ltd & Anor v Muchengwa* SC 155/21 at p 14.

[36] It is also settled law that the granting of costs is at the discretion of a court. A court must judiciously exercise its discretion in accordance with settled principles regulating costs in legal proceedings. What discretion entails was fully discussed in the case of *Mbatha v Ncube and Anor supra*. In this case, there was no special reason for me to depart from the general rule that costs shall follow the cause. The successful party was entitled to her costs.

[37] The further issue was whether or not the costs should be awarded on the higher scale as claimed or on the ordinary scale. It is trite that costs on a legal practitioner and client scale are awarded in exceptional circumstances. In *Nel v Waterberg Landbouwers Ko-operative Vereeninging* 1946 AD 597 at 607 TINDAL JA stated:

> "The true explanation of awards of attorney and client costs not authorized by statute seems to be that, by reason of special considerations arising either from the circumstances which give rise to the action or from the conduct of the losing party, the courts in case considers it just, by means of such order, to ensure more effective than it can do by means of judgment for party and party costs that the successful party will not be out of pocket in respect of the expenses caused to him by the litigation ."

Further A. C. Cilliers in *The Law of Costs* 2nd ed at p 66, classified the grounds upon which the court would be justified in awarding the costs as between attorney and client *inter alia* as follows:

(a) Vexatious and frivolous proceedings

(b) Dishonesty or fraud of litigant

(c) Reckless or malicious proceedings

(d) Litigant's deplorable attitude towards the court.

[38] In this case, I found an award for costs on a punitive scale to be warranted. The conduct of the respondent justified such an award. The first respondent's legal practitioner adopted a casual approach to court proceedings. The first respondent's counsel of choice chose to ignore a fatal defect and sat on his laurels waiting for the doomsday in circumstances where, as conceded, he would have wasted no time to seek condonation and the removal of the bar. Mr *Matiyashe* approached this matter as if condonation is something which the court could grant *mero motu* and is a right that could be demanded from the court. The first respondent, as a litigant, was bound by the conduct of his own legal practitioner after all the legal practitioner was his own choice of a legal representative. See *Apostolic Faith Mission in Zimbabwe v Murefu* SC 28/03.

[39] At the hearing, instead of rising up to make the application Mr *Matiyashe* further wasted the court's time by making frivolous arguments on a point *in limine* solidly backed by settled law. The first respondent was made aware of the arguments on the point in the heads of argument filed in October 2024. Nothing was done to seek to comply with the provisions of the rules. Despite conceding that there was non-compliance counsel still insisted on arguing on a pleading that was a nullity. The law is settled on that point. For being unnecessarily argumentative the first respondent achieved nothing but to waste the court's time. Such conduct justifies an award for costs on a higher scale.

[40] Further, the brazen fraudulent conduct by the first respondent in this case including an attempt to mislead the court by filing an affidavit purportedly deposed to in Zimbabwe when the deponent was in South Africa is conduct that should be condemned in the strongest of terms. Litigants must approach the court with honesty and probity. Attempts to mislead the court by filing deceitful affidavits must never be tolerated. Legal practitioners are officers of the court who owe the court the duty to be honest and serve the administration of justice. They can never partake in any process to mislead the court. ZIYAMBI JA put the position aptly in *Kwandera v Mandebvu* 2006 (1) ZLR 110 (S) at 114B-C as follows:

> "Ethics is one of the pillars on which the legal profession stands. The court relies on the assistance given to it by counsel for it to arrive at a correct decision… Legal practitioners are officers of the court and they are therefore expected to display honesty and a high degree of diligence when they appear before the courts."

[41] In *casu*, it was an issue placed on record that one Clara Muzvondiwa was never in the country on the date her purported affidavit was allegedly commissioned. When this position was communicated to the first respondent's legal practitioners they retreated and acknowledged that the affidavit was improperly commissioned. See the letter from the first respondent's legal practitioners dated 26 July 2024 at p 112. The rules of practice on how an oath should be taken are a matter of settled law. While the matter was determined as unopposed the said evidence of the fraudulent attempts to mislead the court is part of the applicant's answering affidavit. I could not ignore such deplorable conduct. This dishonesty warrants an order for punitive costs.

DISPOSITION

[42] In the premises, the court was satisfied that the applicant had made out a case entitling her to the order sought. The costs shall follow the cause and for the above reasons, it was only fair and proper that they be awarded on a legal practitioner and client scale.

[43] This court accordingly entered the judgment aforestated.

DEMBURE J: ……..

Zvobgo Attorneys, applicant's legal practitioners
Matiyashe Law Chambers, first respondent's legal practitioners