

BATANDI MICHAEL MPOFU N.O

Versus

FELIX DZUMBUNU

And

CHIKOTI DORO

And

ASSISTANT MASTER OF THE HIGH COURT OF ZIMBABWE

IN THE HIGH COURT OF ZIMBABWE
DUBE-BANDA J
BULAWAYO 20 JUNE 2022 & 14 JULY 2022

Special case in terms of rule 52 of the High Court Rules, 2021

S. Siziba for the plaintiff
J. Ndubiwa for the 1st defendant
J. Tshuma for the 2nd defendant

DUBE-BANDA J:

Introduction

1. On the 16 February 2017, plaintiff sued out a summons against 1st defendant seeking an order couched in the following terms:
 - i. An order confirming the cancellation of an agreement of sale entered into by and between plaintiff and defendant in respect of a property known as a certain piece of land being stand number 6505 Bulawayo Township of stand 6541A Bulawayo Township, situate in the District of Bulawayo and which cancellation was occasioned by defendant's breach of the terms and conditions of the said sale agreement.
 - ii. An order evicting the defendant and all those claiming through him from the aforesaid premises on the basis that the defendant and his claimants no

longer have a lawful right to remain in occupation of the premises following the cancellation of the sale agreement.

- iii. An order that the defendant pays occupational damages to the plaintiff in the sum of US\$800-00 per month or US\$26-67 per day, from the 4th September 2015, this being the date of the sale agreement was cancelled, to the date of eviction.
 - iv. Cost of suit at an attorney and client scale.
2. The defendant referred to in the order sought by the plaintiff is the 1st defendant in this matter. 2nd and 3rd defendants were joined to this matter by an order of this Court in Case No. HC 3144/18 granted on the 8th January 2019.
 3. At a case management meeting held on the 19 February 2020 before a judge of this court, the parties agreed to file a written statement of agreed facts and to refer the matter to the Court for determination by way of a special case in terms of Order 29 of the High Court Rules, 1971. A statement of agreed facts was drawn, signed and filed on the 1st October 2020. The matter then proceeded as a special case in terms of the rules of court.
 4. On the 11th February 2022, plaintiff filed a notice to amend the summons, declaration and pleading filed of record in terms of rule 41(1) of the High Court Rules, 2021. The notice sought to delete the names of Thabani Siziba N.O. to be substituted with the name of Batandi Michael Mpofu N.O. There was no written objection to the proposed amendment within the ten days of the delivery of the notice, the amendment sought was therefore effected.

The facts

5. For the purposes of clarity and completeness, I reproduce in *ex extensio* the statement of agreed facts signed and filed by the parties in this matter. These are the agreed facts:

- i. That the plaintiff and 1st defendant sometime in November 2014 entered into a written agreement of sale over stand 6505 Bulawayo Township of Stand 6541A Bulawayo Township, situate in the District of Bulawayo (hereinafter, 'the in initial agreement'). A copy of the initial agreement is annexed hereto and marked, "A".
- ii. That the 1st defendant took occupation of the property immediately upon the signing of the initial agreement pursuant to the terms thereof.
- iii. That in terms of the initial agreement, the 1st defendant agreed and undertook to pay the full prescribed purchase price in respect of the property being the sum of USD105 000.00 as follows:
 - A deposit in the sum of USD25 000.00 upon the signing of the agreement.
 - The balance of USD80 000.00 to be paid by way of three (3) equal instalments commencing on the 28th February 2015, and subsequently on or before the 28 April 2015, and finally on or before the 31 July 2015.
- iv. That the purchase price prescribed in respect of the property in terms of the initial agreement was as per the then prevailing fair market value.
- v. That the first defendant initially paid a deposit of USD37 000.00 by the 12 March 2015. A copy of the defendant's proof of payment of the deposit is annexed hereto and marked "B".
- vi. That the 1st defendant breached the agreement of sale by failing to pay the balance of the purchase price of USD68 000.00 in the manner prescribed in the initial agreement.
- vii. That the notice of termination of the initial agreement of sale over the property was, according to the Sheriff's Return of Service, served upon the

1st defendant at No. 43 Aberdeen Road, Fortunes Gate, Bulawayo on the 12th August 2015, by handing a copy thereof to the 1st defendant's worker. A copy of the notice of the termination and the Sheriff's Return of Service hereto marked "C" and "D", respectively.

- viii. That in terms of the notice of termination, the initial agreement of sale was cancelled on the 4th September 2015.
- ix. That an action was instituted by the plaintiff on the 16th February 2017, under cover of case No. HC 446/17 seeking:
- an order confirming the cancellation of the initial agreement;
 - an order evicting the 1st defendant and all those claiming occupation from the property in question (*sic*);
 - an order that 1st defendant pay occupational damages to the plaintiff in the sum of USD800.00 per month or USD26.67 per day from the 4th September 2015, being the date on the cancellation of the initial agreement to the date of eviction.
- x. The default judgment was granted on the 19th May 2017, confirming the cancellation of the initial agreement and granting the rest of the relief as prayed for in the summons in the matter under cover of Case No. 446/17. A copy of the default judgment is annexed hereto marked "E".
- xi. That in terms of the writ of execution and ejectment issued out on the 8th February 2018, pursuant to the default judgment in the matter under cover of Case No. HC 446/17, the 1st defendant was evicted from the property in question. A copy of the writ of execution and ejectment is attached hereto and marked, "F".
- xii. That the default judgment in the matter under cover of Case No. HC 446/17 was rescinded and set-aside on the 22nd November 2018, in terms of the Order issued in the matter under cover of case No. HC 1576/18, a copy of which is annexed hereto marked "G".

- xiii. That the 1st defendant entered an appearance to defend the action under cover of Case No. HC 446/17 on the 26 November 2018, and filed a special plea on the 18 February 2019, but has not pleaded over to the merits of the matter.
- xiv. That during the period when the order in Case No. HC 446/17 was extant, and on the 14th March 2018, the plaintiff entered into a written agreement of sale over the property with the 2nd defendant, (hereinafter, “the second agreement”). A copy of the second agreement is annexed hereto and marked, “H”.
- xv. That in terms of the second agreement, the 2nd defendant agreed and undertook to pay the full prescribed purchase price in respect of the property being the sum of USD130 000.00 as follows:
- A deposit in the sum of USD70 000.00 upon the signing of the agreement.
 - The balance of USD60 000.00 to be paid between the 31st April 2018, and 31st July 2018.
- xvi. That the purchase price prescribed in respect of the property in terms of the second agreement was per the then prevailing fair market value.
- xvii. That in accordance with the terms of the second agreement and by the 18th July 2018, the 2nd defendant had paid the sum of USD130 000.00 to the plaintiff, being the full prescribed price in respect of the property in question. The prescribed purchase price was paid into the bank account of Waterbuck Trust (Pvt) Ltd as evidenced by the attached proof of payment marked “I”.
- xviii. That the 3rd defendant was made aware of the second agreement of the sale in terms of a report by the plaintiff and duly recorded such sale in its minutes in respect of a creditors’ meeting held on the 21st June 2018. The minutes of

such meeting are duly contained in the 3rd defendant's final liquidation file under CRB 2/10 and attached hereto marked "J".

- xix. That on the 21st March 2018, the only secured creditor of Tabs Avon Lighting (Pvt) Ltd (the company under liquidation) being, NMB Bank Limited, approved of the second agreement of sale and the 3rd defendant was duly made aware of such approval. The letter by the said sole secured creditor of the company under liquidation is contained in the 3rd defendant's final liquidation file under CRB 2/10 and is attached marked "K".
- xx. That in the aftermath of the granting of the order in the matter under cover of Case No. HC 1576/18, and after the conclusion of the second agreement of sale and the payment of the full purchase price in respect of the property by the 2nd defendant, the 1st defendant took steps aimed at remedying his breach of the initial agreement of sale by depositing into plaintiff's legal practitioners trust account the balance of the purchase price being USD68 000.00 in terms of the correspondence attached hereto marked "L".
- xxi. The steps taken by the 1st defendant aimed at remedying his breach of the initial agreement were not accepted by the plaintiff in terms of correspondence attached marked "M".
- xxii. The plaintiff's legal practitioners tendered back to the 1st defendant the amount paid into its trust account in the sum of USD 68 000.00. This amount is currently held in trust by the plaintiff's legal practitioners as per the correspondence attached hereto marked "M".
- xxiii. That by way of an Order granted in the matter under cover of Case No. HC 3144/18, the 2nd defendant was joined to the main proceedings, duly entered an appearance to defend the action and filed his plea thereto.
- xxiv. That as at the date of this statement, and following the 1st defendant's eviction therefrom in terms of the writ of execution and ejectment issued against him in the matter under cover of Case No. HC 1576/18, neither of

the parties are in physical or lawful occupation of the property nor has any party taken transfer thereof.

The issues

The issues for determination by the Court are as follows:

- i. Whether the initial agreement of sale over Stand 6505 Bulawayo Township of Stand 6541A Bulawayo Township, situate in the District of Bulawayo between the plaintiff and 1st defendant was lawfully terminated.
- ii. Whether there existed any legal impediment to the conclusion of the second agreement of sale entered into between the plaintiff and the second defendant at the material time.
- iii. To whom should the property being stand 6505 Bulawayo Township of Stand 6541A Bulawayo Township, situate in the District of Bulawayo be transferred?

Factual disputes

6. There is a preliminary issue to be put out of the way before dealing with the substantive issues arising in this matter. In his submissions, Mr *Ndubiwa* counsel for the 1st defendant submitted that there were disputes of fact in this matter such that it could not be resolved by way of a special case. Counsel contended that the dispute of facts were these: first, was that the Sheriff's return of service did not relate to the service of the notice of cancellation of the agreement of sale between the plaintiff and the 1st defendant. It was contended further that the letter of cancellation was written on the 4th August 2015, however the return of service related to a notice of set-down served on the 6th March 2017. Counsel submitted further that 1st defendant does not dispute that the notice of cancellation of the agreement was served on his Gardner on the 12 August 2015. What was disputed was that the return of service did not relate to the service of the notice of cancellation.

7. The second turned on the identity of the property sold to the 2nd defendant. This contention was anchored on the fact that the agreement of sale between plaintiff and 2nd defendant speaks to Stand number 6512 Bulawayo Township of Stand 6541A Bulawayo Township situate in the District of Bulawayo, when the dispute in this matter turns on Stand number 6505. Counsel submitted that because of these disputes the matter was to be referred to trial.
8. Per *contra* Mr *Siziba* counsel for the plaintiff submitted that the alleged factual disputes were not germane to the resolution of the issues before court. Counsel contended further that the 1st defendant was bound by the statement of agreed facts, and could not purport to renege from such agreed facts. Mr *Tshuma* counsel for the 2nd defendant argued that it was not in dispute that the notice of cancellation was served, what was in dispute was that the Sheriff's return of service did not relate to the service of the notice of cancellation. Counsel argued further that there was a mix-up of Stand numbers in the agreement of sale between plaintiff and 2nd defendant, but nothing material turned on that because the parties were agreed on which stand was in issue. Counsel argued that there was no basis to refer this matter to trial.
9. In dealing with agreed facts, the court in *Kunoka v The Church of the Province of Central Africa* SC 25/2017 said:

Once the facts are agreed, the court should proceed to determine the particular question of law that arises and not delve into the correctness or otherwise of the facts. It is bound to take those facts as correctly representing the agreed position and to thereafter determine any issues of law that may arise therefrom. It is not open to the parties to the stated case to seek to re-open the agreed factual position or to contradict such position. Nor can either party seek to ignore existing legal principle or findings of fact made in connection with the same matter by another court. Of course either party has a remedy at common law, to withdraw any concession made in a stated case owing to *justus error*, fraud, mistake, or any other valid ground.

It has become necessary to restate what a stated case is owing to the fact that in some instances, the appellant in this case has made submissions contrary

to the stated case brought before the court. The appellant has also ignored in part the decision of this court on which the stated case is predicated. It bears stating that if this happens, a party will be kept strictly to the terms of the agreed facts, as it is on the basis of those facts that the court would have been invited to make a determination on some specific question of law. (My emphasis).

10. In the statement of agreed facts in respect of service of the notice of cancellation it was recorded that:

That the notice of termination of the initial agreement of sale over the property was, according to the Sheriff's Return of Service, served upon the 1st defendant at No. 43 Aberdeen Road, Fortunes Gate, Bulawayo on the 12th August 2015, by handing a copy thereof to the 1st defendant's worker.

11. 1st defendant agreed that the notice of termination of the initial agreement of sale was served upon the 1st defendant at No. 43 Aberdeen Road, Fortunes Gate, Bulawayo on the 12th August 2015, on the 1st defendant's worker. 1st defendant is bound by the statement of facts. In his submissions Mr Ndubiwa contended that the 1st defendant does not dispute that the notice of cancellation of the agreement was served on his Gardner on the 12 August 2015. What was disputed was that the return of service did not relate to the service of the notice of cancellation.

12. In the statement of agreed facts in respect of the identity of the property in issue it was recorded that:

That during the period when the order in Case No. HC 446/17 was extant, and on the 14th March 2018, the plaintiff entered into a written agreement of sale over the property with the 2nd defendant.

13. The property referred to is stand number 6505 Bulawayo Township of stand 6541A Bulawayo Township, situate in the District of Bulawayo. There is no factual dispute about the identity of the property in issue. In the statement of agreed facts the parties are agreed as to the identity of the property in issue in this matter.

14. Mr Ndubiwa submitted further that when the statement of agreed facts was signed, 1st defendant had not had sight of the Sheriff's Return of Service and the agreement

of sale between the plaintiff and the 2nd defendant. This is unattainable. I say so because the statement of agreed facts was signed by the parties' legal practitioners. It is unthinkable that a legal practitioner could append his signature on a document to be used in court proceedings without having had sight of all supporting documents. In *Grain Marketing Board v Arenel (Private) Limited and Ors* SC 30/21, the court said:

The appellant is bound by the agreement it entered into with the first respondent in terms of the *caveat subscriptor* rule. Simply put, parties must exercise extreme caution in entering into and signing contracts. Consequently, a party to a contract who appends his or her signature to a document does so at his or her own peril.

15. 1st defendant cannot be heard at this stage to start attacking the statement of agreed facts on the basis that when it was signed it had not seen the supporting documentation. Worse still when the statement was signed by a legal practitioner. In any event no application was made to withdraw from the statement of agreed facts. Further in respect of the attack on the return of service 1st defendant accepts that the notice of termination was served on his worker. The issue for determination is not whether service was done, but whether it was valid service in terms of the law.

16. I hold 1st defendant strictly to the agreed facts. 1st defendant signed a statement of agreed facts. And further the disputes of fact alleged by Mr *Ndubiwa* are not germane to the resolution of the issues in dispute in this matter. 1st defendant does not dispute that the notice of cancellation was served, he disputes that it was served in accordance with the provisions of the law. Further the statement of agreed facts shows that the parties were clear as to the identity of the stand in issue. In the circumstances there is no basis to refer this matter to trial.

17. I now turn to the issues for determination as identified in the statement of agreed facts.

Whether the initial agreement between the plaintiff and 1st defendant was lawfully terminated.

18. In terms of the agreement of sale between the plaintiff and 1st defendant, the latter had to pay a deposit of USD25 000.00 upon signing of the agreement, and the balance of USD80 000.00 had to be paid in three equal instalments. It was an instalment sale of land in terms of section 2 of the Contractual Penalties Act [Chapter 8:04], which says an “instalment sale of land” means a contract for the sale of land whereby payment is required to be made in three or more instalments; or by way of a deposit and two or more instalments; and ownership of the land is not transferred until payment is completed.
19. The agreed facts are that 1st defendant paid a deposit of USD37 000.00 by the 12th March 2015, and breached the agreement of sale by failing to pay the balance of the purchase price of USD68 000.00 in the manner prescribed in the agreement. The notice of termination of the agreement of sale over the property was served upon the 1st defendant at No. 43 Aberdeen Road, Fortunes Gate, Bulawayo, on the 12th August 2015, by handing a copy thereof to his worker.
20. Cut to the bone 1st defendant argues that the notice was not delivered in compliance with section 8(3) of the Contractual Penalties Act [Chapter 8:04] in that it was not delivered to the 1st defendant personally or by registered post to his chosen address. Plaintiff submitted that the 1st defendant was notified of the breach in a manner that complies with the provisions of section 8 of the Contractual Penalties Act, and that the agreement was lawfully cancelled. 2nd defendant contended that the agreement between plaintiff and 1st defendant was lawfully terminated.
21. The question that arises is whether the service of the notice to the 1st defendant upon handing it to his worker was valid service in terms section 8 of the Contractual Penalties Act [Chapter 8:04]. Mr *Ndubiwa* submitted that 1st defendant does not dispute that a notice was served on his worker on the 12 August 2015, the contention is that it was not proper service.

22. Section 8 of the Contractual Penalties Act [Chapter 8:04] provides thus:

Restriction of sellers' rights

(1) No seller under an instalment sale of land may, on account of any breach of contract by the purchaser—

(a) enforce a penalty stipulation or a provision for the accelerated payment of the purchase price; or

(b) terminate the contract; or

(c) institute any proceedings for damages;

unless he has given notice in terms of subsection (2) and the period of the notice has expired without the breach being remedied, rectified or discontinued, as the case may be.

(2) Notice for the purposes of subsection (1) shall—

(a) be given in writing to the purchaser; and

(b) advise the purchaser of the breach concerned; and

(c) call upon the purchaser to remedy, rectify or desist from continuing, as the case may be, the breach concerned within a reasonable period specified in the notice, which period shall not be less than—

(i) the period fixed for the purpose in the instalment sale of the land concerned; or

(ii) thirty days; whichever is the longer period.

(3) Without derogation from section 40 of the Interpretation act [*Chapter 1:01*], a notice shall be regarded as having been duly given to the purchaser for the purposes of subsection (1)—

(a) if it has been delivered to the purchaser personally or to an agent chosen by the purchaser for the purpose of receiving such notices; or

(b) if it has been posted by registered post to the address chosen by the purchaser for the delivery of correspondence or legal documents relating to the instalment sale of land concerned or, in the absence thereof, to the purchaser's usual or last known place of residence or business. (My emphasis).

23. Section 40 (2) of the Interpretation Act [Chapter 1:01] provides thus:

(2) Where an enactment authorizes or requires a document to be served on any person without directing it to be served in a particular manner, the service of that document may be effected—

(a) by personal service; or

(b) by post in accordance with subsection (1); or

(c) by leaving it for him with some person apparently over the age of sixteen years at his usual or last-known place of abode or business; or

(d) in the case of a corporate body, or an association of persons whether incorporated or not, by delivering it to a director, the secretary or clerk of the body or association at the registered or principal office of the body or

association, or serving it by post on such director, secretary or clerk at such office; or
(e)

24. In *Washaya and Another v Makebreak Trading (Private) Limited and 2 Others SC* 163 / 2021, the court held thus:

The contention advanced on behalf of the appellants overlooked the principle contained in s 2(1)(a) of the Interpretation Act, to the effect that the application of the provisions of the Interpretation Act to the construction of any enactment must be consistent with the intention, purpose or context of the enactment.

The purpose of s 8(3) (b) of the Contractual Penalties Act is to make provision for effective service of a written notice of breach of the instalment sale of land by the seller to the purchaser where it has been posted by registered post to the address chosen by the purchaser for the delivery of correspondence or legal documents relating to the instalment sale of land.

25. In determining whether service of the notice was valid service, the court is required to tease out the intention, purpose or context of section 8(3)(b) of the Contractual Penalties Act. Its purpose is to make provision for effective service of a written notice of breach of the agreement of sale. In the agreement of sale 1st defendant provided his address as number 43 Aberdeen Road, Fortunes Gate, Bulawayo. That is the address where the notice of termination of the agreement was served. The agreement does not specify the manner of service of a written notice in the case of breach. The 1st defendant accepts that the notice was indeed delivered, but contends that it was not delivered in terms of the provisions of the law. The position taken by the 1st defendant is tantamount to saying “yes” the notice was delivered and I saw it, but it did not come to me *via* the correct route. Such a position is unattainable. What the law requires is the effective service of the notice, and leaving it with his worker amounts to effective service.

26. The written notice, drawing the attention of the 1st defendant as the purchaser to breach of the agreement and calling upon him to rectify the breach within thirty days of service of the notice on him failing which cancellation of the agreement

would follow, was served on him in terms of section 8 of the Contractual Penalties Act as read with section 40(2)(c) of the Interpretation Act, in that it was served by leaving it with his worker at his usual or last-known place of abode which he provided in the agreement.

27. The notice of cancellation clearly specified that 1st defendant had breached the agreement of sale by failing to pay the instalments. He was given thirty days' notice calculated from the 1st August 2015 to remedy the breach by settling the amount due. The notice specified that failure to settle the amount within thirty days shall lead to an automatic cancellation of the agreement of sale. 1st defendant did not comply with the notice of cancellation, and he unilaterally deposits to the plaintiff's legal practitioners trust account the balance of the purchase price almost three years after the deadline of the 1st September 2015. On the 19 May 2017, this court confirmed the cancellation of the agreement of sale between plaintiff and 1st defendant, and while the order was extant, the property was sold to the 2nd defendant. That on the 22nd November 2018 the order confirming cancellation of the agreement was rescinded is of no moment. Therefore the issue whether the agreement between the plaintiff and 1st defendant was lawfully terminated is answered in favour of the plaintiff and 2nd defendant.

Whether there existed any legal impediment to the conclusion of the second agreement of sale entered into between the plaintiff and the second defendant at the material time.

28. The agreed facts are that a default judgment was granted on the 19th May 2017, confirming the cancellation of the agreement between plaintiff and the 1st defendant. A writ of execution was issued and 1st defendant was evicted from the property. That on the 14 March 2018, during the period when the order in Case No. HC 446/17 was extant the plaintiff entered into a written agreement of sale over the property with the 2nd defendant. The order in HC 446/17 was rescinded and set-aside on the 22nd November 2018.
29. Plaintiff contends that the 2nd agreement was concluded after the cancellation of the 1st agreement and also at the time the default judgment confirming the cancellation

was still extant. It was submitted further that the fact that the default judgment confirming the cancellation was later rescinded is of no moment.

30. 1st defendant in his heads of argument contended that the preamble in the agreement between plaintiff and 2nd defendant describes the property as stand 6512 Bulawayo Township. It is submitted further that the parties had in mind stand 6512 instead of 6505, and therefore there is no privity of contract between plaintiff and 2nd defendant concerning the property.
31. 2nd defendant contends that 1st defendant breached the terms of the agreement by failing to pay the balance of the purchase price by the 31st July 2015 which was the last date of payment provided in the agreement. Subsequently 1st defendant was notified of the breach and was asked to remedy it within thirty days in accordance with section 8(1) (c) (ii) of the Contractual Penalties Act. It was submitted that the notice was served on the 1st defendant, and he failed to remedy the breach within thirty days thereof. The agreement was cancelled as per the notice. Thereafter plaintiff sued out a summons and obtained a default judgment, and 1st defendant was evicted from the property. It is contended that during the period when the order confirming the cancellation was extant, plaintiff sold the property to the 2nd defendant. It was submitted that there was no legal impediment to the conclusion of the second agreement of sale entered into between the plaintiff and the 2nd defendant at the material time.
32. I have found *supra* that the property referred to in the agreed facts is stand number 6505 Bulawayo Township of stand 6541A Bulawayo Township, situate in the District of Bulawayo. There is no factual dispute about the identity of the property in issue subject to the agreement between plaintiff and 2nd defendant.
33. In any event the validity of the agreement of sale between plaintiff and 2nd defendant is not an issue the 1st defendant should concern himself about. His matter does not turn on whether the second agreement was valid or not. His matter turns on whether he breached his agreement of sale with the plaintiff, and whether his agreement was lawfully cancelled. I have found *supra* that the agreement of sale between plaintiff and 1st defendant was lawfully cancelled.

34. Furthermore on the date the property was sold to the 2nd defendant the first agreement had been vacated in terms of the law. The notice was issued and served in terms of the provisions of the law, a default judgment had been granted confirming the cancellation of the agreement between plaintiff and 1st defendant. The plaintiff submitted that the fact that the default judgment was subsequently rescinded is of no moment. I agree. I say so because at the time the second agreement was concluded the default judgment confirming the cancellation was extant. The issue whether at the time the second agreement was concluded there was no impediment to the sale of the property is answered in favour of the plaintiff and 2nd defendant.

To whom should the property being stand 6505 Bulawayo Township of Stand 6541A Bulawayo Township, situate in the District of Bulawayo be transferred?

35. Plaintiff submitted that since the 1st agreement of sale was lawfully terminated, and that the only valid agreement is between the plaintiff and 2nd defendant, then it follows that the property should be transferred to the 2nd defendant. It was argued further that ordering a transfer of the property to the 1st defendant would be tantamount to creating a contract between plaintiff and 1st defendant, as none exists. It was contended further that to order transfer to the 1st defendant would be tantamount to ordering specific performance, which remedy is not available to the 1st defendant because he did not fulfil his contractual obligations.

36. Mr *Ndubiwa* submitted that this court must order that the property be transferred to the 1st defendant. Counsel further contended without conceding that this was a case of a double sale, and that no special circumstances have been shown justifying a departure from the general rule that says the first in time is the stronger.

37. It was submitted further that the court must order specific performance in favour of the 1st defendant because he has paid the purchase price by depositing the balance into the account of plaintiff's legal practitioners. It was argued further that the refusal to accept the payment on account of the earlier unlawful termination of the property was of no consequence.

38. I take the view that this was not a double sale. The agreement between plaintiff and 2nd defendant was entered into after the agreement with 1st defendant was lawfully cancelled.
39. The agreed facts are that 1st defendant initially paid a deposit of USD37 000.00 by the 12 March 2015, and that he breached the agreement of sale by failing to pay the balance of the purchase price of USD68 000.00 in the manner prescribed in the agreement. By his own admission the 1st defendant breached the agreement. I take the view that 1st defendant is not entitled to an order of specific performance because he breached the agreement. The remedy of specific performance is not available to a party who has breached the agreement. See: *Savanhu v Marere NO & Ors*, 2009 [1] ZLR 320. His attempts aimed at remedying his breach of the agreement were not accepted by the plaintiff. A party cannot after a breach make a unilateral payment hoping to remedy the breach.
40. Specific performance is a discretionary remedy vested in the courts. In the exercise of such discretion, the general rule is that, *prima facie*, every party to a binding agreement who is ready to carry out his own obligation under it has a right to demand the other party, so far as it is possible, to perform its undertaking in terms of the contract. Courts will exercise a discretion in determining whether or not decrees of specific performance will be made. See *Hativagone & Another v CAG Farms (Pvt) Ltd & Others* SC 42-2015 at 16.
41. 2nd defendant is entitled to specific performance for the following reasons, that in terms of the agreed facts the 2nd defendant agreed and undertook to pay the full prescribed purchase price in respect of the property being the sum of USD130 000.00 as follows, a deposit in the sum of USD70 000.00 upon the signing of the agreement and a balance of USD60 000.00 to be paid between the 31st April 2018 and 31st July 2018. It is stated that the 2nd defendant had paid the sum of USD130 000.00 to the plaintiff, being the full prescribed price in respect of the property in question. 2nd defendant met its side of the bargain.

42. The issue as to whom should the property being stand 6505 Bulawayo Township of Stand 6541A Bulawayo Township, situate in the District of Bulawayo be transferred to is answered in favour of the 2nd defendant.
43. In the summons plaintiff sought an order that 1st defendant pays occupational damages to the plaintiff in the sum of US\$800-00 per month or USS26-00 per day calculated from the 4th September 2015 to the date of eviction. In *Silonda v Nkomo* HB 60-19, BERE J (as he then was) expressed the view that where parties entered into a sale agreement, the court could not read into it anything other than what such agreement states. It could therefore not be taken as a lease agreement to entitle a litigant to claim holding over damages. Whilst this judgment was appealed, the Supreme Court in *Silonda v Nkomo* SC6/2022 did not interfere with the learned judge's exposition of the law as this was not one of the grounds of appeal ventilated before the Supreme Court. This exposition of the law applies with full force in this case. The plaintiff and 1st defendant did not enter into a lease agreement. 1st defendant resided at the property not as tenant but a purchaser (notwithisatding that the agreement was subsequently cancelled). For this reason the claim for holding over damages is not sustainable and must fail.
44. In the summons plaintiff sought an order for the eviction of the 1st defendant and all those claiming through him from the property. The issue of eviction is now moot. I say so because in the statement of agreed facts it is stated that in terms of the writ of execution and ejection issued out on the 8th February 2018, the 1st defendant was evicted from the property in question and that as at the date of this statement neither of the parties is in physical or lawful occupation of the property. Therefore the issue of eviction no longer presents a live dispute amongst the parties. This court cannot order an eviction of a party who is no longer in occupation of the property where they are sought to be evicted. It is for this reason that the claim for eviction must fail.
45. The general rule is that the costs follow the result. There is no reason why this court should depart from such rule in this case. The 1st defendant is to pay the plaintiff and

2nd defendant's costs on the scale as between party and party. There is no justification for costs on an attorney and client scale.

In the result, I order as follows:

- i. The cancellation of the agreement of sale entered into between plaintiff and 1st defendant in respect of a property known Stand number 6505 Bulawayo Township of Stand 6541A Bulawayo Township, situate in the District of Bulawayo measuring 3109 square metres, D.T. 2749/84 is confirmed.
- ii. That plaintiff shall transfer the property being stand number 6505 Bulawayo Township of Stand 6541A Bulawayo Township, situate in the District of Bulawayo measuring 3109 square metres D.T. 2749/84 to 2nd defendant within thirty (30) days of this order.
- iii. 1st defendant pays the costs of suit for plaintiff and 2nd defendant on a party and party scale.

Ndove & Associates plaintiff's legal practitioners
Mashayamombe & Co. 1st defendant's legal practitioners
Webb, Low & Barry 2nd defendant's legal practitioners