MITCHELL CORPORATION (PRIVATE) LIMITED
versus
LEENGATE (PRIVATE) LIMITED
and
ZVIMBA RURAL DISTRICT COUNCIL

HIGH COURT OF ZIMBABWE
MAMBARA J
HARARE 6 & 13 June 2025

Opposed Application for Summary Judgment

J. Makanda, for the applicant
T.G. Chigudugudze, for the 1st respondent
No appearance for the 2nd respondent

MAMBARA J: This is an application for summary judgment in an action for eviction and removal of structures. The applicant, Mitchell Corporation (Pvt) Ltd, asserts that it is the lawful owner of Stand 643, Rainham Farm, Zvimba, and that the first respondent, Leengate (Pvt) Ltd, has unlawfully encroached upon that property. The alleged encroachment consists of the first respondent (or its agents) erecting buildings or other structures on the applicant's land without any legal right, permission, or lease agreement. The applicant seeks a summary order for the ejectment of the first respondent (and anyone claiming through it) from the property, as well as the demolition or removal of all structures erected on the land. The second respondent, Zvimba Rural District Council, is the local authority for the area; it was cited given its administrative interest in the land, though no specific relief beyond its formal citation is sought against it. The core question is whether the applicant is entitled to immediate relief via summary judgment or whether the first respondent has shown a *bona fide* (good faith) defence that warrants a trial.

Background Facts

The dispute commenced with the applicant issuing summons out of this Court under the above case number, claiming eviction of the first respondent from Stand 643 Rainham Farm and removal of any structures placed thereon. The summons and supporting declaration were served on the respondents, and the first respondent entered an appearance to defend. Thereafter, the first respondent filed a plea setting out its defence to the claim. In response to the

appearance to defend (and in light of the plea), the applicant launched the present application for summary judgment, contending that the first respondent's defence is a sham and that there is no genuine triable issue requiring a full trial. The application is supported by a founding affidavit made on behalf of the applicant, which reiterates the applicant's ownership of the property and the alleged unlawful occupation by the first respondent.

The first respondent opposed the application and filed an opposing affidavit (in addition to its earlier plea). In those papers, the first respondent's purported defence emerged: it raised a plea of misjoinder, asserting that a different entity – one LLH Engineering Projects (Pvt) Ltd – is the true occupier/builder on the land in question. The first respondent essentially claims that the applicant sued the wrong party, since (according to Leengate) LLH Engineering is the one that entered the property and erected the structures. The second respondent did not file any opposing affidavit; it has taken a neutral position, indicating it will abide by the Court's decision. Both the applicant and first respondent filed detailed Heads of Argument, and the matter was set down for determination on the papers and oral submissions in this Court.

The material facts, drawn from the affidavits and documents in the record (and largely common cause except where noted), are as follows. The applicant is the registered owner of Stand 643 Rainham Farm in Zvimba District, Mashonaland West. The stand in question is a delineated piece of land forming part of Rainham Farm, falling under the jurisdiction of the second respondent (Zvimba Rural District Council). Sometime in 2023, the applicant discovered that construction activities were taking place on Stand 643 without its consent. Structures – said to include certain buildings and related works – were being erected on the land. The applicant maintains that it never sold, leased, or licensed this land to anyone, and it had not authorized any construction there. Upon investigation, the applicant attributed these activities to the first respondent, Leengate (Pvt) Ltd, a property development company known to be active in the Rainham area. The applicant avers that the first respondent (either on its own or through contractors) moved onto Stand 643 and began developing it as part of a broader housing project, despite having no title or right to do so.

In support of its claim, the applicant points to contemporaneous correspondence and events. For instance, in mid-2024 when the encroachment was discovered, communications were exchanged involving the council and the first respondent. Notably, an email dated 15 July 2024 from the second respondent (the Council) – addressed to the applicant and copied to a representative of the first respondent (one K. Bhunu) – confirmed that a council inspection had found a *durawall* (boundary wall) built by the occupier of adjacent Stand 179 was indeed

encroaching onto the applicant's Stand 643. The Council in that email reported the encroachment and indicated that the occupier of Stand 179 had been instructed to rectify the anomaly (remove or realign the wall). The following day, 16 July 2024, the applicant's legal practitioners sent a letter of demand to the first respondent (formally complaining of the encroachment). In response, by 27 July 2024, the first respondent's legal practitioners replied in writing – effectively acknowledging the encroachment and proposing a resolution. In that letter (record p.29), the first respondent's lawyers confirmed they also represented LLH Engineering Projects (Pvt) Ltd (a company closely associated with the first respondent) and explained that these two companies held the adjacent Stands 179 and 644, with the applicant's Stand 643 lying between them. The letter further indicated that those entities were operating a quarry on Stand 179 and proposed a compromise arrangement: they suggested a re-pegging (boundary adjustment) that would reduce the applicant's land in order to cure the encroachment, with the first respondent financing the re-survey, or alternatively an outright purchase of Stand 643 from the applicant. In essence, the first respondent at that stage offered to compensate for or eliminate the encroachment by realigning property boundaries or buying the land, implicitly conceding that an encroachment had occurred. Despite these discussions and the first respondent's written undertakings to rectify the situation, nothing was actually done on the ground to remove the offending structures or resolve the issue.

Eventually, frustrated by the lack of concrete remedial action, the applicant issued summons out of this Court (leading to the present proceedings). The first respondent's plea to the summons, however, painted a very different picture. In its plea, Leengate denied that it was encroaching on the applicant's land – offering little more than bare denials – and notably made no mention of LLH Engineering or the earlier communications and admissions. After the applicant filed this summary judgment application, the first respondent (in its opposing affidavit to the application) then raised the new defence that LLH Engineering Projects (Pvt) Ltd, not Leengate, was the party responsible for the structures on Stand 643. This shift in position – from tacitly acknowledging encroachment and attempting a compromise, to later denying any responsibility and blaming a third party – lies at the heart of the dispute now before the Court.

It is common cause that the second respondent (the Council) did not itself put up any structures on Stand 643, nor claim any rights over that stand. The Council's role was peripheral; it was cited largely because of its administrative oversight of land allocations in the area and

its involvement in the initial investigation of the encroachment. The Council has remained neutral in this litigation, indicating it will abide by whatever order the Court makes.

Before turning to the legal issues, one more factual development should be noted. By the time of the hearing, it was asserted (by the first respondent's counsel) that the offending structures – in particular the durawall and any installations encroaching onto Stand 643 – had been removed by LLH Engineering as of February 2025 (while this application was pending). Indeed, the first respondent's supplementary papers (record, p.67 n.10) state that LLH Engineering "long since" removed the impugned structures in early 2025. The applicant does not appear to dispute that certain structures were taken down; however, this was done unilaterally by the first respondent or its ally (LLH) and not as part of any settlement with the applicant. The applicant's stance is that despite any such removal, the first respondent has not acknowledged liability or ceased its claims to the land, and the encroachment could recur. In any event, the matter of costs and the formal vindication of the applicant's property rights remain live issues given that the first respondent, far from capitulating, persists in opposing the relief. Thus, the case was argued on its merits notwithstanding the alleged remedial works on the ground.

Parties' Submissions

Applicant's Submissions

Counsel for the applicant, *Mr. Makanda* submitted that the applicant's claim is a clear-cut one for the eviction of the first respondent from Stand 643 and the removal of structures that the first respondent caused to be erected on that land. He outlined the undisputed facts demonstrating an encroachment: the first respondent (or its agents) constructed certain structures on Stand 643 – including a durawall (boundary wall) which encroached into the applicant's property – as well as a wash plant and other installations related to quarrying operations. When the applicant discovered these incursions and raised concern, the parties engaged in correspondence (primarily via email and letters). During those exchanges, the first respondent made written undertakings to rectify the situation, but ultimately failed to do so. This inaction prompted the applicant to issue summons for eviction and removal of the structures.

Applicant's counsel emphasized that the first respondent's plea to the summons consisted of blanket denials of encroachment, with no detailed rebuttal – what he termed "bare denials". More importantly, he noted that the defence now being advanced in the summary judgment proceedings (i.e. that another company, LLH Engineering, is the real culprit) was

never mentioned in the plea. The introduction of LLH Engineering as the supposed occupier came only at the stage of opposing the summary judgment application, indicating that this is a new, belated defence concocted to avoid judgment. Counsel argued that a defendant cannot opportunistically shift defenses in this manner; the fact that LLH Engineering was not pleaded earlier strongly suggests the defence is not bona fide.

In support of the applicant's factual narrative, counsel took the Court through key documents in the record. The Court was referred, for example, to Annexure "F" to the applicant's founding affidavit – an email dated 15 July 2024 from an official of the second respondent (Zvimba RDC) to both the applicant and first respondent's representative (K. Bhunu) – which confirmed the findings of the Council's inspection: a durawall built by the occupant of Stand 179 encroached on Stand 643, and the occupier of Stand 179 was instructed to rectify that anomaly. (This correspondence is found at page 25 of the record and clearly put the first respondent on notice of the encroachment at that time.) The Court was then directed to the letter of demand written by the applicant's lawyers on 16 July 2024 (record p.26), and the first respondent was reminded of its own response letter dated 27 July 2024 in which it acknowledged the encroachment. That response (record p29) came from the first respondent's legal practitioners (who also represent LLH Engineering) and expressly recognized that a boundary issue existed: it confirmed that Leengate and its sister company LLH Engineering owned the adjacent Stands 179 and 644 (with the applicant's Stand 643 sandwiched between them), and it proposed a compromise solution whereby boundaries would be adjusted (re-pegged) and the first respondent would finance that process. The letter even mentioned that those companies were jointly operating a quarry on Stand 179, implying that the structures at the heart of the dispute were related to that operation.

Counsel submitted that all of these admissions and proposals in correspondence are flatly inconsistent with the position later taken in the first respondent's plea and notice of opposition. In those later filings, the first respondent gave the impression that it had nothing to do with the encroachment, yet the contemporaneous emails and letters tell a different story. Reference was also made to a series of email exchanges in October 2024 (record pages 31–35), in particular an email dated 18 October 2024 (record p 34) from the first respondent's legal practitioners. That email reads in part: *"We reiterate our client's commitment to settle the matter in the discussed manner. Just to avoid the taking of default judgment which would potentially visit our client with avoidable costs, we shall file a plea as we noticed you caused to be issued a notice to plead and after today our client would be barred."*. Counsel highlighted

this statement as revealing the first respondent's true motive: the first respondent essentially admitted it filed its plea not because it had a genuine defence, but to stave off default judgment and buy time to settle. The plea that was eventually filed, counsel argued, was thus not a bona fide defence on the merits at all, but a tactical placeholder. Indeed, he characterized the plea and subsequent opposition as *contrived* and *concocted* merely to delay the "day of reckoning". The sudden mention of LLH Engineering in the opposing affidavit was described as a *red herring* – a diversion with no evidentiary backing, introduced simply to confuse the issue and mislead the Court. Counsel noted that the first respondent had offered no supporting affidavit from LLH Engineering, nor any document (such as a contract or official record) to substantiate the claim that LLH Engineering alone was responsible for the encroachment. The absence of any such proof, coupled with the first respondent's prior acknowledgments of the problem, pointed to a defence that was not genuine.

In summary, the applicant's position was that it had established a clear case for the *rei vindicatio* (recovery of its property from an unlawful occupier) and that the first respondent's papers disclosed no bona fide defence. To avoid summary judgment, a defendant must meet the criteria laid down in *Jena* v *Nechipote* 1986 (1) ZLR 29 (S) at 30D-E, among other authorities – essentially, the defendant must demonstrate a mere *possibility of success* or raise a triable issue on the facts or law. Here, counsel argued, the first respondent had failed to satisfy even the minimum threshold of that test. All indications were that the defence was a sham. Accordingly, the applicant prayed for summary judgment to be granted as sought in the draft order. The applicant also specifically requested costs on the higher scale (legal practitioner–client scale), submitting that the first respondent's conduct in the matter was reprehensible and deserving of censure. In support of punitive costs, the applicant's counsel relied on the case of *Mahembe* v *Matambo* HB 322/02, reported at 2003 (1) ZLR 148 (H), among other authorities, arguing that this was an appropriate case to depart from the ordinary scale of costs.

First Respondent's Submissions

In response, counsel for the first respondent, Mr. *Chigudugudze* maintained that the first respondent has a viable defence and that summary judgment should be refused. He began by suggesting that the applicant's summons and declaration were excipiable (legally defective) as pleaded – although this point was only mentioned in passing and had been raised, if at all, in the plea. The main thrust of the first respondent's argument was that the existence of LLH Engineering Projects (Pvt) Ltd as the party occupying Stand 179 and allegedly encroaching on Stand 643 had been disclosed to the applicant well before the litigation progressed. Counsel

pointed out that the letter of 27 July 2024 (record page 29) explicitly mentioned LLH Engineering and its role, thus arguing that the applicant was aware (or should have been aware) that LLH Engineering was the actual builder of the durawall and structures. In his view, the applicant chose to ignore this and proceeded to sue Leengate regardless; consequently, the applicant cannot complain if Leengate now insists that the wrong party is before the Court.

The Court engaged counsel on this point, querying why—if LLH Engineering's involvement was as critical as the first respondent now asserts—no application was made by the first respondent to join LLH Engineering to the proceedings. In other words, if Leengate truly believed a misjoinder had occurred, one would expect it to seek the joinder of the "correct" party (LLH) at the earliest opportunity. Pressed on this inconsistency (between acknowledging the encroachment and LLH's role in correspondence, yet doing nothing procedurally to bring LLH into the case), counsel for the first respondent could offer little beyond reiterating that Stand 643 was *occupied by LLH Engineering*, not by Leengate. He maintained that it was the applicant's error in not citing LLH, and that Leengate should not be held responsible for LLH's actions.

Counsel also attempted to cast doubt on the applicant's title or locus standi by noting that, while the applicant *claims* to be the owner or lawful occupier of Stand 643, it had not produced a lease agreement or similar document evidencing its rights over the land. (It appears Stand 643, like the adjacent stands, may be land under the Council's jurisdiction, possibly requiring a lease or council allocation letter; the first respondent was suggesting that the applicant did not tender proof of such.) However, this argument was not formally raised in the opposing affidavit and comes across as an afterthought during oral submissions. The applicant's counsel had earlier countered that the applicant's ownership of Stand 643 was pleaded and not meaningfully disputed by the first respondent in its plea or affidavit – hence, raising it at this stage is both procedurally improper and factually unconvincing. Indeed, no competing claimant to Stand 643 has come forward; Leengate's position has never been that someone else owns Stand 643, only that someone else (LLH) may have built on it. Thus, the applicant's entitlement to sue as the landowner was not seriously undercut by the absence of a lease document in the record.

The Court also inquired about the current status on the ground. In response, first respondent's counsel directed the Court to a statement in the first respondent's heads of argument (see footnote 10 on page 67 of the record) indicating that the offending structures had been removed by LLH Engineering as far back as February 2025. This, counsel suggested,

means that the main grievance – the physical encroachment – has already been addressed, ostensibly by the actions of LLH Engineering. He implied that an eviction order might be unnecessary or that the matter had been overtaken by events. The Court, however, noted that such removal was done unilaterally and the first respondent still had not conceded the *legal* issue of trespass or agreed to the relief sought (especially as regards costs). The applicant's counsel highlighted that this post-litigation remedial action, done without prejudice, did not resolve the dispute or the question of liability.

During the hearing, the Court explored the possibility of an amicable settlement. The judge encouraged the parties to consider resolving the matter and even stood the case down for discussions towards a draft consent order. It emerged that the only impediment to settlement was the first respondent's unwillingness to accept any order that implied wrongdoing on its part or that carried an adverse costs order. The first respondent was prepared, at the extreme, to consent to an order simply recording that LLH Engineering would remove (or had removed) the encroaching structures – essentially an order pinning responsibility on LLH – and crucially, an order with no order as to costs against any party. The applicant, on the other hand, insisted that any settlement must include an acknowledgment (express or tacit) of the first respondent's responsibility (given the evidence of its involvement) and payment of costs on the higher scale by the first respondent. This divergence proved unbridgeable. The first respondent would not agree to pay costs or to an order that might be seen as an admission of liability, and the applicant, having been put to considerable expense to enforce what it views as a straightforward property right, would not walk away without both substantive relief and costs. Consequently, no settlement was reached. The matter proceeded to judgment on the merits and on the issue of costs.

In sum, the first respondent's position in argument remained that it is an improperly cited party "hiding behind" the true wrongdoer (LLH Engineering), and that there exists at least a triable issue as to the identity of the encroacher which should preclude summary judgment. The applicant's position remained that the first respondent's denials and finger-pointing at LLH are not credible and do not raise any genuine issue requiring a trial.

Issues for Determination

From the pleadings and submissions, the Court identifies the following key issues requiring determination:

1. Whether the first respondent has disclosed a bona fide defence to the claim for eviction and demolition of structures, such that summary judgment should be refused.
2. If no bona fide defence is established, whether the applicant is entitled to the relief sought without trial (i.e. summary judgment for eviction and removal of structures)

Legal Analysis

Summary Judgment: Governing Principles

Summary judgment is an extraordinary remedy designed to permit swift justice for a plaintiff in clear cases where the defendant has no real defence. It prevents a defendant from abusing the court process by entering an appearance to defend simply to buy time when in fact no triable issue exists. Because it summarily denies a defendant the opportunity to go to full trial, courts exercise caution and require that the plaintiff's claim be unassailable and the defendant's alleged defence be demonstrably lacking in merit. In the oft-cited words of CORBETT JA in the South African case *Maharaj* v *Barclays National Bank Ltd* 1976 (1) SA 418 (A), summary judgment is a remedy of an "extraordinary and drastic nature," only to be granted where the applicant's entitlement to relief is clear and beyond doubt.

Under the High Court Rules of Zimbabwe and our case law, the test for summary judgment is well-settled. The defendant must disclose a bona fide defence – meaning a defence in good faith on the merits – or at least raise a triable issue of fact or law. It is often said that to avoid summary judgment, all the defendant needs to establish is a mere *"possibility of success"* in its defence, or put differently, the appearance of a *"plausible"* case that is not hopeless. GUBBAY JA articulated the standard in *Jena* v *Nechipote* 1986 (1) ZLR 29 (S) at 30D-E, stating that to succeed in avoiding summary judgment, a defendant must show that "there is a mere possibility of success; he has a plausible case; and there is a real possibility that an injustice may be done if summary judgment is granted." If there is any real chance that the defence might succeed at trial, then it would be unjust to grant summary relief and thereby shut the defendant out of court. Conversely, summary judgment should only be granted if the defence is so flimsy or untenable that it obviously cannot succeed at trial.

While this threshold favours the defendant (even a modest or arguable defence should normally suffice to proceed to trial), a defendant is not entitled to defeat a summary judgment application by simply uttering vague denials or furnishing sketchy allegations. The courts require the defendant's opposing affidavit to disclose the nature and details of the defence and the material facts upon which it is grounded with sufficient clarity. The defence must be set out

in a manner that is not inherently or seriously unconvincing. As MALABA J (as he then was) observed in *Hales* v *Doverick Investments (Pvt) Ltd* 1998 (2) ZLR 235 (H), drawing from older precedents, the defendant's affidavit must allege facts which, if proved at trial, would constitute a valid defence. It is not enough for the defendant to rely on mere conclusions or a bare denial; the defendant should present supporting facts or evidence that, if established in the courtroom, would entitle him to prevail. MCNALLY JA explained in *Mbayiwa* v *Eastern Highlands Motel (Pvt) Ltd* S.C. 139/86 that while a defendant need not exhaustively prove his case in the affidavit, he must at least disclose his defence and the material facts upon which it rests with sufficient completeness to enable the court to judge its bona fides. The statement of these material facts should be "sufficiently full to persuade the court that what the defendant has alleged, if proved at the trial, will constitute a defence". In sum, the court performs a balancing act: it does not require the defendant to *prove* the defence at this preliminary stage, but it does require more than a bald or insubstantial allegation – the defence must appear credible on its face. If the proffered defence is inherently contradictory, implausible, or unsupported by any detail, the court may deem it a sham and grant summary judgment notwithstanding the defendant's assertions.

These principles in Zimbabwe align with the approach in other common law jurisdictions (though the procedural contexts differ). For example, in South Africa, the defendant must "satisfy the court" by affidavit that he has a bona fide defence to the action – i.e., that there is some reasonable possibility that the defence is good. The South African courts likewise emphasize that the affidavit opposing summary judgment should not be needlessly bald or vague; it should disclose the defence with sufficient particularity, or risk being rejected as lacking bona fides. English law permits summary judgment under Part 24 of the Civil Procedure Rules where a claim or defence has "no real prospect of success." The English Court of Appeal in *Swain* v *Hillman* [2001] 1 All ER 91 (CA) explained that "no real prospect" means that the claim or defence is fanciful or hopeless – the word "real" is used to distinguish *fanciful* prospects from those that are realistic. Thus, if the defendant's case is not totally without merit – i.e. if there is at least a realistic (as opposed to purely imaginary or theoretical) chance of success – then summary judgment should be refused in the English system. In the United States, although the terminology and timing differ (summary judgment there is typically sought after discovery, under Rule 56 of the U.S. Federal Rules of Civil Procedure), the essence is comparable. U.S. courts will grant summary judgment if, viewing the evidence, "there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter

of law." In other words, if the non-movant (defendant) cannot point to specific evidence creating a factual dispute on an essential element of the claim, the court will not send the matter to trial. The underlying principle remains: a party must have something of substance to go to trial on, not just speculative or conclusory allegations.

In short, across jurisdictions, the message is consistent – summary judgment is appropriate only where the defence is manifestly insubstantial or unsustainable. The court's role at this stage is issue-finding rather than issue-determination. If a defence raises a triable issue (a real dispute of fact or law that genuinely requires examination), the defendant deserves his day in court. But if the defence is a mere stratagem or is devoid of detail that could support a favorable finding at trial, the court is justified in cutting the matter short by entering judgment for the plaintiff.

The Actio Rei Vindicatio and the Right to Evict an Unlawful Occupier

Because the ultimate relief sought is an order of eviction (ejectment) and removal of structures, it is important to outline the substantive law governing an owner's right to recover possession of property from an unlawful occupier. The applicant's claim is effectively a vindicatory one, invoking the common-law *actio rei vindicatio*. In our law (as in South African and Roman-Dutch law generally), the *rei vindicatio* is the legal remedy available to an owner to reclaim his or her property from any person who is in possession of it without consent. The principle is that ownership carries with it the right to possess, and no one may withhold the owner's property without lawful justification. As stated in the locus classicus *Chetty* v *Naidoo* 1974 (3) SA 13 (A), *"It is inherent in the nature of ownership that possession of the res should normally be with the owner, and it follows that no other person may withhold it from the owner unless he is vested with some right enforceable against the owner."* Thus, once an owner proves ownership of the property and that the defendant is in possession of that property, the onus shifts to the defendant to show a legal right to continue in possession (such as a lease, right of retention, purchase agreement, or other entitlement). If the defendant cannot prove any such right, the law will compel him to relinquish possession to the owner. The High Court of Zimbabwe echoed this principle in *Jolly* v *A. Shannon & Anor* 1998 (1) ZLR 78 (H), noting that an owner cannot be deprived of his property against his will and is entitled to recover it from any person occupying it without consent. In other words, the mere fact of someone occupying or using land without the owner's permission entitles the owner to an ejectment order – no further breach or wrongdoing needs to be proved, since the owner's right to possession is sufficient.

Applying that principle to the present case: the applicant, having shown that it is the owner (or lawful lessee) of Stand 643 and that structures were erected on it without its permission, has established a *prima facie* right to evict whoever placed those structures or is occupying the stand. The law does not allow a trespasser or encroacher to immunize himself from eviction simply by having built on the land. Indeed, even improvements or buildings erected by a person on someone else's land typically accede to the land and belong to the landowner (absent some exceptional statutory provision or agreement to the contrary). The encroaching party cannot insist on any entitlement to remain on the land or to have the structures remain *in situ*. The usual remedy in cases of encroachment is an order compelling the encroacher to remove any constructions and to restore possession to the owner. In some jurisdictions, courts have a limited equitable discretion in cases of minor, innocent encroachments (for example, a slight building overlap due to a surveying error) – occasionally granting relief short of demolition, such as ordering a sale of the encroached strip or compensation in lieu of removal, especially if demolition would be disproportionately harmful and the encroachment was in good faith. But such instances are exceptional and usually involve *minor* boundary encroachments made by mistake. Here, by contrast, the allegations suggest a substantial and willful occupation and construction without consent – a deliberate encroachment – which would unequivocally entitle the owner to a removal order and ejectment under the *rei vindicatio*. There is no indication of any equitable considerations in the first respondent's favor; significantly, the first respondent has not claimed to be an innocent purchaser of the land, a long-term occupier with any statutory possessory rights, or a lessee who invested in improvements under some colour of right. The first respondent simply disclaims responsibility entirely, saying "it wasn't us." Thus, if the Court finds that the first respondent was behind the encroachment (or if the purported distinction of a third-party actor is rejected), the applicant's right to an eviction order is clear. The Court would then grant an order ejecting the first respondent and all those claiming occupation through it (which would cover its agents, contractors, or any privies such as LLH Engineering if the latter was acting under Leengate's authority) and requiring removal of the unlawful structures.

Misjoinder vs Non-Joinder: Effect of the Alleged "Wrong Party" Defence

The first respondent's main defence revolves around the idea that it is the wrong party before the Court – that it has been "misjoined," while another party (LLH Engineering Projects (Pvt) Ltd) is the true perpetrator of the encroachment and ought to have been sued instead. This

defence has both a factual aspect (the identity of the encroacher) and a procedural aspect (misjoinder/non-joinder of parties). It is necessary to disentangle these aspects.

Procedurally, under the rules of this Court and general principles of civil practice, a misjoinder or non-joinder of parties is not ordinarily fatal to a cause of action. Courts are generally loath to let a meritorious claim collapse solely because a wrong party was cited or a necessary party omitted. Order 13 Rule 87 of the High Court Rules (identical in substance to the former Rule 87) provides that no action shall be defeated by reason of the misjoinder or non-joinder of any party, and that the court may deal with the matter in dispute so far as regards the rights and interests of the parties actually before it. This principle is echoed widely: for example, the Indian Code of Civil Procedure similarly states that no suit shall be dismissed only due to non-joinder or misjoinder, and many Anglo-American jurisprudences have provisions that misjoinder is not a ground for dismissal. The usual remedy when a wrong party is cited or a right party omitted is simply to join or substitute the correct party, or if a party is truly unrelated, to remove that party from the proceedings. The focus is always on resolving the real dispute on its merits, rather than sacrificing substance to technicalities.

In the context of this case, what the first respondent labels "misjoinder" is essentially a denial of factual responsibility. The first respondent is saying: *"I am not in possession of your land; someone else is. Therefore, you sued me in error."* If that were true, it would mean the applicant's claim – which requires proving that this defendant is holding the property or responsible for the trespass – might fail on the merits against Leengate, and that the applicant should instead pursue the actual wrongdoer (LLH). In effect, the first respondent's point is not a mere technical misjoinder objection; it is a substantive factual defence: *"It's not us; it's a third party."* Thus, the Court must examine whether this claim by the first respondent is credible and backed by any evidence, or whether it is a spurious attempt to evade accountability.

It is noteworthy that the first respondent has provided virtually no detail about LLH Engineering Projects (Pvt) Ltd apart from naming it as the alleged occupier. The opposing affidavit does little more than assert "the structures belong to LLH, not us". It does not explain the relationship (if any) between the first respondent and LLH Engineering – for example, whether LLH is a completely independent third party that coincidentally built on Stand 643, or perhaps a subcontractor or business partner of the first respondent in the Rainham development project. The first respondent did not tender any affidavit from LLH Engineering, nor any documentary proof (such as an agreement, a council lease, or correspondence) indicating that

LLH Engineering was authorized by the Council or anyone else to build on Stand 643. One would expect that if LLH Engineering truly and independently moved onto Stand 643, the first respondent could at least describe how that came about – especially since Leengate itself is involved in development projects in the same locale (indeed, the "Rainham Park" housing development has been linked to Leengate in the background). The stark absence of any supporting detail or third-party confirmation raises serious doubt about the genuineness of this defence. As noted earlier, a defendant must do more than make a bare allegation in opposing summary judgment; it must lay out facts supporting the allegation so that the Court can gauge its legitimacy. Here, the first respondent's mere pointing of the finger at a non-party, without more, is arguably the kind of "bald or sketchy" averment that fails to pass muster as a bona fide defence. It is a rudimentary principle that if a defendant claims "I am not the one – someone else is," the defendant should at least identify that other person clearly and provide some modicum of evidence to make it a plausible scenario (for instance, *"LLH Engineering leased Stand 179 and mistakenly built over the boundary; see attached council lease"* – hypothetically). No such evidence exists in this record.

The Court must therefore assess whether the first respondent's denial of involvement creates a *triable dispute of fact* or not. If the evidence before the Court (including the applicant's founding affidavit and annexures) contained independent confirmation that LLH Engineering (and not Leengate) was on the land – say, if correspondence from the Council or a site inspection report had identified LLH as the developer on that stand – then clearly there would be a serious factual issue requiring a trial (and likely the joinder of LLH as a party). In such a scenario, summary judgment could not be granted against Leengate, because the applicant might indeed have sued the wrong party, and the rightful occupier's liability would need determination after proper pleadings. However, the factual picture here contains no such independent indication of LLH's role apart from the first respondent's own self-serving claim. The applicant, for its part, has consistently maintained that Leengate is the encroacher. In fact, the applicant has suggested (including in its Heads of Argument) that LLH Engineering may be nothing more than an alter ego or agent of Leengate – essentially a vehicle being used by Leengate in the project. The applicant insinuated, and the first respondent tellingly did not refute, that Leengate and LLH Engineering are closely related entities (possibly sharing directors or a contractual relationship). If LLH were truly a completely unrelated stranger, one would expect the first respondent to emphatically say so and provide an explanation such as, *"We have no association with LLH; we have no idea why they entered the land."* Instead, the

first respondent's papers are silent on the precise nexus, if any, between Leengate and LLH apart from saying they are sister companies. This silence permits an inference that LLH's presence (to the extent it is real) might not have been entirely unauthorized by Leengate. Certainly, the first respondent has not *cleanly dissociated* itself from LLH's actions.

Even assuming *arguendo* that LLH Engineering was physically responsible for the construction on the site, the legal question becomes: Was LLH acting on behalf of Leengate or under Leengate's direction/permission? If yes, then Leengate would still be a proper party to hold accountable, since companies can only act through agents or contractors; Leengate cannot escape liability by acting through an intermediary. If no – if LLH was acting wholly independently – then the applicant's claim might indeed need to be refocused onto LLH. But that scenario raises its own implausibilities: How or why would an "independent" company decide to build on land owned by Mitchell Corporation without any colour of right? The likely scenarios are limited: either LLH mistakenly thought the land was available (perhaps due to misinformation from the Council or some confusion in boundaries), or LLH was contracted or encouraged by someone (possibly the Council or Leengate) to build there. None of these scenarios truly exonerate Leengate in the context of this summary judgment application, unless Leengate provides clarity and proof. Without such clarity, the Court is left with a bald denial from Leengate versus a coherent claim by the applicant supported by *prima facie* evidence of encroachment and by Leengate's own earlier admissions and conduct. In the face of such uncertainty, ordinarily a court might err on the side of caution and refuse summary judgment (because resolving factual disputes like "who built the structures?" is usually a matter for trial). But crucially, the first respondent here has not presented a real dispute of fact – it has presented an unsubstantiated denial. The question is whether that unsubstantiated denial alone is enough to resist summary judgment.

It is trite law that a defendant's affidavit which is inherently lacking in detail or credibility can be rejected as not raising a genuine issue fit for trial. The court does not conduct a mini-trial on affidavits, but it is entitled to assess whether the affidavit's contents, if true, would constitute a defence – and whether the affidavit provides a plausible basis for those facts. For example, if a defendant simply says *"It wasn't me"* without any supporting facts, that might be deemed "inherently unconvincing" in the absence of details to back it up. Here, the first respondent's version leaves too many critical questions unanswered: Why would LLH Engineering build on Stand 643? Under what authority or mistake did it do so? What is Leengate's relationship to LLH? If Leengate truly had no involvement, why did it negotiate

with the applicant and propose a remedy for the encroachment, instead of simply washing its hands of the matter? None of these questions are addressed by the first respondent. By contrast, the applicant's version – that Leengate (a property developer with projects in the area) encroached on a neighbouring stand, perhaps in the course of expanding its development – is coherent and accords with the known context (including Leengate's own participation in discussions to remedy the situation). Thus, the first respondent's "it's not us, it's someone else" defence starts to look more like a red herring than a real issue.

Legally, even if Leengate were technically misjoined (in the sense that perhaps LLH should have been named as a defendant), that misjoinder would not automatically defeat the claim. The Court has discretion to order the joinder of LLH Engineering to the proceedings if that were necessary for a just resolution, or to direct any other procedural remedy. However, joining a new party at the summary judgment stage would ordinarily necessitate converting the matter into a trial or at least affording the new party an opportunity to be heard – steps which are antithetical to the whole point of summary judgment (which is to avoid protracted proceedings when no defence exists). If the Court is satisfied that Leengate's defence is a sham, the better course is to proceed to grant summary judgment against Leengate itself. After all, if Leengate has in truth orchestrated or benefited from the encroachment, it should not escape liability by hiding behind a nominally separate entity. Should it later emerge, in the process of enforcing the judgment, that LLH Engineering or other persons are physically on the property, the eviction order can be enforced against "all persons claiming through or under the first respondent" – which would encompass those whom the first respondent allowed onto the land. The draft order in fact is framed to cover not only the first respondent by name but also any associated occupiers. This approach protects the applicant's rights while avoiding undue delay or procedural gamesmanship.

In evaluating this defence, it must be stressed that the Court's role at summary judgment is not to make a definitive factual finding as to whether "Leengate or LLH built the structures" – that would indeed normally require a trial if it were genuinely in dispute. Rather, the task is to decide if the first respondent's claim that "it was LLH, not us" is a sufficiently credible *potential* defence to warrant ventilation at trial. Given the paucity of evidence for that claim, the Court is entitled to find that the defence is not bona fide and does not raise a real triable issue. The first respondent here has not met the minimum threshold of disclosing a plausible defence supported by material facts. Its misjoinder argument, in the circumstances, is a technical point devoid of substance – a smoke-and-mirrors tactic. Misjoinder, as noted, is not

a magic shield to wrongdoing: if the facts show the first respondent orchestrated an unlawful encroachment, it cannot avoid judgment by saying a different corporate vehicle did the physical work. And since the first respondent has offered no alternative lawful basis for the occupation (no contract, no permission, no colour of right whatsoever), there is effectively no defence on the merits to the applicant's claim.

Application of Law to the Facts

Given the above principles, the Court now squarely addresses whether the first respondent has shown a bona fide defence to the applicant's claim. The answer is No. The applicant has established a clear *prima facie* case: it is the owner of the property and it did not consent to any occupation or building by the first respondent. Under the *rei vindicatio*, that entitles the applicant to relief unless the first respondent can show a right or at least a triable issue in defence. The first respondent's attempt to show a triable issue rests solely on pointing to another entity (LLH) without providing any proof. This defence, as presented, is so insubstantial that it fails to raise a "real possibility" of success at trial. The Court remains mindful that if there were any genuine doubt or conflict in the evidence, a trial should be allowed. But here, the first respondent's papers do not reveal a real conflict of fact – they reveal, at best, a *contrived* one. The defence is, to borrow the language from *Hales* v *Doverick*, "not inherently or seriously convincing." It bears the hallmarks of a desperate attempt to avoid judgment: the eleventh-hour naming of a third party, with no evidentiary backing, hoping to muddy the waters.

On the evidentiary record, the more convincing inference is that the first respondent *was* involved in the encroachment (directly or indirectly) and is simply unwilling to admit it. The lack of any affidavit or statement from LLH Engineering, or even a clear explanation of LLH's role, is telling – if LLH were truly an unrelated trespasser, the first respondent could have easily and emphatically distanced itself with details, but it did not. Accordingly, the Court finds that the first respondent has not established a bona fide or plausible defence. There is no material dispute fit for trial. As GUBBAY JA put it in *Jena* v *Nechipote*, there is no "real possibility that an injustice may be done if summary judgment is granted"; on the contrary, to deny the applicant relief would perpetuate an injustice by allowing an admitted non-owner with no *prima facie* right (Leengate) – or its proxy – to continue occupying the applicant's land.

Since the first respondent's sole defence fails, the applicant is entitled to summary judgment on its claim. The appropriate order will be one for the eviction of the first respondent

and all persons claiming occupation through it from Stand 643, Rainham Farm, Zvimba, and for the removal of all structures unlawfully placed on that property.

Costs

The remaining issue is costs. The general rule is that costs follow the result: a successful party is entitled to its costs. Here, the applicant has succeeded and would ordinarily be awarded its costs against the first respondent. However, the applicant has urged the Court to depart from the ordinary scale of costs and to award punitive costs on the legal practitioner–client scale, also known as attorney-client scale. Such an award is extraordinary and is reserved for situations where the conduct of the losing party is reprehensible, vexatious, or in clear abuse of court process. Our courts have emphasized that a higher scale of costs may be justified where a party's actions are grossly unreasonable or show a disregard for the truth or for proper procedure – for instance, where litigation is pursued in bad faith or a defence is frivolous and has wasted the court's time and the opponent's resources (see, e.g., *Nel* v *Waterberg Landbouers Co-op*, 1946 AD 597; *Mahembe* v *Matambo* 2003 (1) ZLR 148 (H), among others).

In the present case, the Court is persuaded that the first respondent's conduct warrants censure in the form of a punitive costs order. The first respondent persisted in a hopeless case and, as the record shows, engaged in a pattern of evasion and delay. It initially gave the applicant the impression that it would remedy the encroachment and even made written commitments to settle the matter, only to renege and do nothing. When summons were issued, it pretended willingness to rectify the situation, asking the applicant to hold off default judgment while it filed a plea – then filed a plea devoid of substance, merely to avoid an early judgment. Afterward, faced with a summary judgment application, it shifted to an inconsistent defence (blaming LLH) and forced the applicant to respond to new allegations that should have been raised, if at all, much earlier. Even during the hearing, the first respondent refused reasonable compromises, such as accepting an order that did not name it explicitly or paying costs at a higher scale, thus necessitating a full judgment. The first respondent's approach fits the description of a litigant who will not stop at anything, even to the point of crawling, to defend a hopeless case In short, the first respondent's opposition was not only lacking in merit, but it was vexatious and unnecessarily prolonged.

It is therefore an appropriate exercise of this Court's discretion to order costs against the first respondent on the legal practitioner and client scale. Such an order ensures that the applicant is more fully indemnified for the legal expenses it incurred due to the first respondent's conduct, and it serves as a rebuke of the first respondent's abuse of the court

process. The applicant should not be out of pocket for having to chase a party that had no valid defence and yet refused to concede.

Disposition

For the reasons given above, the applicant has met the requirements for summary judgment, and the first respondent has failed to establish a bona fide defence or triable issue.

Accordingly, the application for summary judgment succeeds.

It is ordered as follows:

1. The first respondent, Leengate (Private) Limited, and all persons claiming occupation through the first respondent, be and are hereby ejected from Stand 643 Rainham Farm, Zvimba District, Mashonaland West. This eviction encompasses the removal of any employees, contractors, agents, or associates of the first respondent, and includes any other entity (such as LLH Engineering Projects (Pvt) Ltd) or persons who occupy the property under or through the authority of the first respondent.
2. The first respondent shall, within 30 days of service of this order upon it, remove all structures, buildings, materials, plant, equipment and installations that it or anyone acting on its behalf (or through it) has erected or placed on Stand 643 Rainham Farm. The removal shall be carried out safely and without avoidable damage to the land, and the site shall be restored, as far as reasonably possible, to its original condition prior to the first respondent's occupation.
3. In the event that the first respondent or those claiming occupation through it have not vacated the property or have not fully complied with paragraph 2 within the stipulated 30-day period, the Sheriff of the High Court or his lawful Deputy is hereby authorized and directed to evict the first respondent and any other unlawful occupiers from Stand 643 Rainham Farm. The Sheriff is further authorized and directed to demolish, dismantle and/or remove any structures or materials remaining on the property that were erected or placed thereon by the first respondent or its agents, and to restore possession of the property to the applicant. The Sheriff may enlist the assistance of the Zimbabwe Republic Police and/or the second respondent (Zvimba Rural District Council) to the extent necessary to carry out this order and ensure compliance in a peaceful and safe manner.

4. The second respondent, Zvimba Rural District Council, shall cooperate with and facilitate the enforcement of this order to the extent that any administrative action or permission on its part is required.
5. The first respondent shall pay the costs of suit for this application on the legal practitioner and client scale.

MAMBARA J: ……

Kantor & Immerman, applicant's legal practitioners
Madanhe & Chugudugudze, 1st respondent's legal practitioners